No. _____

IN THE

Supreme Court of the United States

Gene Michael Diulio,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented for Review

I. Are 28 U.S.C. § 2255 motions filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), raising due process vagueness challenges to fixed sentences imposed through application of a mandatory Sentencing Guidelines' residual clause timely?

II. Does federal armed bank robbery under 18 U.S.C. § 2113(a), (d) constitute a crime of violence under the physical force clause or the enumerated offense clause as defined by the pre-2005 mandatory Sentencing Guidelines?

Table of Contents

Table of Authorities

Federal Cases

United States Constitution

Federal Statutes

Federal Rules

United States Sentencing Guidelines

Petition for Certiorari

Petitioner Gene Michael Diulio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Related Proceedings and Orders Below

1. The order denying Diulio's motion to vacate under 28 U.S.C. § 2255 and denying him a certificate of appealability in the United States Court for the District of Nevada, *United States v. Diulio*, 2:93-cr-0259-LDG, ECF 151 (D. Nev. Jan. 31, 2020), as well as the accompanying final judgment, *Id.*, ECF 152, are attached as Appendix A and B, respectively.

2. The order denying Diulio's motion for a certificate of appealability in the Ninth Circuit Court of Appeals, *United States v. Diulio*, No. 20-15563, App. Dkt. 3 (9th Cir. July 1, 2020), is attached as Appendix C.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Diulio's case on July 1, 2020. *See* Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). Diulio's petition is timely per Supreme Court Rule 13.1.

Relevant Constitutional, Statutory, and Sentencing Guidelines Provisions

1. The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. U.S. Const. amend. V.

2. Title 18, of the United States Code, Section 1201(a), states someone commits the offense of kidnapping if he or she: "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof . . . ."

3. Section 4B1.2 of the 1994 edition of the Sentencing Guidelines provides:

> 4B1.2. Definitions of Terms Used in Section 4B1.1
>
> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) 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.
>
> (2) The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
>
> (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony

convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

2. "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. 924(e), 4B1.4 (Armed Career Criminal) will apply.

3. "Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age

eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

4. The provisions of 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under 4B1.1.

Statement of the Case

A. District Court Proceedings

In 1994, Petitioner Rick L. Diulio pled guilty to aiding and abetting armed bank robbery, 18 U.S.C. §§ 2, 2113(a), (d), and escape, 18 U.S.C. § 751(a)—Counts One and Three.[1] ECF 84.[2] Applying the 1994 Sentencing Guidelines, the Presentence Investigation Report ("PSR") indicated Diulio should receive U.S.S.G. § 4B1.2(a)'s career offender enhancement for having two prior crimes of violence. PSR ¶ 50. However, the PSR failed to identify which prior convictions allegedly qualified as career offender predicates, failed to specify which career offender clause applied, and failed to identify the statutes of conviction for the predicate convictions. *See* PSR ¶¶ 42-47, 50.

The 1994 Sentencing Guidelines mandated federal courts impose the enhanced career offense sentencing provisions when: (1) the defendant was at least 18 years of age when committing the underlying federal offense; (2) the current federal offense was a "crime of violence" or a "controlled substance offense"; and (3) the defendant had at least two prior felony convictions for a "crime of violence" or a

[1] Though the judgment indicates Diulio was convicted of Counts One and Four, the plea agreement and the presentence investigation report (PSR) state he was convicted of Counts One and Three. The final judgment thus contains a typographical error, though this error does not change the arguments herein.

[2] "ECF" followed by a number refers to an electronic document available on the docket for the District Court in the District of Nevada, Case No. 2:93-cr-00259. "App. Dkt." followed by a number refers to an electronic document available on the docket for the Ninth Circuit Court of Appeals, Case No. 20-15563.

"controlled substance offense." U.S.S.G. § 4B1.1(a) (1994). The 1994 Guidelines defined a "crime of violence" falling into one of three categories:

(1) The offense required "as an element the use, attempted use, or threatened use of physical force against the person of another," referred to as the elements or physical force clause, or

(2) The offense was "burglary of a dwelling, arson, or extortion, involve[d] use of explosives," referred to as the enumerated offense clause; or

(3) The offense "otherwise involve[d] conduct that present[ed]a serious potential risk of physical injury to another," referred to as the residual clause.

U.S.S.G. § 4B1.2(a) (1994).[3]

Without the career offender enhancement, Diulio's guideline range would have been 120 to 150 months of incarceration, based on a total offense level of 26 and criminal history category VI. PSR, ¶¶ 37, 39, 48-49. But with the mandatory career offender enhancement, his guideline range sharply increased to 188 to 235 months of incarceration, based on a total offense level of 31 and criminal history category VI. PSR, ¶ 62.

The district court sentenced Diulio in 1995, applying the then-mandatory career offender provision and its enhanced sentencing provisions, but without

[3] The Guidelines maintained this "crime of violence" definition until August 1, 2016. U.S.S.G. § 4B1.2(a)(2); *see* U.S.S.G. Supp. App. C, amend. 798. This Petition thus focuses on guideline provisions in effect prior to August 1, 2016.

identifying which prior convictions it relied on to apply the enhancement or which career offender guideline clause it applied. The result was an increased sentence of 188 months of imprisonment for aiding and abetting the bank robbery and 60 months for the escape, with the sentences run concurrently. ECF 98.[4]

The district court entered final judgment on August 3, 1995. ECF 98. Diulio did not pursue a direct appeal.

B. Diulio's Habeas Proceedings under *Johnson* and *Beckles*.

On June 26, 2015, this Court held that imposing a sentence under the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), violates the Constitution's due process guarantee. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Less than a year later, this Court held in *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016), that *Johnson* announced a new substantive rule with retroactive effect in cases on collateral review.

Diulio filed a timely motion to vacate on June 23, 2016, seeking habeas relief under *Johnson*. ECF 131, 134. Diulio argued *Johnson* rendered unconstitutional the residual clause of the mandatory career offender guideline in effect at his sentencing—U.S.S.G. § 4B1.2(a)(2) (1994). ECF 134. Specifically, explained his convictions for the underlying federal bank robbery and prior his Florida state robbery and his federal kidnapping did not qualify as crimes of violence. ECF 134,

[4] Though the judgment erroneously indicates Diulio was convicted on Counts One and Four, the plea agreement, PSR, and sentencing transcript all reveal he was convicted of Counts One (aiding and abetting armed bank robbery) and Three (escape). Further, the judgment states that only Count Two was dismissed, further indicating the Count Four reference in the judgment is a typographical error.

pp. 13-29. As neither his current nor the prior offenses qualified as crimes of violence under the remaining clauses of § 4B1.2(a)(1) (1994), Diulio argued his career offender sentence must be vacated. ECF 134.

On March 6, 2017, this Court issued *Beckles v. United States*, where the issue before the Court was whether the *advisory* Sentencing Guidelines "fix the permissible range of sentences" opening them up to constitutional vagueness challenges. 137 S. Ct. 886, 892 (2017). The Court concluded the advisory Guidelines do not fix sentences and thus exempted the advisory Guidelines' residual clause from due process vagueness challenges. *Id.* at 890. *Beckles* explained the "advisory Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement" because district courts do not "enforce" the advisory Guidelines and rely on them "merely for advice in exercising [their] discretion." *Id.* at 894-95. The mandatory Guidelines, in contrast, were "binding on district courts" and "constrain[ed]" them. *Id.* at 894. This Court therefore held *Johnson* does not apply to the *advisory* Sentencing Guidelines as they "do not fix the permissible range of sentences." *Id.* at 892. Through *Beckles*, this Court's analysis confirms mandatory Sentencing Guidelines remain susceptible to vagueness challenges under the Due Process Clause because they fix sentences and bind courts.[5]

[5] To this end, Justice Sotomayor commented in a footnote that the majority's "adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines did fix the permissible range of sentences, may mount vagueness attacks on their sentences," but "[t]hat question is not presented by this case." *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor,

Diulio requested permission to supplement his habeas briefing in the district to address *Beckles* and filed his proposed supplemental brief for the district court's consideration. ECF 141. Without ruling on Diulio's *Beckles* supplemental briefing request, the district court ordered the government to respond to Diulio's habeas petition. ECF 142.[6] The government opposed relief, arguing *Beckles* precluded Diulio's challenge to the Sentencing Guidelines' mandatory career offender's residual clause and, even if *Johnson* rendered the residual clause unconstitutional, federal bank robbery and Florida robbery constituted crimes of violence under U.S.S.G. § 4B1.2's elements clause and federal kidnapping qualified as a crime of violence under § 4B1.2's commentary. ECF 144, pp. 12-19.

Diulio replied, explaining *Beckles* is confined to advisory guideline cases and this Court already held *Johnson*'s new rule retroactive in *Welch*, and, thus, his current and prior offenses did not qualify as career offender predicates. ECF 146.

On January 31, 2020, the district court denied Diulio's petition as premature under *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018). ECF 151. The district court failed to address Diulio's arguments that his prior Florida robbery and federal kidnaping offenses failed to support the career offender enhancement.

As to the underlying federal bank robbery conviction, the district court alternatively stated in a footnote that if Diulio's motion was timely, it "would deny

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J., concurring) (internal citations and quotation marks omitted). Diulio does present that question here.

[6] The district court subsequently granted Diulio's request to file his supplemental regarding *Beckles* on the date it denied his habeas petition. ECF 151.

the motion on its merits" under *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). ECF 151. However, though the underlying armed bank robbery is the only such conviction of Diulio's, the district court's merits ruling twice erroneously indicated he had multiple such and those convictions—*plural*—qualified as crimes of violence under § 4B1.2(a)(1)'s force clause. ECF 151, p. 2, n.1.[7] The district court also denied Diulio a certificate of appealability. ECF 151, 152. Diulio timely appealed to the Ninth Circuit Court of Appeals. ECF 156.

C. Appeal to Ninth Circuit

Diulio requested the Ninth Circuit issue a certificate of appealability on two issues:

1. Are habeas challenges under 28 U.S.C. § 2255 seeking application of *Johnson* to the mandatory Sentencing Guidelines timely, requiring reversal of *Blackstone*?

2. Must Diulio's mandatory career offender sentence be vacated under *Johnson* as at least one predicate necessary for the career offender enhancement is no longer a crime of violence?

App. Dkt. 2, p. 8.

[7] It is presumed the district court erroneously confused Diulio's criminal history with that of his co-defendant Rick L. Archer, as Archer did have more than one conviction for bank robbery. *See United States v. Archer*, 2:93-cr-0259-LDG, ECF 153 (D. Nev. Jan. 31, 2020).

To support his certificate of appealability request, Diulio noted the federal Circuit Courts of Appeal were divided regarding whether *Johnson* applies to mandatory guideline sentences and urged the Ninth Circuit to overrule its decision in *Blackstone*. App. Dkt. 2, pp. 9-15. Diulio explained the same right he seeks in habeas for a new sentence is the same right *Johnson* announced, made retroactive in *Welch*—that defendants have a due process right not to have a sentence fixed by a residual clause identical textually and operationally to the ACCA's. App. Dkt., 2, pp. 9-15.

Diulio further argued the underlying aiding and abetting federal bank robbery offense could not serve as a career offender predicate without § 4B1.2(a)(2)'s residual clause. App. Dkt. 2, pp. 9-15.[8] He explained the Ninth Circuit's decision in *Watson* is erroneous for failing to properly adjudicate the intimidation element of federal bank robbery, which does not require the element of use, attempted use, or threatened use of physical force and also does not require the mens rea necessary for a career offender predicate. App. Dkt., 2, pp. 9-15.

He also argued federal kidnapping (which the district court did not address) is not a crime of violence under the force or enumerated offenses clauses of the career offender guideline. App. Dkt. 2, pp. 17-20. And, to defeat any argument that

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[8] Diulio also argued the PSR's and the district court's failure to indicate which of his prior offenses qualified under the career offender enhancement mandated reversal in the first instance. App. Dkt. 2, p. 16. He assumed for purposes of his habeas arguments, however, the mandatory career offender enhancement was predicated on his underlying federal bank robbery, his Florida state robbery (for which no state statute was identified), and his federal kidnapping. App. Dkt. 2, p. 16.

kidnaping could be deemed to fall within the enumerated offense clause, he explained the commentary existed only to define the residual clause. App. Dkt. 2, pp. 17-20. Absent the residual clause, no commentary existed to include kidnapping with the career offender guideline's crime of violence definition. App. Dkt. 2, pp. 17-20.

On June 31, 2020, the Ninth Circuit denied Diulio's request for a certificate of appealability, stating he had not made the requisite showing. App. Dkt. 3 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).[9]

Reasons for Granting the Petition

I. The Federal Circuits Cannot Resolve the Ongoing Split Over *Johnson*'s Applicability to Mandatory Guideline Sentences.

It is necessary for this Court to resolve the ongoing split between the federal appellate courts as to whether *Johnson* provides an avenue for relief under 28 U.S.C. § 2255 to those sentenced under the formerly mandatory Sentencing Guidelines scheme. *Johnson* struck the ACCA's residual clause as unconstitutionally vague, with *Welch* holding *Johnson* retroactive. *Beckles* prohibited only due process vagueness challenges to the advisory Sentencing

[9] Prior to the Ninth Circuit's denial, on June 23, 2020, Diulio filed a Renewal of Petitioner's Motion to Vacate under 28 U.S.C. § 2255 in the district court to protect his rights under 28 U.S.C. 2255(f)(3), in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), incorporating all the claims in his second or successor petition to preserve his timeliness argument in the event the government subsequently argued his petition was not timely filed. ECF 171.

Guidelines, not due process challenges to mandatory Sentencing Guidelines that fix sentences and bind courts.

Federal circuit courts cannot agree whether *Johnson*'s due process analysis of the ACCA's residual clause applies to the identically worded mandatory career offender provision's residual clause rendering it also unconstitutionally vague. The federal courts' disagreement centers on whether the right this Court recognized in *Johnson*—that defendants cannot be subjected to a fixed sentence by an unconstitutionally vague statute—created an equal right not to be subjected to a fixed sentence of an unconstitutionally vague guideline imposed under a mandatory Sentencing Guidelines scheme. This divide treats similarly situated petitioners dissimilarly, with some permitted to litigate their habeas claims raising due process challenges to mandatory guidelines fixing their sentences and others denied that opportunity.

Given the dire sentencing consequences of the mandatory career offender guideline's enhanced penalties, this Court's guidance is necessary on this important issue to provide equity and consistency to decades-long incarceration decisions.

A. The First and Seventh Circuits Recognize as Timely Habeas Claims Filed Within One Year of *Johnson* Raising Due Process Challenges to Fixed Sentences Imposed Under the Mandatory Sentencing Guidelines Regime.

The First and Seventh Circuits hold habeas petitioners raising due process challenges to the residual clause of the mandatory Sentencing Guidelines "assert" the same "right" this Court announced in *Johnson*, 28 U.S.C. § 2255(f)(3), namely to be free of punishment based on identical, unconstitutionally vague sentencing

enhancements. In these Circuits, such petitioners can litigate timely filed due process challenges to vague mandatory sentencing enhancements under *Johnson*.

The First Circuit, in *Moore v. United States*, 871 F.3d 72, 81-82 (1st Cir. 2017), considering this Court's decision in *Johnson* and *Beckles*, concluded petitioner's due process claim habeas claim challenging the career offender's residual clause under mandatory Sentencing Guidelines scheme filed within one-year of *Johnson*. *Moore* found the petition timely filed and the claim warranted further litigation as the petitioner's mandatory career offender guideline sentence was sufficiently binding on courts to warrant the same judicial consideration awarded claims challenging the ACCA's residual clauses as both assert the unconstitutional vagueness of the respective residual clauses. *See also id.* at 82 ("[I]f one takes seriously, as we must, the Court's description of the pre-*Booker* guidelines as 'mandatory,' one might describe the residual clause of the pre-*Booker* guidelines as simply the ACCA's residual clause with a broader reach, in that it fixed increased minimum and maximum sentences for a broader range of underlying crimes."). The First Circuit therefore finds habeas challenges filed within one-year of *Johnson* are timely and may challenge a fixed sentenced imposed under an unconstitutionally vague mandatory Guidelines regime.[10]

[10] *Moore* involved a request for certification to file a successive petition under 28 U.S.C. § 2255(h)(2), and thus, did not reach a merits decision. 871 F.3d at 85. On remand to the district court, the sentencing judge concluded: "*Beckles* does not control here;" "[f]or 17 years I—along with every other federal judge—imposed sentences on offenders that today would be unconstitutional. No more." *United States v. Moore*, No. CR 1:00-10247-WGY-1, 2018 WL 5982017, at *2 (D. Mass. Nov.

The Seventh Circuit, in *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018), also applied *Johnson*'s recognized "right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause" allowing petitioners' mandatory guideline sentence habeas challenges. *Cross* held the government's argument to the contrary suffered "a fundamental flaw" as it improperly imported "a merits analysis into the limitations period" where one did not exist. 892 F.3d at 293. *Cross* determined the limitations period of 28 U.S.C. § 2255(f)(3) "runs from 'the date on which the right *asserted* was initially recognized by the Supreme Court.'" *Id.* at 293-94 (emphasis added by *Cross*).

Thus, to timely assert a habeas right, *Cross* held § 2255(f)(3) does not require the petitioner to "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." 892 F.3d at 294. The Seventh Circuit concluded its reading of § 2255(f)(3) appropriately gave meaning to the statute's every clause and word. *Id.* (citing *Duncan v. Walker*, 533 U.S. 167 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotations and citation omitted)).[11]

14, 2018). The district court granted petitioner Moore's granted Moore's petition to vacate and correct his sentence. *Id.* at *3.

[11] *Cross* proceeded to a merits decision and held both petitioners were "entitled to relief from their career-offender classifications" under *Johnson*. 892 F.3d at 307.

B. Other Circuits Do Not Recognize as Timely Habeas Claims Filed Within One Year of *Johnson* Raising Due Process Challenges to Fixed Sentences Imposed Under the Mandatory Sentencing Guidelines Regime.

The majority of the remaining federal circuits do not recognize *Johnson*'s rule as permitting habeas challenges to the unconstitutionality of a vague sentencing provisions in the mandatory Guidelines regime, despite detracting judges attempting, unsuccessfully, to garner a conclusion to the contrary. These circuits largely align with the Ninth Circuit's *Blackstone* opinion, finding there is no "recognized" "right asserted" for retroactivity purposes under 28 U.S.C. § 2255(f)(3) as this Court has not explicitly applied *Johnson* in a case involving a mandatory Sentencing Guidelines' residual clause. Critically, some of these circuits believe *Beckles* specifically precludes extending *Johnson* to the residual clause in mandatory Guidelines cases. These circuits interpret the "open question" in *Beckles*—whether *Johnson*'s rule applied to mandatory Sentence Guidelines—against petitioners sentenced under the mandatory Sentencing Guidelines, containing identically worded residual clauses to the ACCA, to deny relief under 28 U.S.C. § 2255(f)(3).

For instance, in *United States v. Green*, the Third Circuit held *Johnson* did not apply to the mandatory Sentencing Guidelines. 898 F.3d 315, 321 (3d Cir. 2018), *cert denied*, 139 S. Ct. 1590 (2019). In doing so, it noted, "[i]f *Johnson* had provided the last word on this issue, we might be persuaded by Green's arguments; however, we are also bound by the Court's ruling in *Beckles*. *Id.* at 321. This is because, prior to *Beckles*, the Third Circuit, "along with the majority of the Courts of

Appeals to consider the question, concluded that the holding in *Johnson* dictated that the residual clause in the now-advisory Sentencing Guidelines was also void for vagueness." *Id.* (footnote omitted). *Green* determined, however, *Beckles* "cabined" *Johnson*'s reach by calling its application to the mandatory Guidelines an "open question," even though the inquiry in *Beckles* did not involve this "open question". *Id*.

Instead of recognizing *Beckles* "open question" as a proper exercise of judicial restraint in deciding only the issue before the Court, circuits repeatedly treat the open question as a barrier to *Johnson*'s application instead of a constitutional bridge. *See, e.g., Raybon v. United States,* 867 F.3d 625, 629, 630 (6th Cir. 2017), c*ert. denied,* 138 S. Ct. 2661 (2018) (holding it was an "open question" whether *Johnson* applied to the mandatory Sentencing Guidelines' residual clause, thus Supreme Court did not create a newly recognized right in *Johnson* preventing its retroactivity under § 2255(f)(3)); *United States v. London*, 937 F.3d 502, 509 (5th Cir. 2019), *as revised* (Sept. 6, 2019), *cert. denied*, 140 S. Ct. 1140 (2020) (finding it "debatable whether the right recognized in *Johnson* applies to the pre-*Booker* Sentencing Guidelines" thus petitioner did "not assert a right dictated by *Johnson* but instead asserts a right that would extend, as opposed to apply, *Johnson* to the pre-*Booker* Guidelines").[12]

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[12] In *United States v. Carr*, the D.C. Circuit avoided petitioner's due process objection to his career offender sentence in the first instance by reaching the merits of his claim, determining his federal bank robbery convictions constituted crimes of violence under the physical force clause. 946 F.3d 598, 599 (D.C. Cir. 2020). The

Other circuits are in accord, with this Court not yet accepting the petitioners' requests for review. *See, e.g., United States v. Brown*, 868 F.3d 297, 301-304 (4th Cir. 2017), *cert denied*, 139 S. Ct. 14 (2018); *Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1297 (2019); *United States v. Greer*, 881 F.3d 1241, 1245-47 nn.3-5 (10th Cir.), *cert. denied*, 139 S. Ct. 374 (2018); *see also In re Griffin*, 823 F.3d 1350, 1356 n.4 (11th Cir. 2016) ("The Supreme Court has not applied Johnson to the Sentencing Guidelines, much less made such an extension retroactive for purpose of successive § 2255 motions.").

Intra-circuit judicial requests to review these decisions to resolve the inter-circuit split have been unsuccessful:

- The Fourth Circuit's Chief Judge dissented, stating he would have found "*Johnson* compels the conclusion that the residual clause under the mandatory Guidelines is unconstitutionally vague" and would have

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Carr approach is ill-suited to cases like Diulio's where (1) the district court clearly erred in reciting the defendant's prior convictions; and (2) the record is unclear which predicate offenses the district court relied on to impose the career offender enhancement in the first instance. It must be presumed the career offender guideline sentence rests on the unconstitutional residual clause "when it is unclear whether a sentencing court relied on the residual clause" in determining that a prior conviction qualified as a predicate. *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017), *overruled on other grounds by Stokeling v. United States*, 139 S. Ct. 544, 555 (2019)).

The district court applied a variation of *Carr* in Diulio's case by issuing an alternative merits ruling, holding the bank robbery offenses constituted crimes of violence under the career offender guideline's violent physical force clause. As discussed *supra*, Diulio has only one bank robbery offense. Thus, the district court's reliance on multiple bank robbery offense to deny Diulio's habeas petition was clearly erroneous.

granted petitioner's request for resentencing; that circuit's precedent remains unchanged. *United States v. Brown*, 868 F.3d 297, 304 (4th Cir. 2017) (Brown, C.J, dissenting).

- A Fifth Circuit judge wrote separately to express that circuit is "on the wrong side of a split over the habeas limitations statute" and its "approach fails to apply the plain language of the statute and undermines the prompt presentation of habeas claims the statute promotes." *London*, 937 F.3d at 510 (Costa, J., concurring).

- A Sixth Circuit judge disagreed with that circuit's precedent in a concurrence, requesting the circuit to revisit the issue; that circuit's precedent also remains unchanged. *See Chambers v. United States*, 763 F. App'x 514, 521 (6th Cir. 2019) (unpublished) (Moore, J., concurring).

- A Ninth Circuit judge disagreed with *Blackstone*, stating "the Seventh and First Circuits have correctly decided this question." *Hodges v. United States*, 778 F. App'x 413, 414-15 (9th Cir. 2019) (unpublished), *cert. denied*, 140 S. Ct. 2675 (2020) (Berzon, J., concurring in judgment).

- Three Eleventh Circuit judges joined in a lengthy concurrence explaining why its circuit precedent was "deeply flawed and wrongly decided;" but its precedent remains unchanged. *In re Sapp*, 827 F.3d 1334, 1337 (11th Cir. 2016) (Jordan, Rosenbaum, Jill Pryor, JJ., concurring).

The result in these circuits leaves habeas petitioners incarcerated and serving unconstitutional career offender sentences with no relief available.

C. Federal Kidnapping Only Qualified as a Crime of Violence under the Mandatory Career Offender Residual Clause.

Assuming *Johnson* applies to remove the residual clause from the career offender guideline, Diulio's prior federal kidnapping offense no longer qualifies as a crime of violence, leaving him without the requisite number of offenses for the enhancement to apply. Federal kidnapping is not a crime of violence under the force or enumerated offenses clauses of the career offender guideline. *See Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1130 (9th Cir. 2012) (holding "federal kidnapping statute has no force requirement" (quoting 18 U.S.C. §1201(a)); *see also United States v. Gillis*, 938 F.3d 1181, 1210 (11th Cir. 2019) (noting "innumerable courts . . . have followed the Supreme Court in *Chatwin* [*v. United States*, 326 U.S. 455 (1946)] in expressly contemplating that the federal kidnapping crime can be committed by mere inveiglement and holding the victim by either physical or psychological force.") (emphasis in original). Instead, federal kidnapping generally fell under the unconstitutional residual clause, as it is a crime this Court assumed to be "a crime that presents a substantial risk of force." *Id.* (citing *United States v. Rodriguez–Moreno,* 526 U.S. 275 (1999)).[13] As a result, Diulio is *not* a career offender if *Johnson* applies to the mandatory Sentencing Guidelines.

[13] As indicated in Note 2, the enumerated offense clause remained unchanged from the date of Diulio's conviction until August 1, 2016. *See* U.S.S.G. Supp. App. C, amend. 798.

However, it has become apparent that clarification is also required from this Court beyond resolving the circuit split over *Johnson*'s application to the mandatory Sentencing Guidelines. This is because some circuits, even when assuming *Johnson* applies to sentences imposed under a mandatory guideline scheme, import the guideline *commentary* explaining the residual clause into the enumerated offense clause to expand its text. For example, in *In re Burgest*, 829 F.3d 1285, 1287 (11th Cir. 2016), the Eleventh Circuit assumed *Johnson* applied to the petitioner's mandatory career offender guideline sentence but believed § 4B1.2's commentary at n.1 expanded the offenses listed in the enumerated offense clause to include kidnapping.

However, the pre-2016 Guidelines commentary does not provide an independent basis for satisfying the crime of violence definition as this commentary only ever interpreted the residual clause.[14] This Court holds only commentary "that

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[14] In explaining its 2016 amendments to U.S.S.G. § 4B1.2(a)(2)'s enumerated offense clause, the Sentencing Commission stated, in part:

> While most of the offenses on the enumerated list under § 4B1.2(a)(2) remain the same, the amendment does revise the list in a number of ways to focus on the most dangerous repeat offenders. The revised list is based on the Commission's consideration of public hearing testimony, a review of extensive public comment, and an examination of sentencing data relating to the risk of violence in these offenses and the recidivism rates of career offenders. Additionally, the Commission's revisions to the enumerated list also consider and reflect the fact that offenses **not specifically enumerated** will continue to qualify as a crime of violence if they satisfy the elements clause.

U.S.S.G. Supp. App. C, amend. 798 (2016) (emphasis added). This 2016 amendment provided further support for the conclusion the enumerated offense clause is limited to those offenses "specifically enumerated" within its text.

interprets or explains a guideline" is authoritative. *Stinson v. United States*, 508 U.S. 36, 38 (1993). The Sentencing Commission itself states commentary plays a secondary, interpretative role. *See* U.S.S.G. § 1B1.7 (2018) (explaining the commentary's purpose is to "interpret [a] guideline or explain how it is to be applied"); *see also United States v. Anderson*, 942 F.2d 606, 611 (9th Cir. 1991), *abrogated on other grounds by Stinson*, 508 U.S. 36 (noting Sentencing Commission's belief that commentary "is an aid to correct interpretation of the guidelines, not a guideline itself or on a par with the guidelines themselves").

Commentary has no freestanding definitional power and cannot add to the text. The Sentencing Reform Act of 1984 created the Sentencing Commission and authorized it to create "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). The Sentencing Commission submits those Guidelines to Congress in advance, *id.* § 994(p), making the Sentencing Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393 (1989). Commentary, by comparison, does not receive the same treatment as the Guidelines. The Sentencing Reform Act does not explicitly authorize the creation of commentary. *See* 28 U.S.C. § 994(a) (authorizing "guidelines" and "policy statements"); *see also Stinson*, 508 U.S. at 41. Nor does the Sentencing Reform Act require the Sentencing Commission submit the commentary to Congress for approval. *See* 28 U.S.C. § 994(p) (requiring only guideline amendments be submitted to Congress); *Stinson*, 508 U.S. at 46 (commentary "is not reviewed by Congress").

Because only commentary "that interprets or explains a guideline" is authoritative, *Stinson*, 508 U.S. at 38, and potential conflicts between the text and the commentary render the text controlling, *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011), any guideline commentary interpreting unconstitutional text must also be excised. Vestigial commentary without a textual hook is invalid under *Stinson*, because its only "functional purpose" was to "assist in the interpretation and application" of text that no longer exists. 508 U.S. at 45.

Removal of the mandatory career offender residual clause thus removes the commentary that interpreted it. The commentary only interpreted the residual clause by providing certain types of generic offenses that may pose enough "risk" to qualify as a crime of violence under the residual clause. Under *Johnson*, that risk analysis is void for vagueness, taking with it the explanatory commentary.

Pre-*Beckles* decisions in the First, Seventh, and Eighth Circuits were in accord. *United States v. Soto-Rivera*, 811 F.3d 53, 59 (1st Cir. 2016); *United States v. Rollins*, 836 F.3d 737, 743 (7th Cir. 2016); *United States v. Bell*, 840 F.3d 963, 968 (8th Cir. 2016). *Beckles* did not decide whether commentary offenses constituted crimes of violence and thus does not undermine the commentary analysis of these opinions. The Seventh Circuit continues to hold the mandatory Guidelines commentary is invalid. *D'Antoni v. United States*, 916 F.3d 658, 663-64 (7th Cir. 2019) (holding the then-mandatory U.S.S.G. § 4B1.2 cmt. n.1 commentary is invalid as it only interpreted the void residual clause).

The First Circuit explained that, absent the residual clause, a listed commentary offense that neither interprets nor explains one of the two remaining clauses in § 4B1.2 is not a crime of violence. *Soto-Rivera*, 811 F.3d at 59 (internal citations omitted). Sitting en banc, the Seventh Circuit found *Soto-Rivera* "ha[d] it exactly right." *Rollins*, 836 F.3d at 743. The *Rollins* Court explained the commentary does not interpret the remaining enumerated or force clauses: "If the application note's list is not interpreting one of those two subparts—and it isn't once the residual clause drops out—then it is in effect *adding* to the definition. And that's *necessarily* inconsistent with the text of the guideline itself." *Id.* at 742 (emphasis in original). Because "application notes are *interpretations of*, not *additions to*, the Guidelines themselves," the commentary cannot have freestanding definitional power. *Id.* at 742 (emphasis in original); *see also id.* at 739 (commentary has "no legal force independent of the guideline"). The Seventh Circuit continues to apply this ruling. *D'Antoni*, 916 F.3d at 663-64.

The Eighth Circuit similarly held a state robbery conviction does not qualify as a crime of violence simply because "robbery" was listed in the commentary. *Bell*, 840 F.3d at 968. *Bell* explained "the residual clause may have served as an anchor for the commentary's inclusion of 'robbery' as a crime of violence because it 'otherwise involve[d] conduct that presents a serious potential risk of physical injury to another.'" *Id.* Without the residual clause, however, "§ 4B1.2's commentary, standing alone, cannot serve as an independent basis for a conviction to qualify as a crime of violence because 'doing so would be inconsistent'" with

removal of the residual clause. *Id.* (quoting *Soto-Rivera*, 811 F.3d at 60). "The issue," *Bell* observed, "is whether the government can rely solely upon the commentary when it *expands* upon the four offenses specifically enumerated in the [text of the] Guideline itself. The answer is no." *Id.* at 967 (emphasis in original).

The only valid function of the commentary is to interpret or explain the definition of "crime of violence" set forth in the residual clause text of § 4B1.2(a)(2) (1994). Absent the residual clause, the commentary listing robbery does not interpret or explain any remaining text. Thus, the commentary contradicts the text, "in that following [the commentary] will result in violating the dictates of [the Guideline]." *Stinson*, 508 U.S. at 43. The commentary is invalid, and the cases relying on enumerated clause through the guideline the commentary to find federal kidnapping a crime of violence, are legally flawed.

For these reasons, Diulio's prior federal kidnaping does not meet the requisites for a career offender predicate under the 1994 mandatory Sentencing Guidelines under *Johnson* and *Beckles*. He therefore no longer has two qualifying career offender predicate offenses necessary for the enhanced sentence he received.

II. This Case Allows the Court to Resolve the Embedded Circuit Split Over *Johnson*'s Application to the Mandatory Guidelines' Residual Clause under 28 U.S.C. § 2253(f)(3).

The continuing split between and within federal circuit courts indicates the judiciary cannot agree on whether *Johnson* applies to the mandatory Sentencing Guidelines' residual clause, despite numerous inter-circuit requests to review decisions holding it does not. The unfortunate result is that only those in the First and Seventh Circuits may seek habeas relief from serving decades-long

unconstitutional career offender sentences imposed under the mandatory residual clause, while those serving identical sentences in the remainder of the country cannot.

Through this Court's work in *Johnson*, and continuing with *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court has ensured defendants are not subject to unpredictable and arbitrary sentences that unconstitutionally vague residual clause impose in violation of their due process rights. *Davis*, 139 S. Ct. at 2336 (holding 18 U.S.C. § 924(c)(3)(B)'s residual clause unconstitutionally vague); *Dimaya*, 138 S. Ct. at 1223 (holding 18 U.S.C. § 16(b)'s residual clause as, "just like ACCA's residual clause, § 16(b) 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates'").

Diulio's case presents the same unpredictable, arbitrary, and unconstitutional sentence this Court corrected in *Johnson*, *Dimaya*, and *Davis*. This case thus permits the Court to carry on its work by correcting arbitrary punishments suffered by those serving mandatory career offender sentences.

As habeas petitioners like Diulio are still serving sentences imposed under the mandatory Sentencing Guidelines regime and have predicate offenses impacted by this Court's decision in Johnson, this issue will reoccur in future cases. It is therefore necessary for this Court to provide guidance and consistency to resolve the deeply divided federal circuits on the issue of *Johnson*'s application to fixed

sentence imposed under the mandatory Guidelines and the viability, if any, of the residual clause's pre-2016 commentary.[15]

Conclusion

For these reasons, Diulio requests this Court grant this petition for certiorari.

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Respectfully submitted,

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[15] Diulio was granted compassionate release on July 20, 2020, and released from federal incarceration and sentenced to a revised term of time served, a federal term of sentence of supervised release with the special condition of home incarceration for the remainder of his federal incarceration term as supervised release, followed by five years of supervised release as originally imposed. ECF 175. Though Diulio has completed the incarceration portion of his sentence, his habeas claims present a live case and controversy, as this Court can provide a remedy to the supervised release portion of his sentence he is still serving. *See United States v. Ketter*, 908 F.3d 61, 66 (4th Cir. 2018) (finding defendant's appeal was not moot, though he was serving his supervised release term, and adopting position taken by eight circuits applying the unitary-sentence approach that treats incarceration terms and supervised release terms part of one sentence); *id.* (*United States v. Hulen*, 879 F.3d 1015, 1018 (9th Cir. 2018); *United States v. Albaadani*, 863 F.3d 496, 502–03 (6th Cir. 2017); *United States v. Montoya*, 861 F.3d 600, 603 n.2 (5th Cir. 2017); *United States v. Carter*, 860 F.3d 39, 43 (1st Cir. 2017); *In re Sealed Case*, 809 F.3d 672, 674–75 (D.C. Cir. 2016); *United States v. Vera-Flores,* 496 F.3d 1177, 1180 (10th Cir. 2007); *United States v. Blackburn*, 461 F.3d 259, 262 (2d Cir. 2006); *United States v. Larson*, 417 F.3d 741, 747 (7th Cir. 2005).