No. _____

IN THE

Supreme Court of the United States

Rick L. Archer,

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 petitions 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*-2016 Sentencing Guidelines?

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Petition for Certiorari

Petitioner Rick L. Archer 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 Archer'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. Archer*, 2:93-cr-0259-LDG, ECF 153 (D. Nev. Jan. 31, 2020), as well as the accompanying final judgment, ECF 154, are attached as Appendix A and B, respectively.

2. The order denying Archer's motion for a certificate of appealability in the Ninth Circuit Court of Appeals, *United States v. Archer*, No. 20-15562, June 30, 2020, Dkt. 6, is attached as Appendix C.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Archer's case on June 30, 2020. *See* Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). Archer'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 2, defines aiding and abetting as:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3. Title 18 of the United States Code, Section 2113, defines armed bank robbery as:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

* * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

4. 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. Archer 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). ECF 82.[1] Applying the 1994 Sentencing Guidelines, the Presentence Investigation Report ("PSR") indicated Archer should receive U.S.S.G. § 4B1.2(a)'s career offender enhancement, but it failed to specify which prior offenses qualified as career offender predicates. *See* PSR ¶¶ 38, 42-46, 49.

In 1994, the 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 "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

[1] "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. 20-15561.

(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).[2]

Without the career offender enhancement, Archer's guideline range would have been 87 to 108 months of incarceration, based on a total offense level of 27 and criminal history category III. PSR, ¶¶ 30-37, 47. But with the mandatory career offender enhancement, his guideline range sharply increased to 210 to 262 months of incarceration, based on a total offense level of 32 and criminal history category VI. PSR, ¶ 73.

The district court sentenced Archer in 1995, applying the then-mandatory career offender provision and its enhanced sentencing provisions, but without identifying which clause applied. The result was an increased sentence of 240 months of imprisonment for aiding and abetting the bank robbery and 60 months for the escape, with the sentences run concurrently. ECF 99, 104.

[2] 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.

B. Direct Appeal

Archer timely appealed the voluntariness of his plea, but the Ninth Circuit Court of Appeals affirmed his conviction in October 1996. *United States v. Archer*, 99 F.3d 1147 (9th Cir. 1996).

C. First Habeas Filing

In 1997, Archer timely filed a motion to vacate under 28 U.S.C. § 2255, which the district court denied in 1999. ECF Nos. 117, 128. He did not appeal the denial.

D. *Johnson v. United States*

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). On April 18, 2016, this Court held in *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016), that *Johnson* announced a new substantive rule with retroactive effect to cases on collateral review.

E. Second or Successor Filing

On February 16, 2017, the Ninth Circuit granted Archer's timely application to file a second or successive motion to vacate under *Johnson* in the Ninth Circuit. *Archer v. United States*, Ninth Cir. Case No. 16-72094, App. Dkts. 1, 2.

Archer filed a successor motion to vacate in the district court on March 16, 2017. ECF 136. He argued he was no longer subject to the 1994 Sentencing Guidelines' mandatory career offender provisions as *Johnson* rendered the residual clause of U.S.S.G. § 4B1.2(a)(2) (1994) unconstitutional. ECF 136. He further

argued federal bank robbery could only have qualified as a predicate offense under the career offender guideline's residual clause, rendering his sentence a violation of his due process rights. ECF 136. Moreover, he submitted that § 4B1.2(a)(2)'s enumerated clause did not list bank robbery in its text and the guideline's commentary provision addressing robbery became invalid once the residual clause became void. ECF 136, p. 15. He additionally argued neither the current nor the prior armed bank robbery offenses qualified as crimes of violence under the physical force clause § 4B1.2(a)(1) as the offense can be committed by intimidation without requiring "as an element the use, attempted use, or threatened use of physical force against the person of another," and without the required mens rea to use, attempt to use, or a threat to use intentional force against another. ECF136, pp. 15-22; ECF 143, 22-25.

Archer also argued this Court's March 6, 2017, decision in *Beckles v. United States*, 137 S. Ct. 886, 892 (2017), further supported relief. The question this Court considered in *Beckles* was whether the advisory Guidelines "fix the permissible range of sentences" opening them up to constitutional vagueness challenges. 137 S. Ct. at 892. 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, 895. The mandatory Guidelines,

in contrast, were "binding on district courts" and "constrain[ed]" them. *Id.* at 894. 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.[3]

The government opposed relief, arguing *Beckles* precluded Archer's challenge to the mandatory Guidelines; that *Johnson* was not retroactive; even if *Johnson* were retroactive, it did not render the career offender guideline's residual clause unconstitutional; and, the federal bank robbery convictions constituted crimes of violence under U.S.S.G. § 4B1.2's physical force clause. ECF 138. Archer maintained *Beckles*'s text confines itself to *advisory* guideline cases, this Court already held *Johnson*'s new rule retroactive in *Welch*, 136 S. Ct. at 1265, and the government failed to overcome Archer's arguments regarding the inability of bank robbery to meet the requisites of the career offender's physical force clause. ECF 146.

On January 31, 2020, the district court denied Archer's petition as prematurely filed under *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019). ECF 153. *Blackstone* held "*Johnson* did not

[3] 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, J., concurring) (internal citations and quotation marks omitted). Archer does present that question here.

recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." 903 F.3d at 1028. *Blackstone* held *this* Court needed to specifically extend *Johnson* to a sentenced imposed under a mandatory Guidelines regime before a motion to vacate under 28 U.S.C § 2255 would be deemed timely. *Id.* The district court alternatively held it would deny Archer's motion on the merits (even if it were timely) under *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). ECF 153, p. 2, n.1. Following *Watson*, the district court rejected Archer's argument that intimidation does not require force or the requisite intentional mens rea. ECF 153, p. 2, n.1. The district court also denied Archer a certificate of appealability. ECF 153, 154, 155.

Archer timely appeal the denial to the Ninth Circuit and requested 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 Archer's mandatory career offender sentence be vacated under *Johnson* as federal armed bank robbery is not a crime of violence, requiring reversal of *Watson*?

App. Dkt. 3, pp. 6.7.

In support of his certificate of appealability request, Archer noted the federal Circuit Courts of Appeal remain split regarding whether *Johnson* applies to mandatory guideline sentences and urged the Ninth Circuit to overrule its decision

in *Blackstone*. App. Dkt., pp. 9-15. Archer 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 the due process right not to have a sentence fixed by a residual clause identical textually and operationally to the ACCA's. App. Dkt., pp. 9-14.

Archer further argued federal bank robbery offenses could not serve as a career offender predicate without § 4B1.2(a)(2)'s residual clause. He explained the Ninth Circuit's decision in *Watson* is erroneous for failing to properly adjudicate the intimidation element of federal bank robbery, which requires no element of use, attempted use, or threatened use of physical force and lacks the required mens rea necessary for a career offender predicate.[4]

On June 30, 2020, the Ninth Circuit denied Archer's request for a certificate of appealability, stating he had not made the requisite showing. App. Dkt. 6 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).[5]

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[4] Archer also argued the PSR's failure to indicate which of his prior offenses qualified under the career offender enhancement mandated reversal in the first instance, but assumed for purposes of habeas arguments the career offender enhancement was predicated on his prior federal bank robbery offenses. App. Dkt., p. 17.

[5] Prior to the Ninth Circuit's denial, on June 23, 2020, Archer 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 No. 172.

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 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.[6]

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 challenges on habeas. *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 (quoting 28 U.S.C. § 2255(f)(3)) (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

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[6] *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. 14, 2018). The district court granted petitioner Moore's granted Moore's petition to vacate and correct his sentence. *Id.* at *3.

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).[7]

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 other 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* (that was not before the *Beckles* Court)—whether *Johnson*'s rule applied to mandatory Sentence Guidelines—against petitioners sentenced under the

[7] *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.

mandatory Sentencing Guidelines, containing identically worded residual clauses to the ACCA, to deny relief under 28 U.S.C. § 2255(f)(3).

For instance, *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"). *Green*, 898 F.3d at 321.

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.,* R*aybon 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").[8]

Other circuits are in accord, with this Court not yet accepting 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

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[8] 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 *Carr* approach is ill-suited to cases like Archer's where the record is unclear which predicate offenses the sentencing court relied on to impose the career offender enhancement. It must be presumed the career offender guideline sentence rests on the 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, it must be assumed that the sentence depended upon the unconstitutional residual clause. *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 Archer'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. There is nothing in the record, however, demonstrating the district court relied on the bank robbery offenses at sentencing to apply the career offender enhancement.

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 granted petitioner's request for resentencing; its 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 its 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 its circuit precedent in a concurrence, requesting the circuit to revisit the issue; its precedent also remains unchanged. *See Chambers v. United States*, 763 F. App'x 514, 521 (6th Cir. 2019) (unpublished) (Moore, J., concurring) (concluding *Raybon* is "wrongly decided precedent").

- 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 Circuit Courts are Further Divided on Whether Federal Bank Robbery Qualifies as a Crime of Violence Under the Physical Force or Enumerated Offense Clauses of U.S.S.G. § 4B1.2.

Assuming *Johnson* does apply to remove the residual clause from the career offender guideline, federal circuit courts remain divided on whether federal bank robbery qualifies as a crime of violence under the physical force clause or the enumerated offense clause of the pre-2016 version of U.S.S.G. § 4B1.2.[9] This circuit split requires guidance from the Court as the federal armed bank robbery statute does not have "as an element the use, attempted use, or threatened use of physical

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

force against the person of another" as required by the physical force clause, and it is also not an enumerated offense. U.S.S.G. § 4B1.2 (1994).

1. The enumerated offense clause

Several circuits rely on the enumerated offense clause of the career offender guideline to find bank robbery a crime of violence. For example, in *United States v. Moore*, the Second Circuit holds federal bank robbery qualifies as a crime of violence under the § 4B1.2(a)(1) (2015) enumerated offense clause "because it is enumerated in the Guidelines *commentary* and conforms to the definition of generic robbery." 916 F.3d 231, 237 (2d Cir. 2019) (emphasis added). The Eleventh Circuit holds the same, relying on guideline commentary to do so. *In re Sams*, 830 F.3d 1234, 1241 (11th Cir. 2016) (citing U.S.S.G. § 4B1.2 cmt. n.1).

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.[10] This Court supports holds only

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[10] In explaining it 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.

commentary "that 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. 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

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see 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.

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 requires removal of 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 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 bank robbery a crime of violence, are legally flawed.

2. The physical force clause

The Ninth Circuit took a different position in *Watson*, finding bank robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)'s physical force clause—a clause similar but not identical to U.S.S.G. § 4B1.2's physical force clause—finding it has "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Watson*, 881 F.3d at 786. There are

several flaws with *Watson* and the circuits cases taking a similar position to find bank robbery falls within the career offender's physical force clause.[11]

Watson held that bank robbery by intimidation "requires at least 'an implicit threat to use the type of violent physical force necessary'" under the force clause. 881 F.3d at 785 (citation omitted). *Watson*, however, incorrectly applied the categorical analysis to reach its flawed conclusion.

First, bank robbery can be committed by a threat to intimidate that does not require a willingness to use violent physical force. This Court recognizes robbery by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). While *Holloway* addressed intimidation in relation to the federal carjacking statute (18 U.S.C. § 2119), the federal bank robbery statute similarly prohibits a taking committed "by intimidation." 18 U.S.C. § 2113(a). *Watson* failed to address this recognized definition.

Second, even if intimidation did require a willingness to use violent physical force, the Ninth Circuit acknowledges "[a] willingness to use violent force is not the same as a threat to do so." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) (finding Massachusetts armed robbery statute does not qualify as a violent

[11] In *United States v. Hammond*, the district court noted "every circuit court but the D.C. Circuit, which has not addressed the subject, has ruled that intimidation—or conduct reasonably causing fear of bodily harm—is conduct that threatens violent physical force. *United States v. Hammond*, 354 F. Supp. 3d 28, 50 (D.D.C. 2018) (listing cases), *appeal dismissed*, No. 19-3006, 2020 WL 3406131 (D.C. Cir. June 12, 2020).

felony under the ACCA).[12] In *Parnell*, the government argued that anyone robbing a bank harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. The Ninth Circuit rejected the government's position, holding "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id.* *Watson* failed to address this recognized distinction.

Third, even where a defendant is willing to use violent physical force, an intimidating act does not require such willingness be communicated *to the victim*. A victim's perception of a "threat" does not prove a defendant actually communicated an intent to inflict harm. In *Elonis v. United States*, 575 U.S. 723 (2015), this Court explained a victim may perceive a "threat" where none exists. So, too, in bank robbery cases, where conviction results despite no intentional intimidation by threatened violent physical force:

- In *United States v. Lucas*, the Ninth Circuit found intimidation where the defendant walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." 963 F.2d 243, 244, 248 (9th Cir. 1992).

[12] *Parnell* explained there were two ways to satisfy the required physical force element for robbery under Massachusetts state law: "(1) 'by force and violence' (i.e., the actual force prong) or (2) 'by assault and putting in fear' (i.e., the constructive force prong). Mass. Gen. Laws Ann. ch. 265, § 19(b).3." 818 F.3d 978.

- In *United States v. Hopkins*, the defendant "spoke calmly, made no threats, and was clearly unarmed," but the Ninth Circuit found intimidation because he entered a bank and gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." 703 F.2d 1102, 1103 (9th Cir. 1983).

Critically, if the defendants in *Lucas* and *Hopkins* were ever "willing" to use or threaten to use violent force, they did nothing to communicate or express that willingness to their victims. *Lucas* and *Hopkins* demonstrate bank robbery does not require the use or threatened use of "violent" physical force.

Therefore, while the Ninth Circuit broadly interprets "intimidation" for sufficiency, affirming convictions including non-violent conduct that *does not* involve the use, attempted use, or threats of violent force, the Ninth Circuit also conversely finds "intimidation" *always involves* the use, attempted use, or threats of violent force for force clause analysis. *Watson*, 881 F.3d at 785. Both propositions cannot be true.

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'").

Archer'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 with its work correcting the arbitrary punishments still existing for those petitioners suffering mandatory career offender sentences.

As the U.S.S.G. § 4B1.2 physical force clause remains worded today as it was before August 1, 2016, the federal bank robbery issue will reoccur in future cases. Thus, the Ninth Circuit's decision in *Watson* and the district court's reliance on it, requires review and correction from this Court to ensure consistency.

Conclusion

For the reasons set forth herein, Archer requests this Court grant this petition for certiorari.

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Respectfully submitted,

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