NO. 19-

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL N. LITTLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HEIDI R. FREESE, ESQ.
Federal Public Defender

QUIN M. SORENSON, ESQ.*
Assistant Federal Public Defender

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
quin_sorenson@fd.org

Counsel for Petitioner

* Counsel of Record

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QUESTION PRESENTED

The question presented is whether a postconviction motion under 28 U.S.C. § 2255, challenging a sentence imposed under the pre-2005 mandatory version of the U.S. Sentencing Guidelines and based on the so-called "residual clause" of the career-offender provision of the Guidelines, U.S.S.G. § 4B1.2(a)(2) (1999), is timely when filed within one year of the decision of this Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held for the first time that the identically worded "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924, is unconstitutionally vague and that defendants cannot be subjected to sentence based on it.

PARTIES TO THE PROCEEDINGS

The petitioner herein, who was the defendant-appellant below, is Paul N. Littles.

The respondent herein, which was the appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Paul N. Littles, hereby petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The order of the court of appeals is unpublished, but is reproduced in the appendix to this petition, Petition Appendix ("Pet. App.") 1a. The decisions of the district court are also unpublished, but are reproduced in the appendix. Pet. App. 2a-3a.

JURISDICTION

The order sought to be reviewed was entered by the court of appeals on January 6, 2020. Pet. App. 1a. The deadline for a petition for a writ of certiorari was originally April 6, 2020, but extended by general order of this Court, dated March 19, 2020, by 60 days, to and including June 5, 2020. This Court has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, as follows:

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

U.S. Const., amend. V.

Section 924 of Title 18 of the U.S. Code provides, in pertinent part, as follows:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year ... that … is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

Section 2255 of Title 28 of the U.S. Code provides, in pertinent part, as follows:

> 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 ... may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> ....
>
> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of ... 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(a), (f)(3).

Section 4B1.2 of the U.S. Sentencing Guidelines previously provided, in pertinent part, as follows:

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

U.S.S.G. § 4B1.2(a) (1999).

STATEMENT OF THE CASE

The relevant facts are simple, and undisputed. The petitioner, Paul N. Littles, was charged and convicted of distribution of a controlled substance in violation of 21 U.S.C. § 841(a), and sentenced in 1999 to a term of imprisonment of 360 months. App. 4a-5a. That sentence was based on the district court's holding that Mr. Littles qualified as a "career offender" under § 4B1.1 of the U.S. Sentencing Guidelines, which provides for enhanced sentence when the defendant has two or more prior convictions for a "crime of violence," defined (at the time) in § 4B1.2 as any offense that either "has an element the use ... of physical force" (the so-called "elements clause") or "involves conduct that presents a serious potential risk of physical injury to another" (the so-called "residual clause"). *Id.* The court determined that Mr. Littles's two prior convictions in Pennsylvania for robbery, under 18 Pa. Cons. Stat. § 3701, satisfied this definition – even though it may be committed without the use of physical force (and thus could not satisfy the "elements clause") – because it involves a risk of serious physical injury (and therefore satisfied the "residual clause"). App. 4a-5a. With application of the enhancement, and in light of the then-mandatory nature of the Guidelines, the minimum term of imprisonment that the district court could impose was 360 months, as the court did. *Id.* The conviction and sentence were upheld on appeal in April 2000. *Id.*

Fifteen years later, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that an identical "residual clause," in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague, and that sentences based on that clause are invalid. 135 S. Ct. at 2563. Within a year thereafter, Mr. Littles moved

pursuant to 28 U.S.C. § 2255 to set aside his sentence on grounds that *Johnson*'s holding applied equally to the "residual clause" of § 4B1.2 of the Guidelines, rendering his sentence – mandated as it was by application of that enhancement – unconstitutional. App. 3a-5a.

The district court denied the motion as untimely under 28 U.S.C. § 2255, which requires such motions to be filed within one year after "the date on which the right asserted was ... newly recognized by the Supreme Court." App. 2a; *see* 28 U.S.C. § 2255(f). It relied on the opinion of the court of appeals in *United States v. Green*, 898 F.3d 315 (3d Cir. 2018), in which the court – rejecting decisions of other circuits – held that *Johnson* did not recognize a new "right" to challenge the "residual clause" of the mandatory Guidelines, and therefore did not open a window to file a motion under 28 U.S.C. § 2255. The court of appeals subsequently refused to issue a certificate of appealability for the same reason. App. 1a.

This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

An acknowledged and entrenched split exists among the circuits over whether a motion under 28 U.S.C. § 2255 challenging the constitutionality of the "residual clause" of § 4B1.2 of the mandatory version of the U.S. Sentencing Guidelines, on the ground that the clause was invalidated by the holding of *Johnson v. United States*, 135 S. Ct. 2551 (2015), asserts the "right … recognized" by *Johnson* and is therefore timely if filed within a year after the opinion. *Infra* Part I. That conflict, on an issue which must be resolved in favor of finding such motions timely, *infra* Part II, and which could affect thousands of individuals serving lengthy terms of imprisonment

based on a plainly unconstitutional Guidelines provision, *infra* Part III, demands review by this Court.

I. THE CIRCUITS ARE OPENLY SPLIT ON THE QUESTION PRESENTED.

The split among the circuits on the question presented, unlike those in some cases, cannot be called speculative, superficial, or reconcilable. To the contrary, it has been recognized in numerous cases as representing an essential disagreement over the impact of *Johnson* and the interpretation of 28 U.S.C. § 2255.

Two circuits, the U.S. Courts of Appeals for the First and Seventh Circuits, have held that post-conviction motions challenging the residual clause of the mandatory Guidelines are timely under 28 U.S.C. § 2255(f)(3) if filed within one year of *Johnson*. *Moore v. United States*, 871 F.3d 72, 82-83 (1st Cir. 2017); *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). Their opinions reason that, because *Johnson* held for the first time that a defendant may not be subjected to a mandatory sentence based on the "residual clause" of Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), a challenge to a mandatory sentence based on the identically worded residual clause of the Guidelines necessarily asserts the "right … recognized" by *Johnson*. *E.g.*, *Moore*, 871 F.3d at 82-83. A contrary conclusion would, the opinions explain, be inconsistent with the text and purpose of 28 U.S.C. § 2255(f)(3), as it would effectively preclude *any* defendant from challenging the residual clause of the mandatory Guidelines under *Johnson* – since any such motion would have to wait until the Court actually applied *Johnson* to the Guidelines, and any motion filed

thereafter would be untimely. *E.g.*, *Moore*, 871 F.3d at 82-83. The opinions explicitly recognize and reject the conflicting holdings of other circuits. *E.g.*, *id.*

Several other courts of appeals, including the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, have held otherwise. *United States v. Green*, 898 F.3d 315, 321 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017); *United States v. London*, 937 F.3d 502, 507 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018); *United States v. Blackstone*, 903 F.3d 1020, 1026 (9th Cir. 2018); *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir. 2018); *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2016). They reason that this Court cannot be said to have "recognized" a right to challenge a sentence imposed under the residual clause of the mandatory Guidelines because it has not explicitly applied *Johnson* to that clause. *E.g.*, *Green*, 898 F.3d at 321. Regardless of whether *Johnson* facially requires that the residual clause of the mandatory Guidelines be invalidated, a motion challenging the clause on that basis cannot be filed, in these circuits, unless and until this Court itself applies *Johnson* to the Guidelines. *E.g.*, *Blackstone*, 903 F.3d at 1026. The opinions acknowledge the split with the First and Seventh Circuits, and feature several dissents and concurrences advocating a different result. *E.g.*, *Green*, 898 F.3d at 322 & n.3; *London*, 937 F.3d at 510 (Costa, J., concurring).

The split among the circuits is clear and deep. Only this Court can resolve it.

II. THE MAJORITY'S APPROACH IS CONTRARY TO DECISIONS OF THIS COURT AND FEDERAL STATUTE.

Notwithstanding the disagreement among other courts, the correct result is clear, and contrary to the holdings of the majority of circuits. Motions challenging the residual clause of the mandatory Guidelines are timely under 28 U.S.C. § 2255(f)(3) if filed within one year of *Johnson*.

This follows from *Johnson* itself. The defendants in both *Johnson* and these cases received mandatory increased sentences based on a judicial determination that they had committed crimes satisfying the same residual clause language: *i.e.*, crimes "involv[ing] conduct that presents a serious potential risk of physical injury to another." *Johnson*, 135 S. Ct. at 2555-63; U.S.S.G. § 4B1.2(a)(2) (1999). This Court held in *Johnson* that this language, there in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague because it "both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557. In particular, this Court found that the language "leaves grave uncertainty about how to estimate the risk posed by a crime" and "about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58.

A postconviction motion challenging the residual clause of the mandatory Guidelines asserts the same right recognized in *Johnson*, and thus is timely if filed within a year of that opinion. "Under *Johnson*, a person has a right not to have his sentenced dictated by the unconstitutionally vague language of the mandatory residual clause," *Cross*, 892 F.3d at 294, and that is precisely the right that these motions assert. These cases arise in the same context as *Johnson*, as they also involve

sentencing increases mandated by the residual clause, and they challenge the same language held unconstitutional in *Johnson*, as the residual clause of the mandatory Guidelines is identical to – and was imported directly from – the residual clause of the Act. *See* U.S.S.G. app. C, amend. 268 ("The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)."). And these motions assert the same right recognized in *Johnson*: *i.e.*, the right not to be subjected to a mandatorily increased sentence on the basis of a vague residual clause. The motions therefore satisfy the statute of limitations of 28 U.S.C. § 2255(f)(3) when filed within one year of *Johnson*, which is "the date on which the right asserted was initially recognized by the Supreme Court."

To hold otherwise – as a majority of circuits have – that the statute of limitations can be satisfied only in the event that this Court explicitly states that the residual clause of the mandatory Guidelines is unconstitutionally vague, misconstrues *Johnson*. The holding in *Johnson* was not dependent on the fact that it arose in the context of the Armed Career Criminal Act. Rather, the Court explained that it was "convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges[, and i]ncreasing a defendant's sentence under the clause denies due process of law." 135 S. Ct. at 2557. That due process right applies just as strongly to the residual clause of the mandatory Guidelines, which is identical to that of the Act in every relevant way.

The majority's interpretation also misinterprets 28 U.S.C. § 2255(f)(3). It first conflates the word "right" in 28 U.S.C. § 2255(f)(3) with a specific *holding* of this Court, as applied to a specific set of facts. Other courts have explained that "Congress in § 2255 used words such as 'rule' and 'right' rather than 'holding,'" and "presumably used th[is] broader term[] 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." *Moore*, 871 F.3d at 82; *cf. Chaidez v. United States*, 568 U.S. 342, 347-48 (2013) (for retroactivity purposes, "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"). *Johnson* recognized the right to be free of the arbitrary language of the residual clause, and that right is equally implicated whether the clause is applied under the Armed Career Criminal Act or the mandatory Guidelines. Further, the majority's view reads the word "asserted" out of 28 U.S.C. § 2255(f)(3). The statute allows a petitioner to file a habeas 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) (emphasis added), and as such requires that the petitioner invoke a right recognized by the Supreme Court, not conclusively prove that the right ultimately applies to his situation. *See, e.g., Cross*, 892 F.3d at 293-94. The majority's reading collapses the merits inquiry into the limitations period inquiry, when Congress wrote the latter more permissively than the former.

The majority's position, moreover, produces the absurd result of precluding *anyone* from challenging a mandatory Guidelines sentence under *Johnson*. Those

courts have suggested that, "[i]f th[is] Court extends *Johnson* to a sentence imposed at a time when the Sentencing Guidelines were mandatory, then [a petitioner] may be able to bring a timely motion under § 2255." 903 F.3d at 1028. But the time for a direct appeal in these cases has long expired, and under the majority rule, no one subject to such a sentence will ever be able to seek a ruling from the Court "extend[ing] *Johnson* to a sentence imposed at the time when the Sentencing Guidelines were mandatory." People serving these sentences may be time-barred as both "too early and then too late, with no in-between period when it would be timely" to assert the right recognized in *Johnson*. *London*, 937 F.3d at 513 (Costa, J. concurring).

The majority's approach is wrong. This Court should correct it.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING, AND IMPLICATES FUNDAMENTAL DUE PROCESS AND LIBERTY INTERESTS.

The acknowledged circuit split, and the misconceptions reflected in the majority's approach, are not the only reasons supporting review. The question presented here, going as it does to the timeliness of any postconviction motion challenging a mandatory Guidelines sentence under *Johnson*, is of exceptional importance.

The divide among the courts of appeals means that many defendants sentenced under the residual clause of the mandatory Guidelines are unconstitutionally imprisoned based purely on geography. Defendants in the First and Seventh Circuits can obtain relief from sentences imposed without due process. *Supra* pp. __. But

defendants in the rest of the country must continue to serve arbitrary sentences. *Supra* pp. __.

Many lives and liberties depend on this accident of geography. Perhaps thousands continue to serve federal sentences imposed under the residual clause of the mandatory Guidelines. *Brown v. United States*, 139 S. Ct. 14 (Mem.) (2018) (Sotomayor, J., dissenting from denial of certiorari). Most of those sentences are years too long: for over 80% of defendants sentenced in 2015, the career offender enhancement increased the mandatory minimum sentence by at least seven years. *See* U.S. Sent'g Comm'n, *Quick Facts - Career Offenders* (2015). The fundamental right of individuals to liberty is at stake – liberty that is safeguarded by "ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part).

Review is particularly warranted because this Court has repeatedly recognized the grave due process problems with punishing people based on the vague residual clause language at issue here. In *Johnson*, this Court explained that a mandatory sentence based on this residual clause language "both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557. "Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 2560.

Likewise, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court invalidated the residual clause of the Immigration and National Act on the ground that it too

suffered from "hopeless indeterminacy." *Id.* at 1213 (quoting *Johnson*, 135 S. Ct. at 2558). Vague laws of this sort open the door to the abuses of power, and are contrary to both English common law and "early American practice." 138 S. Ct. at 1225-26 (Gorsuch, J., concurring in part). They also raise critical separation of powers concerns, insofar as legislators "abdicate their responsibilities for setting the standards of the criminal law" and "leav[e] to judges the power to decide the various crimes includable in [a] vague phrase." *Id.* at 1227.

Most recently, in *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court invalidated the residual clause in 18 U.S.C. § 924(c)(3)(B), again reaffirming 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. The Court emphasized once more the principle that vague laws "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct." *Id.* at 2323.

This case presents the same dangers of arbitrary punishment, and "has generated divergence among the lower courts [that] calls out for an answer." *Brown*, 139 S. Ct. at 14 (Sotomayor, J., dissenting from denial of cert.). The Court should now answer that call.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Quin M. Sorenson
HEIDI R. FREESE, ESQ.
Federal Public Defender

QUIN M. SORENSON, ESQ.*
Assistant Federal Public Defender

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
quin_sorenson@fd.org

Counsel for Petitioner

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