No. __-_____

IN THE

Supreme Court of the United States

TYLAN TREMAINE AUTREY,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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November 1, 2019

QUESTIONS PRESENTED

Petitioner was convicted of federal kidnapping and sentenced as a career offender in 2000, under the then-mandatory Sentencing Guidelines, when the Guidelines' definition of "crime of violence" included a residual clause in U.S.S.G. § 4B1.2 (Nov. 1998). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the identically-worded residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e). In *Welch v. United States*, 136 Ct. 1257 (2016), the Court held that *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review.

Petitioner filed a § 2255 motion within one year of *Johnson*, asserting that his career offender sentence was unconstitutional because § 4B1.2's residual clause was void for vagueness in light of *Johnson*. The district court held Petitioner's motion untimely under 28 U.S.C. § 2255(f)(3) because this Court had not yet found the mandatory Guidelines' residual clause unconstitutionally vague. But the court issued a certificate of appealability on the timeliness question after concluding that kidnapping may well not be a crime of violence absent the residual clause (a view recently confirmed by the Fourth Circuit).

This case presents two questions:

1. Does a § 2255 motion filed within one year of *Johnson*, claiming that *Johnson* invalidates the residual clause of the mandatory career offender guideline, assert a "right … initially recognized" in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3), such that the motion is timely filed?

2. In light of *Johnson*, is the residual clause of the mandatory career offender guideline unconstitutionally vague?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Tylan Autrey*, No. 1:99-cr-00467-1, U.S. District Court for the Eastern District of Virginia. Judgment entered April 21, 2000.

(2) *United States v. Kenneth Cross*, No. 1:99-cr-00467-2, U.S. District Court for the Eastern District of Virginia. Judgment entered May 12, 2000.

(3) *United States v. Tylan Autrey*, No. 1:99-cr-00467-1 (No. 1:16-cv-00788), U.S. District Court for the Eastern District of Virginia. Order entered June 19, 2017.

(4) *United States v. Tylan Tremaine Autrey*, No. 17-7081, U.S. Court of Appeals for the Fourth Circuit. Judgment entered December 3, 2018, and rehearing denied June 4, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tylan Tremaine Autrey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals appears at Pet. App. 1a-2a and is available at 744 F. App'x 165 (4th Cir. 2018). The ruling of the district court appears at Pet. App. 3a-23a and is published at 263 F. Supp. 3d 582 (E.D. Va. 2017).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over Petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a). That court issued its opinion and judgment on December 3, 2018. Petitioner sought rehearing en banc, which was denied on June 4, 2019. On August 21, 2019, this Court granted Petitioner a 60-day extension of time in which to petition for a writ of certiorari, to November 1, 2019. *See* Application 19A205.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in relevant part that "[n]o person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

2. Section 2255 of Title 28, United States Code, provides in relevant part:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from …
>
> (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.
>
> …
>
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain— …
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(f), (h).

3. The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides that

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, …, that— …
>
> (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; …

18 U.S.C. § 924(e)(2)(B).

4. The U.S. Sentencing Guidelines in effect at Petitioner's sentencing in 2003 provided that

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that— …
>
> (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a) (Nov. 1998).

INTRODUCTION

In 2000, after being convicted of federal kidnapping, Petitioner was sentenced to 262 months of imprisonment based on his designation as a career offender, a designation based in part on the treatment of federal kidnapping as a crime of violence. U.S.S.G. § 4B1.2 (Nov. 1998). The district court was mandated by statute to follow the Guidelines. *See* 18 U.S.C. § 3553(b); *United States v. Booker*, 543 U.S. 220 (2005).

After Petitioner's conviction became final, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that increasing a defendant's sentence to a mandatory minimum term of 15 years under the residual clause of the Armed Career Criminal Act's (ACCA's) definition of "violent felony" violates the Constitution's prohibition on vague laws. A year later, the Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson* is retroactively applicable to cases on collateral review.

Within one year of *Johnson*, Petitioner moved to vacate his sentence under § 2255, arguing that his sentence was imposed in violation of the Constitution in light of *Johnson*. The district court ruled that because this Court has not held that *Johnson* invalidates the residual clause in the mandatory Guidelines' definition of "crime of violence," Petitioner's § 2255 motion was untimely. The district court, however, granted a certificate of appealability. The court of appeals affirmed on the basis of the district court's reasoning.

The courts of appeals have split over whether a § 2255 motion filed within one year of *Johnson* that claims *Johnson* invalidates the residual clause of the

mandatory career offender guideline asserts a "right … initially recognized" by this Court in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3). On one side of the split, the Seventh Circuit has made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory Guidelines' residual clause is a straightforward application of *Johnson*; the First Circuit has also recognized this position. On the other side, eight Circuits have ruled that such motions do not assert any right recognized in *Johnson* because *Johnson* did not expressly hold the mandatory Guidelines' residual clause unconstitutionally vague. That view, however, conflicts with this Court's relevant precedents and § 2255(f)(3)'s text. The questions presented impact numerous federal prisoners serving lengthy mandatory career offender sentences, and are urgently in need of resolution by this Court. The issues are cleanly presented in this case, and their resolutions should be outcome-determinative.

STATEMENT OF THE CASE

1. Petitioner pled guilty in February 2000 to violating 18 U.S.C. § 1201, the federal kidnapping statute. In applying the November 1998 Sentencing Guidelines Manual to Petitioner's case, the probation officer initially calculated the adjusted offense level to be 26 and the criminal history category to be VI. Combining the offense level and criminal history category, Petitioner's mandatory sentencing range was 120 to 150 months. The probation officer concluded, however, that Petitioner qualified as a career offender pursuant to U.S.S.G. § 4B1.1 and § 4B1.2. This determination was based in part on treating the instant offense, kidnapping, as a "crime of violence." Accordingly, Petitioner's offense level increased from 34 after

acceptance of responsibility, and the mandatory sentencing range increase to 262 to 327 months.

Neither the government nor the defense had objections to the presentence report. On April 21, 2000, after adopting the report, the district court sentenced Petitioner to 262 months, the bottom of the mandatory range. Petitioner's current date for release from the Bureau of Prisons is January 27, 2023.

Petitioner did not appeal his conviction or sentence. They thus became final ten days after the judgment and amended judgment were entered on the district court's docket. Fed. R. App. P. 4(b)(1)(A), (b)(6) (eff. Dec. 1998); *see Clay v. United States*, 537 U.S. 522, 532 (2003).

2. On June 26, 2015, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the residual clause of the Armed Career Criminal Act's definition of "violent felony," *see* 18 U.S.C. § 924(e)(2)(B), was unconstitutionally vague and thus violated due process. Not quite a year later, the Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson*'s holding applied retroactively to cases in which convictions with sentences imposed pursuant to § 924(e) had become final.

3. Through counsel, Petitioner filed a motion pursuant to 28 U.S.C. § 2255 seeking correction of his sentence in light of *Johnson*. *See* Doc. 44 (filed June 26, 2016).[1] He contended that his mandatory career offender sentence violated due process because § 4B1.2(a) contained a residual clause in its definition of "crime of

[1] The citation "Doc." followed by a number refers to documents in the district court case from which this appeal arises, No. 1:99-cr-00467-TSE-1 (E.D. Va.).

violence" identical to the residual clause in § 924(e)'s definition of "violent felony" that the Supreme Court in *Johnson* declared unconstitutionally vague. Doc. 44, at 4-8. Petitioner further contended that neither his instant conviction for kidnapping nor certain of his prior convictions qualified as crimes of violence under the other clause of § 4B1.2's definition of "crime of violence." Doc. 44, at 8-20. Finally, Petitioner contended that he was entitled to relief under § 2255 because his sentence violated due process as it was dependent upon an unconstitutionally vague residual clause. *Id.* at 20-21.

The government initially moved to place Petitioner's case in abeyance pending the Supreme Court's consideration of § 4B1.2's residual clause in *Beckles v. United States*, an advisory guidelines case. *See* Doc. 49 (government's motion); Doc. 50 (defendant's response noting no objection); Docs. 51, 52 (court's orders playing case in abeyance and staying case pending *Beckles*). Following the Supreme Court's decision on March 6, 2017, *see* 137 S. Ct. 886 (2017), the district court directed defense counsel to file a brief addressing what effect, if any, *Beckles* had on Petitioner's § 2255 motion. Doc. 53. Counsel argued that *Beckles*, which held that vagueness challenges could not be brought against advisory sentencing guidelines provision, did not foreclose challenges to mandatory guideline provisions, and that a conclusion that *Beckles* precludes Petitioner's *Johnson* claim would contravene *United States v. Booker*, 543 U.S. 220 (2005). Doc. 57.

In its response, the government sought to dismiss Petitioner's § 2255 motion as untimely. Doc. 58. The government asserted that the motion was premature, because the Supreme Court has not yet ruled that *Johnson*, which addressed the

residual clause of 18 U.S.C. § 924(e) and held that provision to be unconstitutionally vague, extends to the identically-worded residual clause in § 4B1.2. *See* Doc. 58, at 1-2, 4-7. Relatedly, the government also argued that Petitioner's challenge to his sentence was barred by *Teague v. Lane*, 489 U.S. 288 (1989), and was otherwise procedurally defaulted. Doc. 58, at 7-13, 14-15. Finally, on the merits of Petitioner's claims, the government contended that *Johnson* does not extend to the mandatory Sentencing Guidelines, and that federal kidnapping qualifies as a crime of violence under § 4B1.2's force clause. Doc. 58, at 15-18, 18-20. Petitioner's counsel filed a reply rebutting the government's various contentions. *See* Doc. 61.

4. On June 19, 2017, the district court issued an opinion and an order in which the court denied Petitioner's § 2255 motion. Pet. App. 3a-23a; 263 F. Supp. 3d 582 (E.D. Va. 2017). The court first reviewed the analytical framework for determining timeliness when a claim is based on a right initially recognized by the Supreme Court. Pet. App. 7a-8a. Relying on *Welch v. United States*, 136 S. Ct. 1257 (2016), as well as on *Beckles*, the court found that *Johnson* "did not establish a new 'right' applicable to defendant or the mandatory Guidelines," and that Petitioner was asking the court "to create a new right by announcing that *Johnson* extends to mandatory Guidelines." Pet. App. 9a. The court also relied on *Teague* to find that *Johnson*'s application to the mandatory Guidelines is a question susceptible to debate among reasonable jurists. Pet. App. 10a-11a (citing cases "reach[ing] disparate conclusions despite rigorous and thoughtful analysis"). The court thus rejected what it viewed as Petitioner's attempt to "extend" *Johnson* to the mandatory Sentencing Guidelines. Pet. App. 9a, 11a.

After concluding that Petitioner's § 2255 motion was untimely, the court addressed his arguments about two of his convictions, federal kidnapping and Virginia unlawful causation of bodily injury. Pet. App. 12a-21a. As to federal kidnapping, the court concluded that "it appears that kidnapping in violation of 18 U.S.C. § 1201 would not qualify as a crime of violence pursuant to U.S.S.G. § 4B1.2's force clause." Pet. App. 15a; *see also id.* at 14a (stating that Petitioner's argument about kidnapping "may well succeed if the Supreme Court extends *Johnson* [*2015*] to the mandatory Guidelines").

The court concluded its opinion by stating,

> In sum, defendant's § 2255 motion must be denied as untimely. Furthermore, defendant's argument regarding the Virginia maiming statute is meritless. Nevertheless, if the Supreme Court in the future announces a new rule of constitutional law applicable to the mandatory Guidelines and § 4B1.2's residual clause, and makes that rule retroactive on collateral review, a subsequent § 2255 petition may well succeed with respect to defendant's federal kidnapping conviction.

Pet. App. 21a. Further, although the court denied Petitioner's § 2255 motion, it issued a certificate of appealability:

> It is further ORDERED that the Court ISSUES a certificate of appealability, pursuant to 28 U.S.C. § 2253(c) and Rule 22, Fed. R. App. P., because the dispositive procedural ruling—that defendant's § 2255 motion is untimely—is debatable and defendant states a debatable claim of the denial of a constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000); *see also In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2017) (Jordan, Rosenbaum & Pryor, JJ., concurring) (debating the merits of the Eleventh Circuit's conclusion that *Johnson* does not apply to mandatory Guidelines); *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017) (concluding that kidnapping

> in violation of 18 U.S.C. § 1201 is not categorically a crime of violence).

Pet. App. 22a; *see* Pet. App. 15a n.11 (noting appellate courts' differing views of federal kidnapping and noting pendency of case raising issue in Fourth Circuit).

5. On appeal to the U.S. Court of Appeals for the Fourth Circuit, that court issued a one-paragraph per curiam ruling:

> Tylan Autrey appeals the district court's order denying as untimely his 28 U.S.C. § 2255 (2012) motion. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *United States v. Autrey*, Nos. 1:99-cr-00467-TSE-1, 1:16-cv-00788-TSE (E.D. Va. filed June 19, 2017 & entered June 20, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

Pet. App. 1a; 744 F. App'x 165, 166 (4th Cir. 2018).[2]

Petitioner sought rehearing en banc. Four and a half months later, on June 4, 2019, the court of appeals denied the petition. Pet. App. 24a.

Three weeks later, at the end of June, this Court struck down the residual clause in 18 U.S.C. § 924(c)(3), which is worded similarly to the residual clause in the mandatory Guidelines' definition of "crime of violence." *United States v. Davis*, 139 S. Ct. 2319 (2019). Six weeks after *Davis*, the court of appeals held in a direct appeal

[2] The Fourth Circuit's decision did not cite to its decision in *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017), even though Petitioner had challenged the decision in his brief and had successfully moved to have his appeal held pending rulings on both the *Brown* rehearing petition and the petition for *certiorari*. *See* C.A. Docs. 14, 18, 20, & 21. However, given that the Supreme Court denied *certiorari* in *Brown* on October 15, 2018, and the Fourth Circuit issued its decision in this case seven weeks later, on December 3, 2018, it appears that the decision rested implicitly, if not explicitly, on *Brown*.

case that federal kidnapping is not a crime of violence within the scope of § 924(c)(3)'s force clause. *See United States v. Walker*, 934 F.3d 375 (4th Cir. 2019). Following *Davis* and its own decision in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019), the court of appeals has also expressed renewed interest in § 2255 appeals raising challenges to the mandatory Guidelines. *See United States v. Rumph*, 4th Cir. No. 17-7080, Doc. 26 (tentative calendar order, filed July 25, 2019); *United States v. Sarratt*, 4th Cir. No. 19-6075, Doc. 14 (order granting motion for formal briefing, filed Aug. 26, 2019).

Petitioner now seeks review on the merits of the Fourth Circuit's decision in his case. Should the Court not grant review outright, however, then Petitioner asks that his case be held until the Court rules on similar cases presenting the issues raised here[3] and then reconsidered at that time.

REASONS FOR GRANTING THE PETITION

The courts are divided over whether a § 2255 motion claiming that *Johnson* invalidates the mandatory career offender guideline's residual clause asserts the "right … initially recognized" by this Court in *Johnson*. On one side of the divide, the majority of Circuits to have addressed the issue, including the Fourth, have ruled that such motions do not assert any right recognized in *Johnson* because this Court did not expressly hold in *Johnson* that the mandatory Guidelines' residual clause is unconstitutionally vague. On the other side, the First and Seventh Circuits have made clear that such motions assert the right recognized in *Johnson* because the

[3] *See, e.g.*, *Pullen v. United States*, No. 19-5219; *Bronson v. United States*, No. 19-5316.

invalidation of the mandatory Guidelines' residual clause is a straightforward application of *Johnson*. The majority approach—that these motions were filed too early because this Court has not already held that the mandatory Guidelines' residual clause is void for vagueness—conflates the timeliness question with the merits questions, conflicts with this Court's relevant precedents, and is contrary to the statutory text. The questions presented are of exceptional importance. If the mandatory Guidelines' residual clause is indeed invalid, numerous prisoners serving lengthy unlawful sentences are being denied the opportunity to have any court reach the merits of their claims, including Petitioner. Finally, the issues are cleanly presented in this case, and the answers should be outcome-determinative.

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 Sentencing Guidelines.

Review by this Court is necessary for at least two reasons: first, because there is an entrenched circuit split over this issue; and second, because at least some of the circuits in the majority, including the Fourth Circuit, take a position that conflicts with decisions of this Court and is contrary to the statutory text.

A. The Courts of Appeals are starkly divided on the issue.

1. On one side of the split, eight Circuits (including the Fourth Circuit) have held that *Johnson*'s new retroactive right does not apply to the residual clause of the mandatory guidelines, and thus, that defendants did not file their § 2255 motions in a timely fashion. *See United States v. Green*, 898 F.3d 315 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1590 (2019); *United States v. Brown*, 868 F.3d 297 (4th Cir.

2017), *cert. denied*, 139 S. Ct. 14 (2018); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2661 (2018); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1297 (2019); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019); *United States v. Greer*, 881 F.3d 1241 (10th Cir.), *cert. denied*, 139 S. Ct. 374 (2018); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Not all of these decisions were unanimous, however. The Fourth Circuit issued its decision in *Brown* over the dissent of Chief Judge Gregory. 868 F.3d at 304. Judge Costa concurred in the judgment of the Fifth Circuit's recent decision in *London*, writing separately to express his view that the Fifth Circuit is on "the wrong side of a split over the habeas limitations statute." 937 F.3d at 510. 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. 2019). Judge Berzon, in the Ninth Circuit, has stated her view that "*Blackstone* was wrongly decided" and that "the Seventh and First Circuits have correctly decided" the timeliness question. *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. 2019) (Berzon, J., concurring). And an entire Eleventh Circuit panel called into question that court's decision in *In re Griffin*. *See In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, J.) ("Although we are bound by *Griffin*, we write separately to explain why we believe *Griffin* is deeply flawed and wrongly decided."). This intra-Circuit dissension, coming on top of the inter-Circuit split, further supports review by this Court.

2. On the other side of the split, the Seventh Circuit has held 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 doing so, the Seventh Circuit rejected the approach taken by the majority, explaining that it "suffers from a fundamental flaw" because

> [i]t improperly reads a merits analysis into the limitations period. Section 2255(f)(3) runs from "the date on which the right *asserted* was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3) (emphasis added). It does not say that the movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that we take the disfavored step of reading "asserted" out of the statute.

Id. at 293-94. The court held that the right asserted "was recognized in *Johnson*." *Id.* at 294. "Under *Johnson*, a person has a right not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* Because the appellants "assert precisely that right," they therefore "complied with the limitations period of section 2255(f)(3) by filing their motions within one year of *Johnson*." *Id.*

Turning to the merits question, the Seventh Circuit concluded that the "same two faults" that render the ACCA's residual clause—the combined indeterminacy of how much risk the crime of conviction posed and the degree of risk required—"inhere in the residual clause of the guidelines." 892 F.3d at 299. It "hardly could be otherwise" because the clauses are identically worded and the categorical approach applies to both. *Id.* at 300. Additionally, the Seventh Circuit held that the mandatory Guidelines' residual clause implicated the twin concerns of the vagueness doctrine

because it fixed the permissible range of sentences. *Id.* at 304-06. The court explained that *Beckles* "reaffirmed that the void-for-vagueness doctrine applies to 'laws that fix the permissible sentences for criminal offenses.'" *Id.* at 305 (quoting *Beckles v. United States*, 137 S. Ct. 886, 892 (2017)). "As *Booker* described, the mandatory guidelines did just that. They fixed sentencing ranges from a constitutional perspective." *Id.* Because the Guidelines were "'not advisory'" but "'mandatory and binding on all judges,'" *id.* (quoting *United States v. Booker*, 543 U.S. 220, 233-34 (2005)), "[t]he mandatory guidelines did … implicate the concerns of the vagueness doctrine." *Id.*

The Seventh Circuit's decision deepens the circuit conflicts concerning whether *Johnson* recognized a right not to have one's sentence increased by the mandatory Guidelines' residual clause and whether that clause is unconstitutionally vague. It therefore confirms the reasons for granting the petition for a writ of certiorari in this case.

3. Although the split is presently lopsided, other Circuits may yet side with the Seventh Circuit on this issue, as it is still unresolved in the First, Second, and D.C. Circuits. In *Moore v. United States*, the First Circuit has 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 United States v. Pullen*, 913 F.3d 1270, 1284 n.16 (10th Cir. 2019) (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"). Further, district courts in all three Circuits have granted *Johnson* relief to defendants 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); *Blackmon v. United States*, 2019 WL 3767511, at *6-7 (D. Conn. Aug. 9, 2019) (finding § 2255 motion timely); *Mapp v. United States*, 2018 WL 3716887 (E.D.N.Y. Aug. 3, 2018). Finally, the Fourth Circuit may reconsider its decision in *Brown*, as it has expressed renewed interest in § 2255 appeals raising challenges to the mandatory Guidelines following this Court's decision in *Davis* and its own decision in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019). *See United States v. Rumph*, 4th Cir. No. 17-7080, Doc. 26 (tentative calendar order, filed July 25, 2019); *United States v. Sarratt*, 4th Cir. No. 19-6075, Doc. 14 (order granting motion for formal briefing, filed Aug. 26, 2019).

Thus, what is currently an eight-to-one split could easily become an eight-to-four split, or a seven-to-five split should the Fourth Circuit change its position. But if that court does not, the current split is still sufficiently important for this Court to resolve. *See*, *e.g.*, *Beckles*, 137 S. Ct. at 892 n.2 (resolving similar issue whether residual clause of advisory career offender guideline 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). It also just reaffirmed its position in *Cross*. *Daniels v. United States*, 939 F.3d 898, 900, 903 (7th Cir. Oct. 4, 2019). And even if the Fourth Circuit were to switch sides, it is implausible to think that the seven other Circuits would also switch. *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 F. App'x 390, 391 (3d Cir. Apr. 29, 2019) (refusing to reconsider earlier decision in *Green*).

B. The majority's approach to § 2255(f)(3) conflicts with this Court's precedent and with the plain language of the provision.

1. Although this Court has never said what it means to "recognize" a "right asserted," 28 U.S.C. § 2255(f)(3), its consideration of habeas challenges in the context of another type of unconstitutionally vague sentencing statute illustrate how this analysis works. 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, 363-64 (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, 228-29 (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. In other words, *Maynard* and *Stringer* did not extend *Godfrey*, but were instead simply applications of the principles that governed the Court's earlier decision in *Godfrey*.

Another, more recent federal law example is this Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which refutes the position that *Johnson* only recognized that § 924(e)'s residual clause was unconstitutionally vague. In striking down the residual clause in the federal criminal code's generally applicable definition of "crime of violence," 18 U.S.C. § 16, as incorporated into the immigration laws, *Dimaya* explained that "*Johnson* is a straightforward decision, with equally

straightforward application here," 138 S. Ct. at 1213, and "tells us how to resolve this [§ 16(b)] case," *id.* at 1223. *Dimaya* thus demonstrates that *Johnson* recognized a right not to suffer serious consequences under a residual clause that, like the ones in § 924(e), § 16(b), and the career offender guideline, "ha[s] both an ordinary-case requirement and an ill-defined risk threshold." *Id.* at 1223. If *Johnson* "effectively resolved the case" before the Court in *Dimaya*, *id.* at 1213, involving a "similar" clause resulting in "virtual[ly] certain[]" deportation, then *Johnson*'s application to a clause identical in its text and mode of analysis to that of § 924(e), which similarly mandated years longer in prison, resolves Petitioner's case as well.

Therefore, applying this jurisprudence, a right not to have one's sentence increased by a residual clause that suffers from the same flaws that invalidated § 924(e)'s residual clause is not an extension of *Johnson*, but is simply an application of the principles that governed the result in *Johnson* to a closely analogous set of facts. The mandatory Guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Moore v. United States*, 871 F.3d 72, 81 (1st Cir. 2018). The right asserted is "logically inherent" in *Johnson*, and "is exactly the right recognized by *Johnson*." *Id.* at 82-83. Because "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson*," Petitioner "is asserting the right newly recognized in *Johnson*." *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting); *see London*, 937 F.3d at 511 (Costa, J., concurring in judgment) (motion under consideration in appeal "asserted the right to be free from vague laws 'fixing sentences' that *Johnson* recognized")).

In the face of this Court's decisions, the majority of Circuits have concluded that *Johnson* does not apply beyond cases involving the exact statute at issue in *Johnson*, 18 U.S.C. § 924(e). But as just explained, both the *Godfrey-Maynard-Stringer* line of decisions and *Dimaya* make clear that this type of "exact statute" approach is wrong.

2. Moreover, the "exact statute" approach conflicts with the statutory text. A motion is timely under § 2255(f)(3) if filed within one year of the date on which the "right asserted was initially recognized" by this Court. To "assert" means to "state positively," or to "invoke or enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014). There is no assumption in common usage or in law that one's assertions are necessarily correct. To the contrary. As this Court has put it, a § 2255 motion is timely if filed within one year of the date of the decision from which it "[seeks] to benefit." *Dodd v. United States*, 545 U.S. 353, 360 (2005). The statute of limitations is thus a threshold inquiry about timeliness, separate from a different threshold inquiry about retroactivity and a determination of the merits. *See London*, 937 F.3d at 511 (Costa, J., concurring in judgment) (because petition "asserted the right to be free from vague laws 'fixing sentences' that *Johnson* recognized" and because "the *Johnson* right applies retroactively," the petition was timely "under the habeas statute's plain language").

The "exact statute" approach's treatment of § 2255(f)(3), however, not only reverses the order of operations, but requires that this Court first confirm that the claim is correct on the merits before the statute of limitations can be met, in effect setting a higher bar for the threshold statute-of-limitations inquiry than for courts to

grant relief on the merits. *See London*, 937 F.3d at 511 (Costa, J., concurring in judgment) (recognizing that "our circuit and most others addressing the issue require more than the statute does" and that "[r]estarting the clock only when the Supreme Court has vindicated the prisoner's exact claim transforms a threshold timeliness inquiry into a merits one"). The "exact statute" approach thus renders the statute of limitations redundant: a motion is timely only if this Court has already decided that it is correct on the merits, but if this Court has not already decided that it is correct on the merits, it is untimely.

For prisoners like Petitioner, then, the "exact statute" approach's interpretation of § 2255(f)(3) creates a logical and practical impossibility. If the "right initially recognized by the Supreme Court" requires a precise holding by this Court, it would be impossible for this Court to ever recognize the right or any court to adjudicate the merits. None of these prisoners has an active direct appeal, and more than one year has passed since their convictions became final. 28 U.S.C. § 2255(f)(1). Section 2255 motions would always be premature if this Court had not precisely decided the issue, and this Court could never precisely decide the issue because it would always be too early, in "an infinite loop." *Zuniga-Munoz v. United States*, No. 1:02-cr-124, Doc. 79, at 8 (W.D. Tex. Apr. 26, 2018).

3. Finally, 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, and it is needed now. Without such guidance, disagreement is likely to exist with respect to the scope of every newly recognized retroactive right. The Court should grant review.

II. This Court Should Resolve Whether the Mandatory Sentencing 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. *United States v. Cross*, 892 F.3d 288, 307 (7th Cir. 2018). That decision is correct. The language of § 4B1.2(a)(2)'s residual clause is identical to the residual clause struck down in *Johnson*, 18 U.S.C. § 924(e)(2)(B)(ii). Moreover, it is very similar to the residual clauses struck down in *Dimaya* and in *Davis*, 18 U.S.C. § 16(b) and § 924(c)(3)(B). Courts have 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).

Further, like the residual clause struck down in *Johnson*, the law under which Petitioner was sentenced "fix[ed] the permissible range of sentences." *Beckles*, 137 S. Ct. at 892. That law, 18 U.S.C. § 3553(b), made the Guidelines "mandatory and impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 259 (2005); *id.* at 245 (§ 3553(b) was the "provision of the federal sentencing statute that ma[de] the Guidelines mandatory"). By virtue of § 3553(b), the Guidelines "had the force and effect of laws." *Id.* at 234; *see also Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("[T]he Guidelines bind judges and courts in … pass[ing] sentence in criminal cases."); *Stinson v. United States*, 508 U.S. 36, 42 (1993) ("[T]he Guidelines Manual is binding on federal courts."); *Dillon v. United*

States, 560 U.S. 817, 820 (2010) ("As enacted, the SRA made the Sentencing Guidelines binding.").

Accordingly, in *Booker*, this Court repeatedly recognized that the mandatory Guidelines fixed the permissible range of sentences. *Booker*, 543 U.S. at 226 (observing that "binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose"); *id.* at 227 (factual findings "mandated that the judge select a sentence" within range); *id.* at 236 (judge, not jury, "determined upper limits of sentencing"). Courts were not "bound only by the statutory maximum," *id.* at 234, and there was no difference between the guideline maximum and "the prescribed statutory maximum," *id.* at 238.

Because the law under which Petitioner was sentenced "fixe[d] permissible sentences," it was required to "provide[] notice and avoid[] arbitrary enforcement by clearly specifying the range of penalties available." *Beckles*, 137 S. Ct. at 895. But by combining an ordinary-case requirement and an ill-defined risk threshold, *Johnson*, 135 S. Ct. at 2557-58, the mandatory Guidelines' residual clause failed to clearly specify the range of penalties available. *Beckles*, 137 S. Ct. at 894. As the Court reiterated in *Beckles*, "due process … require[d] notice in a world of mandatory Guidelines." *Id.* at 894 (quoting *Irizarry v. United States*, 553 U.S. 708, 713-14 (2008)).

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 § 4B1.2(1)'s mandatory residual clause must also be void for vagueness. In

short, 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.

III. The Questions Presented Are Exceptionally Important and Urgently in Need of Resolution by This Court.

The importance of the issues raised in this case 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 v. United States*, 139 S. Ct. 14, 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). And because the Sentencing Guidelines are no longer mandatory, it is impossible to resolve this issue on direct appeal.

Unless this Court grants certiorari in a case like Petitioner'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 and D.C. Circuits) can be resentenced to considerably shorter terms of imprisonment, whereas federal prisoners sentenced within the other Circuits must serve the remainder of their unconstitutional sentences. In Petitioner's case, this difference in geography means another three 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 calculation error, this

Court has acknowledged "the risk of unnecessary deprivation of liberty," a risk that "undermines the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). Here, the error is much more than that. The residual clause is unconstitutionally vague in the same ways as the residual clauses the Court has already struck down in 18 U.S.C. §§ 16(b), 924(c), and 924(e); as such, it is "no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). This Court's review is needed.

IV. This Case Presents an Ideal Vehicle for Deciding Both Questions.

This case cleanly presents the two issues for which review is requested, and their resolution will be outcome-determinative. Petitioner was sentenced as a career offender in 2000, when the Sentencing Guidelines were binding on sentencing judges as a matter of law. The career offender guideline mandated a range, the low end of which was 112 months—or nearly ten years—higher than the otherwise permissible range.[4] In light of recent decisions from this Court and the circuit courts, the enhancement depended on an instant offense, federal kidnapping in violation of 18 U.S.C. § 1201, that qualifies as a "crime of violence" only under the residual clause. Petitioner filed his § 2255 motion within one year of *Johnson*. Petitioner's appeal of the district court's denial of his § 2255 motion thus largely rises and falls on whether *Johnson* invalidates the residual clause. Finally, there is no possibility that the case would become moot, as Petitioner's current release date is January 27, 2023.

[4] Without the career offender enhancement, Petitioner's guideline range would be 120 to 150 months—or less than half of the range of 262 to 327 months resulting from the career offender enhancement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. If the Court does not grant review outright, however, then the case should be held until the Court rules on similar cases presenting the issues raised here and considered at that time. *See, e.g.*, *Pullen v. United States*, No. 19-5219; *Bronson v. United States*, No. 19-5316.

Respectfully submitted,

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November 1, 2019