No. _____

In the

Supreme Court of the United States

SEFERINO MARTINEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

In 1996, when the guidelines were mandatory, Martinez was sentenced as a career offender under USSG § 4B1.1 because he had an aggravated burglary conviction and a New Mexico robbery conviction. Then, § 4B1.1's definition of "crime of violence" matched the Armed Career Criminal Act's (ACCA) 'violent felony' definition, 18 U.S.C. § 924(e)(2)(B)(ii). Martinez's prior convictions and the offense of conviction qualified as crimes of violence only under the residual clause. In 2015, this Court struck down as void for vagueness the ACCA's residual clause in 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S.Ct. 2551 (2015). Within one year of the decision in *Johnson*, Martinez filed a motion to vacate his sentence under 28 U.S.C. § 2255. The district court dismissed that 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.

Martinez presents the following questions to this Court:

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) (1995)?

II. Whether the mandatory guidelines' residual clause, USSG § 4B1.2(1) (1995), is void for vagueness?

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In the

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SEFERINO MARTINEZ, Petitioner

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Petition for Writ of Certiorari

Seferino Martinez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Seferino Martinez*, Case No. 18-2113, affirming the district court's dismissal of Martinez's 28 U.S.C. § 2255 motion challenging his career offender sentence, was not published.[1] The district court's memorandum opinion denying the motion was not published.[2]

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[1] App. 1a-2a. 'App.' refers to the attached appendix. 'ROA' refers to the record on appeal which is contained in one volume. Martinez refers to the documents and pleadings in those volumes as ROA followed by the page number found on the bottom right of the page (e.g. ROA at 89). 'Doc.' refers to the number of the document on the district court criminal docket sheet in No. 96-CR-186-WPJ. 'PSR' refers to the presentence report.

[2] App. 3a-5a.

Jurisdiction

On July 16, 2019, the Tenth Circuit affirmed the district court's decision to dismiss Martinez's § 2255 motion challenging his career offender sentence.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Rule 13.1, this petition is timely if filed on or before October 15, 2019.

Pertinent Constitutional and Statutory Provisions

U.S. CONSTITUTION, Amendment V

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

28 U.S.C. § 2255(f)

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

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

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

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

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

[3] App. 1a-2a.

United States Sentencing Guidelines § 4B1.2(1) (1995)

Section 4B1.2(1) (1995) provides:

The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary 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.

18 U.S.C. § 1111

Section § 1111 provides:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

New Mexico Statute

The New Mexico statutory provision involved in this case is N.M. Stat. Ann. § 30-16-2, Robbery, which provides as follows:

Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.

Whoever commits robbery is guilty of a third degree felony.

Statement of the Case

In 1996, Martinez was convicted of second degree murder on an Indian reservation in violation of 18 U.S.C. § 1111(a). ROA at 1-2; Doc. 80. Under then mandatory federal sentencing guidelines, he was sentenced as a career offender to a prison term of 327 months. App. 1a. The career offender enhancement was based on predicate offenses of Crime on an Indian Reservation: Aggravated Burglary, and Robbery contrary to New Mexico state statutes. ROA at 1-2; PSR ¶¶ 26, 27, 56.

On June 21, 2016, relying on this Court's June 26, 2015 decision in *Johnson*, Martinez filed his motion to vacate the career offender sentence. App. 1a; ROA at 1-21. He argued U.S.S.G. § 4B1.2 (1)'s residual clause was unconstitutionally vague and that the underlying second degree murder conviction and the predicate robbery conviction did not meet the crime of violence definition in §4B1.2(1), stripped of its residual clause. *Id.*

Martinez's petition was referred to the magistrate court. Guided by *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), it recommended Martinez's petition be dismissed as untimely. ROA at 72; Doc. 97. Martinez's objections to this recommendation were overruled by the district court. It adopted the magistrate court's findings and recommendations, and dismissed

Martinez's petition. App. 4a-5a. It did not issue a certificate of appealability. App. 5a.

On appeal, the Tenth Circuit affirmed the district court's decision. App. 1a-2a. It agreed that Martinez's motion was untimely according to *Greer*. There a panel rejected as untimely an identical challenge to the mandatory guidelines' career offender residual clause. *Id.* (citing *Greer*,881 F.3d at 1244, 1248-49). The court emphasized that *Greer* held this Court "'did not consider in *Johnson*, and has still not decided, whether the mandatory Guidelines can be challenged for vagueness in the first instance, let alone whether such a challenge would prevail.'" App. 2a (quoting *Greer*, 882 F.3d at 1248). As *Johnson* did not recognize a new right applicable to a sentence imposed under the mandatory Guidelines, the court concluded, like *Greer*, that Martinez's § 2255 motion was untimely. App. 2a.

The court also was unpersuaded *Greer* was overruled by *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). It said its decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019) reiterated, even in light of *Dimaya*, that "'*Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines.'" App. 2a (quoting *Pullen*, 913 F.3d at 1284). Given this binding circuit precedent, it concluded that no reasonable jurist could debate the district court's ruling that Martinez's § 2255 motion was untimely. *Id.*

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Tenth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

Reasons for Granting the Writ

Martinez's offense of conviction and prior robbery conviction qualified as crimes of violence only under § 4B1.2(1)'s hopelessly vague and mandatory residual clause. As the use of that clause increased his sentence by well over thirteen years – Martinez is "linger[ing] [] in prison longer than the law demands." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1908 (2018). Indeed he has been doing so for at least ten years. Many others are as well. *Brown v. United States*, 139 S.Ct. 14, 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). Two Justices agree that certiorari should be granted to resolve whether prisoners like Martinez 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). Given the importance of this issue to the liberty of so many, two more votes should not be that difficult to muster.

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 also is extremely important because its resolution "could determine the liberty of over 1,000 people." *Id.* at 16. *Johnson* held the ACCA's residual clause - which is identical to the guidelines' clause - void for vagueness and, thus, constitutionally infirm. On the underlying merits, *Sessions v. Dimaya* held that 18 U.S.C. § 16(b)'s similarly worded residual clause is void for vagueness under *Johnson*. 138 S.Ct. 1204, 1215-1223 (2018). Each of these residual clauses – in 18 U.S.C. § 924(e), § 16(b), and § 4B1.2(1) – are identical in application - each use the categorical approach to measure the degree of risk. If the former provisions are void for vagueness, then so too must be § 4B1.2(1)'s residual clause.

This case is a natural vehicle to resolve this issue. Martinez's offense of conviction and prior robbery conviction could count as crimes of violence only under § 4B1.2(1)'s residual clause. With that clause excised as unconstitutional, Martinez is not a career offender. If resentenced today, he 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.

Legal Background

A federal prisoner, like Martinez, may move to vacate his sentence under § 2255 if that sentence violates 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*, this Court in *Dimaya*, 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).[4] 28 U.S.C. § 994(h)(1).

In 1996, when Martinez was sentenced, the guidelines were mandatory. They "impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). It was the "binding" nature of the guidelines that triggered the constitutional problem in *Booker*: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-234; 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established by the Guidelines). "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker rejected the idea that the availability of departures rendered the

[4] This case has nothing to do with controlled substance offenses.

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.* Indeed, *Booker* acknowledged that, had the district court departed from the mandatory guidelines range in 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").

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.

It is important for this Court to review Martinez's case 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). 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. *See 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).

However, not all of these decisions were unanimous. In the Fourth Circuit's *Brown* decision, Chief Judge Gregory dissented. 868 F.3d at 304. In the Sixth Circuit, Judge Moore's concurrence expressed her view that the 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 challenged the 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 the issue in *Lester*, 921 F.3d at 1328. This intra-Circuit dissension illustrates the need for this Court's review.

Even though this split is currently lopsided, other circuits may yet side with the Seventh Circuit on this issue. This issue has not been decided in the First, Second, Fifth and D.C. Circuits. In *Moore v. United States*, the First Circuit intimated that, if it had to resolve 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"). Additionally, 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 become a seven-to-five split. Still, the current split is 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). Realistically, it is unlikely any 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 issue affects enough people that individual circuit judges have asked this Court to resolve it:

> 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 decide which circuit is correct.

This issue goes beyond the specific context presented here: The circuits disagree over how to define the scope of a newly recognized retroactive right. Guidance from this Court is necessary. Without such guidance, the circuits will continue to disagree with respect to the scope of every newly recognized retroactive right.

a. Review also is necessary because the majority rule, including the Tenth Circuit's decision here, is wrong.

Consistent with the Tenth Circuit's *Greer* decision, 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. 138 S.Ct. at 1210-1223. And this Court again applied *Johnson* to strike down a different residual clause 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.

In *Green*, the Third Circuit also used the exact-statute approach, but it did so post-*Dimaya*. 898 F.3d at 321-322. *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). A subsequent habeas case, *Maynard v. Cartwright*, held unconstitutional a vague Oklahoma capital-sentencing statute. 486 U.S. 356, 363-364 (1988). The Court said its decision 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*. 503 U.S. at 229. This line of precedent makes clear that an exact statute approach is wrong.

The Ninth Circuit's decision in *Blackstone* is incorrect for a different reason. It relied primarily on *Beckles* although *Beckles* is not the authority it believes it to be. *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. The *Beckles* Court deliberately narrowed its holding: "[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, limited *Beckles*' ruling 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. 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's *Russo* decision also is flawed. It engaged in a *Teague v. Lane*, 489 U.S. 288 (1989), retroactivity analysis (902 F.3d at 882-883) when it is clear 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.

The Eleventh Circuit's decision *Griffin* is unsound as well. The court 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 its reasoning was ill-founded. 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 still 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*. Considering the various ways the circuits have incorrectly analyzed this issue, this Court's intervention 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 from *Johnson*, that in *Welch*, this Court has made retroactive to cases on collateral review. In other words, retroactivity is not at issue. The 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 because of *Pullen*. For two reasons, the 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 used 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. For example, in *Teague*, 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, the 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.

> 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. The Tenth Circuit ignored this portion of *Chaidez*. Yet the Court's explanation is relevant here because it confirms that *Johnson*'s newly recognized right applies to the mandatory guidelines. After all, in *Dimaya* the Court said 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 described the scope of *Johnson*'s right, the Tenth Circuit should have applied *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 question here is straightforward - did the mandatory guidelines fix the permissible range of sentences. This Court should grant Martinez's petition because the answer to this question is evident from the Court's precedent.

The second reason the Tenth Circuit's decision here is incorrect is because it conflicts with this Court's decision in *Booker*. Since *Booker* establishes that the mandatory guidelines fixed the permissible range of sentences, *Johnson* applies in this case.

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.

As mentioned earlier, *Booker* is not the only time that this Court has explained that the mandatory guidelines range fixes the statutory penalty range. *R.L.C.*, 503 U.S. at 297 (statute mandates courts apply guidelines at sentencing); *Mistretta*, 488 U.S. at 391 (guidelines bind judges and courts at sentencing); *Stinson*, 508 U.S. at 42 (Guidelines Manual binding on sentencing 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.* makes sense only 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." *Booker*, 543 U.S. at 234-244. This is much like § 924(e)'s application in cases where its mandatory imprisonment provisions apply to trump the general penalty provisions in 18 U.S.C. § 924(a)(2).

Additionally, *Beckles* acknowledges that *Johnson* applies to provisions that "fix the permissible range of sentences." 137 S.Ct at 892. As the mandatory guidelines did just that, *Booker*, 543 U.S. at 232-243, *Johnson*'s rule must apply to the mandatory guidelines' residual clause in § 4B1.2(1). *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.

Ultimately, unless this Court grants certiorari in a case like Martinez's, federal prisoners sentenced under the mandatory residual clause will either be eligible for relief or not depending on nothing else but geography. An accused sentenced in 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 a much shorter imprisonment term than one sentenced in the other circuits. The latter accused will be left to serve the remainder of his unconstitutional sentence behind bars. In Martinez's case, this difference in geography means more prison time as opposed to immediate release.

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

The Seventh Circuit has definitively reached the merits of this issue and 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 – 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 *Johnson*. Courts have interpreted these residual clauses identically (i.e., under an ordinary-case categorical approach), and even interchangeably. *See*, *e.g.*,*United States v. Wray*, 776 F.3d 1182, 1184 - 85 (10th Cir. 2015) (finding that interpretation of the ACCA's residual clause applies equally to the career offender residual clause); *United States v. Goodwin*, 2015 WL 5167789, *2 (10th Cir. 2015) (unpub.) (given the "linguistic and jurisprudential symmetry between the two residual clauses," the guidelines' clause should also be deemed "unconstitutionally vague"); *United States v. Velázquez*, 777 F.3d 91, 94-98, 94 n.1 (1st Cir. 2015) (interpreting guidelines' clause using "ordinary case" analysis that *Johnson* found "speculative" and unreliable); *United States v. Travis*, 747 F.3d 1312, 1314-17, 1314 n.2 (11th Cir. 2014) (applying this Court's ACCA decisions in *James* and *Sykes* in interpreting guidelines' residual clause); *United States v. Boose*, 739 F.3d 1185, 1187 n.1 (8th Cir. 2014) (court construes ACCA's "violent felony" and guidelines' "crime of violence" as "interchangeable"); *United States v. Meeks*, 664 F.3d 1067, 1070-72, 1070 n.1 (6th Cir. 2012) (same analysis applies to ACCA and guidelines); *United States v. Griffin*, 652 F.3d 793, 802 (7th Cir. 2011) ("[T]he definition of 'violent felony' under the

ACCA is the same as the definition of 'crime of violence' in section 4B1.2 of the guidelines, and it would be inappropriate to treat identical texts differently just because of a different caption." (internal punctuation marks omitted)). When mandatory, the guidelines, through 18 U.S.C. § 3553(b), set the statutory penalty range. 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 is § 4B1.2(1)'s mandatory residual clause.

If this Court holds that § 2253(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 find that § 4B1.2(1)'s residual clause void for vagueness.

Conclusion

The Tenth Circuit panel's decision here is fundamentally flawed. Martinez asks this Court to grant this Petition and review and reverse the Tenth Circuit's decision.

Respectfully submitted,

DATED: October 10, 2019

By: *s/Stephen P. McCue*
STEPHEN P. MCCUE
Federal Public Defender
Attorney for the Petitioner

Appendix

772 Fed.Appx. 766 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Seferino **MARTINEZ**, Defendant - Appellant.

No. 18-2113
|
FILED July 16, 2019

(D.C. Nos. 1:16-CV-00617-WJ-SCY & 1:96-CR-00186-WJ-1) (D. New Mexico)

Before LUCERO, MATHESON, and MORITZ, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY *

Scott M. Matheson, Jr., Circuit Judge

Seferino Martinez seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion as untimely. *See id.* § 2253(c)(1)(B). We deny a COA and dismiss this matter.

I. BACKGROUND

In 1996, Mr. Martinez was sentenced to 327 months in prison as a career offender when the United States Sentencing Guidelines were mandatory. Nearly 20 years later, Mr. Martinez filed a § 2255 motion under *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), which held that the Armed Career Criminal Act's residual clause was unconstitutionally vague. *See id.* at 2557, 2563. He argued that because he received an enhanced sentence under the mandatory Guidelines' similarly worded residual clause, his sentence is unconstitutional under *Johnson*.

The district court denied the motion as untimely under § 2255(f)(3). That provision imposes a one-year limitations period for filing a § 2255 motion from "the date on which the right asserted was initially recognized by the Supreme Court ... and made retroactively applicable to cases on collateral review." *Id.* The district court determined that *Johnson* did not recognize a right made retroactively applicable to cases on collateral review to challenge the constitutional vagueness of the mandatory Guidelines. Hence, Mr. Martinez's motion was untimely. Moreover, the court concluded that our decision in *United States v. Greer*, 881 F.3d 1241 (10th Cir.), *cert. denied*, —— U.S. ——, 139 S. Ct. 374, 202 L.Ed.2d 302 (2018) resolved this issue. It denied a COA. Mr. Martinez renews his request for a COA in this court.

II. DISCUSSION

A COA is a jurisdictional prerequisite to our review. *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). To obtain a COA, Mr. Martinez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires him to show "that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (internal quotation marks omitted). When the district court denied the motion on procedural grounds—here, untimeliness—the prisoner ***767** must show both that "jurists of reason would find it debatable whether the [motion] 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." *Id.* (emphasis added).

No reasonable jurist could debate the district court's conclusion that the § 2255 motion was untimely. As Mr. Martinez acknowledges, our decision in *Greer* forecloses the issue he seeks to raise. Indeed, *Greer* rejected as untimely an identical challenge to

the mandatory Guidelines' career-offender residual clause. 881 F.3d at 1244, 1248-49. *Greer* held the Supreme "Court did not consider in *Johnson*, and has still not decided, whether the mandatory Guidelines can be challenged for vagueness in the first instance, let alone whether such a challenge would prevail." *Id.* at 1248. Because *Johnson* did not recognize a new right applicable to a sentence imposed under the mandatory Guidelines, *Greer* concluded that the § 2255 motion was untimely. *Id.* at 1248-49.

Mr. Martinez recognizes that his § 2255 motion is untimely "as long as *Greer* remains good law," COA Appl. at 11, but he says *Greer* was overruled by *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 1210-11, 200 L.Ed.2d 549 (2018), which invalidated a similarly worded residual clause in 18 U.S.C. § 16(b). Our recent decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019), forecloses that argument. *Pullen* reiterated after *Dimaya* that "*Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines." *Id.* at 1284. Given this binding circuit precedent, no reasonable jurist could debate the district court's conclusion that Mr. Martinez's § 2255 motion was untimely.

III. **CONCLUSION**

We deny a COA and dismiss this matter.

All Citations

772 Fed.Appx. 766 (Mem)

Footnotes

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

End of Document

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SEFERINO MARTINEZ,

Petitioner,

v.

Civ. No. 16-617 WJ/SCY
CR No. 96-186 WJ-1

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on Defendant's objections (Doc. 19) to Magistrate Judge Yarbrough's Proposed Findings and Recommended Disposition (PFRD) (Doc. 18). In his PFRD, Magistrate Judge Yarbrough recommended denying Petitioner Seferino Martinez's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 and *Johnson v. United States* (Doc. 1). The basis of Magistrate Judge Yarbrough's recommendation is the Tenth Circuit's decision in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018) in which the court affirmed the dismissal of a similar motion because the United States Supreme Court has not recognized a right to challenge one's sentence under the previously mandatory sentencing guidelines pursuant to § 2255 and *Johnson*. Petitioner filed his objections to the PFRD on April 24, 2018. Doc. 19. First, Petitioner contends that the Court should resolve the underlying issue as to whether the *Johnson* holding applies retroactively to cases challenging the mandatory sentencing guidelines on collateral review. Doc. 19 at 1-2. Second, Petitioner requests that in the event the Court rejects that argument, the Court issue a Certificate of Appealability. Doc. 19 at 3. For the following reasons, the Court rejects Defendant's Objections (Doc. 19) to Magistrate Judge Yarbrough's PFRD and therefore adopts the PFRD.

Petitioner's first objection was addressed in *Greer* and referenced in Magistrate Judge Yarbrough's PFRD. As stated by the Tenth Circuit, it exceeds the authority of the court to determine the constitutionality of the residual clause of the mandatory guidelines in the first instance on collateral review under Section 2255. 881 F.3d at 1246-47. Petitioner does not challenge Magistrate Judge Yarbrough's analysis on this point, nor does he otherwise provide authority as to why it would be proper for the Court to address the merits of this objection despite *Greer*. The Court therefore rejects Plaintiff's invitation to determine whether the *Johnson* holding applies retroactively to his sentence under the mandatory sentencing guidelines on collateral review.

As for Petitioner's second objection, the Court acknowledges its duty under Rule 11 of the Rules Governing Section 2255 Proceedings to "issue or deny a certificate of appealability when it enters a final order adverse" to the petitioner. "A certificate may issue only if the applicant has made a substantial showing of the denial of a constitutional right." *United States v. Williams*, Civ. No. 16-1226 JTM, 2018 WL 828044, *3 (D. Kan. Feb. 12, 2018) (citing 28 U.S.C. § 2253(c)(2)). This requires that the petitioner demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274 (2004) (internal quotation marks and citation omitted). In the present case, the Court is denying Petitioner's Motion on procedural grounds; namely the timeliness of the Motion. Where a court denies a habeas claim on procedural grounds, the Court may issue a certificate of appealability if "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). Petitioner provides no argument regarding these applicable standards.

Regardless, because the Tenth Circuit in *Greer* clearly resolved the issues presented by Petitioner's Motion, the Court finds that it is beyond debate that its procedural ruling is correct. Unless and until the United States Supreme Court recognizes a right to challenge the residual clause of the mandatory sentencing guidelines, Petitioner's challenge to his sentence pursuant to § 2255 and *Johnson* is untimely. The Court accordingly denies Plaintiff's request for a COA.

IT IS THEREFORE ORDERED that:

(1) The Court ADOPTS Magistrate Judge Yarbrough's Proposed Findings and Recommended Disposition (Doc. 18) and DENIES Petitioner's Motion (CR Doc. 82; Civ. Doc. 1).

CHIEF UNITED STATES DISTRICT JUDGE

No. _____

In the

Supreme Court of the United States

SEFERINO MARTINEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Certificate of Service

I, Stephen P. McCue, hereby certify that on October 10, 2019, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

DATED: October 10, 2019

s/Stephen P. McCue

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