No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN OLIVER BRYANT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, SECOND CIRCUIT

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QUESTIONS PRESENTED (Rule 14.1(a))

1. Whether the district court erred in dismissing the petition as untimely.

2. Whether dismissal of the petition violated the Suspension Clause.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, SECOND CIRCUIT

Petitioner, John Oliver Bryant, respectfully asks that a writ of certiorari issue to review the summary order of the Court of Appeals for the Second Circuit, filed on July 13, 2020.

OPINION BELOW

The summary order of the Court of Appeals, which was published, *Bryant v. United States*, 811 Fed.Appx. 712 (2nd Cir. 2020), was issued on July 13, 2020, and is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The decision of the Court of Appeals for the Second Circuit from which petitioner seeks review was issued on July 13, 2020. This petition is filed within 90 days of the date of the decision, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

***U.S. Const.* amend. V** provides, in pertinent part: "No person shall be held to answer for a ... crime ... nor be deprived of life, liberty, or property, without due process of law."

***U.S. Const*. art. I, § 9, cl. 2** reads: "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(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.

3 U.S.S.G. § 4B1.1 Career Offender (2004)

(a) A defendant is a career offender if

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;

(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and

(3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

* * * *

U.S.S.G. § 4B1.2 Definition of Terms Used in Section 4B1.1 (2004)

(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

The underlying facts are not in dispute. Appellant was convicted in 1994 of all four counts of an indictment charging him with bank robbery and related crimes. The district court decision, dated February 20, 2018, is attached as Appendix B.

Background Facts

The sentencing court

> determined that Bryant was a career offender pursuant to Section 4B1.1 of the Guidelines, because the offense of conviction was a crime of violence and Bryant had at least two prior felony convictions for crimes of violence. U.S.S.G. § 4B1.1 (1993). Specifically, in 1975 Bryant had been convicted of conspiracy to commit bank robbery and entering a bank with intent to commit a felony, and in 1980 he had been convicted of bank robbery. These convictions qualified as crimes of violence under the career offender guideline's residual clause, which applied to a felony offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(1)(ii) (1993). As a result, Bryant's final offense level was 34, at Criminal History Category VI, with a sentencing range of 262-327 months' imprisonment on Counts One, Two, and Four. Count Three – the firearms offense – required a mandatory minimum term of 60 months' imprisonment, to be imposed consecutively to any other sentence imposed. Thus, the applicable mandatory sentencing range was 322-387 months.

Appendix B, p.2.

The district court noted in a footnote that "absent the career offender designation, Bryant's sentencing range would have been substantially less." Appendix B, p.2, f.n.1.

The trial court imposed three consecutive sentences of 300 months, 60 months, and 27 months, for a total term of 387 months. The Court of Appeals affirmed the conviction and sentence by summary order, *United States v. Bryant*, 47 F.3d 1159 (2nd Cir. 1995).

District Court Proceedings

On June 23, 2016, petitioner, through counsel, filed a motion pursuant to § 2255, seeking to vacate his sentence, which was imposed in 1994 pursuant to the then mandatory guidelines. "His central argument is that the career offender guideline's residual clause is unconstitutionally vague...."

The district court held, *inter alia*:

> The Court agrees with the government that the Supreme Court has not extended the reasoning of *Johnson* to make mandatory guideline provisions subject to vagueness challenges or, as relevant here, to declare the residual clause in the mandatory career offender guideline unconstitutionally vague.
>
> Accordingly, having been filed more than one year after his conviction became final, and there being no applicable exception to that rule, Bryant's Section 2255 motion is untimely. Arguably, it [is] also premature – because he is attempting to assert a right the Supreme Court has yet to recognize.

Appendix B, p.5. The court denied appellant's application and also denied a certificate of appealability (Appendix B, p.6).

On April 17, 2018, appellant filed a notice of appeal. He also moved for a certificate of appealability, which the Second Circuit granted on August 22, 2018.

Appellate Proceedings

The Court of Appeals affirmed the district court's decision by summary order, attached as Appendix A, on July 13, 2020. Addressing the Suspension Clause issue, which had not been raised in the district court, the court noted:

> in some cases the one-year limitations period may be an unreasonable barrier and raise a Suspension Clause concern. Bryant, however, cites no authority for the proposition that the one-year limitations period is an unreasonable barrier in this case and we are aware of none. We are thus precluded from ruling in his favor because we cannot find plain error. Typically, we will not find plain error where the operative legal question is unsettled. (Citations and internal quotation marks omitted).

Appendix A, p.4.

REASONS FOR GRANTING THE PETITION

A. This Court should resolve the division in the Circuit Courts as to whether the claim that the residual clause of the mandatory guidelines was unconstitutionally vague is barred by the statute of limitations of the AEDPA.

Following this Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015) and *Beckles v. United States*, 137 S. Ct. 886 (2017), this case presents an important issue over which there is a division in the circuit courts, *i.e.*, whether the claim that the residual clause of the mandatory guidelines was unconstitutionally vague is barred by the statute of limitations of the The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Seventh Circuit has explicitly ruled that "[u]nder *Johnson*, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory [guidelines]

residual clause," *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). In this case, however, the Second Circuit held that

> the right recognized in *Johnson* in the context of ACCA does not extend to the residual clause of the career offender sentencing guideline and that, as a result, the petition of a movant sentenced under that guideline, even if filed within a year of *Johnson*, is not timely under § 2255(f)(3). *Nunez v. United States*, 954 F.3d 465, 467 (2d Cir. 2020).

Appendix A, pp. 2-3.

Most other circuits have agreed with the opinion below. *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 2661 (2018)(the right recognized in *Johnson* must be limited to its holding that "the residual clause of the ACCA is unconstitutionally vague," and thus, the right "d[oes] not extend to other legal authorities such as the [] Guidelines"); *United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S.Ct. 2762 (2019)("*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review"); *Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018), *cert. denied*, 139 S.Ct. 1297 (2019) ("*Johnson* did not address the sentencing guidelines, and *Beckles* rejected a vagueness challenge to the advisory guidelines"); *United States v. Green*, 898 F.3d 315, 322-23 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 1590 (2019) ("[I]n light of *Beckles*, *Johnson*'s holding as to the residual clause in the ACCA created a right only as to the ACCA, and not a broader right that applied to all similarly worded residual clauses, such as that found in the advisory Sentencing

Guidelines"); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir.), *cert. denied*, 139 S.Ct. 374 (2018) (rejecting the defendant's claim based on a "right not to be sentenced under the residual clause of § 4B1.2(a)(2) of the mandatory Guidelines" because "[t]he Supreme Court has recognized no such right"); *United States v. Brown*, 868 F.3d 297, 301-02 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 14 (2018) ("Petitioner's motion relies on a claimed due-process right to have his Guidelines' range calculated without reference to an allegedly vague [] Guidelines' provision. . . . Regrettably for [the p]etitioner, the Supreme Court did not recognize such a right in *Johnson*"); *In re Arnick,* 826 F.3d 787, 788 (5th Cir. 2016) ("*Johnson* did not address [§] 4B1.2(a)(2) of the Guidelines. Nor has the Supreme Court held that a Guidelines enhancement that increases the Guidelines range implicates the same due process concerns as a statute that increases a statutory penalty" (internal citation omitted)).

By contrast, a relative minority of circuit courts have concluded that the *Johnson* right may be more broadly defined as "a right not to have [one's] sentence dictated by the unconstitutionally vague language of [a] mandatory residual clause," and, thus, may include a right not to be sentenced under the residual clause of § 4B1.2 of at least the pre-Booker era, i.e., when the Sentencing Guidelines were mandatory. *Cross v. United States*, *supra*, 892 F.3d at 294 (emphasis removed); *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017) (observing that it "makes sense" that "the rule [in *Johnson*] is broader than the

technical holding" and that "one [could] describe the rule as being that the text of the residual clause, as employed in the ACCA, is too vague to provide a standard by which courts must fix sentences"). The D.C. Circuit upheld a conviction under the old guidelines, but failed to reach the constitutional question in *United States v. Carr*, 946 F.3d 598, 601 (D.C.Cir. 2020), when it found that "bank robbery 'by intimidation' categorically involves a threat of physical force...[and] thus squarely fits within the elements clause's definition of a crime of violence."

Appellant was sentenced in 1994, more than a decade before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), made the previously mandatory sentencing guidelines advisory. Appellant was adjudged a career offender under the residual clause of the 1994 guidelines, which defined crimes of violence to include any felony "involv[ing] conduct that present[ed] a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2) (1992).

In 2015, in *Johnson v. United States*, *supra*, the Supreme Court held that the identical language, as contained in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2012), is unconstitutionally vague. In *Welch v. United States,* 136 S.Ct. 1257 (2016), the Supreme Court made *Johnson* retroactive to cases on collateral review. It is undisputed that petitioner filed the instant petition within a year of the *Johnson* decision and within about two months of the *Welch* decision.

Subsequent to its decisions in *Johnson* and *Welch,* the Supreme Court held that same language in the residual clause of the advisory guidelines was not amenable to a vagueness challenge under the Due Process clause because, in contrast to the ACCA, it "do[es] not fix the permissible range of sentences," *Beckles, supra,* 137 S. Ct. at 892. The district court concluded, incorrectly, that this meant that "[t]he Court left open the question whether the residual clause in the mandatory career offender guideline is subject to a due process vagueness challenge" (Appendix A, p.4).

The ruling in *Beckles* was limited to holding "only that the advisory Sentencing Guidelines ... are not subject to a challenge under the void-for-vagueness doctrine." *Id*. at 896. Its reasoning leads to the conclusion that the mandatory guidelines, which were binding on district courts, 18 U.S.C. § 3553(b), and had "the force and effect of laws," *Booker*, at 234, did "fix the permissible range of sentences." The mandatory guidelines, therefore, in contrast to the advisory guidelines, are subject to vagueness attack. *Beckles*, at 892.

The mandatory guidelines set the minimum and maximum terms of authorized sentences. "Before *Booker*, the guidelines were the practical equivalent of a statute. Departures were permitted on specified grounds, but in that respect the guidelines were no different from statutes, which often specify exceptions." *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013), *cert. denied*, 571 U.S. 1197 (2014); *Narvaez v. United States*, 674 F.3d 621, 630 (7th Cir. 2011) (erroneous career offender designation "illegally

increased" sentence "beyond that authorized"). "Departures...were limited in scope, and sentencing courts had little leeway in employing them." *Moore v. United States*, *supra*(allowing a successive petition to challenge the residual clause of the mandatory guidelines).

Because the mandatory guidelines had "legal force," an erroneous career offender designation under the mandatory guidelines necessarily resulted in a sentence that was greater than the "maximum authorized by law." *United States v. Foote*, 784 F.3d 931, 942 (4th Cir.), *cert denied*, 135 S.Ct. 2850 (2015). "[T]here is no doubt" that the mandatory guidelines were "law" and that an erroneous career offender designation "results in a sentence substantively not authorized by law." *United States v. Doe*, 810 F.3d 132, 160 (3d Cir. 2015). "Under *Johnson*, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory [guidelines] residual clause," *Cross v. United States*, *supra,* 892 F.3d at 294.

Because petitioner's sentence was fixed by language that has been found to be unconstitutionally vague, he must be resentenced. This Court should remand the case to the district court.

B. *Dismissal of the petition violated the Suspension Clause.*

Courts that have dismissed petitions such as the one at hand have done so, as the district court did here, as untimely under the one-year statute of limitations imposed by the AEDPA. *United States v. Blackstone*, *supra; Russo v. United States*, *supra; United*

States v. Green, *supra*; *United States v. Brown*, *supra*); *Raybon v. United States*, *supra*.

This reasoning, however, violates the Suspension Clause, which states that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. Art. I, § 9, cl. 2. At the outset, we note that the exceptions do not apply; there is not any current rebellion or invasion that would justify suspension.

In this instance, though, the one-year statute of limitations makes the writ utterly unavailable to petitioners seeking to challenge sentences imposed under the mandatory guidelines. Since the guidelines became advisory with the *Booker* decision in 2005, every case that was subject to the mandatory guidelines is more than a decade past the expiration of the one-year statute, and it is impossible for any petitioner to employ the writ to challenge his or her conviction. That amounts to a suspension of the writ, at least as to this issue.

In *Felker v. Turpin*, 518 U.S. 651, 664 (1996), the Supreme Court upheld the "gatekeeping" provisions of the AEDPA, noting:

> The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." ... The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a "suspension" of the writ contrary to Article I, § 9.

The Court did not specifically address the one-year statute, which does not generally amount to a suspension of the writ, since

it does allow a prisoner a period of one year within which to petition. With regard to this issue, however, petitioning within one year is patently impossible, and the one-year limit amounts to a suspension of the writ.

In *Boumediene v. Bush*, 553 U.S. 723, 779 (2008), addressing whether the writ had been improperly suspended for prisoners held at Guantanamo, the Court noted:

> We do consider it uncontroversial...that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained... [citation omitted].

That would not be the case if the one-year statute were applied to the issue of the mandatory guidelines residual clause. It seems unlikely that Congress intended to single out this particular group of petitioners and bar them from the writ.

As the Court also noted:

> Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims.

Id, at 773.

Boumediene, like virtually every other case addressing the Suspension Clause, sought to evaluate a substitute for habeas

corpus to determine if it was adequate. In *Luna v. Holder*, 637 F.3d 85, 104 (2nd Cir. 2011), the Second Circuit considered a 30-day filing deadline to review an order of removal by the Board of Immigration Appeals and found that the court's ability to order the BIA to reissue the final order (and thus restart the period) provided an adequate substitute for habeas review of claims regarding the timeliness of appeals.

In contrast, petitioner has no substitute remedy to § 2255. The district court's dismissal of the petition leaves petitioner with no way to raise his claim, amounting to a suspension of the writ. In *Miller v. Marr*, 141 F. 3d 976, 977 (10th Cir.), *cert. denied*, 525 U.S. 891 (1998), the court observed that "[w]hether the one-year limitation period violates the Suspension Clause depends upon whether the limitation period renders the habeas remedy 'inadequate or ineffective' to test the legality of detention. In this case, it does just that.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: September 8, 2020

Respectfully submitted,

_____
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Counsel of Record
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(516) 771-0300

APPENDIX A

Bryant v. United States, 811 Fed.Appx. 712 (2nd Cir. 2020)

18-1141
Bryant v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of July, two thousand twenty.

PRESENT: DENNIS JACOBS,
ROBERT D. SACK,
PETER W. HALL,
Circuit Judges.

John Oliver Bryant,

Petitioner–Appellant,

v. No. 18-1141

United States of America,

Respondent–Appellee.

For Appellant: RANDOLPH Z. VOLKELL, Law Office of Randolph Z. Volkell, Merrick, New York

For Appellee: TIMOTHY V. CAPOZZI, Assistant United States Attorney (Anna M. Skotko, Assistant United States Attorney, *on the brief*), *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, New York

Appeal from a judgment of the United States District Court for the Southern District of New York (Briccetti, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Petitioner–Appellant John Oliver Bryant appeals from an order entered in the United States District Court for the Southern District of New York (Briccetti, *J.*) dismissing his petition for a writ of habeas corpus as untimely pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2255. We agree that Bryant's petition was untimely and affirm its dismissal.

Bryant's petition argues that his 1994 sentence as a career offender under the Sentencing Guidelines—at the time mandatory absent limited circumstances—is unconstitutional because the residual clause of the career offender guideline under which he was sentenced is unconstitutionally vague per *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (holding that the similarly-worded residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C § 924(e)(2)(B), is unconstitutionally vague). As relevant here, AEDPA's one-year statute of limitation runs from the later of "the date on which the judgment of conviction becomes final; . . . [or] 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 . . . ." § 2255(f). Bryant argues that his petition is timely because he filed it on June 23, 2016, within a year of *Johnson* (decided June 26, 2015). *See Welch v. United States*, 136 S. Ct. 1257 (2016) (holding that *Johnson* is retroactive).

This Court recently held that the right recognized in *Johnson* in the context of ACCA does not extend to the residual clause of the career offender sentencing guideline and that, as a result,

the petition of a movant sentenced under that guideline, even if filed within a year of *Johnson*, is not timely under § 2255(f)(3). *Nunez v. United States*, 954 F.3d 465, 467 (2d Cir. 2020); *see also id.* at 469 ("Our decision aligns with that of the majority of circuits to have addressed the issue." (citing *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017))). "It is a longstanding rule of our Circuit that a three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting *en banc* or by the Supreme Court." *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016). Accordingly, we are bound by our holding in *Nunez*, and we too decline to find that Bryant's petition is timely because it was filed within a year of *Johnson*.

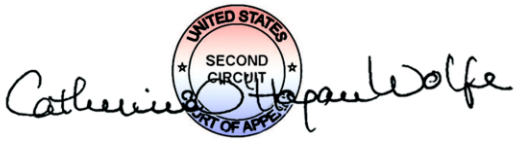
Bryant argues that denying him access to relief under § 2255 would violate the Suspension Clause because all individuals in his situation (sentenced as a career offender under the residual clause at a time when the sentencing guidelines were mandatory) are outside the one-year statute of limitations. *See Nunez*, 954 F.3d at 472 (Pooler, *J.*, concurring) ("[O]ur decision 'denies petitioners, and perhaps more than 1,000 like them, a chance to challenge the constitutionality of their sentences.' Therein lies the injustice." (quoting *Brown v. United States*, 139 S. Ct. 14, 14 (2018) (Sotomayor, *J.*, dissenting from denial of certiorari)). We apply plain error review to Bryant's Suspension Clause argument because Bryant did not raise it before the district court. *United States v. Miller*, 263 F.3d 1, 4 (2d Cir. 2001) ("Issues not raised in the district court . . . will be deemed forfeited on appeal and addressed only upon a showing that the [district] court committed plain error."). For an error to be "plain" it must be clear under current law. *See, e.g.*,

United States v. Gamez, 577 F.3d 394, 400 (2d Cir. 2009). "Typically, we will not find plain error where the operative legal question is unsettled." *Id.* (internal quotation marks omitted).

The Suspension Clause states: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. Art. I, § 9, cl. 2. Our Court has found that AEDPA's statute of limitations does not per se violate the Suspension Clause. *Weaver v. United States*, 195 F.3d 123, 124 (2d Cir. 1999); *see also Rodriguez v. Artuz*, 990 F. Supp. 275, 282–83 (S.D.N.Y. 1998) (holding that one-year limit placed on state court prisoners pursuant to § 2254 does not violate the Suspension Clause), *aff'd*, 161 F.3d 763, 764 (2d Cir. 1998) (per curiam) (affirming for "substantially the reasons stated by the district court").

In *Weaver*, we noted that in some cases the one-year limitations period may be an unreasonable barrier and raise a Suspension Clause concern. 195 F.3d at 125. Bryant, however, cites no authority for the proposition that the one-year limitations period is an unreasonable barrier in this case and we are aware of none. We are thus precluded from ruling in his favor because we cannot find plain error. *See Gamez*, 577 F.3d at 400 ("Typically, we will not find plain error where the operative legal question is unsettled." (internal quotation marks omitted)). We have considered Bryant's remaining arguments and find them to be without merit. We hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX B

Bryant v. United States, 2018 WL 1010212 (S.D.N.Y. 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN OLIVER BRYANT, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	: : : : : : : :	**MEMORANDUM OPINION AND ORDER** 16 CV 4986 (VB) 93 CR 645 (VB)

Briccetti, J.:

Petitioner John Oliver Bryant moves pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Purporting to rely on the authority of Johnson v. United States, 135 S. Ct 2551 (2015), Bryant asserts that when he was sentenced as a "career offender" under the then-mandatory Sentencing Guidelines, the Court erred in finding that certain of his prior convictions qualified as crimes of violence under the "residual clause" of the career offender guideline, U.S.S.G. §§ 4B1.1, 4B1.2(1)(ii) (1993).

For the reasons set forth below, the motion is DENIED as untimely and the petition is DISMISSED.

BACKGROUND

The papers in support of and in opposition to the motion, and the record of the underlying criminal proceedings, reflect the following:

On June 18, 1993, Bryant and his co-conspirators robbed a bank in Pearl River, New York, at gunpoint, then fled in a stolen getaway car. The robbers were pursued by the police, and a gun fight ensued in the parking lot of a nearby high school. The robbers managed to get away, and led numerous police cars on a thirty mile-long high speed chase into New Jersey. The getaway car sustained extensive damage during the chase, and eventually came to a stop. Each

of the robbers was arrested. Four loaded firearms were recovered, as well as the cash stolen from the bank. Thereafter, Bryant and his co-conspirators were indicted in this district for bank robbery (Count One), armed bank robbery (Count Two), use of a firearm during a crime of violence (Count Three), and conspiracy to commit armed bank robbery (Count Four). Following a jury trial in February 1994 before the late Honorable Charles L. Brieant, United States District Judge, Bryant was convicted on all four counts.

At sentencing on April 29, 1994, Judge Brieant determined that Bryant was a career offender pursuant to Section 4B1.1 of the Guidelines, because the offense of conviction was a crime of violence and Bryant had at least two prior felony convictions for crimes of violence. U.S.S.G. § 4B1.1 (1993). Specifically, in 1975 Bryant had been convicted of conspiracy to commit bank robbery and entering a bank with intent to commit a felony, and in 1980 he had been convicted of bank robbery. These convictions qualified as crimes of violence under the career offender guideline's residual clause, which applied to a felony offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(1)(ii) (1993). As a result, Bryant's final offense level was 34, at Criminal History Category VI, with a sentencing range of 262-327 months' imprisonment on Counts One, Two, and Four. Count Three – the firearms offense – required a mandatory minimum term of 60 months' imprisonment, to be imposed consecutively to any other sentence imposed. Thus, the applicable mandatory sentencing range was 322-387 months.[1]

Citing the vicious and highly dangerous nature of Bryant's crimes, the fact that Bryant was a career criminal who acted as the ring leader of the conspiracy, and the need to confine Bryant for the protection of society, Judge Brieant sentenced Bryant to 300 months on Counts

[1] Absent the career offender designation, Bryant's sentencing range would have been substantially less.

One and Two (which merged for purposes of sentencing), 60 months on Count Three, and 27 months on Count Four, with all the sentences to run consecutively, for a total term of imprisonment of 387 months (32¼ years).[2]

The Second Circuit affirmed Bryant's conviction and sentence by summary order on January 27, 1995. United States v. Bryant, 47 F.3d 1159 (2d Cir. 1995). Bryant did not file a petition for certiorari with the Supreme Court.

On June 26, 2015, in Johnson v. United States, 135 S. Ct. 2551, 2563 (2015), the Supreme Court held that the residual clause in the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), which is identical in wording to the residual clause in Section 4B1.2 of the Guidelines, is unconstitutionally vague; and therefore that imposing an increased sentence under ACCA's residual clause violates due process. On April 18, 2016, in Welch v. United States, 136 S. Ct. 1257, 1268 (2016), the Court held that Johnson announced a new "substantive" rule of constitutional law that applies retroactively in cases that challenge on collateral review a sentence enhanced under ACCA.

On June 23, 2016, Bryant filed the instant Section 2255 motion. His central argument is that the career offender guideline's residual clause is unconstitutionally vague under the authority of Johnson and Welch.

On March 6, 2017, in Beckles v. United States, 137 S. Ct. 886, 892 (2017), the Supreme Court held that the career offender guideline's residual clause, which was made advisory – rather than mandatory – by the Court's decision in United States v. Booker, 543 U.S. 220 (2005), is not subject to a vagueness challenge under the Due Process Clause, since the Guidelines, unlike

[2] Bryant was also convicted of assault and weapons charges in New York state court arising out of his shootout with police following the bank robbery, and attempted murder and assault charges in New Jersey state court, arising out of a high speed police chase following the shootout.

ACCA, "do not fix the permissible range of sentences." Thus, the residual clause in the advisory career offender guideline remains valid after Johnson. The Court left open the question whether the residual clause in the mandatory career offender guideline is subject to a due process vagueness challenge.

DISCUSSION

The government contends Bryant's petition is barred by the one-year statute of limitations in 28 U.S.C. § 2255(f).

The Court agrees.

A motion to vacate, correct or set aside a sentence must be filed within one year of the date a judgment of conviction becomes final by the completion of direct review. 28 U.S.C. § 2255(f)(1). Here, Bryant's judgment of conviction became final in 1995, more than twenty-one years before he filed his 2255 motion. There are three exceptions to the general rule, only one of which is arguably applicable here, namely that the motion is timely if it is filed within one year 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(f)(3).

Here, the "right asserted" has not yet been recognized by the Supreme Court. Bryant contends he is asserting what the Supreme Court in Johnson recognized as the "right not to have one's sentence fixed by a 'residual clause [that] produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" (Pet. reply mem. 9-10 (emphasis added)) (quoting Johnson v. United States, 135 S. Ct. at 2558). But the right recognized in Johnson is not, in fact, the right being asserted in this case. Johnson recognized a right not to be sentenced pursuant to a vague federal enhancement statute – ACCA. The right being asserted by Bryant is the right not

to have one's sentencing range within otherwise fixed statutory limits calculated under an allegedly vague provision. It is clear the Supreme Court has decided no such right exists under the advisory guidelines, Beckles v. United States, 137 S. Ct. at 890, and it is equally clear the Court has not – at least not yet – recognized such a right under the mandatory guidelines. See id. at 903 n.4 (Sotomayor, J., concurring).

The Court agrees with the government that the Supreme Court has not extended the reasoning of Johnson to make mandatory guideline provisions subject to vagueness challenges or, as relevant here, to declare the residual clause in the mandatory career offender guideline unconstitutionally vague.

Accordingly, having been filed more than one year after his conviction became final, and there being no applicable exception to that rule, Bryant's Section 2255 motion is untimely. Arguably, it also premature – because he is attempting to assert a right the Supreme Court has yet to recognize.

The weight of post-Beckles authority supports this conclusion. See, e.g., United States v. Greer, 2018 WL 721675, at *5 (10th Cir. Feb. 6, 2018) ("[T]he only right recognized . . . in Johnson was a defendant's right not to have his sentence increased under the residual clause of the ACCA. The Court . . . has still not decided . . . whether the mandatory Guidelines can be challenged for vagueness . . . let alone whether such a challenge would prevail."); United States v. Brown, 868 F.3d 297, 303 (4th Cir. 2017) (Beckles "made clear that the right announced in Johnson did not automatically apply to all similarly worded residual clauses."); Raybon v. United States, 867 F.3d 625, 629 (6th Cir. 2017) (whether Johnson "applies to the mandatory guidelines . . . is an open question"); United States v. Colasanti, 2017 WL 4273300, at *4 (D. Or. Sept. 26, 2017) (citing numerous other cases reaching same result). But see Reid v. United

States, 252 F.Supp.3d 63, 68 (D. Mass. 2017) (Johnson effectively invalidates the mandatory career offender guideline's residual clause).

In sum, Bryant's Section 2255 motion is untimely, and his petition must therefore be dismissed.

Because the motion is denied as untimely, the Court need not reach the merits of the petition.

CONCLUSION

Petitioner's motion under 28 U.S.C. § 2255 is DENIED and the petition is DISMISSED.

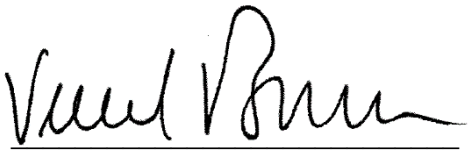
As petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability will not issue. 28 U.S.C. § 2253(c)(2).

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444–45 (1962).

The Clerk is instructed to close case 16 CV 4986.

Dated: February 20, 2018
White Plains, NY

SO ORDERED:



Vincent L. Briccetti
United States District Judge