No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

SCOTT MICHAEL PATRICK, et al.

Petitioners,

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

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QUESTIONS PRESENTED ON REVIEW

Before 2005, when the Sentencing Guidelines were mandatory, the petitioners were sentenced as career offenders under U.S.S.G. § 4B1.1 based on prior convictions that qualified as crimes of violence only under the residual clause in § 4B1.2(a)(2). In 2015, this Court struck down as void for vagueness the identical residual clause in the Armed Career Criminal Act's definition of "violent felony" at 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S. Ct. 2551 (2015). Within a year, each of the petitioners filed a § 2255 motion challenging their career offender sentences in light of the new rule announced in *Johnson*. Each of the motions was denied as untimely under 28 U.S.C. § 2255(f)(3), and the Ninth Circuit affirmed based on its decision in *Blackstone v. United States*, 903 F.3d 1020 (9th Cir. 2018), in which it held that the new right announced in *Johnson* does not apply to the mandatory Guidelines unless and until this Court says so.

The questions presented are:

I. Whether, for purposes of 28 U.S.C. § 2255(f)(3), the right initially recognized in *Johnson* applies to the identical residual clause in the mandatory Guidelines, U.S.S.G. § 4B1.2?

II. Whether the residual clause in the mandatory guidelines is void for vagueness?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. Pursuant to Supreme Court Rule 12.4, the petitioners listed below file this single petition for writ of certiorari to the Ninth Circuit Court of Appeals to cover multiple judgments below raising the same issues.

Petitioners:
Scott Michael Patrick
Warren Hughes Nunn
James Chris Colasanti
David Ernest Gildersleeve
Jeffrey Lewis Beraldo

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Petition for Certiorari

Petitioners Scott Michael Patrick, et al., respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit affirming the denial of their § 2255 motions.

Orders Below & Jurisdiction

The Ninth Circuit decisions below were all unpublished and are included in the attached Appendix. The district court opinions were also unpublished, except for the decision in *United States v. Colasanti*, which is reported at 282 F. Supp. 3d 1213 (D. Or. Sept. 26, 2017). The district court opinions are also included in the attached Appendix. These cases are joined in a single petition pursuant to Rule 12.4, in that they "involve identical or closely released questions." This petition is timely under Supreme Court Rule 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Name	Ninth Circuit Case No.	Oregon District Court Case No.	Ninth Circuit Disposition Date & Type	Appendix Page (Ninth Circuit)	Appendix Page (District Court)
Patrick, Scott Michael	17-35867	6:98-cr-60099-MC (unpublished opinion available at 2017 WL 4683929 (D. Or. Oct. 18, 2017)	11/21/2019 Memorandum	1	3
Nunn, Warren Hughes	18-35136	3:99-cr-00219-MO-3 (oral opinion issued Dec. 16, 2018)	12/16/2019 Order on Summary Affirmance	20	21

Colasanti, James Chris	17-35779	6:96-cr-60132-MC (opinion reported at *United States v. Colasanti*, 282 F. Supp. 3d 1213 (D. Or. Sept. 26, 2017)	12/17/2019 Memorandum	25	28
Gildersleeve, David Ernest	17-35979	3:01-cr-00168-HZ (unpublished opinion available at 2017 WL 5895135 (D. Or. Nov. 28, 2017)	12/17/2019 Memorandum	46	48
Beraldo, Jeffrey Lewis	18-35000	3:03-cr-00511-AA (unpublished opinion available at 2017 WL 2888565 (D. Or. July 5, 2017)	01/09/2020 Order on Summary Affirmance	54	55

Relevant Constitutional and Statutory Provisions

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 states, in relevant part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;

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

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

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

U.S.S.G. § 4B1.2(a) (1989) 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.

Statement of the Case

A. Legal Background

A federal prisoner may move to vacate his or her sentence under § 2255 if the sentence violates the Constitution. *See* 28 U.S.C. § 2255(a). Any such motion generally must be filed within one year of the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). However, a federal prisoner may later file a § 2255 motion within one year from "*the date on which the right asserted was initially recognized by the Supreme Court*, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3) (emphasis added).

In 2015, this Court in *Johnson* struck down as void for vagueness the residual clause in the Armed Career Criminal Act (ACCA) at 18 U.S.C. § 924(e)(2)(B)(ii), thereby announcing a new, substantive rule retroactively applicable to cases on collateral review. 135 S. Ct. at 2557, 2563; *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). In *Sessions v. Dimaya*, this Court applied *Johnson* to strike down 18 U.S.C. § 16(b)'s residual clause as void for vagueness on identical grounds. 138 S. Ct. 1204, 1214-15 (2018). In *United States v. Davis*, the Court applied *Johnson* to strike down the residual clause at 18 U.S.C. § 924(c)(3)(B) as void for vagueness, again on identical grounds. 139 S. Ct. 2319, 2336 (2019). With respect to each statute, the Court found the combination of an ordinary case analysis and an imprecise risk threshold produced more uncertainty than the constitution's due process clause would bear. By the time of *Davis*, even the government

"acknowledge[d] that, if [the categorical approach applies to § 924(c)(3)(B)], then § 924(c)(3)(B) must be held unconstitutional too." *Id.* at 2326-27.

At the time each of the petitioners were sentenced (between 1997 and 2004), the Sentencing Guidelines were mandatory. When the Guidelines were mandatory, they "impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). The career offender guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). Congress mandated that the Sentencing Commission "specify a sentence to a term of imprisonment at or near the maximum term authorized" for certain categories of repeat offenders. *See* 28 U.S.C. § 994(h). The Commission implemented that directive by tying the offense level to the statutory maximum for the instant offense of conviction and automatically placing the defendant in Criminal History Category VI if the defendant's instant offense, and at least two prior convictions, constitute a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1(a)-(b). The Commission's one attempt to ameliorate the severity of the career offender guideline when it was mandatory was held invalid because of the congressional mandate. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997).

Beginning in 1989 and continuing through 2015, the Commission used the statutory definition of "violent felony" from § 924(e) to define "crime of violence" in the Guidelines, repeating the identical residual clause found in the ACCA. U.S.S.G. § 4B1.2 (1989) (defining a crime of violence as an offense punishable by a term of imprisonment

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*." (emphasis added)).

B. Underlying Conviction and Sentencing Proceedings

Each of the petitioners was sentenced as a career offender under U.S.S.G. § 4B1.1 in the pre-*Booker* mandatory Guidelines era. The petitioners were convicted and sentenced as follows:

Scott Michael Patrick

On June 12, 1998, Mr. Patrick was arrested for committing an unarmed bank robbery, in violation of 18 U.S.C. § 2113(a). A federal grand jury returned a one-count indictment charging Mr. Patrick with that offense on July 16, 1998. Mr. Patrick entered a plea of not guilty by reason of insanity and was found guilty by a jury on January 29, 2000. At sentencing on May 23, 2000, the court found that Mr. Patrick qualified as a career offender based on his prior convictions for Oregon Robbery II and federal bank robbery. The career offender enhancement increased Mr. Patrick's base offense from level 20 to level 32, and his mandatory Guidelines range was 210-262 months. The Court imposed a sentence of 210 months at the low end of that range. The court determined that the Guidelines did not permit a reduction for acceptance of responsibility or a downward departure on grounds of Mr. Patrick's mental illness or overrepresentation of his criminal

history. If Mr. Patrick had not been deemed a career offender, his mandatory Guidelines range would have been 92-115 months.[1]

Warren Hughes Nunn

Mr. Nunn was arrested in July 1999, following the discovery of a conspiracy to manufacture methamphetamine in Idaho. At sentencing, the court found that Mr. Nunn played a minor role in the conspiracy and "was less culpable than others given his limited temporal involvement." Mr. Nunn pleaded guilty to conspiracy to manufacture more than 50 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1)(A) and 846. At sentencing on December 7, 2001, the court found that Mr. Nunn qualified as a career offender based on his prior Oregon convictions for Robbery II and Burglary I (two separate convictions). The career offender enhancement increased Mr. Nunn's base offense level from 36 to 37. With a three-level reduction for acceptance of responsibility, Mr. Nunn's mandatory Guidelines range at offense level 34 and criminal history category VI was 262-327 months. The Court granted a two-level departure to account for Mr. Nunn's minor role and a one-level adjustment to effect concurrency by granting credit for time in state custody pursuant to U.S.S.G. § 5G1.3. The Court rejected any further basis for departing from the Guidelines range and sentenced Mr. Nunn to 200 months in prison. If Mr. Nunn had not been deemed a career offender, the Court's guideline calculations under U.S.S.G. § 2D1.1

[1] In 2013, Mr. Patrick received a consecutive 100-month sentence for committing an assault in prison. *See United States v. Patrick*, 630 F. App'x 959 (11th Cir. 2015).

would have produced a Guidelines range before departure of 235-293 months, one level lower than the career offender range.

James Chris Colasanti

Mr. Colasanti was arrested on September 5, 1996, and charged federally with committing three unarmed bank robberies, in violation of 18 U.S.C. § 2113(a). Mr. Colasanti entered pleas of guilty to each charge pursuant to a plea agreement with the government. At sentencing on March 10, 1997, the court found that Mr. Colasanti qualified as a career offender based on his two prior convictions for California robbery. The career offender enhancement increased Mr. Colasanti's base offense level from 20 to 32. With a three-level reduction for acceptance of responsibility, Mr. Colasanti faced a mandatory Guidelines range of 151-188 months. The court found that there was no legal basis "to justify a downward departure[.]" The court sentenced Mr. Colasanti to 188 months' imprisonment. If Mr. Colasanti had not been deemed a career offender, the Guidelines range at total offense level 26 would have been 120-150 months.[2]

David Ernest Gildersleeve

On February 3, 2003, Mr. Gildersleeve entered a guilty plea to one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), based on a series of crimes committed between January and February 2001. Pursuant to the plea agreement, the

[2] In 1998, Mr. Colasanti received a consecutive 46-month sentence for sending threatening letters to the sentencing judge. *See United States v. Colasanti*, No. 6:97-cr-600121-GO (D. Or. July 9, 1998).

government dismissed three additional counts of armed bank robbery and two counts of unarmed bank robbery. Prior to resolving the federal charges, Mr. Gildersleeve received a 30-year state sentence in Multnomah County Circuit Court for charges arising from an armed carjacking committed on February 22, 2001. At sentencing on April 14, 2003, the court found that Mr. Gildersleeve qualified as a career offender based on his prior Oregon convictions for Burglary I, Robbery II, and Robbery III (three separate convictions). The career offender enhancement increased Mr. Gildersleeve's base offense level from 20 to 34. With a three-level reduction for acceptance of responsibility, Mr. Gildersleeve faced a mandatory Guidelines range of 188-235 months. Pursuant to the plea agreement and the dismissal of other charges, the court followed the parties' jointly recommended sentence of 235 months at the high end of that range, with 60 months to be served consecutively to the defendant's undischarged state sentence. If Mr. Gildersleeve had not been deemed a career offender, the Guidelines range at total offense level 24 would have been 100-125 months.[3]

[3] In 2005, the Oregon Court of Appeals reversed Mr. Gildersleeve's state sentence based on a violation of *Blakely v. Washington*, 542 U.S. 296 (2004). *State v. Gildersleeve*, 202 Or. App. 215 (2005). The state court on remand imposed a sentence of 130 months to run consecutively to the federal sentence. Mr. Gildersleeve is now in primary federal custody serving the 235-month term of imprisonment imposed in this case. Upon the expiration of that sentence, Mr. Gildersleeve will return to state custody to serve the remainder of his state sentence.

Jeffrey Beraldo

On February 12, 2004, Mr. Beraldo entered a guilty plea to three counts of unarmed bank robbery in violation of 18 U.S.C. § 2113(a). At sentencing on July 15, 2004, the court found that Mr. Beraldo qualified as a career offender based on his prior convictions for California robbery and federal unarmed bank robbery. The career offender enhancement increased Mr. Beraldo's base offense level from 20 to 32. With a three-level reduction for acceptance of responsibility, Mr. Beraldo faced a mandatory Guidelines range of 151-188 months. The court imposed the minimum available sentence within that range, 151 months. If Mr. Beraldo had not been deemed a career offender, the Guidelines range at total offense level 22 would have been 77 to 96 months.

C. District Court and Ninth Circuit § 2255 Proceedings

Within one year of the Supreme Court's decision in *Johnson*, the petitioners each filed § 2255 motions in the district court asserting that their sentences were imposed in violation of the Constitution because their career offender sentences were premised on the unconstitutional residual clause in § 4B1.2(a). The government in each case opposed the motion, raising the statute of limitations as an affirmative defense. The district court judges denied the petitioners' motions as untimely.[4]

[4] In Mr. Patrick's and Mr. Colasanti's cases, the district court judge alternatively denied the motions on their merits, holding that the residual clause in the mandatory Guidelines was not unconstitutionally vague "as applied" to the petitioners' prior robbery convictions. That aspect of the rulings was not reached on appeal.

On appeal, the Ninth Circuit affirmed the statute of limitations bar based on its precedent in *Blackstone*, 903 F.3d at 1025-1028. In *Blackstone*, the Ninth Circuit concluded that the defendant's *Johnson*-based challenge to his mandatory Guidelines sentence was not timely under 28 U.S.C. § 2255(f)(3) because "the Supreme Court has not yet recognized the right that Blackstone seeks to assert." *Id.* at 1026. In other words, "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." *Id.* at 1028.

The petitioners are all either (1) in Bureau of Prisons custody serving the terms of incarceration at issue here or a consecutively-imposed sentence, (2) on supervised release following their imprisonment, or (3) detained pending resolution of an alleged violation of supervised release.

Reasons for Granting the Writ

This Court in *Johnson*, struck down as void for vagueness the residual clause in 18 U.S.C. § 924(e), then applied *Johnson* to strike down as void for vagueness two other residual clauses in two other statutes. Both of those statutes were held invalid because they required courts to combine the same ordinary-case analysis and ill-defined risk threshold in the same way as the ACCA. Yet, the courts of appeals cannot agree on whether *Johnson* likewise invalidates the residual clause in the mandatory Guidelines, though it was identical in text and application to the one struck down in *Johnson* and though the mandatory Guidelines fixed sentencing ranges. Because the lower courts have reached a deep and intractable impasse, only this Court can resolve the matter.

This question is extremely important. Its resolution "could determine the liberty of over 1,000 people." *Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting from the denial of certiorari). And the petitioners' cases provide an excellent vehicle to resolve the issue because the Ninth Circuits' affirmances were grounded solely on timeliness under 28 U.S.C. § 2255(f)(3). Because the petitioners each diligently pursued the assertion that *Johnson*'s rule renders their sentences unconstitutional, they are entitled to full consideration of those claims on their merits rather than denial at the gates.

A. There Is An Entrenched Circuit Split On The Question Whether, For Purposes Of 28 U.S.C. § 2255(f)(3), The New Retroactive Right Recognized In *Johnson* Applies To The Residual Clause In The Mandatory Guidelines.

The circuits are divided. The Seventh Circuit has held that, for purposes of § 2255(f)(3), the new retroactive right announced in *Johnson* applies to the residual clause in the mandatory Guidelines. *United States v. Cross*, 892 F.3d 288, 299-306 (7th Cir. 2018). In direct conflict, eight circuits (including the Ninth Circuit) have held that *Johnson*'s new retroactive right does not apply to the residual clause in the mandatory Guidelines. *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 14 (2018); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *Blackstone*, 903 F.3d at 1025-28; *United States v. Pullen*, 913 F.3d 1270, 1283-84 (10th Cir. 2019); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Within those eight circuits, the judges have expressed sharp disagreement on the correct rule of law. *See, e.g.*, *Brown*, 868 F.3d at 304-05, 310 (Gregory, C.J., dissenting), *cert. denied*, 139 S. Ct. 14 (2018) ("Because Brown asserts th[e] same right [recognized in *Johnson*], I would find his petition timely under § 2255(f)(3), even though his challenge is to the residual clause under the mandatory Sentencing Guidelines, rather than the ACCA."); *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir. 2019) (Moore, J., concurring), *reh'g denied*, No. 18-3298 (6th Cir. June 26, 2019) (expressing view that *Raybon* "was wrong on this issue."); *London*, 937 F.3d at 510 (5th Cir.) (Costa, J., concurring in judgment) ("We are on the wrong side of a split. . . . Our approach fails to apply the plain language of the statue and undermines the prompt presentation of habeas claims the statute promotes."); *Hodges v. United States*, 778 F. App'x 413, 414-15 (9th Cir. 2019) (Berzon, J., concurring) ("[I]n my view, *Blackstone* was wrongly decided."); *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., joined by Rosenbaum and J. Pryor, JJ., statement respecting the denial of rehearing en banc) ([T]he opinion in *In re Griffin* is mistaken."); *see also In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, JJ.) (calling *Griffin* into question).

The three remaining circuits—the First, Second, and D.C. Circuits—have not decided the question directly, but the First Circuit strongly implied (in the context of the prima facie showing required for certification of a second or successive § 2255 motion) that it would agree with the Seventh Circuit on the merits. *Moore v. United States*, 871 F.3d 72, 81-82 (1st Cir. 2017). The district courts in these three circuits have granted

Johnson relief to individuals sentenced under the residual clause in the mandatory guidelines. *United States v. Hammond*, 351 F. Supp. 3d 106 (D.D.C. 2018); *Blackmon v. United States*, No. 3:16-cv-1080 (VAB), 2019 WL 3767511, at *6 (D. Conn. Aug. 9, 2019); *United States v. Moore*, No. 1:00-cr-10247-WGY, 2018 WL 5982017 (D. Mass. Nov. 14, 2018); *Mapp v. United States*, No. 1:95-cr-01162-FB, 2018 WL 3716887 (E.D.N.Y. Aug. 3, 2018).

The disagreement between and within the circuits is entrenched and will not resolve without this Court's intervention. By denying rehearing en banc in *Chambers*, the Sixth Circuit reaffirmed its holding in *Raybon*. The Ninth and Eleventh Circuits also recently denied rehearing en banc. Order, *Hodges v. United States*, 778 F. App'x 413 (Oct. 17, 2019) (No. 17-35408); *Lester*, 921 F.3d at 1307. The Third and Eighth Circuits have likewise signaled they are not budging. *United States v. Wolfe*, 767 F. App'x 390, 391 (3d Cir. 2019); *Mora-Higuera v. United States*, 914 F.3d 1152, 1154 (8th Cir. 2019). And the Seventh Circuit has declined the government's suggestion to reconsider *Cross*. *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019).

The conflict will remain—producing arbitrary and disparate results—until this Court resolves it. As Judge Moore in *Chambers* urged:

> [The Supreme] Court should resolve this matter. 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 F. App'x at 526-27 (Moore, J., concurring).

B. The Circuits Holding That *Johnson*'s Right Does Not Apply To The Mandatory Guidelines' Residual Clause Are Wrong.

The circuits that have ruled against applying *Johnson*'s new right to the mandatory Guidelines have relied on invalid reasoning that contravenes this Court's precedent.

Several of the circuits have followed an exact-statute approach to the § 2255(f)(3) statute of limitations, holding that *Johnson* does not apply beyond cases involving the ACCA. *See Brown*, 868 F.3d at 302; *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir. 2018); *Green*, 898 F.3d at 321-22. But *Dimaya* and *Davis* prove that approach wrong by establishing that *Johnson*'s rule invalidates all provisions with the same constitutional flaws. In *Dimaya*, the Court applied *Johnson* to strike down as unconstitutionally vague a similar provision in § 16(b). 138 S. Ct. at 1213, 1223. The Court explained that the result flowed from a "straightforward application" of the *Johnson* rule, not its extension. *Id.* *Davis* confirmed the point by applying *Johnson* to strike down yet another statute as unconstitutionally vague, explaining that *Johnson* and *Dimaya* "teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" 139 S. Ct. at 2326. Neither *Dimaya* nor *Davis* extended the rule from *Johnson*; they merely applied it.

The exact-statute approach also conflicts with this Court's void-for-vagueness habeas precedent. In *Godfrey v. Georgia*, this Court held a Georgia capital-sentencing statute unconstitutionally vague. 446 U.S. 420, 433 (1980). In a later habeas case, *Maynard v. Cartwright*, the Court held an Oklahoma capital-sentencing statute unconstitutionally

vague on the same grounds. 486 U.S. 356, 363-64 (1988). The Court held in a later ruling that *Maynard* did not break new ground because it was "controlled by *Godfrey*," even though *Godfrey* and *Maynard* involved different sentencing statutes. *Stringer v. Black*, 503 U.S. 222, 228-29 (1992). And *Godfrey* also controlled in *Stringer* even though that case involved a vague Mississippi capital-sentencing scheme of a different character than the one in *Godfrey*. *Id.* at 229. This line of precedent makes clear that an exact-statute approach is wrong. A mandatory Guidelines challenge is "controlled by [*Johnson*]," even though *Johnson* involved a different law fixing permissible sentences, so long as the same principles apply. Under the *Godfrey/Maynard/Stringer* line of precedent, if *Johnson* requires the invalidation of a criminal provision, then *Johnson* is the rule the petitioners need for their petitions to be timely.

Other circuits have relied on this Court's opinion in *Beckles v. United States*, 137 S. Ct. 886 (2017), to determine that *Johnson*'s right does not apply to the mandatory Guidelines. *See Raybon*, 867 F.3d at 63; *Blackstone*, 903 F.3d at 1026; *Green*, 898 F.3d at 321-22. *Beckles* held that *Johnson* does 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. Ct. at 892. But *Beckles* distinguished the advisory Guidelines from the mandatory Guidelines, *id.* at 894, and cabined its decision to the former: "We 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 (emphasis added). *Beckles* does not limit *Johnson*'s rule with respect to the mandatory guidelines.

In a footnote, Justice Sotomayor's concurring opinion in *Beckles* stated that the case "*leaves open* the question whether defendants sentenced to terms of imprisonment before [*Booker*] . . . may mount vagueness attacks on their sentences," 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) (emphasis added). Contrary to the reasoning of the circuits, Justice Sotomayor's footnote does not have legal significance in determining scope of *Johnson*'s rule. *Cf. Blackstone*, 903 F.3d at 1026 (relying on footnote 4); *Raybon*, 867 F.3d at 629-30 (same). For one thing, the statement appeared in a concurrence, not in the majority opinion. For another, a statement about the absence of a holding in *Beckles* cannot have legal significance in determining the reach of the rule announced in *Johnson*. Moreover, the gist of Justice Sotomayor's concurrence was to make clear that *Beckles* does *not* preclude *Johnson*-based challenges to pre-*Booker* sentences, when the Guidelines "*did* fix the permissible range of sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring) (emphasis in original; internal quotation marks omitted). It should not be twisted to have the opposite effect.

Under the *Godfrey/Maynard/Stringer* line of precedent, if *Johnson*'s constitutional rule is that criminal provisions are unconstitutional when they fix sentences based on the vague "imprecise risk plus ordinary case" combination (as *Dimaya* and *Davis* establish), then *Johnson* recognized the right that petitioners need for their petitions to be timely. The fact that the *advisory* Guidelines are immune from void-for-vagueness challenges, *Beckles*,

137 S. Ct. at 894-96, provides no reason to conclude that the *mandatory* Guidelines are as well. *Beckles* never answered that question because it was not presented.

The reasoning of the Eleventh Circuit falls even further from the mark. The court in *Griffin* drew a line between statutes and guidelines and held that guidelines—whether advisory or mandatory—can never be void for vagueness. 823 F.3d at 1355. The court's basis for this distinction is that guidelines "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." *Id.* But this equally describes the recidivist sentencing statute held void for vagueness in *Johnson*. Indeed, *Godfrey*, *Maynard*, and *Stringer* involved provisions controlling *sentences* rather than proscribing *conduct*. The Eleventh Circuit's reasoning also "denies [] reality" by pretending that the mandatory Guidelines "'were never really mandatory,'" even though courts applied them that way for two decades." *Lester*, 921 F.3d at 1330-31 (Rosenbaum, J., joined by Martin and J. Pryor, JJ.,).

Several circuits have come closer to the mark in considering the scope of a "new rule" under the retroactivity jurisprudence of *Teague v. Lane*, 489 U.S. 288 (1989). *See London*, 937 F.3d at 506-07; *Russo*, 902 F.3d at 882-83; *Pullen*, 913 F.3d at 1280-81. *Chaidez v. United States*, for example, 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." 568 U.S. 342, 347-48 (2013) (internal alterations and quotation marks omitted).

> 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 (internal alterations and quotation marks omitted).

However, *Johnson*'s retroactivity is not in question, because this Court has already held that *Johnson*'s new rule is retroactive. *Welch*, 136 S. Ct. at 1265. The question here is simply whether petitioners *asserted* a new *right* under § 2255(f)(3). If anything, *Chaidez* confirms that applying *Johnson* to the mandatory Guidelines would not require a new rule. *Dimaya* and *Davis* make plain that *Johnson* announced "a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts," *id.*; 138 S. Ct. at 1210-23; 139 S. Ct. at 2326. *Johnson*'s rule defines the category of sentencing provisions that are unconstitutionally vague, and *Booker* establishes that the mandatory Guidelines' run afoul of that rule because they fixed the permissible range of sentences.

Finally, the Ninth Circuit in *Blackstone* went astray in its reliance on this Court's precedent interpreting 28 U.S.C. § 2254(d), a wholly different provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that serves a different purpose and shares no textual similarities with § 2255(f)(3). *Blackstone*, 903 F.3d at 1026-27 (citing *Lopez v. Smith*, 574 U.S. 1 (2014), and *Nevada v. Jackson*, 569 U.S. 505 (2013)). Section 2254(d)(1) is a state-prisoner relitigation bar. It precludes a state prisoner from seeking federal habeas review of any claim previously adjudicated by the state courts

unless the state decision "was contrary to, or involved an unreasonable application of, *clearly established Federal law*, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1) (emphasis added). In that context, this Court has cautioned against reading its holdings at a "high level of generality" when describing the boundaries of "clearly established federal law" for purposes of § 2254(d)(1). *Lopez*, 574 U.S. at 6.

This Court's interpretation of § 2254(d)(1) does not apply to § 2255(f)(3). First, the text is different: the restrictive "clearly established Federal law" language in § 2254(d)(1) appears nowhere in § 2555(f)(3). When Congress employs different language in related statutes, "[w]e usually presume [these] differences in language . . . convey differences in meaning." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018) (internal quotation marks omitted). "[C]learly established federal law" should not be construed to mean the same thing as "right." *See Moore*, 871 F.3d at 82 ("Congress presumably used these broader terms [like 'right' and 'rule' in § 2255] 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.").

Moreover, § 2255(f)(3) serves a different purpose than § 2254(d)(1). Section 2254(d)(1) is a barrier for *state* prisoners who claim that a *state* court has contravened federal law. As a matter of respect to state courts, the federal courts can intervene only when the state court's decision is *clearly* answered to the contrary by a prior decision of

the Supreme Court. *Woods v. Donald*, 575 U.S. 312, 316 (2015); *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Section 2255(f)(3), by contrast, governs the timing of post-conviction motions by federal prisoners. Comity and federalism concerns have no relevance when a *federal* prisoner asks a *federal* court to vacate a federal judgment based on a new Supreme Court decision. *See Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) ("Federalism and comity considerations are unique to federal habeas review *of state convictions*." (emphasis added)).

The purpose of the statute of limitations in § 2255(f)(3) is to "encourag[e] prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *See Carey v. Saffold*, 536 U.S. 214, 266 (2002). To effect that purpose, the lower courts have an obligation to "determin[e] what rights have been recognized by the Supreme Court under AEDPA," *cf. Blackstone*, 903 F.3d at 1026-27, to assess whether the movant has promptly asserted those rights.

C. The Seventh Circuit Was Correct In Holding That *Johnson*'s Right Applies To The Mandatory Guidelines' Residual Clause.

In contrast to the unsupported reasoning put forth by the eight circuits that have limited *Johnson*'s rule, the Seventh Circuit got it right, both as to the statutory interpretation of § 2255(f)(3) and as to the substantive application of *Johnson*'s rule in light of the constitutional principles articulated in *Booker* and *Beckles*.

In *Cross*, the Seventh Circuit held that, for purposes of § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory

Guidelines. 892 F.3d at 299-306. In doing so, the Seventh Circuit rejected the approach taken by other circuits, explaining that it "suffers from a fundamental flaw" because

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

Id. at 293-94 (emphasis in *Cross*; citation omitted). "Under *Johnson*, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 294. Because the appellants' challenge to their mandatory Guidelines sentences "assert[ed] precisely that right," they therefore "complied with the limitations period of section 2255(f)(3) by filing their motions within one year of *Johnson*." *Id.*

Turning to the merits, the Seventh Circuit concluded that the "same two faults" that render the ACCA's residual clause void-for-vagueness—the combined indeterminacy of how much risk the crime of conviction posed and the degree of risk required—"inhere in the residual clause of the guidelines." *Id.* at 299. It "hardly could be otherwise" because the clauses are identically worded and the categorical approach applies to both. *Id*

Additionally, the Seventh Circuit held that the mandatory Guidelines' fixed the permissible range of sentences, implicating vagueness doctrine. *Id.* at 305. The court explained that *Beckles* "reaffirmed that the void-for-vagueness doctrine applies to 'laws that fix the permissible sentences for criminal offenses.'" *Id.* (quoting *Beckles*, 137 S. Ct.

at 892). "As *Booker* described, the mandatory guidelines did just that. They fixed sentencing ranges from a constitutional perspective." *Id.* Because the Guidelines were "'not advisory'" but "'mandatory and binding on all judges,'" *id.* (quoting *Booker*, 543 U.S. at 233-34), "[t]he mandatory guidelines did . . . implicate the concerns of the vagueness doctrine." *Id.*; *see also Moore*, 871 F.3d at 81 (noting *Booker* "essentially resolved" this issue when it ruled that "the Guidelines [were] binding on district judges").

Booker leaves no room for doubt that the mandatory Guidelines fixed sentences. The Court in *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. Under the 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. *Id.* at 244. In its analysis, *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 233-34; 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 binding: "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 234-35.

Booker reflects this Court's long understanding that the mandatory Guidelines range fixed the statutory penalty range. *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory."); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (noting 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.* makes sense only if the mandatory Guidelines range was the statutory penalty range.

This Court should follow the Seventh Circuit's reasoning in *Cross* and find that the right recognized in *Johnson* applies to the mandatory Guidelines for purposes of the statute of limitations in § 2255(f)(3).

D. The Court Should Grant Review Or Hold This Case Pending Review In Another Mandatory Guidelines Case To Ensure The Petitioners' Claims Are Fully Reviewed On Their Merits.

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 (Sotomayor, J., dissenting from the denial of certiorari). And because the Guidelines are no longer mandatory, it is impossible to resolve this issue on direct appeal. Accordingly, this Court should either accept review here or hold these case while reviewing circuits' disarray in another case.

It is no answer that some offenders seeking review ultimately may not be eligible for relief. In *Welch*, this Court decided the question of *Johnson*'s retroactivity even though the petitioner's eligibility for relief remained in dispute. *Welch*, 136 S. Ct. at 1263-64. As the law stands, the question of whether *Johnson* petitioners receive relief will depend on where they were originally sentenced rather than the merits of their cases. Unless this Court grants certiorari in a case like this one, the liberty of federal prisoners sentenced under the mandatory residual clause will continue to depend on the luck of geography.

Nor can the Court simply wait for the issue to fade away as the remaining mandatory Guidelines offenders complete their sentences. The mélange of circuit court rulings will

continue to preclude consistent application of the law when this Court inevitably announces new principles of constitutional law.

Together, the petitioners' cases squarely present the question for review because the statute of limitations was raised and litigated in the district court in each case, and in each case the Ninth Circuit affirmed the denial of relief solely on that ground, based on the circuit's binding precedent in *Blackstone*. The petitioners have diligently asserted their claims of unconstitutional sentencing, and those claims should be determined on their merits rather than precluded by a misconstrued time bar.

E. 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 after *Beckles* 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 at issue in *Cross* (and here) is identical to the residual clause struck down in *Johnson* (§ 924(e)(2)(B)(ii)). And, as already discussed, the Court's decision in *Booker* establishes that the mandatory Guidelines operated as statutes, subject to the same standards of vagueness. Therefore, just as the residual clauses at issue in *Johnson*, *Dimaya*, and *Davis* are void for vagueness, § 4B1.2(a)(2)'s mandatory residual clause must also be void for vagueness.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 19th day of February, 2020.

Elizabeth G. Daily
Attorney for Petitioners

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SCOTT MICHAEL PATRICK, Defendant-Appellant.	No. 17-35867 D.C. Nos. 6:16-cv-01218-MC 6:98-cr-60099-MC-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Submitted November 18, 2019**

Before: CANBY, TASHIMA, and CHRISTEN, Circuit Judges.

Federal prisoner Scott Michael Patrick appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate his sentence. We have jurisdiction under 28 U.S.C. § 2253. We review de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Patrick contends that the district court improperly denied his section 2255 motion as untimely. He asserts that his section 2255 motion is timely because he filed it within one year of *Johnson v. United States,* 135 S. Ct. 2551 (2015), a decision which he contends applies to the mandatory career offender Sentencing Guidelines provision, U.S.S.G. § 4B1.2, under which he was sentenced. This argument is foreclosed because "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." *United States v. Blackstone,* 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019). Contrary to Patrick's argument, our decision in *Blackstone* is not "clearly irreconcilable" with *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Accordingly, the district court properly concluded that section 2255(f)(3) does not apply and Patrick's motion is untimely. *See* 28 U.S.C. § 2255(f)(1).

In light of this disposition, we do not reach the parties' remaining arguments.

The government's motion for summary affirmance is denied as moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

SCOTT MICHAEL PATRICK,

Defendant/Petitioner.

No. 6:98-cr-60099-MC-1

OPINION AND ORDER

MCSHANE, Judge:

Petitioner, Scott Michael Patrick, is currently serving a 210-month sentence imposed pursuant to § 4B1.2(a) of the United States Sentencing Guidelines ("Guidelines").[1] On June 23, 2016, he filed a motion to vacate or correct his sentence under 28 U.S.C. § 2255, arguing that the principles set forth in *Johnson v. United States*, 135 S. Ct. 2551 (2015), render the language found in the mandatory Guidelines provision governing his sentence constitutionally deficient. The Government has since moved to dismiss his motion. Because the court in *Johnson* did not recognize a new right that would apply to the language of the mandatory Guidelines, Petitioner's motion is DENIED as untimely. The Government's motion is GRANTED.

BACKGROUND

In 2000, Petitioner was convicted of federal unarmed bank robbery in violation of 18 U.S.C. § 2113(a). Findings of Fact Order 1. The Presentence Report determined that, under the then-mandatory Guidelines, his instant and prior federal bank robbery offenses, as well one prior conviction for Oregon Robbery II, qualified as "crimes of violence" pursuant to § 4B1.2(a) and

[1] When Petitioner was sentenced in 2000, the Guidelines were still mandatory. *See United States v. Booker*, 543 U.S. 220 (2005).

that he was a Career Offender under § 4B1.1. Presentence Report ¶ 32, 49. The district court applied the Career Offender enhancement and sentenced Petitioner to 210 months' imprisonment—the lower end of his mandatory 210 to 262-month Guidelines range. Findings of Fact Order 6. Without the career offender finding, Petitioner argues that his range would have been 92 to 110 months. Resp. to Pl.'s Mot. to Dismiss 3. Petitioner is currently serving consecutive sentences in federal prison and has a projected release date of May 29, 2023. *Id.*

Petitioner now moves the Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Def.'s Mot. to Vacate, Set Aside, or Correct Sentence 1. He contends that when the Supreme Court struck down the residual clause of the Armed Career Criminals Act ("ACCA") as void for vagueness in *Johnson*, it recognized a new right retroactively applicable to sentences imposed under the identically-worded residual clause of the mandatory Guidelines. *Id.* at 3-5. Applying this right to the Guidelines, he argues that the residual clause is now deemed unconstitutionally vague and, as such, his Career Offender designation violates his due process rights. *Id.* Without the residual clause, he maintains, his convictions for federal bank robbery and Oregon Robbery II no longer qualify as crimes of violence under § 4B1.2(a) and the protections of § 2255 entitle him to relief from his classification as a Career Offender. *Id.* at 5.

The Government opposes Petitioner's motion and seeks its dismissal on three grounds.[2] First, it contends that his motion is untimely. Gov't Mot. to Dismiss 2. Under § 2255(f), a petitioner must file a motion to correct or vacate her sentence within one year of either the date on which the sentence becomes final or the date on which the Supreme Court recognizes a right asserted in her motion. The Government argues that, since Petitioner was sentenced in 2000 and the right recognized in *Johnson* is limited to sentences imposed under the ACCA, his motion is

[2] In its Motion to Dismiss, the Government also asserts that Petitioner cannot satisfy the requirements at 28 U.S.C. § 2255(h)(2) for second or successive petitions. As Petitioner rightly responded, and as the Government later conceded, this is Petitioner's first motion under § 2255 and the aforementioned requirements therefore do not apply.

time barred.[3] Gov't Supp. Mem. 2. Second, the Government argues that, even if Petitioner's motion were timely, the Guidelines' residual clause remains facially valid under the principles and reasoning of *Johnson*, as well as applied to Petitioner's convictions for robbery. *Id.* at 2-3. Finally, the Government contends that Petitioner's federal bank robbery and Oregon Robbery II convictions would still qualify as crimes of violence absent the residual clause. *Id.* at 4.

DISCUSSION

Under 28 U.S.C. § 2255, a prisoner may move to have his sentence vacated or corrected if it "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). A motion pursuant to § 2255 must be filed within one year from the date on which a petitioner's conviction becomes final, unless an exception applies. *Id.* § 2255(f)(1). Petitioner relies on the exception at § 2255(f)(3) to render his motion timely. Def.'s Mot. to Vacate or Correct Sentence 5. Under § 2255(f)(3), a petitioner's motion is timely if (1) it "assert[s] . . . [a] right . . . newly recognized by the Supreme Court," *id.* § 2255(f)(3), (2) it is filed within one year from "the date on which the right asserted was initially recognized by the Supreme Court," *id.* § 2255(f)(3), and (3) the Supreme Court or controlling Court of Appeals has declared the right retroactively applicable on collateral review, *Dodd v. United States*, 545 U.S. 353, 358-59 (2005). As both the text of § 2255(f)(3) and Supreme Court precedent make clear, only the Supreme Court may "recognize" a new right under § 2255(f)(3). *Dodd*, 545 U.S. at 357-59.

[3] The Government consistently conflates the issues of whether the Supreme Court has recognized a new right and whether any such right is retroactively applicable on collateral review. As described *infra*, whereas only the Supreme Court may *recognize* a new right, a court of appeals may declare that right to be retroactively applicable. *Dodd v. United States*, 545 U.S. 353, 357-59. Careless phrasing notwithstanding, it appears that the Government's main contention is that *Johnson* did not recognize the right asserted by Petitioner since it is recognition of a new right, not retroactivity, which would trigger § 2255(f)(3)'s more generous statute of limitations. In any event, the question of retroactivity is irrelevant—whether under § 2255(f)(3) or *Teague v. Lane*, 489 U.S. 288 (1989)—in the present case: if the right recognized in *Johnson* is the same one asserted by Petitioner, then the Supreme Court, in *Welch v. United States*, 136 S. Ct. 1257 (2016), has already declared that right to be retroactively applicable.

The present case turns most immediately on whether the right recognized by the Supreme Court in *Johnson* is the same one asserted by Petitioner. If the Supreme Court has yet to recognize the asserted right, then Petitioner's motion is time barred by § 2255(f)(1). If, however, *Johnson* did recognize the asserted right, then Petitioner's claim is timely under § 2255(f)(3) and he must be resentenced unless the Guidelines' residual clause, as applied in this case, can survive constitutional scrutiny under *Johnson* or, in the alternative, his Career Offender designation finds support in another provision of § 4B1.2. Although the Court finds that Petitioner's motion is time barred under § 2255(f)(1), it further concludes that, even if *Johnson* did recognize an applicable right within the meaning of § 2255(f)(3), that right, as applied in this case, would not render his Guidelines sentence unconstitutional.

I. Petitioner's Motion is Time Barred.

A. The Right Recognized by *Johnson* is Not the Right Asserted by Petitioner.

The determinative issue in this case is whether *Johnson* recognized the specific right "asserted" by Petitioner. 28 U.S.C. § 2255(f)(3). It is clear, and the parties agree, that the Supreme Court's recent opinion in *Beckles v. United States*, 137 S. Ct. 886 (2017), does not directly control this question. In *Beckles*, the Supreme Court clarified that the pre-*Booker* advisory Guidelines, including the residual clause of § 4B1.2(a)(2), "are not subject to vagueness challenges under the Due Process Clause." 137 S. Ct. at 890. In so doing, the Court repeatedly and explicitly emphasized that its holding was limited to the *advisory* sentencing regime. *See id.* at 890, 892, 894, 895, 896, 897; *see also id.* at 903 n.4 (Sotomayor, J., concurring in judgment) (noting that the majority opinion "leaves open" the question of whether the mandatory Guidelines are subject to void-for-vagueness challenges). Whereas the ACCA "fix[es] the permissible range of sentences," it reasoned, the advisory Guidelines "merely guide the exercise of the court's discretion." *Id.* at 892. The pre-*Booker* sentencing Guidelines, the Court thus

concluded, "do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894-95.

Nevertheless, a finding that *Beckles* does not, by its terms, *foreclose* this Court from reading *Johnson* as recognizing the right asserted by Petitioner does not resolve whether *Johnson* did, in fact, recognize such a right. *See United States v. Castaneda*, 91-00582-AK, 2017 WL 3448192, at *2 (C.D. Cal. June 19, 2017) (Kozinski, J., sitting by designation) (explaining that, although "*Beckles* does not preclude [petitioners] from arguing that the mandatory Guidelines are subject to . . . *Johnson*," it also does not end the analysis). That inquiry depends on how one defines what qualifies as a newly recognized right. *See United States v. Autrey*, No. 1:99–cr–467, 2017 WL 2646287, at *3 (E.D. Va. June 19, 2017) ("[E]mbedded in the parties' dispute on timeliness is a question about the meaning of the term 'right' as used in § 2255(f)(3)."); *Mitchell v. United States*, No. 3:00-CR-00014, 2017 WL 2275092, at *3 (W.D. Va. May 24, 2017) (framing the parties' dispute as turning on "the meaning of 'right' under § 2255(f)(3) and its application to *Johnson*"). While the Supreme Court has yet to provide clear guidance on what qualifies as a newly recognized right, lower courts have adopted two contrasting approaches.

First, a newly recognized right could be limited to the "narrow rule announced in a Supreme Court case." *Autrey*, 2017 WL 2646287, at *3. Under this view, the right recognized by *Johnson* is limited to its specific holding: that the ACCA's residual clause is unconstitutionally vague. *See, e.g., Davis v. United States*, No. 16-C-747, 2017 WL 3129791, at *5 (E.D. Wis. July 21, 2017) ("The only right recognized in Johnson was established in its holding."). By asking lower courts to invalidate the mandatory Guidelines' residual clause, petitioners are impermissibly requesting that these courts recognize a right not established by the narrow holding in *Johnson*. *See, e.g., Raybon v. United States*, No. 16-2522, 2017 WL 3470389,

at *3 (6th Cir. Aug. 14, 2017) ("[Petitioner's] untimely motion cannot be saved under § 2255(f)(3) because he is asking for the recognition of a new right by this court.") (internal quotation marks and citation omitted); *Hirano v. United States*, No. 16-00686 ACK, 2017 WL 2661629, at *7 (D. Haw. June 20, 2017) ("[T]he Court is not persuaded by Petitioner's argument that his claim requires only a simple application, rather than an extension, of *Johnson*.").

A second approach is the broad approach that Petitioner would have the Court adopt. Under the broad approach, a newly recognized right could include, or flow from, the *principles* announced in a Supreme Court case. Under this view, a right is "more analogous to the reasoning of a case." *Mitchell*, 2017 WL 2275092, at *3. For example, the right recognized in *Johnson* "could be the fundamental prohibition against unconstitutional vagueness in criminal [directives]," *Autrey*, 2017 WL 2646287, at *3, or "that no individual could face a fixed criminal sentence on the basis of vague language identical to that in the residual clause of the ACCA," *Mitchell*, 2017 WL 2275092, at *3. Employing this broader construction, the right recognized by the Supreme Court in *Johnson*, at least when considered in the context of its decisions in *Booker* and *Beckles*, is flexible enough to encompass the identically-worded residual clause of the mandatory Guidelines. *See, e.g.*, *Sarracino v. United States*, No. 16-734 MCA/CG, 2017 WL 3098262, at *7 (D.N.M. June 26, 2017). ("Considering *Johnson*, *Beckles*, and *Booker*, the Court finds *Johnson* applies to the mandatory Guidelines.").

This second approach is the one adopted, at least implicitly, by the handful of district courts to have found that the right recognized by *Johnson* does extend to the mandatory Guidelines.[4] *See United States v. Mock*, No. 2:02-CR-0102-RHW, 2017 WL 2727095 (E.D.

[4] The First, Second, Third, Fourth, Sixth, and Tenth Circuits have also granted petitioners leave to file second or successive petitions challenging their mandatory-Guideline sentences based on the right recognized in *Johnson*. *See United States v. Moore*, No. 16-1612, 207 WL 4021654 (1st Cir. Sept. 13, 2017); *In re Hoffner*, No. 15-2883, 2017 WL 3908880 (3rd Cir. Sept. 7, 2017); *Vargas v. United States*, No. 16-2112 (2d Cir. May 8, 2017); *In re Hubbard*,

Wash. July 5, 2017); *United States v. Savage*, 231 F. Supp. 3d 542 (C.D. Cal. 2017) (pre-*Beckles*); *United States v. Tunstall*, No. 3:00-cr-050, 2017 WL 2619336 (S.D. Ohio June 16, 2017) (magistrate report and recommendations); *Reid v. United States*, No. 03–CR–30031–MAP, 2017 WL 2221188 (D. Mass. May 18, 2017); *cf. Castaneda*, 2017 WL 3448192 (adopting a principles-based approach, but still finding that *Johnson* did not recognize the right asserted by petitioner). It is also the approach employed by Chief Judge Gregory of the Fourth Circuit in his dissent from the court's decision in *United States v. Brown*, No. 16-7056, 2017 WL 3585073 (4th Cir. Aug. 21, 2017). "A newly recognized right," Judge Gregory explained, "is more sensibly read to include the reasoning and principles that explain it." 2017 WL 3585073, at *13. Applying that reasoning to *Johnson*, he argued that, because the mandatory-Guidelines' residual clause "is identical in text to the ACCA's . . . , enhancements under both clauses were applied using the categorical approach, and the clauses were similarly used to fix . . . applicable sentencing ranges," the petitioner could "rely on the right set forth in *Johnson*." *Id.* at *22.

The Court is persuaded that the narrow approach governs. First, most district courts to have considered the issue, including five within the Ninth Circuit, have employed the narrow approach and held that *Johnson* does not recognize the right to have a sentence calculated without reference to the pre-*Booker* residual clause of § 4B1.2(a)(2). *See, e.g.*, *United States v. Vidrine*, No. 2:95-cr-482, 2017 WL 3822651 (E.D. Cal. Sept. 1, 2017); *United States v. Garcia-Cruz*, No. 96-cr-1908, 2017 WL 3269231 (S.D. Cal. Aug. 1, 2017); *United States v. Beraldo*, No. 3:03-cr-00511, 2017 WL 2888565 (D. Or. July 5, 2017); *Hirano*, 2017 WL 2661629; *Hodges v. United States*, No. C16-1521, 2017 WL 1652967 (W.D. Wash. May 2, 2017); *Davis v. United*

825 F.3d 225 (4th Cir. 2016) (pre-*Brown*); *In re Patrick*, 833 F.3d 584 (6th Cir. 2016) (pre-*Beckles*); *In re Encinias*, 821 F.3d 1224 (10th Cir. 2016) (same). These cases provide little guidance here, however, since the filing of a second or successive petition under § 2255(h)(2) is permitted upon a mere showing of "possible merit"—a relatively easy bar to clear. 825 F.3d at 232; *see also Cooper v. Brown*, 510 F.3d 870, 917-18 (9th Cir. 2007) (holding that the Ninth Circuit only requires a "prima facie showing" of compliance with § 2255 and not "actual[ ] . . . satisf[action]" of the statutory requirements).

States, No. 16-C-747, 2017 WL 3129791 (E.D. Wis. July 21, 2017); *Autrey*, 2017 WL 2646287; *Mitchell*, 2017 WL 2275092. In addition, the only two Courts of Appeals to have considered the issue—the Fourth and Sixth Circuits—have both adopted the same view. *See Brown*, 2017 WL 3585073; *Raybon*, 2017 WL 3470389; *see also United States v. Miller*, No. 16-2229, 2017 WL 3658833 (10th Cir. Aug. 25, 2017) (dismissing on the merits of petitioner's due process claim).

Significantly, in *Beckles*, Justice Sotomayor wrote separately to note, inter alia, that the Supreme Court had yet to take a position on whether the mandatory Guidelines are subject to vagueness challenges. 137 S. Ct. at 903. "The Court's . . . formalistic distinction between mandatory and advisory rules," she explained, "*at least leaves open* the question whether defendants sentenced [prior to *Booker*] may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (emphasis added) (citation omitted). That question, she continued, "is not presented by this case and I, like the majority, take no position on its appropriate resolution." *Id.* Importantly, as the Fourth Circuit observed in *Brown*, "[i]f the Supreme Court left open the question of whether Petitioner's asserted right exists, [then] the Supreme Court has not 'recognized' that right." 2017 WL 3585073, at *9. Indeed, it is difficult to reconcile both Justice Sotomayor's concurrence and Petitioner's acknowledgment that the majority in *Beckles* deliberately avoided any discussion of the mandatory Guidelines, with his contention that *Johnson*, decided two years earlier, definitively recognized that same right. *See, e.g., United States v. Torres*, CV 16-645 LH/WPL, 2017 WL 3052974, at *3 (D.N.M. June 20, 2017) ("Attempting to reconcile these two concepts . . . reveals that [Petitioner's] motion should be denied.").[5]

[5] As discussed in Part II, *infra*, it is also difficult to give precise contours to the right allegedly recognized in *Johnson*—does it invalidate the residual clause on its face or only as applied—and it is doubtful whether it would invalidate the residual clause as applied to the robbery charges in the present case because there are material differences between the ACCA and Guidelines as applied to robbery.

Finally, the narrower approach is further supported by the Supreme Court's consistently conservative and literal reading of § 2255. In *Tyler v. Cain*, 533 U.S. 656 (2001), for example, the Court adopted a narrow construction of the procedural language in § 2255(h)(2). It held that the term "made" in the phrase "made retroactive . . . by the Supreme Court," means "held" retroactive by the Supreme Court. 533 U.S. at 663. The appellant, much as Petitioner does here with the phrase "right . . . newly recognized by the Supreme Court," argued that "made" included the lower courts' "application of . . . principles" established by the Supreme Court. *Id.* The Court emphatically rejected this argument, emphasizing that the statutory text vests it, and no other court, with the ability to make a right retroactive. *Id.* This meant that a right could not apply retroactively unless the Supreme Court had unequivocally made it so. "[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements," it concluded, "we do not have license to question the decision on policy grounds." *Id.* at n.5.

Similarly, in *Dodd*, the Supreme Court narrowly interpreted § 2255(f)(3) to require that the one-year statute of limitations begin running as soon as the Supreme Court recognizes a new right and not when that right is made retroactive. 545 U.S. at 357-58. This was true, the Court maintained, even though another court might fail to make a right retroactive within the one-year period. *Id.* at 359. As noted by the dissent, the text is susceptible to a broader, more intuitive reading, wherein the one-year period commences only upon the right being made retroactive. *Id.* at 364 (Stevens, J., dissenting). The majority rejected this view, however, conceding that although its reading could produce "harsh results in some cases," it was "required" by the plain language. *Id.* at 359. "[W]e must presume," the Court concluded, "that [the] legislature says in a statute what it means and means in a statute what it says there." *Id.* 357 (alteration in original) (quotation marks and citation omitted). In much the same vein, despite any disagreements this

Court may have with the onerous procedural requirements established by § 2255, it "does not have license to question" those requirements "on policy grounds." *Tyler*, 533 U.S. at 663 n.5.

B. The Phrases "New Right" and "New Rule" Are Not Interchangeable.

In his supplemental brief, Petitioner raises a potential third approach to defining what qualifies as a newly recognized right. Def.'s Supp. Br. 2-8. He argues that the phrase "new right" is interchangeable with the phrase "new rule" as used in § 2255(h)(2) and the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989). *Id.* at 3, 7. This interpretation finds support in a handful of cases outside of the Ninth Circuit. *See, e.g.*, *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); *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015). Under this view, a case recognizes a new rule (i.e., a new right) if the result is "not dictated by precedent." *Ezell v. United States*, 778 F.3d 762, 766 (9th Cir. 2015) (quotation marks and citation omitted). A rule is not dictated by precedent if it is "susceptible to debate among reasonable minds," *Butler v. McKellar*, 494 U.S. 407, 415 (1990), and not "apparent to all reasonable jurists," *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quotation marks and citation omitted). Although a case "does not announce a new rule when it is merely an application of the principle that governed a prior decision," it must be an uncontroversial, or "garden variety," application. *Id.* at 1107.

The Court declines to adopt this approach. First, the plain language of § 2255 suggests that a "new rule" is distinct from a "new right." *See Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017) ("We begin, as usual, with the statutory text."). The allegedly interchangeable language comes from textually adjacent parts of the same statute. *Compare* 28 U.S.C. § 2255(f)(3) (requiring a § 2255 petition within one year of a "*right* . . . newly recognized by the Supreme Court") (emphasis added) *with* 28 U.S.C. § 2255(h)(2) (requiring a second or

successive § 2255 petition to contain "a new *rule* of constitutional law") (emphasis added) *and* 28 U.S.C. § 2254 (e)(2)(A)(i) (allowing an evidentiary hearing if petitioner's claim is premised on "a new *rule* of constitutional law") (emphasis added). Importantly, where provisions of the same statute use different terms, it is presumed "that the enacting legislature meant those terms to have at least slightly different meanings." Caleb Nelson, *Statutory Interpretation* 88 (2011). Surely Congress intended that these distinctly-worded provisions—located mere lines apart—would carry different meanings. *Cf. United States v. Cuong Gia Le*, 206 F. Supp. 3d 1134, 1141 (E.D. Va. 2016) ("[B]ecause Congress employed the term 'rule' . . . in other provisions of the AEDPA, there is good reason to think the term 'right' in § 2255(f)(3) means something else.").

Second, the legal and political context within which § 2255(f) was enacted further suggests that the two phrases have different meanings. When AEDPA was drafted in 1996, it was against a backdrop of pre-existing habeas doctrine, including *Teague v. Lane*, 489 U.S. 288 (1989). In *Teague*, the Supreme Court severely limited the circumstances under which a case announcing a "new rule" could be applied retroactively on collateral review. 489 U.S. at 301. As another district court recently observed, "there can be no doubt that Congress was aware of the *Teague* framework when it enacted AEDPA in 1996," not only because *Teague* was the leading case on retroactivity, but because it interprets the very statutory scheme amended by AEDPA and its retroactivity principles are referenced in AEDPA's legislative history. *Cuong Gia Le*, 206 F. Supp. 3d at 1140 (citing H.R. Rep. 104-23, 1995 WL 56412, at *9 (Feb. 8, 1995)). In turn, the choice to adopt the "new rule" language of *Teague* in some parts of AEDPA, such as § 2255(h)(2) and § 2254(e)(2)(A)(i), but to omit it in § 2255(f)(3), strongly suggests that Congress intended the phrases to have different meanings and that it deliberately deviated from the *Teague* framework in its use of the term "right." *See id.* at 1141.

Finally, most district courts to have analyzed the timeliness issue post-*Beckles*, as well as every Court of Appeals, have declined to adopt the "new rule" approach. Indeed, all but one of the district court cases cited by Petitioner in support of his timeliness argument applies a different approach. *See* Def.'s Supp. Br. 9-11 (citing *Sarracino*, 2017 WL 3098262, at *2-3 (applying the principles and reasoning approach); *Reid*, 2017 WL 2221188, at *3-4 (same); *Mock*, 2017 WL 2727095, at *3-4 (same); *Castaneda*, 2017 WL 3448192, at *1-2 (same); *Lowrey v. United States*, No. CR-09-1516, 2017 WL 2348285, at *10-11 (D. Ariz. May 3, 2017) (applying the "new rule" approach). Among post-*Beckles* cases, the Court can find only four opinions applying the new rule analysis. *See United States v. Lowrey*, CV-16-1808, 2017 WL 2348285, at *10-11 (D. Ariz. May 3, 2017) (using the phrase "new rule"); *Autrey*, 2017 WL 2646287, at *3 ("[T]he term 'right' in § 2255(f)(3) is properly interpreted as analogous to a 'new rule' in the *Teague* context."); *Mitchell*, 2017 WL 2275092, at *3 ("[A] right under § 2255(f)(3) must be analogous to a 'new rule' under *Teague*."); *United States v. Russo*, 8:03CR413, 2017 WL 1533380, at *3 (D. Neb. Apr. 27, 2017) ("To determine whether a right has been newly recognized . . . we must inquire whether the Supreme Court announced a 'new rule' within the meaning of the Court's jurisprudence governing retroactivity for cases on collateral review.") (citations omitted)). The relevant authority thus weighs against adopting this third approach.[6]

[6] Moreover, even among those post-*Beckles* courts actually applying the "new rule" approach to the mandatory Guidelines, all but one has concluded that, to render a petitioner's motion timely under § 2255(f)(3), it *would* be required to recognize a new rule. *Compare Autrey*, 2017 WL 2646287, at *4 ("[T]o conclude here that *Johnson* extends to and invalidates § 4B1.2's residual clause is to recognize a 'new' rule."); *Mitchell*, 2017 WL 2275092, at *5 (holding that petitioner sought a "new rule" because *Johnson* "does not dictate that the residual clause of the mandatory Sentencing Guidelines was unconstitutional"); *Russo*, 2017 WL 1533380, at *4 (holding that petitioner's motion failed because it required the court to "create a new rule"); *with Lowery*, 2017 WL 2348285, at *11 ("[T]he application of [*Johnson*'s] holding to other uses of the same [residual] language does not require a new rule.").

II. Even if Petitioner's Motion Were Timely, His Sentence is Not Unconstitutional.

The Court is also not convinced that, even if it concluded that *Johnson* applies to the mandatory Guidelines, Petitioner's sentence would violate his due process rights. That is, regardless of any finding that *Johnson* recognized an applicable right for purposes of the statute of limitations in § 2255(f)(3), it is doubtful whether that new right would afford Petitioner relief on the facts of his case. *See* 28 U.S.C. § 2255(a) (authorizing relief for a prisoner only if his sentence was "imposed in violation of the Constitution or laws of the United States"). The answer to that question depends on how one describes the effect of *Johnson* on the mandatory Guidelines: is the residual clause invalid on its face or only as applied? If the residual clause is facially invalid, then any sentence imposed under the residual clause would be per se unconstitutional. However, if *Johnson* only stands for the proposition that the mandatory Guidelines' residual clause is subject to as-applied vagueness challenges, then the Court must determine whether Petitioner's due process rights have been violated in the present case.[7]

Petitioner assumes that, if this Court concedes *Johnson*'s applicability to the mandatory Guidelines, then it must also find that the residual clause is facially invalid because the identically-worded residual clause of the ACCA was facially invalidated in *Johnson*. *See, e.g.*, Def.'s Supp. Br. 2, 10. This assumption is a stretch given that neither the holding nor dicta in *Johnson* ever discuss the sentencing Guidelines. *But see* 135 S. C.t at 2557, 2560 (referencing four Guidelines cases as part of a general discussion of the residual clause language). More importantly, however, it misconstrues the Supreme Court's reasoning in *Johnson*. Although the Court facially invalidated the ACCA's residual clause despite the fact that some conduct might

[7] This uncertainty about the precise relevance of *Johnson* to the case at bar only serves to reinforce the Court's conclusion in Part I: if the *Johnson* court "recognized" a new right retroactively applicable to the mandatory Guidelines on collateral review, then why have lower courts consistently struggled to describe the actual scope and substance of that right?

"clearly fall[ ] within the provision's grasp," 135 S. Ct. at 2561, that conclusion does not dictate that the mandatory Guidelines' residual clause cannot be saved by its straightforward application to robbery. There are two important differences with respect to the Guidelines.

First, the ACCA did not include commentary. As the majority in *Johnson* effectively illustrated, virtually every application of the ACCA residual clause, unlike that contained in the mandatory Guidelines, could be contested. *See* 135 S. Ct. at 2560 ("[M]any of the cases the . . . dissent deem easy turn out not to be so easy after all."). Second, *Johnson* left untouched the enumerated felonies clause of § 4B1.2, the ACCA feature most analogous to the commentary. Petitioner does not contend, nor could he, that the enumerated felonies clause is void for vagueness. Since the Supreme Court has clearly held that the commentary to the mandatory Guidelines is authoritative, *Stinson v. United States*, 508 U.S. 36, 38 (1993), and the commentary thus functions in the same manner as the valid enumerated felonies clause of the ACCA, *Johnson* almost surely does not render the residual clause facially invalid.

As applied to Petitioner's robbery convictions, the residual clause is constitutional because robbery is named as a crime of violence in the commentary. *See* U.S.S.G. § 4B1.2, app. n.2 (1995) ("Crime of violence includes . . . robbery."). The only court within the Ninth Circuit to have addressed this issue upheld the residual clause on that basis. In *Castaneda*, Judge Alex Kozinski, sitting by designation in the Central District of California, rejected a nearly identical as-applied challenge to a conviction for federal armed bank robbery. 2017 WL 3448192, at 1*-2. Judge Kozinski explained that the *Johnson* court's overriding concerns about adequate notice and arbitrary enforcement are not implicated in the context of a robbery conviction. *Id.* at *1-2. This is so, he wrote, because "robbery is explicitly named as a crime of violence in the application note to the career offender guideline." *Id.* at *2. Since "commentary in the

Guidelines Manual that interprets or explains a guideline is authoritative," *id.* (quoting *Stinson*, 508 U.S. at 38), and "Ninth Circuit precedent at the time established that federal robbery . . . [was] [a] crime[ ] of violence under the then-existing Guidelines," *id.* (citing *United States v. McDougherty*, 920 F.2d 569, 573-73 (9th Cir. 1990) and *United States v. Selfa*, 918 F.2d 749, 751-52 (9th Cir. 1990)), the petitioner "had plenty of notice," *id.*

Justices Ginsburg and Sotomayor relied on an identical analysis in their *Beckles* concurrences. In *Beckles*, the defendant's predicate crime—possessing a sawed-off shotgun as a felon—was also explicitly named in the commentary accompanying the Guidelines' residual clause. *See* U.S.S.G. § 4B1.2(a), app. n.1 (2006) ("Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) is a crime of violence") (internal quotation marks omitted). Justice Ginsburg maintained that the defendant could not make a void for vagueness challenge because his conduct was clearly prescribed by the commentary. *Beckles*, 137 S. Ct. at 898 (Ginsburg, J., concurring in the judgment). Since the Guidelines' commentary is "authoritative," she explained, the defendant "cannot . . . claim that § 4B1.2(a) was vague as applied to him [nor] . . . as applied to the conduct of others." *Id.* (citing *Stinson*, 508 U.S. at 38 and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010)). As Justice Sotomayor added, *Johnson* "affords Beckles no relief because the commentary under which was sentenced was not unconstitutionally vague." *Id.* (Sotomayor, J., concurring in the judgment); *see also United States v. Miller*, No. 16-2229, 2017 WL 3658833, at *4-6 (10th Cir. Aug. 25, 2017) (denying petitioner's § 2255 motion on the merits while citing and relying on the exact same analysis as Justice Ginsburg, Justice Sotomayor, and Judge Kozinski).

Although the residual clause, standing alone, might be unconstitutional, that does not mean that the commentary must be voided as well. It is true that the commentary has no

freestanding authority and cannot, absent the anchoring text of the residual clause, form the basis of a Career Offender designation. *Stinson*, 508 U.S. at 38, 45; *see also United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (holding that when a "conflict exists between the text and the commentary . . . the text of the guidelines governs"). A court, however, is not required to excise the residual clause before considering its application note. As Justice Ginsburg explained in *Beckles*, "excising the problematic provision *first* and considering the illustrative language *second* flip[s] the normal order of operations in adjudicating vagueness challenges." 137 S. Ct. at 897 n.* (Ginsburg, J., concurring in the judgment); *see also Castaneda*, 2017 WL 3448192, at *2 (making the same point). To the contrary, the Supreme Court has "routinely rejected, in a variety of contexts, vagueness claims where a clarifying construction rendered an otherwise enigmatic provision clear as applied to the challenger." 137 S. Ct. at 897 n.* (Ginsburg, J., concurring in the judgment) (citations omitted); *see also Castaneda*, 2017 WL 3448192, at *2 ("Clarifying constructions save otherwise vague statutes from vagueness challenges.") (citing *Bell v. Cone*, 543 U.S. 447, 453-60 (2005); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 500-02 (1982)). Thus, even if Petitioner satisfied the requirements of § 2255(f)(3), the Court is not persuaded that, as applied here, the Guidelines' residual clause is unconstitutional.

III. Petitioner is Entitled to a Certificate of Appealability.

The Court must lastly consider whether to issue Petitioner a certificate of appealability. *See* R. Governing Section 2255 Cases 11 ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). A certificate of appealability is warranted when "reasonable jurists could debate the district court's resolution." *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). This standard "requires something more than the absence of frivolity but something less than a merits determination." *Id.* While the Court believes that its conclusions

are supported by both law and fact, the unsettled and contested nature of *Johnson*'s significance to the mandatory Guidelines is such that reasonable jurists could debate their merit. A certificate of appealability is therefore warranted.

CONCLUSION

For the foregoing reasons, Petitioner's motion to vacate or correct his sentence under 28 U.S.C. § 2255 is DENIED and the Government's motion to dismiss is GRANTED.

It is so ORDERED and DATED this 18th day of October, 2017.

s/ Michael J. McShane
Michael J. McShane
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WARREN HUGHES NUNN, Defendant-Appellant.	No. 18-35136 D.C. Nos. 3:16-cv-01155-MO 3:99-cr-00219-MO-3 District of Oregon, Portland ORDER

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

The government's motion for summary affirmance (Docket Entry No. 25) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019). Contrary to Nunn's argument, our decision in *Blackstone* is not "clearly irreconcilable" with *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. WARREN HUGHES NUNN, Defendant.	No. 3:99-cr-00219-MO-3 February 16, 2018 Portland, Oregon

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT CHIEF JUDGE

we know that guidelines can be vague because *Beckles* and *Johnson* tell us that the standard is do they fix sentences. It's not are they guidelines or are they statutes. It's do they fix sentences. And so that's really the standard that we should be judging does vagueness scrutiny apply.

That was very fast.

THE COURT: Thank you.

MS. SHOEMAKER: Your Honor, may I add one thing? It's not in response to what Ms. Daily says, but it was something else I think in response to your question earlier about whether or not if you could apply the rule to the guidelines, would that be possible.

And I think it's further distinguished because in the guidelines context we have the commentary that also applied, went along with the residual clause. So it's not just a matter of looking solely at the residual clause here, but you would also have to look at it as it's interpreted by the commentary. And so in every given case, you would be asking, well, is this unconstitutional as applied or is it unconstitutional as a whole? So I think that's just yet another distinction between the guidelines context versus the ACC.

THE COURT: Thank you.

I appreciate the arguments here. I consider it a difficult question, but in my view, I think the principal question I have to decide is -- Well, first let me back up.

I think that it's clearly possible that a holding by the Supreme Court has to be read as announcing a new rule beyond the confines of its bare facts. So I wouldn't say that the rule should be that, you know, if the Supreme Court decides that Nebraska has a determinative sentencing scheme that's unconstitutionally -- unconstitutional in some way, that Oklahoma has to wait for the Supreme Court to say the same thing about Oklahoma if their schemes are the same. So I think it's pretty clear that you have to read the Supreme Court opinion to decide, well, what is the rule being announced here? And that rule might extend beyond the bare facts of a case.

In this case, the question then is, well, what do we have here? Do we have a rule that should be cabined by its setting, the Armed Career Criminal Act, or at a minimum its setting, a residual clause in a statute that creates minimum mandatory sentencing and enhanced maximum sentencing, or should the rule be one that applies outside that setting to, for example, mandatory guidelines under the career offender provision.

And in my view, I think that's -- I think whether *Johnson* applies in this setting is an open question. It's not one that is clearly within the rule announced in *Johnson*. And because of that, I think that really the way to think about this petition is that it's premature. It's late, yes. We all agree that it's late unless a new rule has been announced, and

in my view, *Johnson* isn't a new rule that has been announced that covers our setting, not because I'm unwilling to read *Johnson* beyond its bare setting, but because this setting is qualitatively different enough in ways that matter under the rationale in *Johnson* to fail to announce a new rule that covers our case, and therefore it's untimely for lack of a new rule that would otherwise toll its untimeliness, given the date of the judgment in this case.

Thank you very much.

Anything further from petitioner today?

MS. DAILY: Will there be a written ruling?

THE COURT: No.

MS. DAILY: Thank you.

THE COURT: For the United States?

MS. SHOEMAKER: Thank you, Your Honor, nothing.

THE COURT: We'll be in recess.

THE CLERK: All rise. Court is in recess.

(Proceedings concluded.)

NOT FOR PUBLICATION

FILED

DEC 17 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES CHRIS COLASANTI, Defendant-Appellant.	No. 17-35779 D.C. Nos. 6:16-cv-01235-MC 6:96-cr-60132-MC-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Submitted December 11, 2019**

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Federal prisoner James Chris Colasanti appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate his sentence. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Colasanti contends that the district court abused its discretion by considering the timeliness of his section 2255 motion. We conclude that the government did not deliberately waive a statute of limitations defense and the district court did not abuse its discretion by considering the timeliness of the motion. *See Day v. McDonough*, 547 U.S. 198, 202, 207-10 (2006) (district court may consider the timeliness of a habeas petition sua sponte if parties are given fair notice and an opportunity to present their positions).

Colasanti next asserts that his section 2255 motion is timely because he filed it within one year of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and the right recognized in *Johnson* applies to the mandatory career offender guideline under which he was sentenced. Colasanti's reliance on *Johnson* is foreclosed because "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." *United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019). Contrary to Colasanti's argument, our decision in *Blackstone* is not "clearly irreconcilable" with *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Accordingly, the district court properly concluded that section 2255(f)(3) does not apply and Colasanti's motion is untimely. *See* 28 U.S.C. § 2255(f)(1).

In light of this disposition, we do not reach the parties' remaining

arguments.

The government's motion for summary affirmance is denied as moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

JAMES CHRIS COLASANTI,

Defendant/Petitioner.

No. 6:96-cr-60132-MC

OPINION AND ORDER

MCSHANE, Judge:

Petitioner, James Chris Colasanti, is currently serving a 188-month sentence imposed pursuant to § 4B1.2(a)(2) of the United States Sentencing Guidelines ("Guidelines").[1] On June 23, 2016, he filed a motion to vacate or correct his sentence under 28 U.S.C. § 2255, arguing that the principles set forth in *Johnson v. United States*, 135 S. Ct. 2551 (2015), render the language found in the mandatory Guidelines provision governing his sentence constitutionally deficient. The Government has since moved to dismiss his motion. Because the court in *Johnson* did not recognize a new right that would apply to the language of the mandatory Guidelines, Petitioner's motion is DENIED as untimely. The Government's motion is GRANTED.

BACKGROUND

In 1996, Petitioner pled guilty to three counts of federal unarmed bank robbery in violation of 18 U.S.C. § 2113(a). J. and Commitment 1. The presentence report determined that, under the then-mandatory Guidelines, his bank robbery offense and two prior convictions for California robbery qualified as "crimes of violence" pursuant to § 4B1.2(a)(2) and that he was a

[1] When Petitioner was sentenced in 1997, the Guidelines were still mandatory. *See United States v. Booker*, 543 U.S. 220 (2005).

Career Offender under § 4B1.1. Presentence Report ¶ 53. The district court applied the Career Offender enhancement and sentenced Petitioner to 188 months' imprisonment—the upper end of his mandatory 151 to 188-month Guidelines range. J. and Commitment 1. Without the career offender finding, Petitioner's range would have been 120 to 150 months. Presentence Report ¶ 52. Petitioner is currently serving his sentence in federal prison and has a projected release date of November 3, 2017. Mem. in Supp. of Def.'s Mot. to Vacate or Correct Sentence 3.

Petitioner now moves the Court to vacate or correct his sentence pursuant to 28 U.S.C. § 2255. Def.'s Mot. to Vacate or Correct Sentence 1. He contends that when the Supreme Court struck down the residual clause of the Armed Career Criminals Act ("ACCA") as void for vagueness in *Johnson*, it recognized a new right retroactively applicable to sentences imposed under the identically-worded residual clause of the mandatory Guidelines. *Id.* at 3-4. Applying this right to the Guidelines, he argues that the residual clause is now deemed unconstitutionally vague and, as such, his Career Offender designation violates his due process rights. *Id.* Without the residual clause, he maintains, his convictions for federal bank robbery and California robbery no longer qualify as crimes of violence under § 4B1.2(a) and the protections of § 2255 entitle him to relief from his classification as a Career Offender. *Id.* at 5.

The Government opposes Petitioner's motion and seeks its dismissal on two grounds. Gov't Mot. to Dismiss and Answer 3-5. First, it contends that the right recognized in *Johnson* does not apply to the residual clause of the mandatory Guidelines. *Id.* at 3. Instead, *Johnson* is limited to sentences imposed under the ACCA. *Id.* Second, the Government argues that, even if there is a "colorable argument" that *Johnson* does apply to the mandatory Guidelines, the residual clause is still constitutional as applied to the facts of this case. *Id.* at 4-5. In particular, it asserts that the due process concerns animating the Supreme Court's decision in *Johnson* are

absent because robbery is explicitly named as a crime of violence in the application note to the Career Offender provision. *Id.*

DISCUSSION

Under 28 U.S.C. § 2255, a prisoner may move to have his sentence vacated or corrected if it "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). A motion pursuant to § 2255 must be filed within one year from the date on which a petitioner's conviction becomes final, unless an exception applies. *Id.* § 2255(f)(1). Petitioner relies on the exception at § 2255(f)(3) to render his motion timely. Def.'s Mot. to Vacate or Correct Sentence 5. Under § 2255(f)(3), a petitioner's motion is timely if (1) it "assert[s] . . . [a] right . . . newly recognized by the Supreme Court," *id.* § 2255(f)(3), (2) it is filed within one year from "the date on which the right asserted was initially recognized by the Supreme Court," *id.* § 2255(f)(3), and (3) the Supreme Court or controlling Court of Appeals has declared the right retroactively applicable on collateral review, *Dodd v. United States*, 545 U.S. 353, 358-59 (2005). As both the text of § 2255(f)(3) and Supreme Court precedent make clear, only the Supreme Court may "recognize" a new right under § 2255(f)(3). *Dodd*, 545 U.S. at 357-59.

The present case turns most immediately on whether the right recognized by the Supreme Court in *Johnson* is the same one asserted by Petitioner. If the Supreme Court has yet to recognize the asserted right, then Petitioner's motion is time barred by § 2255(f)(1). If, however, *Johnson* did recognize the asserted right, then Petitioner's claim is timely under § 2255(f)(3) and he must be resentenced unless the Guidelines' residual clause, as applied in this case, can survive constitutional scrutiny under *Johnson* or, in the alternative, his Career Offender designation finds support in another provision of § 4B1.2. Although the Court finds that Petitioner's motion is time barred under § 2255(f)(1), it further concludes that, even if *Johnson* did recognize an

applicable right within the meaning of § 2255(f)(3), that right, as applied in this case, would not render his Guidelines sentence unconstitutional.

I. Petitioner's Motion is Time Barred.

A. The Court May *Sua Sponte* Consider the Timeliness of Petitioner's Motion.

As a threshold matter, Petitioner asserts that, in failing to raise the issue in any pleading, the Government has waived its right to challenge the timeliness of his motion.[2]

In general, a party waives any affirmative defense, such as a statute of limitations, not raised in its first responsive pleading. *See* Fed. R. Civ. P. 8(c); *see also Day v. McDonough*, 547 U.S. 198, 207-09 (2006); *Morrison v. Mahoney*, 399 F.3d 1042, 1046-47 (9th Cir. 2005). This general rule, however, is subject to exceptions. In the Ninth Circuit, for example, a party may raise an affirmative defense after an initial pleading if the other party is not prejudiced. *See Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). The Supreme Court has also held that, in the context of federal habeas petitions, a district court may "consider, *sua sponte*, the timeliness" of a petition if the parties are given "fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 207-09; *see also Shelton v. United States*, 800 F.3d 292, 294 (6th Cir. 2015) (extending *Day* to § 2255 context).

Without parsing the ambiguous language of the Government's pleading, the Court believes it is appropriate and fair to *sua sponte* consider the timeliness of Petitioner's motion. Petitioner was given a full opportunity to argue timeliness at oral arguments, and was

[2] Motions pursuant to § 2255 are governed by both the Federal Rules of Civil Procedure ("Federal Rules") and the Rules Governing Section 2255 Cases ("2255 Rules"). *See* Fed. R. Civ. P. 81(a)(4) ("These rules apply to proceedings for habeas corpus . . . to the extent that the practice in those proceedings . . . is not specified in . . . the Rules Governing Section 2255 Cases . . . ."). Specifically, Rule 12 of the latter makes the Federal Rules applicable to § 2255 petitions "to the extent they are not inconsistent with" the 2255 Rules. R. Governing Section 2255 Cases 12; *see also Woodford v. Garceau*, 538 U.S. 202, 208 (2003). Since the 2255 Rules make not mention of affirmative defenses or waiver, the Federal Rules govern this particular issue.

subsequently given notice and granted leave to file supplemental pleadings on the matter of timeliness. He cannot now claim to be prejudiced.

B. The Right Recognized by *Johnson* is Not the Right Asserted by Petitioner.

As noted above, the determinative issue in this case is whether *Johnson* recognized the specific right "asserted" by Petitioner. 28 U.S.C. § 2255(f)(3). It is clear, and the parties agree, that the Supreme Court's recent opinion in *Beckles v. United States*, 137 S. Ct. 886 (2017), does not directly control this question. In *Beckles*, the Supreme Court clarified that the pre-*Booker* advisory Guidelines, including the residual clause of § 4B1.2(a)(2), "are not subject to vagueness challenges under the Due Process Clause." 137 S. Ct. at 890. In so doing, the Court repeatedly and explicitly emphasized that its holding was limited to the *advisory* sentencing regime. *See id.* at 890, 892, 894, 895, 896, 897; *see also id.* at 903 n.4 (Sotomayor, J., concurring in judgment) (noting that the majority opinion "leaves open" the question of whether the mandatory Guidelines are subject to void-for-vagueness challenges). Whereas the ACCA "fix[es] the permissible range of sentences," it reasoned, the advisory Guidelines "merely guide the exercise of the court's discretion." *Id.* at 892. The pre-*Booker* sentencing Guidelines, the Court thus concluded, "do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894-95.

Nevertheless, a finding that *Beckles* does not, by its terms, *foreclose* this Court from reading *Johnson* as recognizing the right asserted by Petitioner does not resolve whether *Johnson* did, in fact, recognize such a right. *See United States v. Castaneda*, 91-00582-AK, 2017 WL 3448192, at *2 (C.D. Cal. June 19, 2017) (Kozinski, J., sitting by designation) (explaining that, although "*Beckles* does not preclude [petitioners] from arguing that the mandatory Guidelines are subject to . . . *Johnson*," it also does not end the analysis). That inquiry depends on how one defines what qualifies as a newly recognized right. *See United States v. Autrey*, No. 1:99–cr–

467, 2017 WL 2646287, at *3 (E.D. Va. June 19, 2017) ("[E]mbedded in the parties' dispute on timeliness is a question about the meaning of the term 'right' as used in § 2255(f)(3)."); *Mitchell v. United States*, No. 3:00-CR-00014, 2017 WL 2275092, at *3 (W.D. Va. May 24, 2017) (framing the parties' dispute as turning on "the meaning of 'right' under § 2255(f)(3) and its application to *Johnson*"). While the Supreme Court has yet to provide clear guidance on what qualifies as a newly recognized right, lower courts have adopted two contrasting approaches.

First, a newly recognized right could be limited to the "narrow rule announced in a Supreme Court case." *Autrey*, 2017 WL 2646287, at *3. Under this view, the right recognized by *Johnson* is limited to its specific holding: that the ACCA's residual clause is unconstitutionally vague. *See, e.g.*, *Davis v. United States*, No. 16-C-747, 2017 WL 3129791, at *5 (E.D. Wis. July 21, 2017) ("The only right recognized in Johnson was established in its holding."). By asking lower courts to invalidate the mandatory Guidelines' residual clause, petitioners are impermissibly requesting that these courts recognize a right not established by the narrow holding in *Johnson*. *See, e.g.*, *Raybon v. United States*, No. 16-2522, 2017 WL 3470389, at *3 (6th Cir. Aug. 14, 2017) ("[Petitioner's] untimely motion cannot be saved under § 2255(f)(3) because he is asking for the recognition of a new right by this court.") (internal quotation marks and citation omitted); *Hirano v. United States*, No. 16-00686 ACK, 2017 WL 2661629, at *7 (D. Haw. June 20, 2017) ("[T]he Court is not persuaded by Petitioner's argument that his claim requires only a simple application, rather than an extension, of *Johnson*.").

A second approach is the broad approach that Petitioner would have the Court adopt. Under the broad approach, a newly recognized right could include, or flow from, the *principles* announced in a Supreme Court case. Under this view, a right is "more analogous to the reasoning of a case." *Mitchell*, 2017 WL 2275092, at *3. For example, the right recognized in

Johnson "could be the fundamental prohibition against unconstitutional vagueness in criminal [directives]," *Autrey*, 2017 WL 2646287, at *3, or "that no individual could face a fixed criminal sentence on the basis of vague language identical to that in the residual clause of the ACCA," *Mitchell*, 2017 WL 2275092, at *3. Employing this broader construction, the right recognized by the Supreme Court in *Johnson*, at least when considered in the context of its decisions in *Booker* and *Beckles*, is flexible enough to encompass the identically-worded residual clause of the mandatory Guidelines. *See, e.g.*, *Sarracino v. United States*, No. 16-734 MCA/CG, 2017 WL 3098262, at *7 (D.N.M. June 26, 2017). ("Considering *Johnson*, *Beckles*, and *Booker*, the Court finds *Johnson* applies to the mandatory Guidelines.").

This second approach is the one adopted, at least implicitly, by the handful of district courts to have found that the right recognized by *Johnson* does extend to the mandatory Guidelines.[3] *See United States v. Mock*, No. 2:02-CR-0102-RHW, 2017 WL 2727095 (E.D. Wash. July 5, 2017); *United States v. Savage*, 231 F. Supp. 3d 542 (C.D. Cal. 2017) (pre-*Beckles*); *United States v. Tunstall*, No. 3:00-cr-050, 2017 WL 2619336 (S.D. Ohio June 16, 2017) (magistrate report and recommendations); *Reid v. United States*, No. 03–CR–30031–MAP, 2017 WL 2221188 (D. Mass. May 18, 2017); *cf. Castaneda*, 2017 WL 3448192 (adopting a principles-based approach, but still finding that *Johnson* did not recognize the right asserted by petitioner). It is also the approach employed by Chief Judge Gregory of the Fourth Circuit in his dissent from the court's decision in *United States v. Brown*, No. 16-7056, 2017 WL 3585073

[3] The First, Second, Third, Fourth, Sixth, and Tenth Circuits have also granted petitioners leave to file second or successive petitions challenging their mandatory-Guideline sentences based on the right recognized in *Johnson*. *See United States v. Moore*, No. 16-1612, 207 WL 4021654 (1st Cir. Sept. 13, 2017); *In re Hoffner*, No. 15-2883, 2017 WL 3908880 (3rd Cir. Sept. 7, 2017); *Vargas v. United States*, No. 16-2112 (2d Cir. May 8, 2017); *In re Hubbard*, 825 F.3d 225 (4th Cir. 2016) (pre-*Brown*); *In re Patrick*, 833 F.3d 584 (6th Cir. 2016) (pre-*Beckles*); *In re Encinias*, 821 F.3d 1224 (10th Cir. 2016) (same). These cases provide little guidance here, however, since the filing of a second or successive petition under § 2255(h)(2) is permitted upon a mere showing of "possible merit"—a relatively easy bar to clear. 825 F.3d at 232; *see also Cooper v. Brown*, 510 F.3d 870, 917-18 (9th Cir. 2007) (holding that the Ninth Circuit only requires a "prima facie showing" of compliance with § 2255 and not "actual[ ] . . . satisf[action]" of the statutory requirements).

(4th Cir. Aug. 21, 2017). "A newly recognized right," Judge Gregory explained, "is more sensibly read to include the reasoning and principles that explain it." 2017 WL 3585073, at *13. Applying that reasoning to *Johnson*, he argued that, because the mandatory-Guidelines' residual clause "is identical in text to the ACCA's . . . , enhancements under both clauses were applied using the categorical approach, and the clauses were similarly used to fix . . . applicable sentencing ranges," the petitioner could "rely on the right set forth in *Johnson*." *Id.* at *22.

The Court is persuaded that the narrow approach governs. First, most district courts to have considered the issue, including five within the Ninth Circuit, have employed the narrow approach and held that *Johnson* does not recognize the right to have a sentence calculated without reference to the pre-*Booker* residual clause of § 4B1.2(a)(2). *See, e.g.*, *United States v. Vidrine*, No. 2:95-cr-482, 2017 WL 3822651 (E.D. Cal. Sept. 1, 2017); *United States v. Garcia-Cruz*, No. 96-cr-1908, 2017 WL 3269231 (S.D. Cal. Aug. 1, 2017); *United States v. Beraldo*, No. 3:03-cr-00511, 2017 WL 2888565 (D. Or. July 5, 2017); *Hirano*, 2017 WL 2661629; *Hodges v. United States*, No. C16-1521, 2017 WL 1652967 (W.D. Wash. May 2, 2017); *Davis v. United States*, No. 16-C-747, 2017 WL 3129791 (E.D. Wis. July 21, 2017); *Autrey*, 2017 WL 2646287; *Mitchell*, 2017 WL 2275092. In addition, the only two Courts of Appeals to have considered the issue—the Fourth and Sixth Circuits—have both adopted the same view. *See Brown*, 2017 WL 3585073; *Raybon*, 2017 WL 3470389; *see also United States v. Miller*, No. 16-2229, 2017 WL 3658833 (10th Cir. Aug. 25, 2017) (dismissing on the merits of petitioner's due process claim).

Significantly, in *Beckles*, Justice Sotomayor wrote separately to note, inter alia, that the Supreme Court had yet to take a position on whether the mandatory Guidelines are subject to vagueness challenges. 137 S. Ct. at 903. "The Court's . . . formalistic distinction between mandatory and advisory rules," she explained, "*at least leaves open* the question whether

defendants sentenced [prior to *Booker*] may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (emphasis added) (citation omitted). That question, she continued, "is not presented by this case and I, like the majority, take no position on its appropriate resolution." *Id.* Importantly, as the Fourth Circuit observed in *Brown*, "[i]f the Supreme Court left open the question of whether Petitioner's asserted right exists, [then] the Supreme Court has not 'recognized' that right." 2017 WL 3585073, at *9. Indeed, it is difficult to reconcile both Justice Sotomayor's concurrence and Petitioner's acknowledgment that the majority in *Beckles* deliberately avoided any discussion of the mandatory Guidelines, with his contention that *Johnson*, decided two years earlier, definitively recognized that same right. *See, e.g., United States v. Torres*, CV 16-645 LH/WPL, 2017 WL 3052974, at *3 (D.N.M. June 20, 2017) ("Attempting to reconcile these two concepts . . . reveals that [Petitioner's] motion should be denied.").[4]

Finally, the narrower approach is further supported by the Supreme Court's consistently conservative and literal reading of § 2255. In *Tyler v. Cain*, 533 U.S. 656 (2001), for example, the Court adopted a narrow construction of the procedural language in § 2255(h)(2). It held that the term "made" in the phrase "made retroactive . . . by the Supreme Court," means "held" retroactive by the Supreme Court. 533 U.S. at 663. The appellant, much as Petitioner does here with the phrase "right . . . newly recognized by the Supreme Court," argued that "made" included the lower courts' "application of . . . principles" established by the Supreme Court. *Id.* The Court emphatically rejected this argument, emphasizing that the statutory text vests it, and no other court, with the ability to make a right retroactive. *Id.* This meant that a right could not apply retroactively unless the Supreme Court had unequivocally made it so. "[E]ven if we

[4] As discussed in Part II, *infra*, it is also difficult to give precise contours to the right allegedly recognized in *Johnson*—does it invalidate the residual clause on its face or only as applied—and it is doubtful whether it would invalidate the residual clause as applied to the robbery charges in the present case because there are material differences between the ACCA and Guidelines as applied to robbery.

disagreed with the legislative decision to establish stringent procedural requirements," it concluded, "we do not have license to question the decision on policy grounds." *Id.* at n.5.

Similarly, in *Dodd*, the Supreme Court narrowly interpreted § 2255(f)(3) to require that the one-year statute of limitations begin running as soon as the Supreme Court recognizes a new right and not when that right is made retroactive. 545 U.S. at 357-58. This was true, the Court maintained, even though another court might fail to make a right retroactive within the one-year period. *Id.* at 359. As noted by the dissent, the text is susceptible to a broader, more intuitive reading, wherein the one-year period commences only upon the right being made retroactive. *Id.* at 364 (Stevens, J., dissenting). The majority rejected this view, however, conceding that although its reading could produce "harsh results in some cases," it was "required" by the plain language. *Id.* at 359. "[W]e must presume," the Court concluded, "that [the] legislature says in a statute what it means and means in a statute what it says there." *Id.* 357 (alteration in original) (quotation marks and citation omitted). In much the same vein, despite any disagreements this Court may have with the onerous procedural requirements established by § 2255, it "does not have license to question" those requirements "on policy grounds." *Tyler*, 533 U.S. at 663 n.5.

C. The Phrases "New Right" and "New Rule" Are Not Interchangeable.

In his supplemental brief, Petitioner raises a potential third approach to defining what qualifies as a newly recognized right. Def.'s Supp. Br. 3-8. He argues that the phrase "new right" is interchangeable with the phrase "new rule" as used in § 2255(h)(2) and the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989). *Id.* at 3. This interpretation finds support in a handful of cases outside of the Ninth Circuit.[5] *See, e.g.*, *United States v. Morgan*, 845 F.3d 664,

[5] Although Petitioner suggests that "every circuit to have addressed the issue"—five in total—has adopted the "new rule" analysis, the law in these circuits appears to be less settled than he suggests. Def's Supp. Br. 3 n.1. In the Fourth Circuit, for example, where the "new rule" analysis allegedly governs, the *Brown* court declined to follow that analysis as recently as last month when it found a petitioner's § 2255 motion untimely under an analogous set of

667-68 (5th Cir. 2017); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016); *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015). Under this view, a case recognizes a new rule (i.e., a new right) if the result is "not dictated by precedent." *Ezell v. United States*, 778 F.3d 762, 766 (9th Cir. 2015) (quotation marks and citation omitted). A rule is not dictated by precedent if it is "susceptible to debate among reasonable minds," *Butler v. McKellar*, 494 U.S. 407, 415 (1990), and not "apparent to all reasonable jurists," *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quotation marks and citation omitted). Although a case "does not announce a new rule when it is merely an application of the principle that governed a prior decision," it must be an uncontroversial, or "garden variety," application. *Id.* at 1107.

The Court declines to adopt this approach. First, the plain language of § 2255 suggests that a "new rule" is distinct from a "new right." *See Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017) ("We begin, as usual, with the statutory text."). The allegedly interchangeable language comes from textually adjacent parts of the same statute. *Compare* 28 U.S.C. § 2255(f)(3) (requiring a § 2255 petition within one year of a "*right* . . . newly recognized by the Supreme Court") (emphasis added) *with* 28 U.S.C. § 2255(h)(2) (requiring a second or successive § 2255 petition to contain "a new *rule* of constitutional law") (emphasis added) *and* 28 U.S.C. § 2254 (e)(2)(A)(i) (allowing an evidentiary hearing if petitioner's claim is premised on "a new *rule* of constitutional law") (emphasis added). Importantly, where provisions of the same statute use different terms, it is presumed "that the enacting legislature meant those terms to have at least slightly different meanings." Caleb Nelson, *Statutory Interpretation* 88 (2011). Surely Congress intended that these distinctly-worded provisions—located mere lines apart—would carry different meanings. *Cf. United States v. Cuong Gia Le*, 206 F. Supp. 3d 1134, 1141

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facts. 2017 WL 3585073, at *9. And in *Headbird*, a case out of the Eight Circuit, it was the parties that agreed to use the "new rule" analysis, and the court thus did not give the issue extensive treatment. 813 F.3d at 1095 ("We see no reason to dispute the joint position of the parties.").

(E.D. Va. 2016) ("[B]ecause Congress employed the term 'rule' . . . in other provisions of the AEDPA, there is good reason to think the term 'right' in § 2255(f)(3) means something else.").

Second, the legal and political context within which § 2255(f) was enacted further suggests that the two phrases have different meanings. When AEDPA was drafted in 1996, it was against a backdrop of pre-existing habeas doctrine, including *Teague v. Lane*, 489 U.S. 288 (1989). In *Teague*, the Supreme Court severely limited the circumstances under which a case announcing a "new rule" could be applied retroactively on collateral review. 489 U.S. at 301. As another district court recently observed, "there can be no doubt that Congress was aware of the *Teague* framework when it enacted AEDPA in 1996," not only because *Teague* was the leading case on retroactivity, but because it interprets the very statutory scheme amended by AEDPA and its retroactivity principles are referenced in AEDPA's legislative history. *Cuong Gia Le*, 206 F. Supp. 3d at 1140 (citing H.R. Rep. 104-23, 1995 WL 56412, at *9 (Feb. 8, 1995)). In turn, the choice to adopt the "new rule" language of *Teague* in some parts of AEDPA, such as § 2255(h)(2) and § 2254(e)(2)(A)(i), but to omit it in § 2255(f)(3), strongly suggests that Congress intended the phrases to have different meanings and that it deliberately deviated from the *Teague* framework in its use of the term "right." *See id.* at 1141.

Finally, most district courts to have analyzed the timeliness issue post-*Beckles*, as well as every Court of Appeals, have declined to adopt the "new rule" approach. Indeed, none of the mandatory Guidelines-specific district court cases cited by Petitioner in support of his timeliness argument applied that approach. *See* Def's Supp. Br. 11 (citing *Reid*, 2017 WL 2221188, at *3-4 (applying the principles and reasoning approach); *Sarracino*, 2017 WL 3098262, at *2-3 (same); *Mock*, 2017 WL 2727095, at *3-4 (same); *United States v. Long*, No. 2:16-cv-00464 (C.D. Cal. Sept. 15, 2017) (slip op. at 3) (taking no position); *United States v. Parks*, No. 16-cv-01565,

2017 WL 3732078, at *11-12 (confusing the issues of timeliness and retroactivity and thus taking no position)). Among post-*Beckles* cases, the Court can find only four opinions applying the new rule analysis. *See United States v. Lowrey*, CV-16-1808, 2017 WL 2348285, at *10-11 (D. Ariz. May 3, 2017) (using the phrase "new rule"); *Autrey*, 2017 WL 2646287, at *3 ("[T]he term 'right' in § 2255(f)(3) is properly interpreted as analogous to a 'new rule' in the *Teague* context."); *Mitchell*, 2017 WL 2275092, at *3 ("[A] right under § 2255(f)(3) must be analogous to a 'new rule' under *Teague*."); *United States v. Russo*, 8:03CR413, 2017 WL 1533380, at *3 (D. Neb. Apr. 27, 2017) ("To determine whether a right has been newly recognized . . . we must inquire whether the Supreme Court announced a 'new rule' within the meaning of the Court's jurisprudence governing retroactivity for cases on collateral review.") (citations omitted)). The weight of relevant authority thus goes against adopting this third analytical framework.[6]

II. Even if Petitioner's Motion Were Timely, His Sentence is Not Unconstitutional.

The Court is also not convinced that, even if it concluded that *Johnson* applies to the mandatory Guidelines, Petitioner's sentence would violate his due process rights. That is, regardless of any finding that *Johnson* recognized an applicable right for purposes of the statute of limitations in § 2255(f)(3), it is doubtful whether that new right would afford Petitioner relief on the facts of his case. *See* 28 U.S.C. § 2255(a) (authorizing relief for a prisoner only if his sentence was "imposed in violation of the Constitution or laws of the United States"). The answer to that question depends on how one describes the effect of *Johnson* on the mandatory Guidelines: is the residual clause invalid on its face or only as applied? If the residual clause is

[6] Moreover, even among those post-*Beckles* courts actually applying the "new rule" approach to the mandatory Guidelines, all but one has concluded that, to render a petitioner's motion timely under § 2255(f)(3), it *would* be required to recognize a new rule. *Compare Autrey*, 2017 WL 2646287, at *4 ("[T]o conclude here that *Johnson* extends to and invalidates § 4B1.2's residual clause is to recognize a 'new' rule."); *Mitchell*, 2017 WL 2275092, at *5 (holding that petitioner sought a "new rule" because *Johnson* "does not dictate that the residual clause of the mandatory Sentencing Guidelines was unconstitutional"); *Russo*, 2017 WL 1533380, at *4 (holding that petitioner's motion failed because it required the court to "create a new rule"); *with Lowery*, 2017 WL 2348285, at *11 ("[T]he application of [*Johnson*'s] holding to other uses of the same [residual] language does not require a new rule.").

facially invalid, then any sentence imposed under the residual clause would be per se unconstitutional. However, if *Johnson* only stands for the proposition that the mandatory Guidelines' residual clause is subject to as-applied vagueness challenges, then the Court must determine whether Petitioner's due process rights have been violated in the present case.[7]

Petitioner argues that, if this Court concedes *Johnson*'s applicability to the mandatory Guidelines, then it must also find that the residual clause is facially invalid because the identically-worded residual clause of the ACCA was facially invalidated in *Johnson*. Def.'s Reply Br. 6-10. This argument is a stretch given that neither the holding nor dicta in *Johnson* ever discuss the sentencing Guidelines. *But see* 135 S. C.t at 2557, 2560 (referencing four Guidelines cases as part of a general discussion of the residual clause language). More importantly, however, this argument misconstrues the Supreme Court's reasoning in *Johnson*. The Court held that the residual clause was facially invalid despite the fact that some conduct might "clearly fall[ ] within the provision's grasp." 135 S. Ct. at 2561. No easy cases could save the otherwise defective language. This pronouncement, Petitioner contends, means that, like the unconstitutional provision in the ACCA, the residual clause in the mandatory Guidelines cannot be saved by its straightforward application to robbery. This is wrong for two reasons.

First, the ACCA did not include commentary. As the majority in *Johnson* effectively illustrated, virtually every application of the ACCA residual clause, unlike that contained in the mandatory Guidelines, could be contested. *See* 135 S. Ct. at 2560 ("[M]any of the cases the . . . dissent deem easy turn out not to be so easy after all."). *Johnson* left untouched the enumerated felonies clause of § 4B1.2, the ACCA feature most analogous to the commentary. Petitioner

[7] This uncertainty about the precise relevance of *Johnson* to the case at bar only serves to reinforce the Court's conclusion in Part I: if the *Johnson* court "recognized" a new right retroactively applicable to the mandatory Guidelines on collateral review, then why have lower courts consistently struggled to describe the actual scope and substance of that right?

does not contend, nor could he, that the enumerated felonies clause is void for vagueness. Since the Supreme Court has clearly held that the commentary to the mandatory Guidelines is authoritative, *Stinson v. United States*, 508 U.S. 36, 38 (1993), and the commentary thus functions in the same manner as the valid enumerated felonies clause of the ACCA, *Johnson* almost surely does not render the residual clause facially invalid.

As applied to Petitioner's robbery convictions, the residual clause is constitutional because robbery is named as a crime of violence in the commentary. *See* U.S.S.G. § 4B1.2, app. n.2 (1995) ("Crime of violence includes . . . robbery."). The only court within the Ninth Circuit to have addressed this issue upheld the residual clause on that basis. In *Castaneda*, Judge Alex Kozinski, sitting by designation in the Central District of California, rejected a virtually identical as-applied challenge to a conviction for federal armed bank robbery. 2017 WL 3448192, at 1*-2. Judge Kozinski explained that the *Johnson* court's overriding concerns about adequate notice and arbitrary enforcement are not implicated in the context of a robbery conviction. *Id.* at *1-2. This is so, he wrote, because "robbery is explicitly named as a crime of violence in the application note to the career offender guideline." *Id.* at *2. Since "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative," *id.* (quoting *Stinson*, 508 U.S. at 38), and "Ninth Circuit precedent at the time established that federal robbery and California robbery were crimes of violence under the then-existing Guidelines," *id.* (citing *United States v. McDougherty*, 920 F.2d 569, 573-73 (9th Cir. 1990) and *United States v. Selfa*, 918 F.2d 749, 751-52 (9th Cir. 1990)), the petitioner "had plenty of notice," *id.*

Justices Ginsburg and Sotomayor relied on an identical analysis in their *Beckles* concurrences. In *Beckles*, the defendant's predicate crime—possessing a sawed-off shotgun as a felon—was also explicitly named in the commentary accompanying the Guidelines' residual

clause. *See* U.S.S.G. § 4B1.2(a), app. n.1 (2006) ("Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) is a crime of violence") (internal quotation marks omitted). Justice Ginsburg maintained that the defendant could not make a void for vagueness challenge because his conduct was clearly prescribed by the commentary. *Beckles*, 137 S. Ct. at 898 (Ginsburg, J., concurring in the judgment). Since the Guidelines' commentary is "authoritative," she explained, the defendant "cannot . . . claim that § 4B1.2(a) was vague as applied to him [nor] . . . as applied to the conduct of others." *Id.* (citing *Stinson*, 508 U.S. at 38 and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010)). As Justice Sotomayor added, *Johnson* "affords Beckles no relief because the commentary under which was sentenced was not unconstitutionally vague." *Id.* (Sotomayor, J., concurring in the judgment); *see also United States v. Miller*, No. 16-2229, 2017 WL 3658833, at *4-6 (10th Cir. Aug. 25, 2017) (denying petitioner's § 2255 motion on the merits while citing and relying on the exact same analysis as Justice Ginsburg, Justice Sotomayor, and Judge Kozinski).

Petitioner counters that if the residual clause, standing on its own, would be unconstitutional, then the commentary must be voided as well. Def.'s Reply Br. 9-10. He rightly observes that the commentary has no freestanding authority and thus cannot, absent the anchoring text of the residual clause, form the basis of his Career Offender designation. *Stinson*, 508 U.S. at 38, 45; *see also United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (holding that when a "conflict exists between the text and the commentary . . . the text of the guidelines governs"). He wrongly suggests, however, that the Court must first excise the residual clause, and then consider the application note. Def.'s Reply Br. 9-10. As Justice Ginsburg explained in *Beckles*, "excising the problematic provision *first* and considering the illustrative language *second* flip[s] the normal order of operations in adjudicating vagueness challenges." 137 S. Ct.

at 897 n.* (Ginsburg, J., concurring in the judgment); *see also Castaneda*, 2017 WL 3448192, at *2 (making the same point). To the contrary, the Supreme Court has "routinely rejected, in a variety of contexts, vagueness claims where a clarifying construction rendered an otherwise enigmatic provision clear as applied to the challenger." 137 S. Ct. at 897 n.* (Ginsburg, J., concurring in the judgment) (citations omitted); *see also Castaneda*, 2017 WL 3448192, at *2 ("Clarifying constructions save otherwise vague statutes from vagueness challenges.") (citing *Bell v. Cone*, 543 U.S. 447, 453-60 (2005); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 500-02 (1982)). Thus, even if Petitioner satisfied the requirements of § 2255(f)(3), the Court is not persuaded that, as applied here, the Guidelines' residual clause is unconstitutional.

III. Petitioner is Entitled to a Certificate of Appealability.

The Court must lastly consider whether to issue Petitioner a certificate of appealability. *See* R. Governing Section 2255 Cases 11 ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). A certificate of appealability is warranted when "reasonable jurists could debate the district court's resolution." *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). This standard "requires something more than the absence of frivolity but something less than a merits determination." *Id.* While the Court believes that its conclusions are supported by both law and fact, the unsettled and contested nature of *Johnson*'s significance to the mandatory Guidelines is such that reasonable jurists could debate their merit. A certificate of appealability is therefore warranted.

CONCLUSION

For the foregoing reasons, Petitioner's motion to vacate or correct his sentence under 28 U.S.C. § 2255 is DENIED and the Government's motion to dismiss is GRANTED.

It is so ORDERED and DATED this 26th day of September, 2017.

s/Michael J. McShane
Michael J. McShane
United States District Judge

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID ERNEST GILDERSLEEVE, Defendant-Appellant.	No. 17-35979 D.C. Nos. 3:16-cv-01234-HZ 3:01-cr-00168-HZ-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, Presiding

Submitted December 11, 2019**

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Federal prisoner David Ernest Gildersleeve appeals from the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate his sentence. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Gildersleeve contends that the district court erred by denying his section 2255 motion as untimely. He asserts that his section 2255 motion is timely because he filed it within one year of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and the right recognized in *Johnson* applies to the mandatory career offender guideline under which he was sentenced. This argument is foreclosed because "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." *United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019). Contrary to Gildersleeve's contention, our decision in *Blackstone* is not "clearly irreconcilable" with *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Accordingly, the district court properly concluded that section 2255(f)(3) does not apply and that Gildersleeve's motion is untimely. *See* 28 U.S.C. § 2255(f)(1).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID ERNEST GILDERSLEEVE

Defendant.

No. 3:01-cr-00168-HZ

OPINION & ORDER

Billy J. Williams
United States Attorney
Scott E. Bradford
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Portland, Oregon 97202

Attorneys for United States of America

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Attorney for Defendant

HERNÁNDEZ, District Judge:

Defendant is currently serving a 235-month sentence imposed on April 14, 2003, under the pre-*Booker* mandatory Guidelines. The court enhanced Defendant's sentence, based in part, on his prior convictions for Oregon Burglary I, Robbery II, and Robbery III each qualifying as a "crime of violence" under U.S.S.G. §§ 4B1.1 and 4B1.2. On June 23, 2016, Defendant filed his motion to vacate or correct his sentence under 28 U.S.C. § 2255, arguing that in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the residual clause of the mandatory Guidelines used to enhance his sentence was unconstitutionally void for vagueness. *See* Mot. to Vacate, Set Aside or Correct Sentence, ECF 32 [hereinafter "*Johnson* Motion"].The Government moves to dismiss Defendant's *Johnson* Motion on the ground that it is untimely filed under 28 U.S.C. § 2255(f)(3). Because Defendant's motion does not satisfy § 2255(f)(3), the Government's motion to dismiss is granted and Defendant's *Johnson* Motion is denied.

BACKGROUND

In February 2003, Defendant pled guilty to one count of federal armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d). Def.'s Mem. in Support of *Johnson* Motion, Ex. A, ECF 40. As part of that plea agreement, Defendant agreed that he was subject to enhanced punishment under U.S.S.G. §§ 4B1.1 and 4B1.2. *Id.* at 10. The Presentence Report

recommended that Defendant's sentence be enhanced because his conviction for federal armed bank robbery, as well as his prior Oregon convictions for Burglary I, Robbery II, and Robbery III each qualified as a "crime of violence" under the residual clause of the Guidelines. Def.'s Mem. in Support of *Johnson* Motion 2–3. Defendant's offense level under a criminal history category of VI was raised from level 24 to level 31. *Id.* As a result, his mandatory Guidelines range was 188–235 months. *Id.* Pursuant to the plea agreement, the parties recommended a 235-month sentence at the high-end of the range and the court imposed the recommended sentence. *Id.*

On June 23, 2017, Defendant filed his *Johnson* Motion seeking to vacate, set aside, or correct his sentence. In *Johnson*, the Supreme Court determined that the residual clause of the Armed Career Criminal Act ("ACCA") was void for vagueness. 135 S. Ct. at 2563. Defendant argues that the identically-worded residual clause of the mandatory Guidelines is also void for vagueness under *Johnson*. Accordingly, Defendant claims that his prior Oregon convictions cannot support the application of mandatory sentence enhancements under the Guidelines.

In response, the Government moves to dismiss Defendant's *Johnson* motion as time-barred. Under 28 U.S.C. § 2255(f), a motion to vacate or correct a sentence must be filed within one year from the date on which the sentence became final or from the date that the Supreme Court initially recognizes the right asserted by the movant. The Government argues that Defendant's *Jonson* Motion is untimely because he was sentenced in 2003 and the right recognized by the Supreme Court in *Johnson* is distinct from the one asserted by Defendant. Specifically, the Government contends that the narrow holding of *Johnson* applied only to the ACCA and did not encompass a new right applicable to the mandatory Guidelines.

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STANDARDS

Under 28 U.S.C. § 2255(a), a prisoner may move to vacate, set aside, or a correct a sentence if it "was imposed in violation of the Constitution or laws of the United States." A one-year limitation period applies to motions filed under this section. 28 U.S.C. § 2255(f). The limitations period runs, in relevant part, from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]" 28 U.S.C. § 2255(f)(3).

DISCUSSION

The question before the Court is whether the Supreme Court recognized in *Johnson* a right to have a sentence calculated without reference to the pre-*Booker* residual clause of the mandatory Guidelines. Other courts in this district have considered the same legal question in cases with very similar factual backgrounds involving bank robbery convictions. *See United States v. Beraldo*, No. 3:03-cr-00511-AA, 2017 WL 2888565 (D. Or. July 5, 2017); *United States v. Colasanti*, No. 6:96-cr-60132-MC, 2017 WL 4273300 (D. Or. Sept. 26, 2017); *United States v. Patrick*, No. 6:98-cr-60099-MC-1, 2017 WL 4683929 (D. Or. Oct. 18, 2017). Each of those decisions concluded that *Johnson* did not recognize the right that the defendants claimed, and each dismissed the defendants' motions as time-barred.

For example, in *Colasanti*, the defendant pled guilty to three counts of federal unarmed bank robbery and he had two prior convictions for California robbery, all of which qualified as "crimes of violence" under the mandatory Guidelines. 2017 WL 427330, at *1. The defendant in that case also argued that *Johnson* applied to the mandatory Guidelines. *Id.* Following a growing consensus of cases, the *Colasanti* court adopted a narrow approach for determining whether the Supreme Court had recognized a new right. *Id.* at *4. Applying the majority's narrow approach,

the court concluded that "*Johnson* d[id] not recognize the right to have a sentence calculated without reference to the pre-*Booker* residual clause of § 4B1.2(a)(2)." *Id.* (collecting cases).

Moreover, both the defendant in *Colasanti* and the instant case rely on *Beckles v. United States*, 137 S. Ct. 886 (2017), to support their claim that *Johnson* recognized a new right applicable to the mandatory Guidelines. In *Beckles*, the Supreme Court held that the post-*Booker* advisory guidelines were not subject to void-for-vagueness challenges under *Johnson*. *Id.* at 892. The *Beckles* Court reasoned that there was a constitutionally significant distinction between "statutes fixing sentences" such as the ACCA and the advisory Guidelines which do not fix the permissible range of sentences. *Id.* at 892–93. The Supreme Court concluded that the advisory guidelines "merely guide the exercise of a court's discretion" and are thus "not subject to a vagueness challenge under the Due Process Clause." *Id.* at 893. Justice Sotomayor separately wrote that the majority opinion "leaves open the question of whether defendants sentenced [prior to *Booker*]—that is, during the period in which the Guidelines did 'fix the permissible range of sentences,'— may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (internal citation omitted). Justice Sotomayor continued that "[t]hat question is not presented by this case and I, like the majority, take no position on its appropriate resolution." *Id.*

The court in *Colasanti* found that while *Beckles* "left open" the question above, it did not resolve whether *Johnson* recognized such a right regarding the mandatory Guidelines. 2017 WL 4273300, at *3. The *Colasanti* court limited *Johnson* to its specific holding "that the ACCA's residual clause is unconstitutionally vague." *Id.* at *3. The court elaborated that "[b]y asking lower courts to invalidate the mandatory Guidelines' residual clause, petitioners are impermissibly requesting that these courts recognize a right not established by the narrow

holding in *Johnson*." *Id.* at *3 (citing *Raybon v. United States*, 867 F.3d 625, 630–31 (6th Cir. 2017)).

The Court is persuaded by the reasoning in *Colasanti* and concludes that the Supreme Court in *Johnson* did not recognize a new right with respect to the mandatory Guidelines. The majority of opinions from this jurisdiction and the growing weight of relevant authority favor narrowing *Johnson* to its holding. *See Patrick*, 2017 WL 4683929, at *4 (collecting cases). Accordingly, the Court concludes that Defendant's claimed right does not satisfy 28 U.S.C. § 2255(f)(3) and his *Johnson* Motion is therefore time-barred.

CONCLUSION

The Court grants the Government's motion to dismiss Defendant's *Johnson* Motion [45] and Defendant's *Johnson* Motion [32] is denied. The Court also finds that reasonable jurists could debate the Court's resolution of this matter and a certificate of appealability is therefore granted.

Dated this 28 day of November, 2017.

Marco Hernández

MARCO A. HERNÁNDEZ
United States District Judge

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEFFREY LEWIS BERALDO, Defendant-Appellant.	No. 18-35000 D.C. Nos. 3:16-cv-01092-AA 3:03-cr-00511-AA-1 District of Oregon, Portland ORDER

Before: CALLAHAN, NGUYEN, and HURWITZ, Circuit Judges.

The government's motion for summary affirmance (Docket Entry No. 26) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019); *White v. Klitzkie*, 281 F.3d 920, 922 (9th Cir. 2002) ("[W]e can affirm the district court on any ground supported by the record."). Contrary to Beraldo's argument, our decision in *Blackstone* is not "clearly irreconcilable" with *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFREY LEWIS BERALDO,

Defendant.

Case No. 3:03-cr-00511-AA
3:16-cv-01092-AA
OPINION AND ORDER

AIKEN, Judge:

In 2004, defendant Jeffrey Lewis Beraldo pleaded guilty to bank robbery. He was was sentenced to 151 months' imprisonment, to be followed by three years' supervised release. The Court based that sentence, in part, on a determination that defendant was a career offender under the then-mandatory federal Sentencing Guidelines ("the Guidelines").[1] Defendant's career offender designation rested on a determination that his prior convictions (a federal conviction for

[1] Defendant was sentenced before *United States v. Booker*, 543 U.S. 220 (2005), rendered the Guidelines advisory.

unarmed bank robbery and a California state conviction for robbery II) were crimes of violence within the meaning of a provision of the Guidelines known as the residual clause.[2]

The Armed Career Criminal Act ("ACCA") contains an identically-worded residual clause. *Johnson v. United States*, 135 S. Ct. 2551, 2555–56 (2015). On June 26, 2015, the Supreme Court held that the ACCA's residual clause was unconstitutionally vague. *Id.* at 2557. After *Johnson*, a split arose in the lower courts regarding the decision's effect on the Guidelines' residual clause. *Beckles v. United States*, 137 S. Ct. 886, 891–92 (2017). Specifically, the courts disagreed over whether advisory Guidelines, as distinct from statutes that fix minimum and maximum sentences, may be challenged on vagueness grounds. In March 2017, the Court resolved that disagreement, holding that the advisory Guidelines are not susceptible to vagueness challenges and that *Johnson* therefore had no effect on sentences calculated using the advisory Guidelines' residual clause. *Id.* at 897. *Beckles* did not, however, address *Johnson*'s effect on sentences calculated using the residual clause of the mandatory Guidelines. *See id.* at 894 (distinguishing between advisory and mandatory sentencing guidelines in explaining why the concerns animating the vagueness doctrine do not apply to the advisory Guidelines).

On June 15, 2016, defendant filed a motion to correct, vacate, or set aside his sentence pursuant to 28 U.S.C. § 2255. The Court stayed the briefing schedule pending the Supreme Court's decision in *Beckles*. The government now moves to dismiss defendant's petition, arguing that (1) *Johnson* does not apply to mandatory Guidelines cases; (2) even if *Johnson* does apply to mandatory Guidelines cases, it is not retroactive on collateral view in those cases; and

[2] "Residual clause" refers to the fact that the provision is the last, catch-all part of the Guidelines' definition of "crime of violence." *See, e.g.*, *United States v. Lee*, 821 F.3d 1124, 1126 (9th Cir. 2016).

(3) defendant's petition is time-barred. It is unnecessary to address the government's first two arguments because the petition must be dismissed as untimely.[3]

Petitions under 28 U.S.C. § 2255 are subject to a one-year limitations period. That 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) is at issue here, and defendant was sentenced thirteen years ago. Accordingly, the parties agree that the petition is untimely unless subsection (3) applies. Defendant asserts that his petition is timely under that subsection because the right he asserts is the same right the Supreme Court recognized in *Johnson*.

The right asserted by defendant is the right not to be subjected to a sentence enhanced by a vague mandatory sentencing guideline. Particularly in view of the *Beckles* Court's statements about the differences between mandatory and advisory sentencing guidelines, that right is a logical extension of the right recognized in *Johnson*. But after *Beckles*, it is doubtful that right is the *same* right recognized in *Johnson*. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) (explaining that although the majority opinion in *Beckles* forecloses vagueness

[3] Because the petition is dismissed on timeliness grounds, it is also unnecessary to address petitioner's argument that the government has waived its other two arguments or is judicially estopped from making them.

challenges to the advisory Guidelines, it "leaves open the question whether defendants sentenced to terms of imprisonment before" *Booker* "may mount vagueness attacks on their sentences"). It appears that all federal courts to have considered this question have reached the same conclusion. *See, e.g.*, *Hirano v. United States*, 2017 WL 2661629, *7 (D. Haw. June 20, 2017); *United States v. Autrey*, 2017 WL 2646287, *4 (E.D. Va. June 19, 2017); *Ellis v. United States*, 2017 WL 2345562, *2 (D. Utah May 30, 2017); *Mitchell v. United States*, 2017 WL 2275092, *5 (W.D. Va. May 24, 2017); *Hodges v. United States*, 2017 WL 1652967, *2 (W.D. Wash. May 2, 2017); *United States v. Russo*, 2017 WL 1533380, *3 (D. Neb. Apr. 27, 2017). In view of this growing consensus and the Court's decision in *Beckles*, I conclude that defendant cannot rely on 28 U.S.C. § 2255(f)(3) to make his petition timely because the right he asserts has not been recognized by the Supreme Court.

For the reasons stated above, the government's motion to dismiss (doc. 39) is GRANTED and petitioner's 2255 petition (doc. 30) is DISMISSED. However, I find that reasonable jurists could debate whether "the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). I therefore grant a certificate of appealability on the issue of whether defendant's motion falls within the scope of 28 U.S.C. § 2255(f)(3).

IT IS SO ORDERED.

Dated this 5th day of July 2017.

Ann Aiken
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFREY LEWIS BERALDO,

Defendant.

Case No. 3:03-cr-00511-AA
3:16-cv-01092-AA
OPINION AND ORDER

AIKEN, Judge:

Defendant Jeffrey Lewis Beraldo seeks reconsideration of my opinion and order denying his motion to correct, vacate, or set aside his sentence under 28 U.S.C. § 2255. I denied that motion on timeliness grounds, holding that defendant was not asserting a right "newly recognized" by the Supreme Court in the year preceding his motion, as required by § 2255(f)(3). *United States v. Beraldo*, 2017 WL 2888565, *2 (D. Or. July 5, 2017). Recognizing that reasonable jurists could debate the correctness of that conclusion, however, I granted plaintiff a certificate of appealability. *Id.*

Defendant now moves for reconsideration under Federal Rule of Civil Procedure 59(e). "[A]ltering or amending a judgment under Rule 59(e) is an extraordinary remedy usually

available only when: (1) the court committed manifest errors of law or fact, (2) the court is presented with newly discovered or previously unavailable evidence, (3) the decision was manifestly unjust, or (4) there is an intervening change in the controlling law." *Rishor v. Ferguson*, 822 F.3d 482, 491–92 (9th Cir. 2016) (citation and internal quotation marks omitted).

After carefully considering defendant's arguments, I conclude the demanding standard of Rule 59(e) is not satisfied here. Defendant's arguments are purely legal, so reconsideration is not warranted on the grounds of newly discovered or previously unavailable evidence. No intervening change in controlling law supports reconsideration, either. Defendant cites the Ninth Circuit's intervening decision in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). *Geozos*, which analyzed the timeliness requirements of a related statutory provision, 28 U.S.C. § 2255(h)(2), certainly has implications for decisions involving the interpretation of § 2255(f)(3). But it is not "controlling law" here because it concerned not only a different provision of § 2255 but also a different application of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Specifically, *Geozos* addressed how to deal with a sentencing record that was ambiguous as to whether the sentence rested on the provision of the Armed Career Criminals Act invalidated by *Johnson*. 870 F.3d at 895. That question is distinct from the question raised by defendant's § 2255 motion: whether *Johnson* necessarily invalidated the residual clause of the pre-*Booker* mandatory sentencing guidelines.

That leaves the manifest error and manifest injustice approaches to Rule 59(e) relief. Under the circumstances presented here, the analysis of those two options is closely related. Defendant's well-researched brief and citation of supplemental authorities establish that there is a split among district courts regarding whether a motion arguing that the residual clause of the mandatory sentencing guidelines is void for vagueness asserts the same right newly recognized

in *Johnson*. *Compare, e.g.*, *United States v. Colasanti*, — F.Supp.3d —, 2017 WL 4273300, *3 (D. Or. Sept. 26, 2017) ("Indeed, it is difficult to reconcile [the fact that] the majority in *Beckles* [*v. United States*, 137 S. Ct. 886 (2017)] deliberately avoided any discussion of the mandatory sentencing Guidelines . . . with his contention that *Johnson*, decided two years earlier, definitively recognized [a] right" that applies in the context of a mandatory Guidelines challenge) *with, e.g.*, *United States v. Roy*, — F.Supp.3d —, 2017 WL 4581792, *6 (D. Mass. Oct. 13, 2017) ("The new rule Roy relies on here is the rule announced in *Johnson* . . . , simply applied to the pre-*Booker* career offender guideline.") A split may be brewing at the appellate level, as well. *Compare United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017) (dismissing the defendant's § 2255 petition as untimely because "*Johnson* dealt only with the residual clause of ACCA . . . [and] did not discuss the mandatory Sentencing Guidelines' residual clause") *and Raybon v. United States*, 867 F.3d 625, 627 (6th Cir. 2017) (same) *with Moore v. United States*, 871 F.3d 72, 82–83 (1st Cir. 2017) (expressing skepticism about the reasoning of *Brown* and *Raybon* and concluding that the defendant, who challenged his mandatory guidelines sentence under *Johnson*, had made a sufficient threshold showing under 28 U.S.C. § 2255(h)(2) to permit him to make his timeliness arguments to the district court). But the very existence of such splits suggests that settling on either position is unlikely to be the sort of "manifest error" that would justify relief from judgment under Rule 59(e). The splits are very good evidence that reasonable jurists could disagree about how to resolve defendant's motion, but that only underscores the appropriateness of granting defendant a certificate of appealability, which I have already done.

For similar reasons, I find no manifest injustice justifying relief from judgment. As explained above, defendant's motion raises a difficult legal question with which judges across the country are wrestling—yielding divided results. It may well be that defendant's argument

will prevail in the Ninth Circuit and I will have landed on the wrong side of the issue. But I cannot conclude the prior opinion works a manifest injustice when it remains an open and hotly debated question how the issue at the heart of that opinion ought to be resolved.

Because defendant has not satisfied the standard for reconsideration under Rule 59(e), his motion (doc. 58) is DENIED.

IT IS SO ORDERED.

Dated this 8th day of December 2017.

Ann Aiken
United States District Judge