No. _____

IN THE

Supreme Court of the United States

JOHN WARD,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, for purposes of 28 U.S.C. § 2255(f)(3), the new rule announced in *Johnson v. United States*, 135 S.Ct. 2551 (2015), applies to the identical residual clause in the mandatory guidelines, USSG § 4B1.2(a)(2)?

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

RELATED PROCEEDINGS

United States v. Ward, Case No. 5:01-cr-40050-DDC-1 (D. Kan. Aug. 4, 2017)

United States v. Ward, Case No. 5:16-cv-04109-DDC (D. Kan. Aug. 4, 2017)

United States v. Ward, No. 17-3182 (10th Cir. Aug. 29, 2019)

United States v. Ward, No. 16-3181 (10th Cir. June 28, 2016)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

INDEX TO APPENDIX iv

TABLE OF AUTHORITIES CITED v
- Cases v
- Statutes vii
- Other Authorities viii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. This Court should resolve whether the new retroactive rule announced in *Johnson* applies to the identical residual clause in the mandatory guidelines. 5

II. This Court should resolve whether the mandatory guidelines' residual clause is void for vagueness. 18

CONCLUSION 19

INDEX TO APPENDIX

Appendix A: Tenth Circuit's Unpublished Decision..... 1a

Appendix B: Tenth Circuit's Order Granting Panel Rehearing 8a

Appendix C District Court's Order Denying Motion to Vacate Sentence..... 10a

Appendix D: Order Supplementing Order Denying Motion to Vacate Sentence.... 18a

Appendix E: District Court's Order Granting Motion to Vacate Sentence 19a

TABLE OF AUTHORITIES CITED

PAGE

Cases

Beckles v. United States, 137 S.Ct. 886 (2017) ..... passim

Best v. United States, 2019 WL 3067241 (N.D. Ind. July 12, 2019) 17

Brown v. United States, 139 S.Ct. 14 (2018)..... 2, 6, 8, 16

Butler v. MecKellar, 494 U.S. 407 (1990)..... 12

Chaidez v. United States, 568 U.S. 342 (2013) 12, 13

Chambers v. United States, 763 Fed. Appx. 514 (6th Cir. Feb. 21, 2019) 5, 8

Cruz v. United States, 2018 WL 3772698 (S.D. Ill. Aug. 9, 2018) 17

D'Antoni v. United States, 916 F.3d 658 (7th Cir. 2019)..... 16

Godfrey v. Georgia, 446 U.S. 420 (1980) 9, 11

Hodges v. United States, 2019 WL 3384841 (9th Cir. July 26, 2019)..... 6

In re Anderson, 829 F.3d 1290 (11th Cir. 2016) 6

In re Griffin, 823 F.3d 1350 (11th Cir. 2016)..... 5, 6, 10

In re Sapp, 827 F.3d 1334 (11th Cir. 2016) 6

Johnson v. United States, 135 S.Ct. 2551 (2015)..... passim

Lester v. United States, 921 F.3d 1306 (11th Cir. 2019) 6, 8

Mapp v. United States, 2018 WL 3716887 (E.D. N.Y. Aug. 3, 2018)..... 7

Maynard v. Cartwright, 486 U.S. 356 (1988) 9, 11

McCullough v. United States, 2018 WL 4186384 (C.D. Ill. Aug. 31, 2018)..... 16

Mistretta v. United States, 488 U.S. 361 (1989) 15

Moore v. United States, 871 F.3d 72 (1st Cir. 2018)..... 7, 16

Mora-Higuera v. United States, 914 F.3d 1152 (8th Cir. 2019) 7

NLRB v. SW Gen., 137 S.Ct. 929 (2017) 15

Raybon v. United States, 867 F.3d 625 (6th Cir. 2017) 5, 8

Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018) 17

Russo v. United States, 902 F.3d 880 (8th Cir. 2018) 5, 7, 10, 11

Sessions v. Dimaya, 138 S.Ct. 1204 (2018) 8, 13, 18, 19

Sotelo v. United States, 922 F.3d 848 (7th Cir. 2019) 7

Stinson v. United States, 508 U.S. 36 (1993) 15

Stringer v. Black, 503 U.S. 222 (1992) 9, 11

Swanson v. United States, 2019 WL 2144796 (C.D. Ill. May 16, 2019) 16

Teague v. Lane, 489 U.S. 288 (1989) 10, 12, 13

United States v. Blackstone, 903 F.3d 1020 (9th Cir. 2018) 5, 9

United States v. Booker, 543 U.S. 220 (2005) 10, 13, 14, 16

United States v. Brown, 868 F.3d 297 (4th Cir. 2017) 5, 8, 10

United States v. Carter, 2019 WL 5580091 (Dist. D.C. Oct. 29, 2019) 7

United States v. Cross, 892 F.3d 288 (7th Cir. 2018) 5, 7, 16, 18

United States v. Davis, 139 S.Ct. 2319 (2019) 8, 17, 19

United States v. Doxey, 833 F.3d 692 (6th Cir. 2016) 19

United States v. Doyal, 894 F.3d 974 (8th Cir. 2018) 19

United States v. Green, 898 F.3d 315 (3d Cir. 2018) 5, 8

United States v. Greer, 881 F.3d 1241 (10th Cir. 2018) 4, 5

United States v. Hammond, 351 F.Supp.3d 106 (Dist. D.C. 2018) 7

United States v. Hernandez, 3:00-cr-00113-BBC (W.D. Wis. Nov. 2, 2018); 17

United States v. London, 937 F.3d 502 (5th Cir. 2019) ..... passim

United States v. Moore, 2018 WL 5982017 (D. Mass. Nov. 14, 2018) 7, 8

United States v. Moyer, 282 F.3d 1311 (10th Cir. 2002) 19

United States v. Nelums, No. 2:02-cr-00147-PP (E.D. Wis. Jan. 1, 2019) 17

United States v. Parker, No. 2:92-cr-00178-PP-6 (E.D. Wis. Dec. 17, 2018) 17

United States v. Pickett, 916 F.3d 960 (11th Cir. 2019) 19

United States v. R.L.C., 503 U.S. 291 (1992) 15

United States v. Wolfe, 767 Fed. Appx. 390 (3d Cir. Apr. 29, 2019) 8

Welch v. United States, 136 S.Ct. 1257 (2016) 10, 11, 19

Zollicoffer v. United States, 2018 WL 4107998 (C.D. Ill. Aug. 29, 2018) 17

Statutes

18 U.S.C. § 3231 1

18 U.S.C. § 3553(b) 14, 19

18 U.S.C. § 841(c) 2

18 U.S.C. § 924(a)(2) 16

18 U.S.C. § 924(e) 16

18 U.S.C. § 924(e)(2)(B)(ii) 19

21 U.S.C. § 846 3

26 U.S.C. § 5845(a) 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 2255 ..... passim

28 U.S.C. § 2255(f) 1, 4

28 U.S.C. § 2255(f)(3) ..... passim

28 U.S.C. § 2255(h)(2) 2

Other Authorities

U.S. Const. amend. V 1

U.S. Const. amend. VI 13, 14

USSG § 4B1.2 3

USSG § 4B1.2(a)(2) ..... i, 2, 19

USSG § 4B1.2(a)(2) (2016) 2

USSG Supp. to App. C, amend. 798 (2016) 2

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The Tenth Circuit's unpublished order in Mr. Ward's appeal is available at 2019 WL 4071752, and is included as Appendix A. The Tenth Circuit's unpublished order granting panel rehearing is included as Appendix B. The district court's unpublished order denying Mr. Ward's motion under 28 U.S.C. § 2255 is available at 2017 WL 3334644, and is included as Appendix C. The district court's order supplementing the order denying Mr. Ward's motion under 28 U.S.C. § 2255 is included as Appendix D. The district court's earlier (and since vacated) unpublished order granting Mr. Ward's motion under § 2255 is included as Appendix E.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 2255. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed the denial of Mr. Ward's motion to vacate under § 2255 on August 29, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause provides:

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

28 U.S.C. § 2255(f) provides:

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

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

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

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

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

USSG § 4B1.2(a)(2)[1] provides:

(a) 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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

This petition involves the now-familiar interplay between 28 U.S.C. § 2255(f)(3), USSG § 4B1.2(a)(2)'s mandatory residual clause, and *Johnson v. United States*, 135 S.Ct. 2551 (2015). So far, this Court has declined to resolve a conflict in the Circuits over whether *Johnson*'s new retroactive right applies to strike down the mandatory guidelines' residual clause as void for vagueness. *See*, *e.g.*, *Brown v. United States*, 139 S.Ct. 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). We recently

[1] The United States Sentencing Commission amended this provision in 2016. USSG Supp. to App. C, amend. 798 (2016). It currently defines a crime of violence as: "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." USSG § 4B1.2(a)(2) (2016).

asked this Court to resolve this conflict in *Pullen v. United States*, No. 19-5219 (involving 28 U.S.C. § 2255(h)(2)'s analogous new-retroactive-right requirement), and *Bronson v. United States* (No. 19-5316) (involving § 2255(f)(3) and the 1988 version of § 4B1.2). On October 7, 2019, the government filed its brief in opposition in *Bronson*, and we filed a reply on October 22, 2019. This Court has not yet distributed *Bronson* (or *Pullen*) for conference.[2] Each petition is an excellent vehicle to resolve the conflict over *Johnson*'s application in the mandatory guidelines context. This Court should grant either or both of those petitions. If it does, this Court should hold this petition in abeyance pending the resolution of the petitions in *Pullen* and *Bronson*. Otherwise, this Court should grant this petition.

1. In 2001, a federal jury in Kansas convicted John Ward of conspiring to possess more than 50 grams of cocaine base under 21 U.S.C. § 846. Pet. App. 1a. At sentencing, the district court found that Mr. Ward qualified as a career offender under USSG § 4B1.2 and sentenced him to 360 months' imprisonment (at the lowest end of the mandatory guidelines range). Pet. App. 2a, 19a-20a. Mr. Ward qualified as a career offender based on, *inter alia*, a Colorado conviction for attempt to disarm a police officer. Pet. App. 29a. Mr. Ward appealed his conviction, and the Tenth Circuit affirmed. Pet. App. 2a.

In 2016, the Tenth Circuit granted Mr. Ward authorization to file a successive § 2255 motion so that he could assert a *Johnson* claim. Pet. App. 2a. Mr. Ward filed

[2] *Pullen* has been rescheduled. This Court has ordered the government to file a response in another one of our cases, *Aguilar v. United States*, No. 19-5315, which is a joint petition raising the identical § 2255(h)(2) issue raised in *Pullen*. The government has twice extended the time to file its response in *Aguilar*. The response is currently due December 6, 2019.

a § 2255 motion, asserting that he no longer qualified as a career offender post-*Johnson*. Pet. App. 2a. The government agreed that, if the mandatory guidelines' residual clause was void for vagueness, Mr. Ward's prior Colorado conviction for attempt to disarm a police officer was no longer a crime of violence and that Mr. Ward would no longer be a career offender. Pet. App. 29a. In February 2017, the district court granted the § 2255 motion. Pet. App. 2a, 29a-30a. But in August 2017, the district court reconsidered its decision and denied the motion, finding that Mr. Ward's motion was untimely under 28 U.S.C. § 2255(f)(3). Pet. App. 2a, 12a. The district court granted a certificate of appealability on whether Mr. Ward's § 2255 motion was time-barred under § 2255(f). Pet. App. 3a.

2. On appeal, the government moved for summary affirmance in light of the Tenth Circuit's decision in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018) (holding that § 2255(f)(3) does not permit the filing of a § 2255 *Johnson* motion attacking the mandatory guidelines' residual clause). Pet. App. 3a. The Tenth Circuit granted the motion and summarily affirmed. Pet. App. 3a. Mr. Ward petitioned for panel rehearing and rehearing en banc, and the Tenth Circuit granted panel rehearing, vacated the summary affirmance order, and ordered supplemental briefing. Pet. App. 3a. In August 2019, the Tenth Circuit affirmed in light of its recent decision in *Pullen* (reaffirming *Greer*'s holding that *Johnson* does not apply to the mandatory guidelines' residual clause). Pet. App. 6a.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve whether the new retroactive rule announced in *Johnson* applies to the identical residual clause in the mandatory guidelines.

1a. Review is necessary because there is an entrenched circuit split over this issue. The Seventh Circuit has held, in a published decision, that 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 held that a § 2255 motion raising a mandatory-guidelines *Johnson* claim is timely under § 2255(f)(3).

b. In direct conflict with the Seventh Circuit, eight Circuits (including the Tenth Circuit), in the § 2255(f)(3) context, have held that *Johnson*'s new retroactive right does not apply to the residual clause of the mandatory guidelines. *Greer*, 881 F.3d at 1248; *United States v. London*, 937 F.3d 502 (**5th Cir.** 2019); *United States v. Blackstone*, 903 F.3d 1020 (**9th Cir**. 2018); *Russo v. United States*, 902 F.3d 880 (**8th Cir**. 2018); *United States v. Green*, 898 F.3d 315 (**3d Cir**. 2018); *United States v. Brown*, 868 F.3d 297 (**4th Cir**. 2017); *Raybon v. United States*, 867 F.3d 625 (**6th Cir**. 2017); *In re Griffin*, 823 F.3d 1350 (**11th Cir**. 2016).

But not all of these decisions were unanimous. The Fourth Circuit issued its decision in *Brown* over the dissent of Chief Judge Gregory. 868 F.3d at 304. In the Sixth Circuit, Judge Moore authored a concurrence expressing her view that the Sixth Circuit's decision in *Raybon* "was wrong on this issue." *Chambers v. United States*, 763 Fed. Appx. 514, 519 (6th Cir. Feb. 21, 2019) (unpublished). Judge Berzon has also authored a concurrence, disagreeing with Ninth Circuit precedent and

stating her belief that "the Seventh and First Circuits have correctly decided this question." *Hodges v. United States*, __ Fed. Appx. __, 2019 WL 3384841 (9th Cir. July 26, 2019). And an entire Eleventh Circuit panel called into question the Eleventh Circuit's decision in *In re Griffin*. *In re Sapp*, 827 F.3d 1334, 1336-1341 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, J.). Judge Martin dissented on this issue as well in *In re Anderson*, 829 F.3d 1290, 1294 (11th Cir. 2016), and *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., dissenting, joined by Rosenbaum and Pryor, J.). Judge Rosenbaum authored a separate dissent on this issue in *Lester*. 921 F.3d at 1328.

Most recently, Judge Costa concurred in *London*, noting his belief that the Fifth Circuit was "on the wrong side of a split over the habeas limitations statute." *London*, 937 F.3d at 510. "Our approach fails to apply the plain language of the statute and undermines the prompt presentation of habeas claims the statute promotes." *Id.* Judge Costa also noted "a unique impediment" to review: because the guidelines are no longer mandatory, "a cramped reading of the limitations provision prevents the only litigants affected by this issue from ever pursuing it." *Id.* at 513 (citing *Brown*, 139 S.Ct. at 15 (Sotomayor, J., dissenting)). Judge Costa ended with a plea for this Court's review: "at a minimum, an issue that has divided so many judges within and among circuits, and that affects so many prisoners, 'calls out for an answer.'" *Id.* at 513-514 (quoting *Brown*, 139 S.Ct. at 14 (Sotomayor, J., dissenting)).

This intra-Circuit dissension supports review in this Court.

c. Although this split is currently lopsided, other Circuits may yet side with the Seventh Circuit on this issue. This issue is still an open one in the First, Second, and

D.C. Circuits. In *Moore v. United States*, the First Circuit strongly implied that, if tasked with resolving the merits, it would side with the Seventh Circuit. 871 F.3d 72, 81-82 (1st Cir. 2018); *Pullen*, 913 F.3d at 1284 n.16 (conceding that "language in *Moore* suggests the panel of the First Circuit would have reached the same conclusion had it been conducting a [substantive] analysis"). And district courts in all three Circuits have granted *Johnson* relief to individuals sentenced under the residual clause of the mandatory guidelines. *United States v. Carter*, 2019 WL 5580091, at *12-1 (Dist. D.C. Oct. 29, 2019) (Huvelle, J.); *Blackmon v. United States*, 2019 WL 3767511, at *6 (D. Conn. Aug. 9, 2019) (Bolden, J.); *United States v. Moore*, 2018 WL 5982017 (D. Mass. Nov. 14, 2018); *Mapp v. United States*, 2018 WL 3716887 (E.D. N.Y. Aug. 3, 2018); *see also United States v. Hammond*, 351 F.Supp.3d 106 (Dist. D.C. 2018).

What is an eight-to-one split could easily become an eight-to-four split. And regardless, the current split is still sufficiently important for this Court to resolve. *See*, *e.g.*, *Beckles v. United States*, 137 S.Ct. 886, 892 n.2 (2017) (resolving similar issue whether residual clause of advisory guidelines was constitutional where only one Circuit had held that it was).

Moreover, without this Court's resolution, the split will continue to exist. The Seventh Circuit recently declined the government's suggestion to reconsider *Cross*. *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019); *see also Daniels v. United States*, 939 F.3d 898, 902 (7th Cir. 2019) (reaffirming *Cross*). And it is implausible to think that all of the other eight Circuits would switch sides. *Mora-Higuera v. United States*, 914 F.3d 1152, 1154 (8th Cir. 2019) (reaffirming earlier decision in *Russo*);

United States v. Wolfe, 767 Fed. Appx. 390, 391 (3d Cir. Apr. 29, 2019) (refusing to reconsider earlier decision in *Green*); *Lester*, 921 F.3d 1306 (refusing to consider this issue en banc over two dissents).

This is also an issue this Court has been asked to resolve:

> the Supreme Court should resolve this split. It is problematic that these individuals are potentially sentenced in violation of the Constitution or laws of the United States without clarification as to whether *Johnson* applies to a sentencing provision that is worded identically to, and is equally binding as, the ACCA's unconstitutionally vague residual clause.

Chambers, 763 Fed. Appx. at 526-527 (Moore, J., concurring); *see also London*, 937 F.3d at 513-514 (Costa, J., concurring). In light of the conflict in the Circuits, this Court should do just that.

2a. Review is also necessary because the majority rule (including the Tenth Circuit's position below) is wrong. To begin, both the Fourth and Sixth Circuits held, pre-*Dimaya*, that *Johnson* does not apply beyond cases involving the exact statute at issue in *Johnson*. *Brown*, 868 F.3d at 302; *Raybon*, 867 F.3d at 630-631. But *Dimaya* applied *Johnson* to strike down a different provision as unconstitutionally vague. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1210-1223 (2018). And this Court again applied *Johnson* to strike down a different provision as unconstitutionally vague in *United States v. Davis*, 139 S.Ct. 2319 (2019). The Fourth and Sixth Circuit's reasoning does not survive *Dimaya* and *Davis*. Not even the government agrees with this exact-statute approach. *Moore*, 871 F.3d at 82.

The Third Circuit in *Green* also adopted an exact-statute approach, but it did so post-*Dimaya*. 898 F.3d at 321-322. The decision in *Green* is just as unpersuasive as *Brown* and *Raybon* however, because that decision ignores *Dimaya* entirely. *Id.*

The Third, Fourth, and Sixth Circuit's exact-statute approach conflicts with this Court's void-for-vagueness habeas precedent. In *Godfrey v. Georgia*, this Court held unconstitutional a vague **Georgia** capital-sentencing statute. 446 U.S. 420, 433 (1980). In a subsequent habeas case, *Maynard v. Cartwright* held unconstitutional a vague **Oklahoma** capital-sentencing statute. 486 U.S. 356, 363-364 (1988). The decision in *Maynard* was "controlled by *Godfrey*," even though *Godfrey* and *Maynard* involved different sentencing statutes. *Stringer v. Black*, 503 U.S. 222, 228-229 (1992). And *Godfrey* also controlled in *Stringer* even though that case involved a vague **Mississippi** capital-sentencing scheme of a different character than the one in *Godfrey*. *Id.* at 229. This line of precedent makes clear that an exact-statute approach is wrong.

The Ninth Circuit in *Blackstone* relied primarily on *Beckles*. *Beckles* held that *Johnson* did not provide relief for individuals sentenced under the advisory guidelines' residual clause because the advisory guidelines "do not fix the permissible range of sentences." 137 S.C.t at 892. But *Beckles* distinguished advisory guidelines from mandatory guidelines. *Id.* at 894. *Beckles* cabined its decision: "[w]e hold only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Id.* at 896. *Beckles* did not hold that *Johnson*'s rule does not apply to the mandatory guidelines.

Blackstone also relied on footnote 4 of Justice Sotomayor's concurrence in *Beckles*. 903 F.3d at 1026. In that footnote, Justice Sotomayor, like the majority opinion, cabined the decision in *Beckles* to the advisory guidelines:

The Court's adherence to the formalistic distinction between mandatory and

> advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*]—that is, during the period in which the Guidelines did "fix the permissible range of sentences"—may mount vagueness attacks on their sentences.

137 S.Ct. at 903 n.4 (cleaned up). Rather than take *Beckles* (and Justice Sotomayor's concurrence) at its word – that *Johnson* does not extend to the advisory guidelines – the Ninth Circuit fixated on Justice Sotomayor's use of the phrase "leaves open the question" to conclude that *Johnson* could not apply to the mandatory guidelines because that question is an open one. 903 F.3d at 1027. But it is the decision in *Beckles*, not *Johnson*, that purports to leave that question open. *Brown*, 139 S.Ct. at 15 (Sotomayor, J., dissenting). Although the advisory guidelines are not subject to void-for-vagueness challenges, that does not mean that the mandatory guidelines are not. *Beckles*, 137 S.Ct. at 894-896. *Beckles* did not answer this question because it was not presented. But the Ninth Circuit mistakenly interpreted *Beckles* as having answered the question.

The Eighth Circuit in *Russo* engaged in a *Teague*[3] retroactivity analysis. 902 F.3d at 882-883. As did the Fifth Circuit in *London*. 937 F.3d at 506-507. But we already know that *Johnson*'s right applies retroactively to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). The question is whether *Johnson*'s right applies to mandatory guidelines, not whether the right is retroactive under *Teague*. That analysis has nothing to do with *Teague* retroactivity.

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

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

void for vagueness. 823 F.3d at 1355. But it did so under bad reasoning. According to the Eleventh Circuit, guidelines cannot be vague because they "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." *Id.* But so too recidivist sentencing statutes, like the one at issue in *Johnson*. Recidivist sentencing statutes "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." Yet they can be void for vagueness. *Johnson*, 135 S.Ct. at 2557. And as mentioned above, this Court declared sentencing provisions void for vagueness in *Godfrey*, *Maynard*, and *Stringer*. Review is necessary.

b. The Tenth Circuit's position also conflicts with this Court's precedent. Under § 2255(f)(3), a defendant not only must assert relief under a newly recognized right, but that right must have been made retroactively applicable to cases on collateral review. This case involves a newly recognized right (*Johnson*) that this Court has made retroactive to cases on collateral review (in *Welch*). In other words, retroactivity is not at issue. The only issue involves the scope of *Johnson*'s newly recognized right: does it only apply to statutes, or does it also apply to the mandatory guidelines? The Tenth Circuit has limited *Johnson* to statutes. *Pullen*, 913 F.3d at 1283-1284. In two ways, the Tenth Circuit's position is inconsistent with this Court's precedent.

The first involves the test employed to determine the scope of a newly recognized right. The Tenth Circuit has adopted the test employed by the Eighth Circuit in *Russo*. *Pullen*, 913 F.3d at 1281. That test asks whether the application of the newly recognized right is "dictated by precedent" and "apparent to all reasonable jurists" as opposed to "susceptible to debate among reasonable minds." *Id.* The Eighth Circuit

derived this test from three decisions: *Teague*, 489 U.S. at 301, *Butler v. MecKellar*, 494 U.S. 407, 415 (1990), and *Chaidez v. United States*, 568 U.S. 342, 347 (2013).

But these decisions dealt with retroactivity, not the scope of a newly recognized right. In *Teague*, for instance, this Court conducted a retroactivity analysis and determined that the petitioner's proposed new rule would not apply retroactively to cases on collateral review. 489 U.S. at 301. Thus, this Court declined to consider "whether the fair cross section requirement should be extended to the petit jury." *Id.* at 309-310, 316. Because *Teague* did not address the scope of the right asserted by the defendant, it is impossible to read *Teague* as providing guidance on that issue.

Butler also involved retroactivity. There, a subsequent decision made clear that the defendant's interrogation was unconstitutional. 494 U.S. at 411-412. There was no question about the scope of this new right, only a question whether this right applied retroactively to cases on collateral review. *Id.* at 412-413. The issue here is not whether *Johnson* is retroactive (it is). The issue is whether *Johnson*'s right encompasses the mandatory guidelines. Nothing in *Butler* helps to answer that question.

Chaidez also involved retroactivity. 568 U.S. at 344. It too is inapposite. And even if a retroactivity analysis mattered when defining the scope of a newly recognized right, *Chaidez* explains "that a case does not announce a new rule when it is merely an application of the principle that governed a prior decision to a different set of facts." *Id.* at 347-348 (cleaned up).

> Where the beginning point of our analysis is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges

> a new rule, one not dictated by precedent. Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.

Id. at 348 (cleaned up). The Tenth Circuit has ignored this portion of *Chaidez*. *See Pullen*, 913 F.3d at 1281-1283. To the extent that it has relevance, it confirms that *Johnson*'s newly recognized right applies to the mandatory guidelines. After all, we know from *Dimaya* that *Johnson* announced "a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts." 138 S.Ct. at 1210-1223.

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

Which leads to the second reason to grant this petition: the Tenth Circuit's position conflicts with this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Because *Booker* establishes that the mandatory guidelines fixed the permissible range of sentences, *Johnson* applies in this case.

Booker held that the application of the mandatory guidelines violated a defendant's Sixth Amendment right to have a jury find facts "essential to his punishment." 543 U.S. at 232. Because, under a mandatory guidelines scheme, judges were authorized to find facts "necessary to support a sentence exceeding the maximum authorized by" a defendant's guilty plea or a jury's verdict, the mandatory

guidelines violated the Sixth Amendment. *Id.* at 244 (emphasis added).

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

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

In *Booker*, the government argued that the guidelines did not violate the Sixth Amendment because they "were promulgated by a Commission rather than the Legislature." *Id.* at 237. The Tenth Circuit has drawn the same distinction. *Pullen*, 913 F.3d at 1283. But *Booker* rejected the distinction. "In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than

Congress, lacks constitutional significance." 543 U.S. at 237. It did not matter "whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239. Rather, "the Commission is an independent agency that exercises policymaking authority delegated to it by Congress." *Id.* at 243.

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

The Tenth Circuit's position ignores the "commonplace" rule "that the specific governs the general." *NLRB v. SW Gen.*, 137 S.Ct. 929, 941 (2017). Thus, when the guidelines were mandatory, the mandatory guidelines range controlled over the statutory penalty range for the underlying conviction because the guidelines range

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

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

3. The importance of this issue cannot be understated. "Regardless of where one stands on the merits of how far *Johnson* extends, this case presents an important question of federal law that has divided the courts of appeals and in theory could determine the liberty of over 1,000 people." *Brown*, 139 S.Ct. at 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). And because the guidelines are no longer mandatory, it is impossible to resolve this issue on direct appeal.

There are numerous defendants who have already obtained relief in the Seventh Circuit. *See*, *e.g.*, *United States v. Cross*, 892 F.3d 288, 307 (7th Cir. 2018); *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019); *Swanson v. United States*, 2019 WL 2144796 (C.D. Ill. May 16, 2019); *McCullough v. United States*, 2018 WL 4186384 (C.D. Ill. Aug. 31, 2018); *Zollicoffer v. United States*, 2018 WL 4107998 (C.D. Ill. Aug.

9, 2018); *Cruz v. United States*, 2018 WL 3772698 (S.D. Ill. Aug. 9, 2018); *Best v. United States*, 2019 WL 3067241 (N.D. Ind. July 12, 2019); *United States v. Nelums*, No. 2:02-cr-00147-PP, D.E.285 (E.D. Wis. Jan. 1, 2019); *United States v. Parker*, No. 2:92-cr-00178-PP-6, D.E.310 (E.D. Wis. Dec. 17, 2018); *United States v. Hernandez*, 3:00-cr-00113-BBC, D.E.54, 57 (W.D. Wis. Nov. 2, 2018). Many more outside the Seventh Circuit would obtain relief if this Court were to take this issue and reverse the Tenth Circuit.

The reality is this: unless this Court grants certiorari in *Pullen*, *Bronson*, or here, federal prisoners sentenced under the mandatory guidelines' 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) will be resentenced to much shorter terms of imprisonment, whereas federal prisoners sentenced within the other Circuits will be left to serve the remainder of their unconstitutional sentences behind bars.

This liberty interest is not insubstantial. Even in the *advisory* guidelines context, and even with respect to a plain vanilla guidelines error, this Court has acknowledged "the risk of unnecessary deprivation of liberty," a risk that "undermines the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1908 (2018). Here, the error is much more than that. The residual clause is unconstitutionally vague; it is "no law at all." *Davis*, 139 S.Ct. at 2323. This Court's decision in *Johnson* acknowledged that the void for vagueness doctrine "serves as a faithful expression of ancient due process and separation of

powers principles the Framers recognized as vital to ordered liberty under the Constitution." *Dimaya*, 138 S.Ct. at 1224 (Gorsuch, J., concurring). The Tenth Circuit's position ignores those vital liberty interests and effectively condemns prisoners, like Mr. Ward here, to serve unconstitutional sentences. Review is necessary.

Additionally, as Judge Costa's concurrence in *London* explains, "this limitations issue affects more than the *Johnson* line of cases." 937 F.3d at 510. Thus, it is not true that the resolution of this question resolves nothing more than the set of cases involving the mandatory guidelines' residual clause. The resolution of this question would resolve a broader split over the meaning of § 2255(f)(3), and it would provide much needed guidance to the lower courts with respect to cases involving the scope of newly recognized retroactive rights. Review is necessary.

4. Finally, although *Pullen* and *Bronson* are excellent vehicles to resolve this issue, this petition is also an excellent vehicle. With the residual clause gone, as the government has conceded, Mr. Ward is no longer a career offender. Pet. App. 29a. Indeed, the district court initially granted his § 2255 motion. Pet. App. 29a-30a. The Tenth Circuit resolved the issue on the merits, and, if successful, Mr. Ward would be released from prison immediately. Review is necessary.

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

The one Circuit (the Seventh) that has definitively reached the merits of this issue has held that the mandatory guidelines' residual clause is void for vagueness. *Cross*, 892 F.3d at 307. That decision is correct. The language of § 4B1.2(a)(2)'s residual

clause is identical to the residual clause struck down in *Johnson* (§ 924(e)(2)(B)(ii)). Courts interpreted the two residual clauses identically (i.e., under an ordinary-case categorical approach), and even interchangeably. *See*, *e.g.*, *United States v. Pickett*, 916 F.3d 960, 965 n.2 (11th Cir. 2019); *United States v. Doyal*, 894 F.3d 974, 976 n.2 (8th Cir. 2018); *United States v. Doxey*, 833 F.3d 692, 710 (6th Cir. 2016); *United States v. Moyer*, 282 F.3d 1311, 1315 n.2 (10th Cir. 2002). And, as explained above, when mandatory, the guidelines, via § 3553(b), set the statutory penalty range. *See supra* Section I(2b). In other words, the mandatory guidelines operated as statutes, and, thus, could be void for vagueness like statutes. It flows directly from *Johnson* and *Welch*, then, that, if the residual clauses in *Johnson*, *Dimaya*, and *Davis* are void for vagueness, then so too § 4B1.2(a)(2)'s mandatory residual clause.

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

CONCLUSION

This Court should grant the petitions filed in *Pullen* and/or *Bronson* and hold this petition in abeyance pending their resolution. Otherwise, for the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN D. WARD,

Defendant - Appellant.

No. 17-3182
(D.C. Nos. 5:16-CV-04109-DDC &
5:01-CR-40050-DDC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HARTZ**, Circuit Judges.

John D. Ward appeals the district court's order denying as untimely his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm.

Background

In 2001, Ward was convicted of conspiracy to possess more than 50 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The district court

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

sentenced him as a career offender under U.S. Sentencing Guidelines Manual (USSG) § 4B1.1 (U.S. Sentencing Comm'n 2002) to 360 months' imprisonment. His conviction was affirmed on appeal. *United States v. Ward*, 60 F. App'x 716, 719 (10th Cir. 2003). The district court thereafter denied Ward's first motion to vacate his sentence under 28 U.S.C. § 2255(a).

In 2016, this court granted Ward's application for leave to file a second § 2255(a) motion so he could assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that the Armed Career Criminal Act's residual clause was unconstitutionally vague, *id*. at 2557, 2563, and in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court held that *Johnson* applies retroactively to cases on collateral review. Within one year of *Johnson*, Ward filed his authorized second § 2255 motion, arguing that because he received an enhanced sentence under the mandatory guidelines' similarly worded residual clause, his sentence is unconstitutional under *Johnson*.

The district court initially granted the motion and vacated Ward's sentence, but before resentencing, the Supreme Court decided in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), that *Johnson* does not impact sentences enhanced under the now advisory guidelines. *Id.* at 895. The government sought reconsideration of the order granting Ward's § 2255 motion arguing, among other things, that the motion was untimely under § 2255(f), which, as pertinent here, requires that a § 2255 motion be filed within one year from the later of "the date on which [the movant's] judgment of conviction bec[ame] final," § 2255(f)(1), and "the date on which the

right asserted was initially recognized by the Supreme Court . . . and made retroactively applicable to cases on collateral review," § 2255(f)(3). Specifically, the government argued that Ward's motion was untimely because he filed it more than a year after his conviction became final and § 2255(f)(3) does not apply because the Supreme Court had not held that *Johnson* applies retroactively to sentences imposed under the mandatory guidelines. The district court agreed that the Supreme Court had not recognized the right Ward sought to assert—the due process right not to be sentenced under an unconstitutionally vague sentencing provision—and denied his motion as untimely. The court granted a certificate of appealability ("COA") on the issue of whether Ward's claim is time-barred.

This court initially granted the government's motion for summary affirmance pursuant to *United States v. Greer*, 881 F.3d 1241, 1248-49 (10th Cir.) (holding that *Johnson* did not create a new rule of constitutional law applicable to the mandatory guidelines and rejecting as untimely a vagueness challenge to the mandatory guidelines' career-offender residual clause), *cert. denied*, 139 U.S. 374 (2018). *United States v. Ward*, 718 F. App'x 757 (10th Cir. 2018) (per curiam). But we later granted Ward's petition for panel rehearing, vacated the summary affirmance order, and ordered supplemental briefing.

After supplemental briefing was completed, Ward sought a limited remand to allow the district court to consider his motion for a sentence reduction under the Fair

Sentencing Act and First Step Act.[1] The government conceded that he qualified for a reduction and, after the district court issued an order indicating it would grant a reduction if it had jurisdiction to do so, agreed that remanding the case for resentencing was appropriate. We directed a limited remand to consider Ward's motion for sentence reduction and abated the appeal to facilitate the remand. On remand, the district court resentenced Ward to 262 months' imprisonment, which is at the low end of his career offender guidelines range under the First Step Act. We must now decide whether the district court erred in dismissing Ward's § 2255 motion as untimely.[2]

Discussion

1. Issuance of COA

As an initial matter, we reject the government's assertion that the COA is deficient because the certified issue is a non-constitutional question of statutory construction regarding the applicability of the time bar and the COA does not specifically identify the underlying constitutional issue.

[1] The Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, increased the drug quantities necessary to trigger statutory mandatory minimum and maximum penalties for crack cocaine offenses. The First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 permits the district court to apply the Fair Sentencing Act retroactively to covered offenses committed before August 3, 2010.

[2] We note that Ward's resentencing does not moot his appeal because if we were to hold that the district court erred in dismissing his claim that he should not have been sentenced as a career offender, the applicable guidelines range could ultimately be further reduced, resulting in an even shorter sentence than his new sentence under the First Step Act.

To obtain a COA when the district court denies or dismisses a § 2255 motion on procedural grounds (like untimeliness), the defendant must show that jurists of reason could debate both the correctness of the procedural ruling and whether the motion stated a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). With respect to the latter requirement, courts do not "delve into the merits of the claim" at the certification stage. *Fleming v. Evans*, 481 F.3d 1249, 1259 (10th Cir. 2007). Instead, courts "simply take a quick look at the face of the [motion]" to determine whether the movant "has facially alleged the denial of a constitutional right." *Paredes v. Atherton*, 224 F.3d 1160, 1161 (10th Cir. 2000) (per curiam) (brackets and internal quotation marks omitted). Under § 2253(c)(3), the COA must "indicate which specific issue or issues satisfy" the requirement that the applicant make "a substantial showing of the denial of a constitutional right," § 2253(c)(2).

Here, a "quick look" at Ward's motion reveals that he facially alleged the denial of the due process right not to be sentenced under an unconstitutionally vague sentencing provision. Accordingly, the substantial-question-of-constitutional-law requirement is satisfied and the COA is not deficient despite its failure to specify the underlying constitutional issue. *See Houchin v. Zavaras*, 107 F.3d 1465, 1469 n.2 (10th Cir. 1997) (holding that the COA from the denial of a one-issue § 2254 motion complied with the requirements of § 2253(c)(3) despite its failure to specify the constitutional issue).

2. Denial of Motion as Untimely

We review de novo the district court's dismissal of Ward's §2255 motion as untimely. *United States v. Denny*, 694 F.3d 1185, 1189 (10th Cir. 2012).

Ward argues that we are not bound by *Greer* because its reasoning has been abrogated by the Supreme Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Supreme Court invalidated the residual clause of the federal criminal code's definition of "crime of violence" in 18 U.S.C. § 16(b) as impermissibly vague. 138 S. Ct. at 1210, 1216. But *Dimaya* did not address the career-offender residual clause in the mandatory guidelines, and we recently validated *Greer*'s holding, reiterating that "*Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines." *United States v. Pullen*, 913 F.3d 1270, 1285 (10th Cir. 2019), *petition for cert. filed* (U.S. July 15, 2019) (No. 19-5219).

Consequently, the one-year limitations period applicable to Ward's § 2255 motion cannot be based on the date *Johnson* was decided. Instead, it must be based upon "the date on which [his] judgment of conviction bec[ame] final," 28 U.S.C. § 2255(f)(1). And, because Ward filed his motion nearly fourteen years after his conviction became final, the district court correctly concluded that the motion is time barred.

Accordingly, we lift the abatement of this appeal and affirm the district court's order dismissing Ward's § 2255 motion.

Entered for the Court

Bobby R. Baldock
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

August 6, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN D. WARD,

Defendant - Appellant.

No. 17-3182
(D.C. Nos. 5:16-CV-04109-DDC &
5:01-CR-40050-DDC-1)
(D. Kan.)

ORDER

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This matter comes before the court on defendant-appellant John Ward's *Petition for Rehearing En Banc*. The court ordered plaintiff-appellee United States to file a response to the petition, which it did on May 18, 2018. Mr. Ward also filed a letter with supplemental authority under Fed. R. App. P. 28(j) on June 11, 2018. Having considered the parties' filings, we grant panel rehearing.

The Order and Judgment of April 11, 2018, affirming the district court's judgment in light of *United States v. Greer*, 881 F.3d 1241 (10th Cir.), *petition for cert. filed* (U.S. May 1, 2018) (No. 17-8775), is vacated, and the parties are directed to file merits briefs in accordance with this order. Both Supreme Court and circuit court decisions have issued since the opening brief was filed that may affect the court's consideration of the issues before it. Accordingly, Mr. Ward shall file a new opening brief within 40 days

of the date of this order, and further briefing by the parties shall follow in accordance with Fed. R. App. P. 31(a). The briefs shall comply generally with all Federal Rules of Appellate Procedure and local rules of this court applicable to merits briefs.

In light of our decision to grant the request for panel rehearing and vacate the Order and Judgment, the request for en banc consideration is denied as moot.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JOHN D. WARD,** **Defendant.**	**Case No. 01-CR-40050-01-DDC**

MEMORANDUM AND ORDER VACATING DOC. 150 AND DENYING PETITIONER'S MOTION UNDER § 2255

Mr. Ward argued in a § 2255 motion that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidated the Guideline provision used to impose his sentence. *Johnson* held that the residual clause of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague and thus violated the notice provision of the Due Process Clause. *Id.* at 2257. Mr. Ward's § 2255 motion sought to apply that ruling to the identically-worded residual clause of U.S.S.G. § 4B1.2—the Guideline that the court used to impose his sentence. Following precedent from the Fourth and Sixth Circuits and the majority of district court cases in our Circuit, the court held that *Johnson* applies retroactively to the Guidelines, and thus invalidated sentences imposed under U.S.S.G. § 4B1.2. Doc. 150 at 6–7. The court thus granted Mr. Ward's § 2255 motion in its February 27, 2017 Memorandum and Order (Doc. 150), and ordered resentencing on March 6, 2017 (*id.* at 12).

But, after the court granted Mr. Ward's § 2255 motion, the Supreme Court held in *Beckles v. United States* that the advisory Guidelines, including U.S.S.G. § 4B1.2(a)'s residual clause, are not subject to a vagueness challenge under the Due Process Clause. 137 S. Ct. 886,

892 (2017). The Court explained that the advisory Guidelines "do not fix the permissible range of sentences" but "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* So, the court concluded "that the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness." *Id.* at 895.

Beckles differs from this case because, unlike Mr. Ward, the defendant in *Beckles* was sentenced under the advisory Guidelines. Mr. Ward, on the other hand, was sentenced before the Supreme Court decided *United States v. Booker*, making the Guidelines "effectively advisory." 543 U.S. 220, 245 (2005). So, when the court sentenced Mr. Ward, the Guidelines' range was mandatory, not advisory. And, Justice Sotomayor, in a concurring opinion in *Beckles*, recognized that the "distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker* . . . may mount vagueness attacks on their sentences." *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring).

Following the Supreme Court's ruling, the court ordered the parties in this case to confer whether *Beckles* requires the court to vacate its Memorandum and Order granting Mr. Ward's Motion under § 2255. Doc. 160. The court ordered the parties to file submissions explaining their respective positions on the effect of the Supreme Court's ruling on Mr. Ward's § 2255 motion. *Id.* The court also vacated the resentencing hearing set for March 30, 2017. Doc. 164. Mr. Ward has submitted supplemental briefing on the issue. Doc. 169. The government has responded. Doc. 172. And, Mr. Ward has submitted a Reply. Doc. 175.

After considering the parties' submissions, the court concludes that Mr. Ward's motion is untimely under § 2255(f)(3). The court thus vacates its Memorandum and Order granting Mr. Ward's § 2255 motion. Doc. 150. And, the court denies his request for § 2255 relief. Doc. 137.

A one-year statute of limitations applies to petitions filed under 28 U.S.C. § 2255. The limitations period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which facts supporting the claim or claims presented could have been discovered through the exercise of reasonable diligence.

28 U.S.C. § 2255(f). Neither subsection (2) nor (4) apply here, and Mr. Ward's conviction became final almost 14 years ago. So, Mr. Ward's § 2255 motion is untimely unless subsection (3) applies to it. Mr. Ward asserts that his motion relies on the new right recognized in *Johnson* holding that the ACCA's residual clause is unconstitutionally vague. Because Mr. Ward filed his motion within one year of the Supreme Court's decision in *Johnson*, he asserts his § 2255 motion is timely.

The government disagrees. The government asserts that the rule announced in *Johnson* does not apply to Mr. Ward because the court never sentenced him under the ACCA's residual clause. Instead, the court sentenced Mr. Ward under U.S.S.G. § 4B1.2(a)'s residual clause. The government thus contends that the Supreme Court has not recognized the rule that Mr. Ward seeks to raise in his motion—that is, *Johnson* extends to the mandatory Guidelines, including

U.S.S.G. § 4B1.2(a)'s residual clause, making them subject to vagueness challenges under the Due Process Clause. The government asserts that the problem for Mr. Ward is not that he is too late in filing his § 2255 motion, but that his motion is premature.[1]

The Tenth Circuit has not decided whether a motion raising a *Johnson*-based challenge against the mandatory Guidelines' residual clause is properly raised under § 2255(f)(3). But, nearly every court that has answered this question—including three district courts in our Circuit—have dismissed such § 2255(f) motions as untimely. *See*, *e.g.*, *Zamora v. United States*, No. CV 16-695-JCH-GBW, 2017 WL 3054645, at *6 (D.N.M. June 29, 2017) (recommending dismissal of a petitioner's § 2255 motion as untimely because "the Supreme Court has not yet recognized a right to a vagueness challenge of sentencing guideline provisions (in *Johnson* or otherwise)"); *United States v. Torres*, No. 16-645 LH/WPL, 2017 WL 3052974, at *3 (D.N.M. June 20, 2017) (recommending dismissal of a petitioner's § 2255 motion as untimely because "*Johnson* did not address whether sentences imposed under the residual clause of the career offender guideline before *Booker* can be challenged as void for vagueness, and *Beckles* left the issue open," so petitioner was not asserting a right recognized by the Supreme Court and made retroactively applicable to cases on collateral review as § 2255(f)(3) requires); *Ellis v. United States*, No. 2:16-CV-484-DAK, 2017 WL 2345562, at *3 (D. Utah May 30, 2017) (dismissing a § 2255 motion as untimely because "*Johnson* does not apply to [petitioner's] case" and "neither

[1] Mr. Ward never argues that the government has waived its right to assert a statute of limitations defense under § 2255(f)(3). The court also concludes that no waiver has occurred here. "[W]aiver is the intentional relinquishment or abandonment of a known right." *Wood v. Milyard*, 566 U.S. 463, __, 132 S. Ct. 1826, 1835 (2012) (citations and internal quotation marks omitted). Although the government's initial response to Mr. Ward's § 2255 motion never asserted that § 2255(f)(3) barred his claim, the government asserts this argument in its supplemental response. See Doc. 172 at 5. The government filed this supplement after the Supreme Court decided *Beckles* and provided support for its § 2255(f)(3) argument that Mr. Ward is not seeking to assert a "newly recognized" right but, instead, an extension of the rights announced in *Johnson*. *See* Doc. 172 at 5, 10–12. Under these facts, the court finds no intentional relinquishment or abandonment of the government's § 2255(f)(3) argument.

the Supreme Court nor the Tenth Circuit has directly recognized a right to modify a sentence increased under the residual clause of USSG § 4B1.2 before *Booker* . . . ."). *See also Davis v. United States*, No. 16-C-747, 2017 WL 3129791, at *6 (E.D. Wis. July 21, 2017) (denying a petitioner's § 2255 motion as untimely because "the Supreme Court has not held that the Guidelines' residual clause is unconstitutionally vague, and [petitioner] cannot assert that this right was 'newly recognized' by the Court in *Johnson*."); *United States v. Beraldo*, No. 3:03-cr-00511-AA, 2017 WL 2888565, at *2 (D. Or. July 5, 2017) (following the "growing consensus [of district court cases] and the Court's decision in *Beckles*" and concluding that "defendant cannot rely on 28 U.S.C. § 2255(f)(3) to make his petition timely" because he asserted "the right not to be subjected to a sentence enhanced by a vague mandatory sentencing guideline" and that right "has not been recognized by the Supreme Court"); *Hirano v. United States*, No. 16-00686-ACK-KJM, 2017 WL 2661629, *8 (D. Haw. June 20, 2017) (denying a petitioner's § 2255 motion as untimely because "while the Supreme Court may still decide that the Guidelines as they were applied prior to *Booker* are subject to a vagueness challenge based on the Court's analysis in *Johnson*, it has not done so yet" (citation and internal quotation marks omitted)); *United States v. Autrey*, __ F. Supp. 3d __, 2017 WL 2646287, *4 (E.D. Va. June 19, 2017) (denying a § 2255 motion as untimely because "it is clear that *Johnson* did not establish a new 'right' applicable to defendant or the mandatory Guidelines"); *Mitchell v. United States*, No. 3:00-CR-00014, 2017 WL 2275092, at *5 (W.D. Va. May 24, 2017) ("Because the Supreme Court has not decided whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague—and did not do so in *Johnson II*—Petitioner's motion is untimely under § 2255(f)(3)"); *Cottman v. United States*, No. 8:02-CR-397-T-24TBM, 2017 WL 1683661, at *1, 3 (M.D. Fla. May 3, 2017) ("*Johnson*'s void for vagueness holding as to the ACCA's

residual clause does not extend to the United States Sentencing Guidelines and the career offender classification" so "§ 2255(f)(3) does not apply to extend the time for filing a § 2255 motion"); *Hodges v. United States*, No. C16-1521JLR, 2017 WL 1652967, at *2–3 (W.D. Wash. May 2, 2017) ("However, [petitioner] seeks to extend, not apply, the rule announced in *Johnson*. Until further pronouncement of the Supreme Court concerning the applicability of *Johnson* to the Guidelines as they were applied prior to *Booker*, [petitioner's] collateral attack on the residual clause in USSG § 4B1.2(a)(2) does not meet the requirements of 28 U.S.C. § 2255(f)(3)"); *United States v. Russo*, No. 8:03CR413, 2017 WL 1533380, at *3 (D. Neb. Apr. 27, 2017) (concluding that "the holding in *Johnson* did not announce a new rule invalidating the residual clause in § 4B1.2(a)(2) of the Guidelines" and so "[d]efendant's § 2255 Motion seeks an extension, not an application, of the rule announced in *Johnson*").

In sum, each one of these courts has concluded that the Supreme Court's holding in *Johnson* did not create a newly-recognized right allowing petitioners to assert vagueness challenges under the Due Process Clause based on the mandatory Guidelines' residual clause. These courts thus denied such challenges as untimely (because they are premature) under § 2255(f)(3). The court finds the reasoning of these cases persuasive, and it adopts their rationale here. Because the Supreme Court has not recognized the right that Mr. Ward seeks to assert—*i.e.*, that his sentence imposed under the mandatory Guidelines violated the Due Process Clause because it was based on an unconstitutionally vague residual clause—the court concludes that § 2255(f)(3) renders his motion untimely.

The court recognizes that its February 27, 2017 Memorandum and Order held that "*Johnson* applies retroactively to invalidate federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)" and that "*Johnson*'s invalidation of the residual clause of U.S.S.G. §

4B1.2(a)(2) is a new substantive rule that applies retroactively to cases on collateral review." Doc. 150 at 7, 10. But, the court reached this conclusion before the Supreme Court had decided *Beckles*. And, as one district court has observed, "after *Beckles*, it is doubtful" that the right Mr. Ward asserts here for a sentence imposed under the mandatory Guidelines "is the *same* right recognized in *Johnson*." *Beraldo*, 2017 WL 2888565, at *2. So, now that the Supreme Court has decided *Beckles*, the court revises its earlier ruling to the extent that it conflicts with this decision. The court thus vacates its February 27, 2017 Memorandum and Order granting Mr. Ward's § 2255 motion. Doc. 150. And, the court denies Mr. Ward's § 2255 motion.

Rule 11 of the Rules Governing Section 2255 Proceedings requires the court to "issue or deny a certificate of appealability when it enters a final order adverse" to the petitioner. A court may grant a certificate of appealability ("COA") only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the [petitioner's] underlying constitutional claim, a COA should issue when the [petitioner] shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, the court concludes that reasonable jurists could debate whether the court was correct in its ruling. The court thus grants a COA on the issue of whether Mr. Ward's motion falls within the scope of 28 U.S.C. § 2255(f)(3).

IT IS THEREFORE ORDERED BY THE COURT THAT the Memorandum and Order granting defendant John D. Ward's Motion to Vacate Under § 2255 (Doc. 150) is VACATED.

IT IS FURTHER ORDERED THAT defendant John D. Ward's Motion to Vacate Under § 2255 (Doc. 137) is DENIED.

IT IS SO ORDERED.

Dated this 3rd day of August 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JOHN D. WARD,** **Defendant.**	**Case No. 01-CR-40050-01-DDC**

ORDER

Earlier today, the court issued a Memorandum and Order vacating its February 27, 2017 Memorandum and Order and denying defendant John D. Ward's Motion to Vacate under § 2255. Doc. 176. After issuing that Order, the court located a 3-day old opinion from our court, and just recently available on Westlaw, addressing the same issue the court decided in this case—whether a petitioner may challenge the constitutionality of a sentence imposed under the residual clause of the mandatory Sentencing Guidelines. Judge Lungstrum concluded that 28 U.S.C. § 2255(f)(3) bars a petitioner from asserting such a challenge because it is not a right newly-recognized by the Supreme Court. *United States v. Brigman*, No. 03-20090-01-JWL, 2017 WL 3267674, at *3 (D. Kan. Aug. 1, 2017). The court also reached this conclusion in its August 4, 2017 Order. Doc. 176. And, so, the court supplements its Memorandum and Order with this citation to *Brigman* as additional authority supporting the conclusion it has reached.

Dated this 4th day of August 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JOHN D. WARD,** **Defendant.**	**Case No. 01-CR-40050-01-DDC**

MEMORANDUM AND ORDER

Defendant John D. Ward has filed a Motion for Order to Lift Stay of Proceedings. Doc. 145. Mr. Ward, proceeding pro se,[1] asks the court to lift the stay that it imposed on his Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. On January 17, 2017, the court entered a Memorandum and Order staying the case pending the Supreme Court's decision in *Beckles v. United States*, Docket No. 15-8544 (June 27, 2016). Doc. 144. As the court explained in that Order, defendant argues in his § 2255 motion that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidates the Guideline provision used to impose defendant's sentence. But, as the court also explained in its Order, whether *Johnson* applies retroactively is uncertain pending the Supreme Court's decision in *Beckles*.[2] So, the court concluded that a stay was warranted in the interest of judicial economy.

Mr. Ward now moves to lift the stay. To support his motion, Mr. Ward cites recent district court cases from our Circuit ruling that *Johnson* applies retroactively to render invalid the

[1] Because Mr. Ward files his motion pro se, the court construes his pleadings liberally and holds them to a less stringent standard than formal pleadings drafted by lawyers. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[2] The Supreme Court heard oral argument in *Beckles* in November 2016, but the Court has not yet issued its decision.

Guideline provision used to impose his sentence. And, Mr. Ward argues that he is entitled to immediate release if the court follows the holdings of these cases and rules in his favor. After considering plaintiff's arguments and reviewing the cases he cites, the court grants Mr. Ward's motion to lift the stay, and now considers his § 2255 motion on the merits.

I. Motion to Lift Stay

The Tenth Circuit has held that a party seeking a stay in a civil case "must demonstrate 'a clear case of hardship or inequity' if 'even a fair possibility exists that the stay would damage another party.'" *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000) (quoting *Span–Eng Assocs. v. Weidner*, 771 F.2d 464, 468 (10th Cir. 1985)). This rule serves the underlying principle "that '[t]he right to proceed in court should not be denied except under the most extreme circumstances.'" *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971)). In the criminal context, "[a] criminal defendant's right to proceed on a § 2255 motion is equally if not more important than an ordinary civil litigant." *United States v. Aldershof*, No. 07-CR-10034-01-JTM, 2016 WL 7210717, at *1 (D. Kan. Dec. 13, 2016) (citing *Yong v. I.N.S.*, 208 F.3d 1116, 1120 (9th Cir. 2000) ("habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy")).

The court's Order imposing a stay thoroughly discusses the relevant factual background of Mr. Ward's conviction and sentence. Doc. 144 at 2–4. In brief, a jury convicted Mr. Ward of conspiring to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 18 U.S.C. § 2. The PSR used to calculate Mr. Ward's sentence determined, based on Mr. Ward's criminal history, that he was a career offender within the

meaning of U.S.S.G. § 4B1.1. And, the PSR calculated a Guideline sentencing range of imprisonment of 360 months to life. The court sentenced Mr. Ward to 360 months' imprisonment. Mr. Ward has served about 189 months of his 360-month sentence.

The government concedes that if the Supreme Court holds in *Beckles* that *Johnson* applies retroactively to invalidate Mr. Ward's classification as a career offender under U.S.S.G. § 4B1.1, Mr. Ward would be eligible for resentencing because he no longer would be considered a career offender. Doc. 147 at 7. The government also has recalculated Mr. Ward's Guideline sentencing range without classifying him as a career offender. The government calculates that, without the career offender classification, Mr. Ward's revised total offense level (after applying Amendment 782) would be 32 and his criminal history score would be III, producing a Guideline sentencing range of 151 to 188 months' imprisonment. *Id.* at 8. Thus, under this revised calculation and assuming a Guideline sentencing range of 151 to 188 months' imprisonment, Mr. Ward likely is eligible for immediate release from prison.

The court concludes that continuing the stay here would impose a serious risk of damage to Mr. Ward by delaying his release from prison. *See Aldershof*, 2016 WL 7210717, at *1 (lifting a stay on defendant's § 2255 motion because "there exists a fair possibility that the stay would damage this defendant by delaying his release from prison"); *see also United States v. Fisher*, No. 00-CR-33-TCK, 2016 WL 4442800, at *2 (N.D. Okla. Aug. 22, 2016) (denying a motion to stay for three reasons: (1) a fair possibility existed that a stay would damage defendant by delaying his release from prison; (2) the government failed to show hardship or inequity to support a stay; and (3) there is no guarantee that *Beckles* will answer the question posed). The court recognizes, as it did in its Order granting the stay, that interests of judicial economy favor a stay. But the interest in judicial economy cannot outweigh defendant's possible

right to immediate release. *See Aldershof*, 2016 WL 7210717, at *1 ("And although it would save judicial resources to wait for the Supreme Court's decision in *Beckles*, defendant's possible right to immediate release trumps any judicial economy that a stay would further.").

The court also notes that the Tenth Circuit has ordered several district courts to rule on pending § 2255 motions without waiting for the Supreme Court to decide *Beckles*. *See*, *e.g.*, *United States v. Smith*, No. 16-8091, 2016 WL 6609499, at *1 (10th Cir. Nov. 9, 2016) (directing district court to vacate its order staying the case and to consider defendant's § 2255 motion on the merits); *United States v. Carey*, No. 16-8093, 2016 WL 6543343, at *3 (10th Cir. Nov. 4, 2016) (same); *United States v. Miller*, No. 16-8080 (10th Cir. Nov. 2, 2016) (unpublished) (same).

For all these reasons, the court grants Mr. Ward's motion to lift the stay and now considers his § 2255 motion on the merits. The court, however, explicitly reserves ruling on the question not at issue here. That is, whether a stay is appropriate in cases where a defendant's release date is after the Supreme Court likely is issue its decision in *Beckles*.

II. Motion to Vacate Sentence Under § 2255

A. Does *Johnson* Apply Retroactively to the Guidelines?

Mr. Ward asks the court to conclude that the Supreme Court's decision in *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2). The Tenth Circuit already has concluded that the residual clause in U.S.S.G. § 4B1.2(a)(2) is unconstitutionally vague. *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015). But, our Circuit has not decided whether a defendant may raise a *Johnson/Madrid* challenge on collateral review.

The only two Circuits that have reached this issue—the Fourth and the Sixth—have concluded that *Johnson* applies retroactively to the Guidelines and thus a petitioner may raise a *Johnson* challenge on collateral review. *See In re Patrick*, 833 F.3d 584, 588 (6th Cir. 2016) (granting a petitioner authorization to file a second or successive § 2255 motion after concluding that *Johnson* is a substantive decision that applies retroactively to the Guidelines); *In re Hubbard*, 825 F.3d 225, 235 (4th Cir. 2016) (authorizing a second or successive § 2255 motion after finding that *Johnson*'s application to the Guidelines is a substantive rule which applies retroactively). And, several Circuits, including ours, have authorized second or successive § 2255 petitions, finding a prima facie showing that *Johnson* applies retroactively to the Guidelines. *See*, *e.g.*, *Blow v. United States*, 829 F.3d 170, 172 (2d Cir. 2016); *In re Encinias*, 821 F.3d 1224, 1226 (10th Cir. 2016); *In re McCall*, 826 F.3d 1308, 1310 n.2 (11th Cir. 2016) (Martin, J., concurring) (compiling cases).

Several district courts in our Circuit have addressed this issue with conflicting results. The majority have concluded that *Johnson* applies retroactively to the Guidelines to invalidate sentences imposed under U.S.S.G. § 4B1.2(a)(2). *See*, *e.g.*, *Aldershof*, 2016 WL 7210717, at *3–5 (granting a defendant's § 2255 motion after concluding that *Johnson* applies retroactively to the Guidelines, that the defendant's predicate convictions no longer qualified as crimes of violence after *Johnson*, and that the defendant thus was eligible for resentencing); *United States v. Trujillo*, No. 09-cr-00172-CMA, 2016 WL 7034973, at *5 (D. Colo. Dec. 1, 2016) (granting a defendant's § 2255 motion after holding that *Johnson* applied retroactively to challenge his sentence under the residual clause of U.S.S.G. § 4B1.2(a)(2)); *Andrews v. United States*, No. 2:16-CV-00501-DB, 2016 WL 4734593, at *5 (D. Utah Sept. 9, 2016) (granting a defendant's § 2255 motion because "*Johnson*'s application to the Guidelines is a substantive rule, which

applies retroactively to [a defendant's] § 2255 petition"); *Culp v. United States*, No. 2:16-CV-672-TS, 2016 WL 5400395, at *6 (D. Utah Sept. 27, 2016) (granting a defendant's § 2255 motion after determining that "the rule announced in *Johnson* is substantive as applied to the Guidelines" so a defendant may raise a *Johnson* challenge on collateral review); *United States v. Fisher*, No. 00-CR-33-TCK, 2016 WL 4628546, at *2 (N.D. Okla. Sept. 6, 2016) (granting a defendant's § 2255 motion after concluding "that *Johnson*'s invalidation of the residual clause in U.S.S.G. § 4B1.2(a)(2), as recognized by the Tenth Circuit in *Madrid*, is a new substantive rule in this circuit that applies retroactively to cases on collateral review" and thus "Defendant's career-offender enhancement under the Guidelines' residual clause is invalid"); *United States v. Daugherty*, No. 07-CR-87-TCK, 2016 WL 4442801, at *6 (N.D. Okla. Aug. 22, 2016), *abrogated on other grounds by United States v. Frazier-LeFear*, No. 16-6128, 2016 WL 7240134 (10th Cir. Dec. 15, 2016) (granting a defendant's § 2255 motion after holding that the defendant may raise a *Johnson/Madrid* challenge on collateral review and that his sentence imposed under U.S.S.G. § 4B1.2(a)(2)'s residual clause violated the Constitution).

On the other hand, at least two district courts in our Circuit—including a case in this District—have held that *Johnson* does not afford a defendant relief on collateral review. *United States v. Mulay*, No. 01-40033-01-SAC, 2017 WL 373382, at *6 (D. Kan. Jan. 26, 2017) (denying a defendant's § 2255 motion after concluding that "[t]he *Johnson* rule is not substantive and does not afford the defendant relief on collateral review"); *Miller v. United States*, No. 1:16-CV-0137-SWS, 2016 WL 7256875, at *8–9 (D. Wyo. Dec. 15, 2016) (same).

The government urges the court to adopt the reasoning of *Mulay* and *Miller*, and deny Mr. Ward's § 2255 motion here. But, after reviewing the cases, the court concludes that the Supreme Court or Tenth Circuit, if presented with this issue, would adopt the majority view that

Johnson applies retroactively to invalidate federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2).

The Supreme Court recently explained: "Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989), set forth a framework for retroactivity in cases on federal collateral review." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). *Teague* held that "a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced." *Id.* But, *Teague* also recognized "two categories of rules that are not subject to its general retroactivity bar." *Id.* It described the two categories this way:

> First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules are more accurately characterized as not subject to the bar. Second, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

Id. (citations and internal quotation marks and alternations omitted). The Supreme Court thus explained that "[i]t is undisputed . . . that *Teague* requires the retroactive application of new substantive and watershed procedural rules in federal habeas proceedings." *Id.*

Here, the government argues that a rule extending *Johnson* to the Guidelines is a procedural rule and thus not applied retroactively. The Supreme Court has provided the following guidance to determine whether a rule is "substantive" and thus applies retroactively, or merely "procedural" and not retroactive:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that

> place particular conduct or persons covered by the statute beyond the State's power to punish. Procedural rules, by contrast, regulate only the manner of determining the defendant's culpability. Such rules alter the range of permissible methods for determining whether a defendant's conduct is punishable. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.

Welch v. United States, 136 S. Ct. 1257, 1264–65 (2016) (citations and internal quotation marks omitted). In *Welch*, the Supreme Court held that *Johnson* announced a substantive rule because it "changed the substantive reach" of the Armed Career Criminal Act ("ACCA") and altered the class of persons that the ACCA punishes. *Id.* at 1265. The Court explained:

> Before *Johnson*, the [ACCA] applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After *Johnson*, the same person engaging in the same conduct is no longer subject to the [ACCA] and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence. *Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause.

Id. (citations and internal quotation marks omitted).

The government asserts that the Supreme Court's decision invalidating the residual clause of the ACCA is substantive because it altered the statutory range of permissible sentences under a statutory sentencing mandate. Doc. 147 at 9. The government argues, however, that the *Johnson* rule as applied to the residual clause in U.S.S.G. § 4B1.2(a)(2) differs because it produces a procedural change in the sentencing process—not a substantive one—by invaliding an advisory Guideline range. *Id.* Thus, the government contends, a defendant may not assert a *Johnson* challenge retroactively in a collateral challenge to a federal sentence under the Guidelines.

The Fourth and Sixth Circuits have considered the government's arguments and found them unconvincing. *See In Re Patrick*, 833 F.3d at 588 (rejecting the government's argument that *Johnson*'s application to the Guidelines is procedural); *see also Hubbard*, 825 F.3d at 234 (rejecting the government's two arguments that the *Johnson* rule as applied to the Guidelines is procedural because "[n]either argument is convincing"). The Fourth and Sixth Circuits instead concluded that *Johnson*'s application to the Guidelines "substantively changes the conduct by which federal courts may enhance the sentence of a defendant" and thus is a substantive rule. *In Re Patrick*, 833 F.3d at 588; *see also Hubbard*, 825 F.3d at 234 (explaining that "striking down the residual clause embodied in § 16(b), and thereby removing it from the applicable version of the Sentencing Guidelines, would alter the range of conduct or the class of persons that the [Sentencing Guidelines] punishes and, thus, the 'substantive reach' of the Sentencing Guidelines would be altered just as much as was true for the ACCA" (citations and internal quotation marks omitted)).

The Fourth Circuit also reasoned that, though the Guidelines are discretionary, they "hardly represent a mere suggestion to courts about the proper sentences defendants should receive." *Hubbard*, 825 F.3d at 235; *see also In Re Patrick*, 833 F.3d at 588 (concluding that "the discretionary nature of the Guidelines is inconsequential because they nonetheless are the lodestone of sentencing and have considerable influence" and the Guidelines have "a real and pervasive and only quasi-advisory effect on sentencing, bringing them closer to a statute which fixes sentences than a sort of suggested opinion" (citations and internal quotation marks omitted)). And, this principle is "even more true when [a defendant] was sentenced [before] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), [was] decided and the Sentencing Guidelines were still being treated as mandatory." *Hubbard*, 825 F.3d at

235; *see also In Re Patrick*, 833 F.3d at 588 (noting that the Supreme Court had not yet decided *Booker* when defendant in that case was sentenced, and thus the Guidelines were mandatory at the time of his sentencing).

Also, the majority of district courts in our Circuit to reach the question have rejected the government's argument that *Johnson*'s application to the Guidelines is a procedural rule. These courts have adopted the reasoning of the Fourth and Sixth Circuits and have concluded that "*Johnson*'s invalidation of the residual clause in U.S.S.G. § 4B1.2(a)(2), as recognized by the Tenth Circuit in *Madrid*, is a new substantive rule in this circuit that applies retroactively to cases on collateral review." *Daugherty*, 2016 WL 4442801, at *5; *see also Aldershof*, 2016 WL 7210717, at *3; *Trujillo*, 2016 WL 7034973, at *5; *Andrews*, 2016 WL 4734593, at *5.

The court agrees. It thus adopts the reasoning of the Fourth and Sixth Circuits and follows the approach adopted by the majority of district courts in our Circuit that have considered this issue. The court concludes that *Johnson*'s invalidation of the residual clause of U.S.S.G. § 4B1.2(a)(2) is a new substantive rule that applies retroactively to cases on collateral review. Thus, Mr. Ward may assert his *Johnson* challenge to the Guideline used to calculate this sentence by way of his § 2255 motion.

B. Mr. Ward Is Not Career Offender Under the Guidelines Post-*Johnson*

The PSR used to calculate Mr. Ward's sentence classified him, based on his criminal history, as a career offender within the meaning of U.S.S.G. § 4B1.1. U.S.S.G. § 4B1.1(a) provides, in relevant part, that a defendant is a career offender if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). Today, the Guidelines define "crime of violence" as:

> [A]ny 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 murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. 5845(a) or explosive material as defined in 18 U.S.C. 841(c).

U.S.S.G. § 4B1.2.

The PSR found Mr. Ward's two prior Colorado felony convictions as "crimes of violence" sufficient to support his classification as a career offender. The first conviction was criminal attempt to disarm a police officer; and the second was menacing. The government concedes that the conviction for criminal attempt to disarm a police officer does not qualify as a crime of violence under the current version of U.S.S.G. § 4B1.2. Doc. 147 at 7. Instead, this conviction only qualifies as a predicate crime of violence under the residual clause in the 2001 Guideline's definition of a crime of violence, *i.e.*, ones "involv[ing] conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2) (U.S. Sentencing Comm'n 2001). And, if *Johnson* invalidates Mr. Ward's sentence under the residual clause of U.S.S.G. § 4B1.2(a)(2), the government concedes that Mr. Ward no longer qualifies as a career offender making him eligible for resentencing. Doc. 147 at 7.

Because the court holds that *Johnson* applies retroactively to invalidate sentences calculated under the residual clause of U.S.S.G. § 4B1.2(a)(2), Mr. Ward is entitled to relief under § 2255. Mr. Ward's sentence was "imposed in violation of the Constitution." 28 U.S.C. § 2255. It was based on the residual clause of U.S.S.G. § 4B1.2(a)(2), which, *Johnson* and *Madrid* hold, is unconstitutionally vague. Consequently, Mr. Ward is no longer considered a career

offender under the Guidelines. His conclusion renders Mr. Ward eligible for resentencing. The court thus grants Mr. Ward's § 2255 motion and schedules Mr. Ward for resentencing.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant John D. Ward's Motion for Order to Lift Stay of Proceedings (Doc. 145) is granted.

IT IS FURTHER ORDERED THAT defendant John D. Ward's Motion to Vacate Under § 2255 is granted.

Re-sentencing is scheduled for **March 6, 2017 at 1:30 p.m.** Defendant John D. Ward shall remain in custody until that time.

IT IS SO ORDERED.

Dated this 27th day of February 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge