No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

BRIAN VIDRINE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are Vidrine's § 924(c) convictions invalid in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and its progeny?

2. Does *Johnson* apply to the mandatory sentencing guidelines to invalidate the career offender sentencing enhancement applied to Vidrine?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

U.S. CONSTITUTION

FEDERAL STATUTES

MISCELLANEOUS

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PETITION FOR CERTIORARI

BRIAN VIDRINE petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

The Ninth Circuit's panel memorandum decision affirming the district court's denial of habeas relief is unpublished. It is included in the Appendix at App. - 1. The district court's decision denying relief was unpublished. It is included in the Appendix at App.-4 to App.-5. The magistrate judge's findings and recommendations adopted by the district court were also unpublished. These are in the Appendix at App.-6 to App.-20.

JURISDICTION

The Ninth Circuit's decision was filed on December 17, 2019. App.-1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law whose application is disputed in this case include:

The Fifth Amendment to the United States Constitution. It reads, in pertinent part:

> [N]or shall any person . . .be deprived of life, liberty, or property, without due process of law.

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as: "an offense that is a felony and"

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The federal bank robbery statute at issue here reads, in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(a), (d) (1996).

28 U.S.C. § 2255(f) states:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
> …
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

U.S.S.G. § 4B1.2(a) (1998) 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

1. After a jury trial, Mr. Vidrine was convicted of three counts of bank robbery in violation of 18 U.S.C. § 2113(a), (d) and two firearm counts in violation of 18 U.S.C. § 924(c). App.-7 -App.-8. At sentencing, the district court gave Vidrine a term of 468 months in prison, made up of 60 months on count 1 (escape), concurrent 168-month terms for bank robbery(counts 2, 4 and 6, concurrent to each other and to count 1), and consecutive terms for the section 924(c) counts (60 months on count 5 and 240 months on count 7). App.-8. It found Vidrine was a career offender under U.S.S.G. §§ 4B1.1 and 4B1.2 because his bank robbery offense was a "crime of violence" and that he had at least two qualifying prior convictions. *Id*. At the time of the sentencing hearing in 1997, the district court was mandated by statute to follow the Guidelines. *Id.*; *see also* 18 U.S.C. § 3553(b). Without a career offender finding, Vidrine's 1995 Guideline range would have been 135-168 months. The district court found the full career offender range (262-237) overstated his history. Nonetheless, for Vidrine the effect of the career offender finding was to raise his range to 151-188 months on the bank robbery counts. App.-8.

Vidrine appealed. The Ninth Circuit affirmed his convictions and sentence. *United States v. Vidrine,* C.A. No. 97-10461, 1998 U.S. App. LEXIS 31994 (9th Cir. Dec. 22, 1998) (unpublished). He sought other post conviction relief without success.

2. On June 26, 2015, this Court decided *(Samuel) Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that the residual clause in the Armed Career Criminal Act (ACCA) was unconstitutional. The uncertainty about how to identify the "ordinary case" of the crime, together with the uncertainty about how to determine whether a risk is sufficiently "serious,""both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id*. at 2557-58. In *Welch v. United States,* 136 S. Ct. 1257 (2016), this Court held that *Johnson* applies retroactively to cases on collateral review.

3. Within a year of *Johnson*, Mr. Vidrine filed an application for authorization to file a second or successive § 2255 motion in the district court attacking his conviction and sentence. His proffered 2255 motion argued that *Johnson* applied to and voided his 924(c) convictions and the residual clauses in the career-offender guideline. The Ninth Circuit granted the application and directed the district court to consider the petition deemed filed in the district court on June 21, 2016, the date the application was filed in the appellate court. The government opposed all relief.

The magistrate judge recommended denying the 924(c) chllenges and dismissing the career offender challenge as untimely. App.-13 to App.-18, App.18 to App.-19. Over Vidrine's objections, the district court adopted this analysis. App.-5 to App.-5. The district court granted a certificate of appealability on both issues. App.-5.

4. The Ninth Circuit affirmed in an unpublished memorandum decision that denied his §924(c) challenge and dismissed his career offender claims on timeliness grounds. App.-2 to App.-3. It relied on an earlier published decisions, *United States v. Watson*, 881 F.3d 782, 785 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018), and *United States v. Blackstone,* 903 F.3d 1020 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019). *Watson* held federal bank robbery is a crime of violence under § 924(c)(3)(A), while *Blackstone* held that "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." 903 F.3d at 1028.

REASON FOR GRANTING THE WRIT

A. The Court Decisions Holding Bank Robbery to Be a Crime of Violence Are Inconsistent with this Court's Rulings that the Offense Neither Requires Any Specific Intent Nor Any Actual or Threatened Violent Force

Numerous Circuits have reached logically inconsistent positions regarding federal bank robbery. These courts hold that this offense —whose conduct does not

require any specific intent or any actual or threatened violent force—qualifies as a crime of violence under the elements clauses of section 924(c)(3)(A). *See, e.g., Watson*, 881 F.3d at 785; *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017) (holding federal bank robbery a crime of violence under U.S.S.G. § 4B1.2(a)(1)); *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (en banc) (holding that federal carjacking by intimidation is a crime of violence under § 924(c)(3)(A)).

At the same time, these Circuits also apply an ever-decreasing bar for what constitutes "intimidation" in the context of sufficiency of the evidence challenges. *See e.g., United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (rejecting insufficiency challenge where defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing); *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (affirming bank robbery by intimidation conviction where the defendant affirmatively voiced no intent to use violent physical force).

The courts cannot have it both ways – either bank robbery requires a threat of violent force, or it does not; but the same rule must apply to both sufficiency cases and

to the categorical analysis applicable to § 924(c) convictions and consecutive sentences imposed based on the bank robbery. Given the heavy consequences that attach to a bank robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of law into order. Certiorari is necessary.

1. THE CATEGORICAL APPROACH DETERMINES WHETHER AN OFFENSE IS A CRIME OF VIOLENCE

To determine if an offense qualifies as a "crime of violence," courts apply the categorical approach to discern the "minimum conduct criminalized" by the statute. *Moncrieffe v. Holder,* 133 S. Ct. 1678, 1684-85 (2013); *Almanza-Arenas v. Lynch,* 815 F.3d 469, 482 (9th Cir. 2016) (en banc). Courts must "disregar[d] the means by which the defendant committed his crime, and loo[k] only to that offense's elements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this rubric, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe,* 569 U.S. at 190-91 (alterations omitted). If the statute of conviction criminalizes some conduct that does involve intentional violent force and some conduct that does not, the statute of conviction does not categorically constitute a crime of violence. *Mathis,* 136 S. Ct. at 2248.

There are two requirement for "violent force." First, violent *physical* force is required for a statute to meet § 924(c)'s elements clause. *Stokeling v. United States,*

139 S. Ct. 544, 552-53 (2019) (citing *Johnson v. United States,* 559 U.S. 133, 140 (2010) ("*Johnson I)).* In *Johnson I,* this Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. In *Stokeling,* this Court interpreted *Johnson I*'s "violent physical force" definition to encompass physical force "potentially" causing physical pain or injury to another. 139 U.S. at 554. Second, the use of force must also be intentional and not merely reckless or negligent. *Leocal v. Ashcroft,* 543 U.S. 1, 12-13 (2004); *United States v. Benally,* 843 F.3d 350, 353-54 (9th Cir. 2016).

Following *Johnson II*'s holding in the ACCA context, this Court held that the residual clause in the Immigration and Nationality Act's "crime of violence" definition, 18 U.S.C. § 16(b), is void for vagueness and violates due process. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018). The residual clause in § 16(b) is identical to the residual clause in § 924(c)(3)(B). Following the *Dimaya* decision, the government shifted gears and began to argue that the residual clause in § 924(c)(3)(B) could be saved from vagueness by jettisoning the categorical approach. *Davis v. United States* rejected this argument and held that the residual clause in § 924(c)(3)(B) was unconstitutionally vague. 139 S. Ct. 2319, 2330, 2336 (2019).

2. INTIMIDATION WITHIN THE MEANING OF 18 U.S.C. § 2113(A) IS NOT A MATCH FOR THE DEFINITION OF A CRIME OF VIOLENCE IN 18 U.S.C. § 924(c)(3)(A)

a. Federal bank robbery does not require the use or threat of *violent* physical force

Intimidation for purposes of the federal bank robbery statute can be, and often is, accomplished by a simple demand for money. A verbal request for money does not require a threat of violent force "capable" of "potentially" "causing physical pain or injury" to another, *Stokeling,* 139 S. Ct. at 554. The Ninth Circuit's *United States v. Lucas*, 963 F.2d 243 (9th Cir. 1992), provides an example. Lucas walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." 963 F.2d at 244. The Circuit held that Lucas's conduct, by "opening the bag and requesting the money," employed "intimidation," and rejected an insufficiency challenge. *Id.* at 248. Because there was no threat – explicit or implicit – the minimum conduct necessary to sustain a conviction for bank robbery does not satisfy *Stokeling*'s standard for a crime of violence under the elements clause. *See also United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (rejecting insufficiency challenge where defendant gave bank teller a note demanding money in denominations the teller did not have and "left the bank in a nonchalant manner" after the teller walked toward the vault. *Id.* ("'express threats of

bodily harm, threatening body motions, or the physical possibility of concealed weapons' are not required for a conviction for bank robbery by intimidation").

Though such a minimal level of conduct is sufficient in the Ninth Circuit to sustain a bank robbery conviction, the Circuit nonetheless concluded in *Watson* that bank robbery always requires the threatened use of violent physical force. This decision cannot be squared with the Circuit's sufficiency decisions and means that either the Ninth Circuit is ignoring this Court's decisions setting out the standard for violence -- or, for decades, people have been found guilty of bank robbery who simply are not guilty. Either way, the matter requires this Court's intervention.

The Court's attention is needed because this pattern of inconsistent holdings applies broadly across the Circuits. The Tenth Circuit affirmed a bank robbery by intimidation conviction where the defendant simply helped himself to the money and made neither a demand nor a threat to use violence. *United States v. Slater*, 692 F.2d at 107-08 (defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing). And yet, the same Court has consistently concluded since *Johnson I* and *Johnson II* that bank robbery requires the violent use of force. *E.g., United States v. Higley,* 726 F. App'x 715, 717 (10th Cir. 2018).

The Fourth Circuit, in *United States v. Ketchum,* similarly upheld a bank robbery by intimidation conviction against a sufficiency challenge where the defendant affirmatively voiced no intent to use violent physical force. 550 F.3d 363, 365 (4th Cir. 2008). Ketchum gave a teller a note that read, "These people are making me do this," and then told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *Id.* The teller gave Ketchum money and he left the bank. *Id.* And yet, the Fourth Circuit has *also* held that "intimidation" necessarily meets the threatened use of violent physical force required for crime of violence purposes. *McNeal,* 818 F.3d at 157.

Likewise, the Fifth and Eleventh Circuits uphold convictions for robbery by intimidation where there was no weapon, no verbal or written threat, and where the victims were not actually afraid, if the hypothetical ordinary and reasonable person would be in fear. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987); *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005). These Circuits also inconsistently hold that the "intimidation" element meets the "crime of violence" standards because such an offense necessarily requires the threatened use of violent physical force. *Brewer,* 848 F.3d at 716; *Ovalles,* 905 F.3d 1300.

Each of these courts have applied a non-violent construction of "intimidation" in rejecting insufficiency of the evidence challenges to bank robbery convictions, but

have held that "intimidation" *always* requires a defendant to threaten the use of violent physical force. The two positions cannot be squared.

In *Watson*, the Ninth Circuit reached its conclusion that bank robbery qualifies as a crime of violence by asserting that bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson I* standard.'" 881 F.3d at 785 (citing *Johnson I,* 559 U.S. 133). It is wrong, however, to equate the imputed willingness to use force with a threat to do so. Indeed, the Ninth Circuit previously acknowledged this very distinction. In *United States v. Parnell,* 818 F.3d 974, 980 (9th Cir. 2016), the government had argued that a defendant who commits a robbery while armed harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. In finding the Massachusetts armed robbery statute at issue did not qualify as a violent felony, the Circuit rejected the government's position and held that "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id*. *Watson* failed to follow, or even address, this distinction. This Court should grant certiorari to review this question – whether federal armed bank robbery by intimidation is a crime of violence under 18 U.S.C. § 924(c)(3)(A) because the offense fails to require any *intentional* use, attempted use, or threatened use of *violent* physical force.

b. Federal Bank Robbery is a General Intent Crime; the Government has Not been Required to Prove Beyond a Reasonable Doubt that Defendants Understood that Their Conduct was Perceived as Intimidating by Another

As discussed above, both the Circuit below and this Court recognizes that section 2113(a) is a general intent crime. This means the government need not prove beyond a reasonable doubt that the defendant purposely threatened to harm anyone. *United States v. Burnim*, 576 F.2d 236, 237 (9th Cir. 1987); *Carter v. United States*, 530 U.S. 255, 269-70 (2000). Because section 2113(a) defines a general intent crime, the requisite *mens rea* is established by proof that the defendant took the property of another through conduct that can be characterized as intimidating. Thus, "[w]hether [the defendant] specifically intended to intimidate [the victim] is irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). The element of intimidation is established so long as the defendant willfully engages in conduct "that would put an ordinary, reasonable person in fear of bodily harm," regardless of whether the defendant understood that his conduct would be perceived as intimidating by the ordinary person, let alone intended to intimidate anyone. *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990).

It follows that the Circuit has held that a defendant can be convicted of bank robbery by intimidation where he does no more than calmly hand a note to a teller

explaining that a bank robbery is in progress and politely requesting that the teller provide him with some money. Even if the defendant is unaware of the inherently intimidating nature of his conduct, there is sufficient evidence to convict. *See e.g., Lucas*, 963 F.2d at 247-48; *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991); *Hopkins*, 703 F.2d at 1103. Indeed, even where the defendant does not interact with the teller at all, but simply reaches over and/or jumps over the counter and removes the money himself, circuit courts have had no problem concluding that the element of "intimidation" had been established because the defendant's conduct could be perceived as intimidating to the tellers present regardless of the defendant's intent. *See, e.g., Kelley*, 412 F.3d at 1245-46 (explaining that "intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts," and thus "[w]hether a particular act constitutes intimidation is viewed objectively . . . and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating") (internal quotations omitted); *United States v. Caldwell*, 292 F.3d 595, 597 (8th Cir. 2002) (defendant did not say anything to teller, made no intimidating gestures nor indicated in any way that he was armed, held element of intimidation satisfied because any reasonable bank teller would be intimidated by defendant's conduct). In other words, the government's burden of proof to establish bank robbery by intimidation is "low;" all

the government need establish is that a "bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force." *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016).

Thus, aA second independent reason for granting certiorari rests with the Circuit's failure to recognize the implications for "crime of violence" analysis that bank robbery is a general intent crime. To commit a crime of violence, the use of violent force must be intentional and not merely reckless or negligent. *Leocal,* 543 U.S. at 12-13; *Benally,* 843 F.3d at 353-54. But, a defendant can commit a bank robbery by intimidation without intentionally intimidating anyone.

The Circuit relied on *Watson*. But *Watson* plainly conflicts with this Court's *Carter* decision. *Carter* holds the federal bank robbery statute, § 2113(a), "contains no explicit *mens rea* requirement of any kind." 530 U.S. at 267. *Carter* further explained that federal bank robbery does not require an "intent to steal or purloin." *Id.* In evaluating the applicable *mens rea*, this Court emphasized it would read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269.

Thus, *Carter* recognized that bank robbery under § 2113(a) "certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)," *id.,* but found no basis

to impose a specific intent in § 2113(a), *id.* at 268-69. Instead, the Court determined "the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of general intent—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation)." *Id.* at 268.

This Court's classification of § 2113(a) as a general intent crime in *Carter* means the statute requires nothing more than knowledge—a lower *mens rea* than the specific intent required by the elements clause of § 924(c)(3)(A) to categorically qualify as a "crime of violence."

Consistent with *Carter,* the Ninth Circuit holds that juries need not find intent in § 2113(a) cases. Rather, in the Ninth Circuit, a finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. *Foppe,* 993 F.2d at 1451 (affirming conviction, holding jury need not find defendant intentionally used force and violence or intimidation on the victim bank teller.) A specific intent instruction was unnecessary, *Foppe* concluded, because "the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation." *Id.* Nowhere in *Foppe* did the Ninth Circuit suggest that the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation

should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see also Hopkins,* 703 F.2d at 1103 (approving instruction stating intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring a finding that the defendant intended to, or knew his conduct would, produce such fear).

This conflict is not unique to the Ninth Circuit. *See United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) ("[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . The intimidation element of § 2113(a) is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation.") (internal quotations omitted); *Kelley,* 412 F.3d at 1244 ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating."); *United States v. Yockel,* 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

This Court recognizes that if an act turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks," then only a negligence standard is required. Such offenses do not require an intentional mens rea. *Elonis v. United States,* 135 S. Ct. 2001, 2011 (2015). Because jurors in a

bank robbery case are called on only to judge what a reasonable bank teller would feel – as opposed to the defendant's intent – the statute cannot be deemed a categorical crime of violence.

The Circuits' *sub silentio* holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Consequently, this Court should grant certiorari to address whether bank robbery is categorically a "crime of violence" under the elements clause, because general intent "intimidation" does not satisfy this standard. As this Court clarified in *Leocal*, the use of force is not dispositive. The definition of a crime of violence under § 16(a), like the definition under § 924(c)(3)(A) at issue here, contains a critical attendant circumstance – *against the person or property of another*. Accordingly, we look not to the fact that a defendant intentionally used force (or intentionally engaged in conduct that a reasonable person would perceive as threatening). Instead, we ask whether, when the defendant engaged in said conduct, did he act with more than negligence with respect to the possibility that said conduct would result in harm to another or be perceived by a reasonable person as threatening harm. In other words, the dispositive element under § 16(a) and § 924(c)(3)(A) is "against the person or property of another," and specifically the defendant's intent with respect to the "'use . . . of physical force *against the person or property of another*.'" *Leocal*, 543 U.S. at 9 (emphasis in original).

Notably, both parties in *Leocal* looked just to the fact that the defendant used (or threatened to use) force, and not to the defendant's awareness that said use of force might be directed at the person of another, or perceived to be threatening by the person of another. *Id*. at 9. The *Leocal* Court explained that this analysis was incorrect. Where the statute includes the language "against the person or property of another," the parties were wrong to look to the defendant's intentional use of force. Instead, what mattered was the *defendant's awareness* that said intentional use of force might impact the person of another. *Id.*

Indeed, as this Court has subsequently explained, when the relevant statutory language simply requires proof of the use of force, that can be satisfied by the "knowing or intentional application of force," *United States v. Castleman*, 134 S. Ct. 1405, 1409, 1415 (2014), but the analysis is different when the narrowing language "against the person or property of another" is added. *Leocal*, 543 U.S. at 9. Accordingly, the "critical aspect" of the crime of violence defined under § 16(a) and § 924(c)(3)(A), in contrast to the definition at issue in *Castleman*, is that the predicate offense necessarily requires not only the intentional use of force but "one involving the 'use . . . of physical force *against the person or property of another*.'" *Leocal*, 543 U.S. at 9 (ellipse and emphasis in original). And, where the "key phrase in § 16(a) [is] – the 'use. . . of physical force against the person or property of another,'" a conviction

for the predicate offense must necessarily establish that the defendant acted with "a higher degree of intent than negligent or merely accidental conduct" with respect to the possibility that his conduct would harm another. *Leocal*, 543 U.S. at 9.

In other words, sections 16(a) and 924(c)(3)(A) target a narrower class of defendants: those who have a certain callousness towards others – those who, at the very least, perceive the risk of harm to others, but act anyway. *See, e.g., Begay v. United States*, 553 U.S. 137, 145 (2008). *Begay* explains that while a person may intentionally drink, and presumably, intentionally drive, DUI statutes do not require proof that a defendant "purpose[fully] or deliberate[ly]" drove under the influence, and "this distinction matters considerably." *Id*. at 146. Where, under a recidivist sentencing statute, or in the case of the enhancement under § 924(c), the question is whether a defendant's convictions stand for the proposition that he possesses such a high degree of danger to others that a judge must loose sentencing discretion under 18 U.S.C. § 3553(a)). *See id*.

If a court limited its analysis to simply whether a defendant intentionally engaged in dangerous conduct, without asking whether the defendant necessarily knew the harm he was exposing others to, then the "mandatory minimum sentence would apply to a host of crimes which, though dangerous" do not necessarily evince "the deliberate kind of behavior associated with violent criminal use of firearms." *Begay*,

553 U.S. at 146-47 (citing, among other offenses, 18 U.S.C. § 365(a) which proscribes the tampering of consumer products under circumstances manifesting extreme indifference to the risk that by so doing one is placing another person in danger of death or bodily injury, as an offense that does not identify the type of person Congress meant to capture when defining a violent felony); *c.f., United States v. Smith*, 544 F.3d 781, 785 (7th Cir. 2008) ("We must remember that the enhanced prison term under the ACCA [and § 924(c)] is imposed *in addition* to prison time that already has been served for the predicate felony convictions," and is reserved for "those offenders whose criminal history evidenced a high risk for recidivism and future violence") (emphasis in original).

Not surprisingly, the Ninth Circuit sitting *en banc* reiterated the critical distinction that the *Leocal* Court drew between those offenses that simply require proof that the defendant intentionally used force and those that require proof beyond a reasonable doubt that the defendant intentionally used force *against the person of* another, by clarifying that the phrase "against the person of another" "implies the use of force must be a means to an end." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1131-32 (9th Cir. 2006). In other words, the issue is not whether the defendant intentionally used force, or intentionally engaged in conduct that might be perceived by others as a threat, but whether the offense of conviction requires proof beyond a

reasonable doubt of the *intentional* "*use* . . . of physical force *against* the person or property of another." *Id*. at 1131 (emphasis in original). Following *Fernandez-Ruiz*, the Circuit has therefore "place[d] crimes *motivated by intent* on a pedestal, while pushing off other very dangerous and violent conduct, because not intentional, does not qualify as a 'crime of violence.'" *Teposte v. Holder*, 632 F.3d 1049, 1053 (9th Cir. 2011) (emphasis added).

Thus, a second independent need for review is focused on the definition of a crime of violence under section 924(c)(3)(A) and its limiting language "against the person of another." This Court should grant certiorari to address whether the government must prove beyond a reasonable doubt that a defendant must be more than negligent with respect to whether his intentional conduct could harm another.

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

The Court should grant certiorari to resolve a conflict in the Circuits in the treatment of timeliness of mandatory-guidelines claims.

1. There Is a Deep and Entrenched Inter- and Intra-circuit Split on the Timeliness of Mandatory Guidelines Claims

After this Court denied a number of claims raising the application of *Johnson* to the mandatory guidelines, *see Brown v. United States*, 139 S. Ct. 14, 14 & n.1 (2018) (Sotomayor, J., dissenting from denial of certiorari), the circuit split has grown.

a. The Seventh Circuit has held that mandatory guidelines claims based on *Johnson* are timely. *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). This Circuit has not retreated from that position to realign itself with other courts. *See e.g., Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019) ("[W]e reject the government's suggestion to reconsider *Cross*'s holding that *Johnson* recognized a new right as to the mandatory sentencing guidelines."). Instead, it continues to grant petitioners relief under *Cross*. *E.g.*, *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019).

The First Circuit has also found a mandatory guideline claim timely when filed within one year of *Johnson*. *Moore v. United States*, 871 F.3d 72, 81-83 (1st Cir. 2017). The Solicitor General maintained that that decision did not represent the "settled circuit law on the issue," because it was issued in the context of a second-or-successive application. *See* Brief in Opposition, at 15 n.4, *United States v. Gipson*, 17-8637 (2018). But since that time, *Moore* has been the basis for grants of substantive relief in the First Circuit. *E.g.*, Order, *United States v. Moore*, 1:00-10247-WGY, 2018 U.S. Dist. LEXIS 194252, 2018 WL 5982017 (D. Mass. Nov. 1, 2018) (granting § 2255 relief); *United States v. Roy*, 282 F. Supp. 3d 421, 432 (D. Mass. 2017). The United States has not appealed those decisions.

Thus, in two Circuits, petitioners have been granted substantive relief on claims that would be considered untimely in the Ninth Circuit.

b. Meanwhile, the Third, Fourth, Sixth, Ninth, and Tenth Circuits have all held that *Johnson* did not recognize the right not to be sentenced under the ordinary case doctrine in the guideline context, and thus *Johnson* claims raised by those sentenced under the mandatory career-offender guideline are untimely. *United States v. Green*, 898 F.3d 315, 322-23 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297, 301-03 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625, 629-31 (6th Cir. 2017); *Blackstone*, 903 F.3d at 1026; *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018).

While these decisions are binding in these Circuits, the arguments have not stopped. In *Chambers v. United States*, a judge of the Sixth Circuit called on her colleagues to reconsider their decision in *Raybon*. 763 Fed. App'x 514, 519, 2019 WL 852295, at *4 (Feb. 21, 2019) (Moore, J, concurring) ("I write separately because *Raybon* was wrong on this issue.). And in the Tenth Circuit, the Court continued to grant certificates of appealability—despite *Greer*—in recognition that reasonable jurists could come out the other way on the timeliness question. Order, *United States v. Crooks*, CA No. 18-1242, 2019 WL 1757314, at *2 (10th Cir. Apr. 19, 2019). The fact that other Circuits disagree establishes the right to a certificate of appealability.

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

c. Finally, some Circuits have not yet issued decisions. In some places, the timeliness of the claim depends on which courthouse, or even which courtroom in a single courthouse, one finds oneself. *Compare United States v. Hammond*, 354 F. Supp. 3d 28, 42 (D.D.C. 2018) (finding mandatory guideline claim based on *Johnson* timely) *with* Order, *United States v. Upshur*, 10-cr-251, 2019 WL 936592, at *7 (D.D.C. Feb. 26, 2019) (finding mandatory guideline claim based on *Johnson* untimely); Report and Recommendation, *Zuniga-Munoz v. United States*, 02-cr-134-JRN, Dkt #79, at 4-8 (W.D. Tex. Apr. 26, 2018), *aff'd* Dkt. #81 (finding mandatory guideline claim timely and granting relief) *with* Order, *Givens v. United States*, 16-cv-515-SS, 2018 WL 327368, at *2 (W.D. Tex. Jan. 8, 2018) (finding mandatory guideline claim untimely and denying relief); *Mapp v. United States*, 95-cr-1162, 2018 WL 3716887, at *4 (E.D.N.Y. Aug. 3, 2018) (granting relief in a habeas petition raising mandatory guideline *Johnson* claim), *vacated on other grounds*, *with Nunez v. United States*, 16-cv-4742, 2018 WL 2371714, at *2 (S.D.N.Y. May 24, 2018) (denying *Johnson* claims on timeliness grounds).

The split in this case is well-developed and mature, and it's not going away. Nor is the issue continuing to evolve in the lower courts. Instead, as new cases are

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

2. The Mandatory Guidelines Challenge Is of Exceptional Importance

a. This disparate case law is too important to be left in place. More than a thousand individuals filed petitions after *Johnson* raising a claim that *Johnson* applied to their career-offender sentence. *See Brown*, 139 S. Ct. at 16. If their claims are not heard, many will spend an additional decade or more in custody, based solely on an improperly imposed guideline sentence. *Cf* Sentencing Resource Counsel Project, Data Analyses 1 (2016), *available* http://www.src-project.org/wp-content/uploads/2016/04/Data-Analyses-1.pdf (citing FY 2014 statistics, the average guideline minimum for career offenders charged with drug offenses was 204 months, and the average minimum for drug offenders not charged as career offenders was 83 months). The career-offender designation in Mr. Vidrine's case raised his guideline range from 135-168 months to 151-188 months on the non-924(c) counts.

Not only will those sentenced under the mandatory guidelines be left out in the cold, but petitioners in the future will be left without clear guidance for what event

triggers the statute of limitations for filing a habeas claim. A defendant is permitted to file a single § 2255 petition before he triggers the higher standard for filing a second or successive petition under 28 U.S.C. § 2255(h). If he files too late, or too early, even his meritorious claims will likely never be adjudicated. Where such high stakes decisions have such little margin for error, it is important that litigants have clear rules to apply.

b. Moreover, this Court's failure to address this arbitrariness has created a secondary market for habeas relief, where petitioners receive differential treatment depending, not only on the Circuit where they sustained their conviction, but on the Circuit in which they happen to be serving their sentence. For example, Petitioner Stony Lester was convicted in the Eleventh Circuit, a circuit which has held *Johnson* does not apply to the mandatory guidelines at all. *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2017) (en banc). Like all others convicted in that Circuit, he was foreclosed from relief via § 2255 motion. *Lester v. United States*, 921 F.3d 1306 (11th Cir. Apr. 29, 2019). But the BOP placed Lester in a facility in the Fourth Circuit. That Circuit has held that a petitioner may file, via 28 U.S.C. § 2241's "escape hatch," a petition arguing that one's mandatory guideline calculation was wrong. *United States v. Wheeler*, 886 F.3d 415, 433 (4th Cir. 2018). Thus, even as the Eleventh Circuit denied his § 2255 petition, the Fourth Circuit found that his career-offender sentence should

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

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

from the relevant records and unfamiliar with the local state laws, to expend efforts reviewing a case.

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

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

On the merits, the Ninth Circuit erred in dismissing Mr. Vidrine's mandatory guidleines claim for relief as untimely.

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

[1]Section 2255(f)(3) states, in whole: "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The *Blackstone* decision, however, discussed only the first clause.

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

The Ninth Circuit in *Blackstone* decided that prisoners need to wait for the Supreme Court to expressly apply *Johnson* to the mandatory guidelines. *Blackstone*, 903 F.3d at 1026. Its decision rests on three errors: disregard for the text of Section 2255(f)(3), a faulty analogy between the statute of limitations for federal prisoners and the "clearly established federal law" standard applicable to state prisoners, and a misreading of this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017).

b. First, the panel's analysis disregards the starting place for any statutory interpretation question: the text of Section 2255(f)(3) itself. Section 2255 uses "right" and "rule," not "holding." *Moore*, 871 F.3d at 82. "Congress presumably used these broader terms because it recognizes that the Supreme Court guides the

lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* While *Johnson*'s holding struck down the residual clause of the ACCA, the right it recognized was the right not to have one's sentence dictated by a residual clause that combines the hopelessly vague ordinary-case analysis and an ill-defined risk threshold. That is the same right that Mr. Vidrine asserts. A contrary view "divests *Johnson*'s holding from the very principles on which it rests and thus unduly cabins *Johnson*'s newly recognized right." *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

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

Moreover, Section 2255(f)(3) requires only that a petitioner *assert* the right recognized by the Supreme Court. It "does not say that movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized." *Cross*, 892 F.3d at 294. To "assert" is "to invoke or enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014); *see also Dodd v. United States*, 545 U.S. 353, 360 (2005) (describing a § 2255 motion as timely if it was filed within one year of the decision from which it "sought to benefit"). And asserting a right does not require anything more than different language in related sections of a statute, we presume these differences in language convey differences in meaning." *Lopez v. Sessions*, 901 F.3d 1071, 1077-78 (9th Cir. 2018) (internal quotation marks and alterations omitted).

Moreover, Section 2254(d)(1) serves a different purpose than Section 2255(f)(3). Section 2254(d)(1) — the clearly-established-federal-law standard — is a barrier for state prisoners who claim that a state court has contravened federal law, as interpreted by the Supreme Court. The strictness of that rule promotes comity and federalism: Section 2254 is a vehicle to correct state courts unreasonably deviate from the Supreme Court's interpretation of federal constitutional law. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). In that context, as a matter of respect to state courts, the Supreme Court will intervene only if the state court's decision is clearly answered

to the contrary by a prior decision of the Supreme Court. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Thus, the standard is "intentionally difficult to meet." *Id.*

In contrast, Section 2255(f)(3) is a statute-of-limitations provision for federal prisoners. Comity and federalism concerns have no relevance when a federal prisoner asks a federal court to vacate a federal judgment. *See Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) ("Federalism and comity considerations are unique to federal habeas review of state convictions."). If the Court were to examine the purpose of AEDPA, as *Blackstone* held it was obligated to do, 903 F.3d at 1027, the proper inquiry is not the purpose of the clearly established federal law requirement in Section 2254(d)(1), but the purpose of the statute-of-limitation provision itself. AEDPA's statute of limitations has the "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 266 (2002). This, too, is a unifying mark of statutes of limitation; they are "designed to encourage [petitioners] 'to pursue diligent prosecution of known claims.'" *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (citation omitted); *see also Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("Statutes of limitation . . . . stimulate to activity and punish negligence."). Mr. Vidrine filed within one year of *Johnson* because he saw the relevance *Johnson* had to his own case.

The Ninth Circuit's decision in Mr. Vidrine's case, as with *Blackstone* generally, thwarts the very purpose of § 2255(f)(3) by forcing Vidrine and others to wait and file a later (now potentially successive) petition. Because Congress intended the AEDPA statute of limitations "to eliminate delays in the federal habeas review process," not create them, *Holland v. Florida*, 560 U.S. 631, 648 (2010), a reading of Section 2255(f)(3) of limitations is premised on notice of one's claim, not its ultimate validity. *Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984) ("[T]he crucial issue in our statute of limitations inquiry is whether [the City] had notice of the federal claim, not whether the claim itself is valid.").

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

of limitations generally run from the occurrence of the last circumstance necessary to give rise to a claim, *see (Robert) Johnson v. United States*, 544 U.S. 295, 305-09 (2005), Mr. Vidrine was correct to assume that *Johnson* was the trigger that would start his one-year count down.

The Ninth Circuit's faulty analogy to the clearly-established-federal-law standard in Section 2254(d) also puts that Court in conflict with settled interpretation given to the "right" as defined in the second clause of Section 2255(f)(3), which, of course, must have the same meaning as the provision interpreted here. *See* 28 U.S.C. § 2255(f)(3) ("the date on which the right asserted was initially recognized, if *that right* has been newly recognized by the Supreme Court") (emphasis added). The Circuits have broadly read the second clause to invoke *Teague*'s "new rule" jurisprudence.[2/] And in that context, this Court has recognized that the "new rule" is

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

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

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

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

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

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

By following *Blackstone* in the fact of *Davis* and *Dimaya,* the Circuit erred. It misread and misapplied *Beckles*. While *Beckles* created an exception to *Johnson*'s reach – to any Due Process based vagueness challenge – where the sentencing provision does not "fix the permissible range of" sentences, as with the advisory

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[3] *United States v. Booker,* 3543 U.S. 220 (2005).

guidelines. *Id.* at 894-95. But *Beckles* did nothing to disturb *Johnson*'s reasoning that where a vague sentencing provision *does* fix a defendant's sentence, it is subject to attack under the Due Process Clause. If anything, it reiterates that point. *Id.* at 892; *see also Cross*, 892 F.3d at 304-05; *Brown*, 868 F.3d at 308 (Gregory, C.J., dissenting). Nor did it upset *Booker*'s holding that, by virtue of Section 3553(b), the mandatory guidelines fixed sentences; they "had the force and effect of laws" and that, "[i]n most cases . . . the judge [was] bound to impose a sentence within the Guidelines range." *Booker* 543 U.S. at 234; *see Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

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

4. This Case Presents a Good Vehicle For This Issue

Finally, Mr. Vidrine's case presents a good vehicle for addressing the mandatory guidelines issue. The Ninth Circuit addressed the issue squarely, and the

timeliness analysis of Section 2255(f)(3) controlled the outcome. The Court's decision below was not fact-bound, and a decision here would resolve the timeliness of *Johnson* claims based on the mandatory guidelines nationwide. Thus, this case presents a good opportunity for the Court to address the timeliness of a claim based on *Johnson* in the mandatory guidelines.

CONCLUSION

For all the above reasons, Mr. Vidrine asks this Court to grant his writ.

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Respectfully submitted,

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