No. _____

In the

Supreme Court of the United States

FRANK FERNANDEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

AMY M. KARLIN
Interim Federal Public Defender
BRIANNA MIRCHEFF*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4784
Facsimile: (213) 894-0081

Attorneys for the Petitioner
* Counsel of Record

Questions Presented

1. Whether a § 2255 motion filed within one year of *Johnson v. United States*, claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline, asserts a "right . . . initially recognized" in *Johnson* for timeliness purposes under 28 U.S.C. § 2255(f)(3).

2. Whether, in light of *Johnson*, the residual clause of the mandatory guidelines is unconstitutionally vague.

Statement of Related Proceedings

- *United States v. Frank Fernandez*
  2:99-cr-00083-DOC-1 (C.D. Cal. Jan. 22, 2011)
- *United States v. Frank Fernandez*,
  388 F.3d 1199 (9th Cir. 2004), *modified by* 425 F.3d 1248 (9th Cir. 2005)
- *Frank Fernandez v. United States*,
  544 U.S. 1043 (2005)
- *Frank Fernandez v. United States, v. United States*,
  8:16-cv-01143-DOC (C.D. Cal. Feb. 12, 2018)
- *Frank Fernandez v. United States*,
  18-55183 (9th Cir. Aug. 21, 2019)

Table of Contents

Page(s)

Table of Authorities

Page(s)

Federal Cases

Table of Authorities

Page(s)

Table of Authorities

Page(s)

Table of Authorities

Page(s)

Table of Authorities

Page(s)

Federal Statutes and Sentencing Guidelines

In the

Supreme Court of the United States

FRANK FERNANDEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Frank Fernandez petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability in his case.

Opinions Below

The Ninth Circuit's order denying Mr. Fernandez's application for a certificate of appealability ("COA") was not published. App. 1a. The district court issued a written order denying Mr. Fernandez's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and denying his request for a certificate of appealability. App. 2a-16a.

Jurisdiction

The Ninth Circuit issued its order denying Mr. Fernandez a COA on August 21, 2019. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

22 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255(f) states:

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

…

(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

U.S.S.G. § 4B1.2(a) (2000) reads:

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

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

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Introduction

Section 2255(f) states that a one-year statute of limitations applies to federal habeas petitions and runs from the latest of several triggering dates, including "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). This case turns on when, precisely, a "right" has been "recognized" by this Court—and whether it requires that this Court decide a case in the same statutory context, or whether a habeas petitioner should file once this Court issues a decision with clear application to his case. The Circuits are divided on this question, meaning that similarly situated petitioners receive relief, or not, depending of the geography of their conviction. The Court should grant Petitioner's writ.

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. In Mr. Fernandez's case, his § 2255 motion challenged the residual clause in the career-offender provision of the mandatory guidelines, and

argued that it was void for vagueness under *Johnson*. But the Ninth Circuit never reached the merits of his claims, based on a prior decision of the Court saying that his claim was untimely because this Court had yet not decided a case that addressed directly *Johnson*'s impact on the mandatory career-offender guideline. As such, it concluded, this Court had not recognized "the right" Petitioner asserted.

This Court should grant plenary review to consider whether a claim raising *Johnson*'s impact on the career-offender provision of the mandatory guidelines is timely under 28 U.S.C. § 2255(f)(3). There is an entrenched division in the Circuits on this question: the First and Seventh Circuits find such claims timely, the Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits find the claims untimely, and the district courts of the Second and D.C. Circuits are internally divided—as the district courts of the Ninth Circuit were prior to the Court's holding in *Blackstone*.

The unevenness of this playing field and this Court's unwillingness to intervene has created a secondary market for relief: at least one petitioner blocked from raising a mandatory guidelines claim via § 2255 in his district of *conviction* won relief raising a mandatory guideline claim via § 2241 petition in the district of *confinement*—taking advantage of favorable (but nationally uneven) caselaw in that Circuit about whether a mandatory guideline error is a cognizable "miscarriage of justice" under that statute. As it stands, whether

an inmate receives review of his mandatory-guideline claim is a matter of arbitrariness upon arbitrariness.

The status quo is intolerable, the circuit split does not appear likely to resolve itself, and the inferior federal courts have struggled without guidance on this issue for too long. This Court should grant the writ and decide, finally, whether a claim that *Johnson* invalidates the residual clause in the mandatory career-offender guideline is timely if filed within a year of *Johnson*.

Statement of the Case

1. Mr. Fernandez was convicted, after a jury trial, of: (1) violating the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18U.S.C. § 1962(c) (Count 1); (2) conspiracy to violate RICO ("RICO Conspiracy"), in violation of 18 U.S.C. § 1962(d) (count 2); (3) two counts of conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), 846 (counts 3 and 4); and (3) three counts of committing Violent Crimes in Aid of Racketeering ("VICAR"), in violation of 18 U.S.C. § 1959(a) (Counts 14, 15, and 21). On January 22, 2001, the district court sentenced him to life imprisonment--a then-mandatory life sentence for the RICO counts, 240 months on the drug charges and 120 months on the VICAR counts.

The Presentence Report ("PSR") concluded that Mr. Fernandez was a career offender under U.S.S.G. § 4B1.1 because his instant convictions for

RICO, RICO conspiracy, and VICAR were crimes of violence and he had two prior adult felony convictions for crimes of violence. (PSR ¶ 79.) The first of the career offender predicates was Mr. Fernandez's 1981 conviction for attempted armed robbery, attempted burglary, and assault with a deadly weapon, in violation of California Penal Code Sections 211 and 664, 459 and 664, and 245(a) and 12022(a), respectively. (PSR ¶ 79(c), 119-123; Superior Court Case No. A561078.) The second of the career offender predicates was his 1987 conviction for unarmed bank robbery, in violation of 18 U.S.C. § 2113(a). (PSR ¶ 79(c), 128-132; District Court Dkt. No. 86-881.)

The career offender finding resulted in a significant difference in Mr. Fernandez's sentence. The PSR found that his non-career-offender offense level was 30, but that his career-offender offense level was 37, a swing of 7 levels. (PSR ¶ 82.) Moreover, because all career offenders are automatically placed in Criminal History Category VI, see U.S.S.G. § 4B1.1(b), the career offender determination increased Mr. Fernandez's criminal history category from IV to VI. (PSR ¶¶ 135-136.) In total, then, the career offender designation had the effect of changing Mr. Fernandez's guideline range from 135-168 months to 360 months-life.

At a sentencing hearing held on January 22, 2001, the district court imposed a term of life imprisonment, consisting of life on Counts 1 and 2 (the RICO and RICO conspiracy counts), 240 months on Counts 3 and 4 (the

controlled substances counts), and 120 months on Counts 14, 15, and 21 (the VICAR counts), all counts to run concurrently. (Ex. C, Sentencing Transcript, at 28, 68-69.)

Mr. Fernandez's conviction was affirmed on direct appeal.

2. On June 19, 2016--within one year of this Court's decision in *Johnson*--Mr. Fernandez filed a first motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his sentence, imposed under the mandatory career-offender guideline was invalid because it was premised on the residual clause.

After full briefing, the district court denied Mr. Fernandez's claims, and declined to grant a certificate of appealability. The court did not, as the government had urged, deem the claim untimely. Instead, it ruled on the merits of the claim.

3. Petitioner filed a request for a certificate of appealability in the Ninth Circuit, supported by full briefing on the standard and the reasons for granting the COA. The Ninth Circuit denied it in an order citing *United States v. Blackstone*, 903 F.3d 1020, 1027-28 (9th Cir. 2018), but not further analyzing the question. (App. 1a.) *Blackstone* is the Ninth Circuit's precedential decision holding that a claim seeking to apply *Johnson* to the mandatory guidelines is not timely.

Reason for Granting the Writ

A. The Court Should Grant Plenary Review to Clarify the Timeliness of Mandatory Guidelines Claims Based on *Johnson*.

This Court should grant plenary review in order to settle the deep—and expanding—disconnect between the Circuits in their treatment of timeliness of mandatory-guidelines claims.

1. *There is a deep and entrenched inter- and intra-circuit split on the timeliness of mandatory guidelines claims.*

At the beginning of OT 2018, this Court denied a number of claims raising the application of *Johnson* to the mandatory guidelines. *See Brown v. United States*, 139 S. Ct. 14, 14 & n.1 (2018) (Sotomayor, J., dissenting from denial of certiorari). At the time, the Solicitor General represented that the circuit split was shallow and might well resolve itself without the intervention of the Court. Today, over a year later, that prediction has proved false.

a. The Seventh Circuit has held that mandatory guidelines claims based on *Johnson* are timely. *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). Contrary to the United States' prediction, *see* Brief in Opposition, at 15, *United States v. Gipson*, 17-8637 (2018), the Seventh Circuit has not retreated from that position to align itself with other courts. *Sotelo v. United States*, ___ F.3d ___, 2019 WL 1950314, at *3 (May 2, 2019)

("[W]e reject the government's suggestion to reconsider *Cross*'s holding that *Johnson* recognized a new right as to the mandatory sentencing guidelines."). Instead, it continues to grant petitioners relief under *Cross*. *E.g.*, *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019)

The First Circuit issued a published order finding a mandatory guideline claim timely. *Moore v. United States*, 871 F.3d 72, 81 (1st Cir. 2017). The Solicitor General maintained that that decision did not represent the "settled circuit law on the issue," because it was issued in the context of a second-or-successive application. *See* Brief in Opposition, at 15 n.4, *United States v. Gipson*, 17-8637 (2018). But since that time, *Moore* has been the basis for grants of substantive relief in the First Circuit. *E.g.*, Order, *United States v. Moore*, 1:00-10247-WGY, 2018 WL 5982017 (D. Mass. Nov. 1, 2018) (granting § 2255 relief); *United States v. Roy*, 282 F. Supp. 3d 421, 432 (D. Mass. 2017). The United States has not appealed those decisions.

Thus, in two Circuits, petitioners have been granted substantive relief on claims that would be shut out of court in the Ninth Circuit.

b. Meanwhile, the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have all held that *Johnson* did not recognize the right not to be sentenced under the ordinary case doctrine in the guideline context, and thus *Johnson* claims raised by those sentenced under the mandatory career-offender guideline are untimely. *United States v. Green*, 898 F.3d 315, 322-23

(3d Cir. 2018); *United States v. Brown*, 868 F.3d 297, 301-03 (4th Cir. 2017); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625, 629-31 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Notably, while those decisions are all final, they have not been uniformly endorsed. 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 wrote a concurring decision 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, opined 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). An 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."). And in the Tenth Circuit, the Court continues to grant

certificates of appealability—despite *Greer*—in recognition that reasonable jurists could come out the other way on the timeliness question. Order, *United States v. Crooks*, 18-1242, 2019 WL 1757314, at *2 (10th Cir. Apr. 19, 2019).

Thus even in Circuits that have "settled law," the question continues to vex the courts.

c. Finally, some Circuits have not yet issued decisions. Thus, in some places, the timeliness of the claim depends on which courthouse, or even which courtroom in a single courthouse, one finds oneself. *Compare United States v. Hammond*, 354 F. Supp. 3d 28, 42 (D.D.C. 2018) (finding mandatory guideline claim based on *Johnson* timely) *with* Order, *United States v. Upshur*, 10-cr-251, 2019 WL 936592, at *7 (D.D.C. Feb. 26, 2019) (finding mandatory guideline claim based on *Johnson* untimely); *Mapp v. United States*, 95-cr-1162, 2018 WL 3716887, at *4 (E.D.N.Y. Aug. 3, 2018) (granting relief in a habeas petition raising mandatory guideline *Johnson* claim), *vacated on other grounds*, *with Nunez v. United States*, 16-cv-4742, 2018 WL 2371714, at *2 (S.D.N.Y. May 24, 2018) (denying *Johnson* claims on timeliness grounds).

The split in this case is well-developed and mature, and it's not going away. Nor is the issue continuing to evolve in the lower courts: Instead, as new cases are decided, courts simply decide which side of the split they will

join. There is simply no reason to let the lower courts continue to struggle over the question; this is a case that "presents an important question of federal law that has divided the courts of appeal" and merits this Court's review. *See Brown*, 139 S. Ct. at 16 (Sotomayor, J., dissenting from denial of certiorari) (citing Sup. Ct. Rule 10).

2. *The question presented is of exceptional importance.*

a. This disparate caselaw is too important to be left in place. More than a thousand individuals filed petitions after *Johnson* raising a claim that *Johnson* applied to their career-offender sentence. *See id.* If their claims are not heard, many will spend an additional decade or more in custody, based solely on an improperly imposed guideline sentence. *Cf* Sentencing Resource Counsel Project, Data Analyses 1 (2016), *available* http://www.src-project.org/wp-content/uploads/2016/04/Data-Analyses-1.pdf (citing FY 2014 statistics, the average guideline minimum for career offenders charged with drug offenses was 204 months, and the average minimum for drug offenders not charged as career offenders was 83 months).

Not only will those sentenced under the mandatory guidelines be left out in the cold, but petitioners in the future will be left without clear guidance for what event triggers the statute of limitations for filing a habeas claim. A defendant is permitted to file a single § 2255 petition before he triggers the higher standard for filing a second or successive petition under

28 U.S.C. § 2255(h). If he files too late, or too early, even his meritorious claims will likely never be adjudicated. Where such high stakes decisions have such little margin for error, it is important that litigants have clear rules to apply.

b. Moreover, this Court's failure to address this arbitrariness has created a secondary market for habeas relief, where petitioners receive differential treatment depending, not only on the Circuit where they sustained their conviction, but on the Circuit in which they happen to be serving their sentence. For example, Petitioner Stony Lester was convicted in the Eleventh Circuit, a circuit which has held *Johnson* does not apply to the mandatory guidelines at all. *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2017) (en banc). Like all others convicted in that Circuit, he was foreclosed from relief via § 2255 motion. *Lester v. United States*, ___ F.3d ___, 2019 WL 1896580, at *1 (11th Cir. Apr. 29, 2019)

Luckily for Mr. Lester, the BOP placed him far from home, in a facility in the Fourth Circuit. That Court has held that a petitioner may file, via 28 U.S.C. § 2241's "escape hatch," a petition arguing that one's mandatory guideline calculation was wrong. *United States v. Wheeler*, 886 F.3d 415, 433 (4th Cir. 2018). Thus, even as the Eleventh Circuit denied his § 2255 petition, the Fourth Circuit found that his career-offender sentence should be vacated, concluded that any route to such relief was blocked in the Eleventh Circuit,

and it granted his § 2241 petition. *Lester v. Flournoy*, 909 F.3d 708, 714 (4th Cir. 2018). After two Circuits expended simultaneous efforts writing separate published opinion spanning seventy-five pages (and pointing in different directions), Mr. Lester was released from custody. Notably, all that effort was poured into case where Mr. Lester's substantive eligibility for relief has been clear for a full decade. *See Lester*, 909 F.3d at 710 (citing *Chambers v. United States*, 555 U.S. 122, 127-28 (2009) as the case that established that Lester's career-offender sentence was erroneous).

If his claim is unique, it soon will not be. Three Circuits deem an error in the calculation of the mandatory guidelines to be a miscarriage of justice cognizable under 28 U.S.C. § 2241. *Wheeler*, 886 F.3d at 433; *Brown v. Caraway*, 719 F.3d 583, 587-88 (7th Cir. 2013); *Hill v. Master*, 836 F.3d 591, 593 (6th Cir. 2016). Others have caselaw foreclosing that route to the prisoners housed within their Circuit. *E.g.*, *McCarthan v. Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1090 (11th Cir. 2017) (en banc). Thus, while it might have seemed like the fight was winding down when the Court denied *Brown v. United States,* et al., this fall, those denials in fact signaled the start of the second round. This second round creates yet another level of disparity even more disconnected from substantive merit for relief. And it requires another set of attorneys and courts, far from the relevant records and unfamiliar with the local state laws, to expend efforts

reviewing a case.

This is too much arbitrariness to be tolerated. It cannot be that some federal inmates whose convictions arise in certain circuits or who are housed in certain circuits receive review of their mandatory-guidelines career offender claims, and others are foreclosed from review simply because of where they were sent to serve out their term. The evolution of this secondary market for relief underscores the need for this Court's immediate intervention.

3. *The Ninth Circuit's decision is wrong.*

On the merits, the Ninth Circuit erred in dismissing Mr. Fernandez's claim as untimely—too *early*—because the Court has not yet explicitly applied *Johnson* to the mandatory guidelines.

1. Where a federal prisoner believes he should benefit from a Supreme Court decision, he must file his petition within one year of the date "on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3).1 *Johnson* struck down the residual clause of the Armed Career Criminal Act as void for vagueness. 135 S. Ct. at 2557. In so

1 Section 2255(f)(3) states, in whole: "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." The panel's decision, however, discussed only the first clause.

doing, it reiterated that due-process vagueness principles apply, not only to statutes defining the elements of crimes, but also to provisions "fixing sentences." *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). And it concluded that the combination of the ordinary-case analysis and an ill-defined risk threshold "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. Mr. Fernandez's mandatory-guideline claim asserts the right not to have his sentence fixed by the same residual-clause analysis the Supreme Court already deemed unconstitutionally vague in *Johnson*. He satisfies Section 2255(f)(3) and his claim is timely.

The Ninth Circuit's decision in *Blackstone*, the decision that foreclosed Mr. Fernandez's claim in the Ninth Circuit, rested on three errors: disregard for the text of Section 2255(f)(3), a faulty analogy between the statute of limitations for federal prisoners and the "clearly established federal law" standard applicable to state prisoners, and a misreading of this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). *Blackstone*, 903 F.3d at 1026.

2. First, the *Blackstone* court's analysis disregards the starting place for any statutory interpretation question: the text of Section 2255(f)(3) itself. Section 2255 uses "right" and "rule," not "holding." *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017). "Congress presumably used these

broader terms because it recognizes that the Supreme 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." *Id.* While *Johnson*'s holding struck down the residual clause of the ACCA, the right it recognized was the right not to have one's sentence dictated by a residual clause that combines the hopelessly vague ordinary-case analysis and an ill-defined risk threshold. That is the same right that Mr. Fernandez asserts. A contrary view "divests *Johnson*'s holding from the very principles on which it rests and thus unduly cabins *Johnson*'s newly recognized right." *United States v. Brown*, 868 F.3d 297, 310 (4th Cir. 2017) (Gregory, C.J., dissenting).

Indeed, any uncertainty about the breadth of the "right" recognized by *Johnson* was dispelled by *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). There, the Court held that "*Johnson* is a straightforward decision, with equally straightforward application" to the 18 U.S.C. § 16(b) residual clause. *Id.* Though Section 16(b) uses wholly different statutory language, the Court acknowledged that the residual clause was subject to the same vagueness concerns highlighted in *Johnson*, and thus could not be distinguished. *Id.* at 1213-14. "And with that reasoning, *Johnson* effectively resolved the case now before us." *Id.* at 1213. Just as *Johnson* "effectively resolved" the validity of

the residual clause in Section 16(b), a provision that used wholly different statutory language, *Johnson* effectively resolved the issue here.

Moreover, Section 2255(f)(3) requires only that the petitioner *assert* the right recognized by the Supreme Court. It "does not say that 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." *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). To "assert" is "to invoke or enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014); *see also Dodd v. United States*, 545 U.S. 353, 360 (2005) (describing a § 2255 motion as timely if it was filed within one year of the decision from which it "sought to benefit"). And asserting a right does not require anything more than staking a claim to some potential benefit. *Cf.* 50 U.S.C. § 3996(a) (permitting service members to take steps "for the perfection . . . or further assertion of rights"). The government's contrary reading "would require that [the Court] take the disfavored step of reading 'asserted' out of the statute." *Cross*, 892 F.3d at 294.[2]

[2] The statute also requires that the right be "recognized" by the Supreme Court—though, apart from specifying *who* must make the decision, (the Supreme Court as opposed to a circuit court,) the phrase offers little interpretative aid because it depends entirely on how broadly or narrowly one defines "right."

3. The Ninth Circuit panel did not grapple with these textual points, concluding that it would violate AEDPA's purpose to read the "right" recognized by *Johnson* as encompassing those sentenced under an analogous statute. *Blackstone*, 903 F.3d at 1026. It's true that, when describing the boundaries of "clearly established federal law" for purposes of Section 2254(d)(1), the Court has cautioned against reading its holdings at a high level of generality. But this faulty analogy disregards the different text, purpose, and nature of the two inquiries.

First, the restrictive language in Section 2254(d)(1) (requiring a state decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law") appears nowhere in Section 2555(f)(3). In fact, it does not appear in all of Section 2255. "Where Congress employs different language in related sections of a statute, we presume these differences in language convey differences in meaning." *Lopez v. Sessions*, 901 F.3d 1071, 1077-78 (9th Cir. 2018) (internal quotation marks and alterations omitted).

Moreover, Section 2254(d)(1) serves a different purpose than Section 2255(f)(3). Section 2254(d)(1)—the clearly-established-federal-law standard—is a barrier for state prisoners who claim that a state court has contravened Federal law, as interpreted by the Supreme Court. The strictness of that rule promotes comity and federalism: Section 2254 is a vehicle to correct state

courts that go rogue in violation of the Supreme Court's interpretation of the federal constitution. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). In that context, as a matter of respect to state courts, the Supreme Court will intervene only if the state court's decision is clearly answered to the contrary by a prior decision of the Supreme Court. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Thus, the standard is "intentionally difficult to meet." *Id.* Section 2255(f)(3), by contrast, is a statute-of-limitations provision for federal prisoners. Comity and federalism concerns have no relevance when a federal prisoner asks a federal court to vacate a federal judgment. *See Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) ("Federalism and comity considerations are unique to federal habeas review of state convictions.").

If the Court were to examine the purpose of AEDPA, as the *Blackstone* panel suggested it should, *Blackstone*, 903 F.3d at 1027, the proper inquiry is not the purpose of the clearly established federal law requirement in Section 2254(d)(1), but the purpose of the statute-of-limitation provision itself. AEDPA's statute of limitations has the "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 266 (2002). This, too, is a unifying mark of statutes of limitation; they are "designed to encourage [petitioners] 'to pursue diligent prosecution of known claims.'" *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049

(2017) (citation omitted); *see also Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("Statutes of limitation . . . . stimulate to activity and punish negligence."). Mr. Fernandez filed as soon as he saw the relevance of *Johnson* to his own case; the Ninth Circuit's decision would thwart the very purpose of § 2255(f)(3) by forcing him to wait and file a later (now potentially successive) petition. Because Congress intended the AEDPA statute of limitations "to eliminate delays in the federal habeas review process," not create them, *Holland v. Florida*, 560 U.S. 631, 648 (2010), a reading of Section 2255(f)(3) that encourages petitioners to sit on their hands is contrary to the purpose of AEDPA.[3]

4. Even if the panel's reliance on Section 2254(d)(1) were not precluded by the plain language and the animating principles of the statute-of-limitations provision, there is no reason to import the "clearly-established-federal-law" standard, a merits concept, into the decision whether the statute of limitations is satisfied. A statute-of-limitations analysis is a preliminary question, not intended to prejudge the merits of the case. This concept is uniform across bodies of law. *Hunter v. Philip Morris USA*, 582 F.3d 1039,

[3] This concern for diligence is manifested in other linguistic choices in the same provision, which requires the petitioner to move when the right is "*initially* recognized" and "*newly* recognized"—reinforcing Congress's desire to encourage diligence, as well as its acknowledgment that a right may be addressed and refined over a number of decision. 28 U.S.C. § 2255(f)(3) (emphasis added).

1045 (9th Cir. 2009) (noting that courts can look at statute-of-limitations affirmative defense to evaluate fraudulent joinder, as that defense is "rather unique" in that it does not "relate to the merits of the case"); *George v. United States*, 672 F.3d 942, 946 (10th Cir. 2012) (Gorsuch, J.) ("The merits of that claim or assertion of adverse interest are irrelevant. . . . Were the rule otherwise, of course, the statute of limitations and merits inquiries would collapse and involve no analytically distinct work."). That is because a statute of limitations is premised on notice of one's claim, not its ultimate validity. *Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984) ("[T]he crucial issue in our statute of limitations inquiry is whether [the City] had notice of the federal claim, not whether the claim itself is valid.").

Like other statutes of limitations, then, Section 2255(f)(3) is merely a triggering point—marking the moment when Mr. Fernandez had notice that his sentence was imposed in violation of the Constitution. When Mr. Fernandez filed his claim, *Johnson* had held that a provision materially identical to the provision that drove his sentencing was void for vagueness. It had reiterated that, under *Batchelder*, sentencing provisions that fixed sentences were subject to a vagueness challenge. *Johnson*, 135 S. Ct. at 2557. The Ninth Circuit had always applied *Batchelder* to the mandatory guidelines. *United States v. Gallagher,* 99 F.3d 329, 334 (9th Cir. 1996); *United States v. (Linda) Johnson,* 130 F.3d 1352, 1354 (9th Cir. 1997). In

other words, *Johnson* was the last piece of the puzzle. Because statutes of limitations generally run from the occurrence of the last circumstance necessary to give rise to a claim, *see (Robert) Johnson v. United States*, 544 U.S. 295, 305-09 (2005), Petitioner was correct in assuming that *Johnson* was the trigger that would start the clock.

5. The Ninth Circuit's faulty analogy to the clearly-established-federal-law standard in Section 2254(d) also puts that Court in conflict with settled interpretation given to the "right" as defined in the second clause of Section 2255(f)(3), which, of course, must have the same meaning as the provision interpreted here. *See* 28 U.S.C. § 2255(f)(3) ("the date on which the right asserted was initially recognized, if *that right* has been newly recognized by the Supreme Court") (emphasis added). The Circuits have broadly read the second clause to invoke *Teague*'s "new rule" jurisprudence.[4] And in that context, this Court has recognized that the "new rule" is the case

[4] *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015); *Coleman v. United States*, 329 F.3d 77, 81-82 (2d Cir. 2003); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013); *United States v. Morgan*, 845 F.3d 664, 667-68 (5th Cir. 2017); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016); *United States v. Hong*, 671 F.3d 1147, 1148-50 (10th Cir. 2011); *Figueroa-Sanchez v. United States*, 678 F.3d 1203, 1207-08 (11th Cir. 2012);.The Ninth Circuit has said the same, albeit in unpublished opinions. *Simpson v. Evans*, 525 F. App'x 535, 537 (9th Cir. 2013) (applying a *Teague* "new rule" case to interpret the state prisoner corollary to Section 2255(f)(3)); *United States v. Berkley*, 623 F. App'x 346, 347 (9th Cir. 2015) (applying new rule analysis to interpret Section 2255(f)(3)).

that "breaks new ground," not a later case that merely applies that rule to a different context. *Chaidez v. United States*, 568 U.S. 342, 342-48 (2013).

In *Stringer v. Black*, the Court held its decisions applying *Godfrey v. Georgia*, 446 U.S. 420 (1980), to similar capital sentencing statutes in Oklahoma and Mississippi did not create new rules. 503 U.S. 222, 229 (1992). For "new rule" purposes, it didn't matter that Oklahoma's statute "involved somewhat different language" than the Georgia statute considered in *Godfrey*. *Id.* at 228-29 ("[I]t would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case."). Nor did it matter that Mississippi's sentencing process differed from Georgia's, because those differences "could not have been considered a basis for denying relief in light of [Supreme Court] precedent existing at the time." *Id.* at 229. *Godfrey* may have broken new ground and created a new rule, but the application of *Godfrey* to analogous statutory contexts did not.

Under *Stringer* and *Chaidez*, an application of a new rule to an analogous statutory scheme does not create a second new rule; the second rule is merely derivative of the first. And for the same reason, a new rule recognized by the Supreme Court should not be confined to its narrow holding. Rather, the "right" recognized by a decision of this Court encompasses the principles and reasoning underlying the decision that have

applications elsewhere—even if there are minor linguistic or mechanical differences in the provisions at issue.

Applying this standard here, the "right" recognized in *Johnson* must be defined according to the principles it recognized—and not merely its narrow result. *Johnson* did not merely strike down the residual clause of the ACCA; it recognized the right not to have one's sentence fixed by the application of the ordinary-case analysis applied to a hazy risk threshold. And application of Johnson to the pre-*Booker* guidelines "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Moore*, 871 F.3d at 81. Because "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enhancement as the ACCA's residual clause at issue in *Johnson*," Petitioner here is asserting the same right newly recognized in *Johnson*, and he can lay claim to Section 2255(f)(3)'s statute-of-limitation provision. *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

6. At bottom, the Ninth Circuit's decision in *Blackstone* overlearns the lesson of *Beckles v. United States*, 137 S. Ct. 886 (2017). It's true that *Beckles* created an exception to *Johnson*'s reach where the sentencing provision does not "fix the permissible range of" sentences, as with the advisory guidelines. *Id*. at 894-95. But *Beckles* did nothing to disturb *Johnson*'s reasoning that where a vague sentencing provision *does* fix a

defendant's sentence, it is subject to attack under the Due Process Clause. If anything, it reiterates that point. *Id.* at 892; *see also Cross*, 892 F.3d at 304-05; *Brown*, 868 F.3d at 308 (Gregory, C.J., dissenting). Nor did it upset *Booker*'s holding that, by virtue of Section 3553(b), the mandatory guidelines fixed sentences; they "had the force and effect of laws" and that, "[i]n most cases . . . the judge [was] bound to impose a sentence within the Guidelines range." *Booker v. United States*, 543 U.S. 220, 234 (2005); *see Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

The Ninth Circuit's decision in *Blackstone* thus read too much into the Justice Sotomayor's statement, in *Beckles*, that the application of *Johnson* to the mandatory guidelines is an "open" question. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). The concurrence simply clarified that the Court's holding was limited to the advisory guidelines; the case did not present the application of *Johnson* to the mandatory guidelines, and, perforce, did not foreclose it. And it certainly casts no doubt on Mr. Fernandez's assertion of the right recognized in *Johnson*.

For all of these reasons, the Ninth Circuit's decision is wrong, and should be reversed.

B. 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.

Conclusion

For the foregoing reasons, Mr. Fernandez respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

DATED: November 13, 2019

By: BRIANNA MIRCHEFF
Deputy Federal Public Defender
Attorney for the Petitioner