No. 19-

IN THE

SUPREME COURT OF THE UNITED STATES

EDDIE JENNINGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). Then in *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. And this Court has applied this same rule in invalidating the nearly identical language in 18 U.S.C. § 16(b), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and in 18 U.S.C. § 924(c)(3)(B), *United States v. Davis*, 139 S. Ct. 2319 (2019).

A motion to correct sentence under 28 U.S.C. § 2255 is timely when filed within one year of "the date on which the right asserted was initially recognized by this Court, if that right has been newly recognized by this Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

The question presented is:

1. Whether this Court's rulings in *Johnson* and *Welch*, retroactively invalidating the residual clause of the ACCA because it was unconstitutionally vague, apply to an identically worded provision in a different mandatory sentencing scheme, that is, the residual clause of the career-offender provision of the former mandatory Sentencing Guidelines or does this application require recognition of a "new right"?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Eddie Jennings.

The Respondent, the appellee below, is the United States of America.

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PETITION FOR A WRIT OF *CERTIORARI*

The Petitioner, Eddie Jennings, petitions this Court for a writ of *certiorari* to review the final order of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals order is at No. 17-2903, and is reproduced in the appendix to this petition. (Petitioner's Appendix ("Pet. App.") 1a). The memorandum opinion and order of the district court may be found at 4:92-CR-00204 and is reproduced in the appendix, (Pet. App. 2a-9a).

JURISDICTION

The Court of Appeals for the Third Circuit issued its opinion on July 19, 2019. (Pet. App. 1a). This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

INTRODUCTION

This case presents whether Mr. Jennings and others similarly situated can rely on the right of defendants this Court recognized in *Johnson* not to be sentenced under an unconstitutionally vague statute, and applied retroactively in *Welch*, to challenge identical language in the former, mandatory version of the Sentencing Guidelines. In denying Mr. Jennings the opportunity to present his claim, the Third Circuit's precedent in *United States v. Green*, 898 F.3d 315 (3d Cir. 2018) and order here affect innumerable individuals serving long sentences imposed under an unconstitutional framework, the mandatory Guidelines. *See Booker v. United States*, 543 U.S. 220, 226-27 (2005). Not only were these individuals sentenced under an unconstitutional scheme, but based on *Johnson*, they were also subjected to the unconstitutionally vague residual clause for career-offender enhancement.

The Third Circuit's ruling, however, effectively closes the courthouse doors to them, precluding them from seeking relief until this Court recognizes – a second time – that the vague language invalidated in *Johnson* is equally invalid as it appears in the identically worded career-offender provision. Indeed, this Court has applied the rule in *Johnson* to other similarly worded provisions. *E.g., Dimaya*, 138 S. Ct. at 1204, and *Davis*, 139 S. Ct. at 2319. And Justices Sotomayor and Ginsburg have expressed their concern with the failure of the courts to apply *Johnson* to the former mandatory Guidelines, observing, in addition, the division on this issue among the circuits. *See Brown v. United States*, 139 S. Ct. 14-16 (2018) (Sotomayor and Ginsburg, J.J., dissenting from the denial of *certiorari*).

A writ of *certiorari* should be granted so that this Court may correct this manifest injustice and resolve the circuit split.

STATEMENT OF THE CASE

In November 1992, a jury found Mr. Jennings guilty of assault on a correctional officer, in violation of 18 U.S.C. § 111, and destruction of government property, in violation of 18 U.S.C. § 1361. *See* (Ex. 2a). The Probation Office prepared a presentence report, finding that Mr. Jennings qualified for the career-offender enhancement under the former mandatory Sentencing Guidelines. *See* (Ex. 3a). Probation determined that Mr. Jennings's sentencing guideline range was 30 to 37 months, based on a total offense level of 12 and a criminal history category of VI. Without the career-offender enhancement, Mr. Jennings's guideline range would have been 24 to 30 months.

In February 1993, the late Honorable James F. McClure, Jr., sentenced Mr. Jennings—as a career offender—to 36 months. *See* (Ex. 2a). The sentence consisted of 36 months on each count to run concurrently with each other and to run consecutively to a sentence imposed in the Central District of California. *See* (Ex. 2a n.1).

Based on *Johnson*, Mr. Jennings moved to correct his sentence under Section 2255 of Title 28 of the United States Code, 28 U.S.C. § 2255. *See* (Ex. 2a). The district Court denied Mr. Jennings' motion to correct, holding that it was untimely. *See* (Pet. App. 7a). In the district court's view, this Court's opinion in *Johnson* did not announce a "new rule" applicable to the same language in the mandatory Guidelines, as the holding in that case applied only to the Armed Career Criminal Act. *See* (Pet. App. 7a). Thus, Mr. Jennings' motion was untimely, as it was filed

outside the one-year limitation period that follows after a judgment becomes final. *See id*.

On appeal, the Third Circuit summarily affirmed on the basis of its opinion in *Green*, 898 F.3d at 315. *See* (Pet. App. 1a).

REASONS FOR GRANTING THE PETITION

A. The Third Circuit's precedent and order here, declining to apply the rule in *Johnson* to identically worded language in another mandatory sentencing provision, conflicts with this Court's precedent addressing the application of new rules to cases on collateral review, deepens a circuit split, and involves an issue of exceptional importance.

The issue presented in this case is before this Court in two other cases, *Pullen v. United States*, No. 19-5219, and *Bronson v. United States*, No. 19-5316. If this Court grants a writ of *certiorari* in either of these cases, then this matter should be held in abeyance pending the disposition in either *Pullen* or *Bronson*.

1. The Third Circuit's precedent conflicts with this Court's precedent

Emphasizing a footnote in Justice Sotomayor's concurring opinion in *Beckles,* the Third Circuit in *Green* concluded that this Court "left open" whether *Johnson* applies to the mandatory Guidelines, and thus the right asserted by Mr. Green had not been "recognized." *See Green*, 898 F.3d at 321. In the Third Circuit's view, *Beckles* limited the right identified in *Johnson* to its holding that the residual clause of the ACCA was unconstitutionally vague. *See id*. But just because this Court in *Beckles* did not have a mandatory Guidelines case before it, does not mean that application of *Johnson's* rule to identical language in that mandatory scheme would be "new."

A case announces a "new rule" when it "breaks new ground," but "a case does not announce a new rule, when it is merely an application of the principle that governed a prior decision." *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)). "To determine what counts as a new rule," courts must "ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by [existing] precedent." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment). If a "factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies," the rule is not new. *Id*.

And this Court's decisions in *Dimaya* and more recently, in *Davis*, underscore this principle. In *Dimaya* this Court held that "*Johnson* is a straightforward decision, with equally straightforward application" to a different residual clause, 18 U.S.C. § 16(b). *Dimaya*, 138 S. Ct. at 1213. This Court explained that where the two flaws *Johnson* found combined in the ACCA residual clause combine in another statute's residual clause, *Johnson* effectively resolved the case. *Id*. at 2013. It follows from this reasoning that *Dimaya* did not amount to a new rule for *Teague* purposes (or a "newly recognized" rule to restart the Section 2255(f)(3) statute of limitations for *Johnson*). *Dimaya* shows that *Johnson* is the "new rule."

Likewise, in *Davis*, this Court applied *Johnson* and *Dimaya* to the residual clause language in Section 924(c)(3)(B). *See Davis*, 139 S. Ct. at 2326. *Davis* thus was not a new rule, but the simple application of existing precedent.

Moreover, Congress enacted the statute of limitations in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") to "curb lengthy delays in filing," while "preserving the availability of review when a prisoner diligently . . . applies for federal habeas review in a timely manner," including when this Court "recognizes a new right that is retroactively applicable." H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995). Congress used the word "right" rather than "holding" because it "recognizes that [this] Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Moore v. United States,* 871 F.3d 72, 82 (1st Cir. 2017). Reading Section 2255(f)(3) to require prisoners to wait for this Court to decide a case exactly like theirs encourages delay and discourages diligent pursuit of known claims, contrary to Congress's purposes. *Cf. Johnson v. United States*, 544 U.S. 295, 309 (2005) ("explicit" requirement of "due diligence" in Section 2255(f)(4) "reflects AEDPA's core purposes").

2. The Courts of Appeal disagree on whether *Johnson* applies to the mandatory Guidelines.

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). In direct conflict with the Seventh Circuit, seven Circuits have held that *Johnson's* new retroactive right does not apply to the residual clause of the mandatory guidelines. *See, e.g.*, *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 F. App'x 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*. *See 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. Without this Court's resolution, the split will continue to exist.

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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