No. 20–_____

In the
Supreme Court of the United States

Miguel Nunez,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Second Circuit's decision below, *Nunez v. United States*, 954 F.3d 465 (2d Cir. 2020), and the First Circuit's contrary decision in *Shea v. United States*, 976 F.3d 63 (1st Cir. 2020), deepen a circuit split over the following important and recurring question of federal law:

Whether a motion under 28 U.S.C. § 2255 challenging the constitutionality of the residual clause of the mandatory U.S. Sentencing Guidelines is timely if filed within one year of *Johnson v. United States,* 576 U.S. 591 (2015), which held unconstitutional the identical residual clause of the Armed Career Criminal Act.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Miguel Nunez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the denial of his motion to correct his sentence under 28 U.S.C. § 2255.

OPINIONS AND ORDERS BELOW

The Second Circuit's decision (Petitioner's Appendix ("App.") 1a–13a) is reported at 954 F.3d 465 (2d Cir. 2020). The order denying Mr. Nunez's petition for rehearing or rehearing en banc (App. 18a) is unreported. The district court's memorandum opinion denying Mr. Nunez's motion under 28 U.S.C. § 2255 (App. 14a–17a) is unreported but appears at 2018 WL 2371714 (S.D.N.Y. May 24, 2018).

JURISDICTION

The court of appeals entered judgment on March 30, 2020. App. 1a. Mr. Nunez's timely petition for rehearing or rehearing en banc was denied on June 15, 2020. App. 18a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). The district court had jurisdiction under 28 U.S.C. § 2255.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES

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

Section 2255 of title 28, U.S.C., provides in relevant part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States … may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> [. . .]
>
> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Section 4B1.1 of the U.S. Sentencing Guidelines (1998) provides in relevant part:

> **§ 4B1.1. Career Offender**
>
> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2(a) of the U.S. Sentencing Guidelines (1998) provides in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INTRODUCTION

This petition presents an important and recurring question of federal law on which the courts of appeals are deeply and intractably split: whether a motion under 28 U.S.C. § 2255 challenging the constitutionality of the residual clause of the mandatory U.S. Sentencing Guidelines is timely if filed within one year of *Johnson v. United States*, 576 U.S. 591 (2015), which struck down the identical residual clause of the Armed Career Criminal Act as unconstitutionally vague. Though the Court has previously denied petitions presenting similar questions, *see, e.g.*, *Patrick v. United States,* 140 S. Ct. 2635 (Mar. 30, 2020) (mem.); *Brown v. United States*, 139 S. Ct. 14 (2018) (mem.), two more Circuits—the First and Second—have now entered the fray on opposite sides. The Court should grant review to resolve this persistent conflict.

Johnson held that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. 576 U.S. at 593–606. The clause mandated a higher minimum sentence (and increased the maximum sentence) for defendants convicted of crimes "involv[ing] conduct that presents a serious potential risk of physical injury to another." *Id.* at 593 (quoting 18 U.S.C. § 924(e)(2)(B) (internal quotation marks omitted)). As the Court explained, this language "leaves grave uncertainty about how to estimate the risk posed by a crime" and "about

how much risk it takes for a crime to qualify." *Id.* at 597–98. The Court ruled that the "indeterminacy of the wide-ranging inquiry [the clause] required ... both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 597.

Mr. Nunez was sentenced in 2000 under the then-mandatory U.S. Sentencing Guidelines. Those Guidelines contained a residual clause identical to the residual clause struck down in *Johnson*. U.S.S.G. § 4B1.2(a)(2) (1998). That identical language is no coincidence: the Guidelines' residual clause was expressly "derived from 18 U.S.C. § 924(e)," the provision at issue in *Johnson*. U.S.S.G. app. C, amend. 268. When the Guidelines' residual clause was applied to Mr. Nunez, his range of imprisonment increased from a Guidelines maximum of 151 months to a mandatory Guidelines *minimum* of 151 months. No valid basis for a downward departure existed. Instead, the district court upwardly departed and sentenced him to 360 months in prison.

Although the mandatory Guidelines' residual clause gives rise to the same due process violation as the residual clause struck down in *Johnson*, there is a widespread and entrenched circuit split on whether there is any vehicle for challenging the clause. Under 28 U.S.C. § 2255(f)(3), a motion to correct a sentence may be filed within one year of the date "on which the right asserted was initially recognized by the Supreme Court." The

First and Seventh Circuits agree that challenges to the residual clause of the mandatory Guidelines are timely if filed within a year of *Johnson* because they "assert[]" the same "right" recognized in *Johnson*.

Eight other circuits, including the Second Circuit below, disagree. They hold that, under § 2255(f)(3), the "right" not to be sentenced under the residual clause's vague language differs depending on whether that provision is employed under the ACCA or the mandatory Guidelines—even though the two clauses are identical, serve identical purposes, and impose the same risk of arbitrary punishment. These circuits thus subject individuals like Mr. Nunez to a catch-22. They hold that a post-conviction motion challenging the mandatory Guidelines' residual clause cannot be brought until this Court decides that the mandatory Guidelines' residual clause is unconstitutional. But this Court will not have an opportunity to decide whether the mandatory Guidelines' residual clause is unconstitutional unless motions challenging that clause can be brought. Eight circuits thus leave individuals like Mr. Nunez with no avenue to bring the due process challenge two circuits allow.

The Court spoke forcefully in *Johnson* about the "first essential of due process": the law must provide "fair notice" of what is prohibited. And the Court has repeatedly reaffirmed the importance of that basic principle. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1231 (2018) (Gorsuch, J.,

concurring in part and concurring in the judgment) ("Vague laws invite arbitrary power.... [T]he Constitution demands more."); *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019) ("Statutes must give people 'of common intelligence' fair notice of what the law demands of them.") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). This case presents a double dose of arbitrariness: Mr. Nunez was sentenced as a "career offender" under an arbitrary residual clause, and he cannot challenge that sentence because he happened to be convicted in a circuit that does not allow him to challenge that sentence.

The Court has denied certiorari in earlier cases presenting similar issues, *see, e.g.*, *Patrick v. United States*, 140 S. Ct. 2635 (Mar. 30, 2020) (mem.); *Brown v. United States*, 139 S. Ct. 14 (2018) (mem.)—over the recorded dissent of Justices Ginsburg and Sotomayor, *see Patrick,* 140 S. Ct. at 2635 (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari); *Brown*, 139 S. Ct. at 14–16 (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari) ("*Brown* Dissent"). But it did so before the First and Second Circuits weighed in. The time has come to resolve the issue. The question presented has fully percolated, yet the courts of appeals remain more widely and intractably divided than ever. Unlike other cases in which the Court has denied review, the issue is cleanly presented here. The stakes are also high. There are "perhaps more

than 1,000" others like Mr. Nunez who seek to "challenge the constitutionality" of a sentencing enhancement that added years, and sometimes decades, to their confinement. *See Brown* Dissent, 139 S. Ct. at 14, 16 & n.4 (citing Brief of Eight Federal Public Defender Offices as *Amici Curiae* in *United States v. Brown*, No. 16–7056 (4th Cir. Dkt. 62), at 1a–5a (estimating, based on Sentencing Commission data, that 1,187 "mandatory guidelines § 2255 cases" were "pending nationwide as of October 1, 2017")). The Court should end the ongoing division over this important and recurring question.

STATEMENT OF THE CASE

The facts are undisputed and set forth in detail in the Second Circuit's majority opinion. App. 2a–5a (954 F.3d at 467–69). In summary, Mr. Nunez pleaded guilty in 1999 to one count of Hobbs Act robbery and one count of conspiracy to commit Hobbs Act robbery. He was sentenced in 2000 to 30 years (360 months) in prison under the then-mandatory Sentencing Guidelines. Those Guidelines contained a residual clause identical to the residual clause struck down in *Johnson*. U.S.S.G. § 4B1.2(a)(2) (1998). When the Guidelines' residual clause was applied to Mr. Nunez, he qualified as a "career offender," and his mandatory range of imprisonment increased as a result. *See* App. 4a (954 F.3d at 468). Instead

of facing a range of 121-to-151 months, he faced a range of 151-to-188 months. *Id.*; Presentence Investigation Report ("PSR") ¶¶ 45, 66. No valid basis for a downward departure below this range existed. *See* PSR ¶¶ 80–82. Instead, the district court upwardly departed and imposed an aggregate prison term of 360 months. App. 3a (954 F.3d at 467).

After *Johnson* was decided, Mr. Nunez, like perhaps 1,000 or more other federal prisoners, realized his mandatory Guidelines sentence was likely unconstitutional. Acting promptly, he filed a § 2255 motion within one year of *Johnson* that "asserted" the same "right" "initially recognized" in *Johnson*, § 2255(f)(3): the right not to be subjected to an increased mandatory sentencing range based on the sentencing judge's inherently arbitrary determination that he had committed crimes "involv[ing] conduct that presents a serious potential risk of physical injury to another." 576 U.S. at 593 (quoting 18 U.S.C. § 924(e)(2)(B)); U.S.S.G. § 4B1.2(a)(2) (1998). But rather than resolve the merits of petitioner's claim, the district court dismissed it as untimely because *Johnson* specifically concerned the ACCA's residual clause, not the identical clause in the mandatory Guidelines. App. 14a–17a. The court so ruled even though the mandatory Guidelines' residual clause used the same "ordinary case" approach, combined with an "uncertainty about how much risk" is required, to "fix[] sentences"—the precise flaws that, according to *Johnson*,

Dimaya, and *Davis*, rendered the ACCA clause (and similar clauses in other statutes) unconstitutionally vague. *Johnson*, 576 U.S. at 596–97; *Dimaya*, 138 S. Ct. at 1216 (applying *Johnson* to the 18 U.S.C. § 16(b) residual clause); *Davis*, 139 S. Ct. at 2336 (applying *Johnson* to the 18 U.S.C. § 924(c)(3)(B) residual clause).

The Second Circuit affirmed. App. 3a (954 F.3d at 467). Citing *Lopez v. Smith*, 574 U.S. 1, 4, 6 (2014), and *Nevada v. Jackson*, 569 U.S. 505, 512 (2013)—both of which concerned the deference owed to state courts under 28 U.S.C. § 2254(d)(1), not the statute of limitations for federal prisoners under 28 U.S.C. § 2255(f)(3)—the court ruled against Mr. Nunez because he could not show that *Johnson* "itself" resolved "the specific question presented by th[is] case." App. 5a (954 F.3d at 469) (quoting *Lopez*, 574 U.S. at 6).

The court rejected the Seventh Circuit's contrary holding in *Cross v. United States,* 892 F.3d 288, 294 (7th Cir. 2018), *reh'g denied* (Aug. 31, 2018). The court reasoned that *Cross* "'effectively reads "recognized" out of [the second clause of] 28 U.S.C. § 2255(f)(3) by not engaging in an inquiry into whether the right asserted by the petitioner is the same right that was recognized by the Supreme Court.'" App. 5a (954 F.3d at 471) (quoting *United States v. Green*, 898 F.3d 315, 322 (3d Cir. 2018)).

Judge Pooler and Judge Raggi each concurred in separate opinions. Judge Pooler, who also authored the majority opinion, wrote separately "to emphasize the injustice our decision today creates." App. 8a (954 F.3d at 472 (Pooler, J., concurring)). Judge Raggi disagreed that Mr. Nunez himself will suffer any injustice, but acknowledged that this dispute is irrelevant to the purely legal question of whether his § 2255 motion is timely. *See* App. 10a (954 F.3d at 474 (Raggi, J., concurring)) ("This court did not need to discuss [Nunez's] conduct in any detail to hold [his] § 2255 motion untimely.").

After the Second Circuit denied Mr. Nunez's timely petition for rehearing or rehearing en banc (App. 18a), the First Circuit rejected the Second Circuit's position (and similar decisions from seven other circuits) and joined the Seventh Circuit in holding that § 2255 challenges to the residual clause of the mandatory Guidelines are timely if filed within one year of *Johnson*, at least where, as here, no basis for a downward departure from the Guidelines range existed. *Shea v. United States*, 976 F.3d 63, 78–83 (1st Cir. 2020).

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for four overriding reasons. First, the circuit split over the question presented, which two Justices and numerous lower courts have acknowledged, not only persists but has widened. Second, the question presented is important and recurring. Third, this case provides a suitable vehicle for resolving the conflict. And fourth, the Second Circuit's position is incorrect.

I. The Circuits are openly split on the question presented.

Review is merited because of the acknowledged, persistent, and deep split on the timeliness of *Johnson* challenges to the residual clause of the mandatory Guidelines. *See, e.g., Brown* Dissent, 139 S. Ct. at 15–16; *Shea*, 976 F.3d at 69; App. 7a (954 F.3d at 471); *United States v. Carr*, 946 F.3d 598, 600 n.3 (D.C. Cir. 2020). The First and Seventh Circuits hold that § 2255 motions challenging the residual clause of the mandatory Guidelines "assert[]" the same "right" "initially recognized" in *Johnson*, 28 U.S.C. § 2255(f)(3)—the right to be free of punishment based on identical, unconstitutionally vague mandatory sentencing enhancements—and thus are timely if filed within one year of *Johnson*. Other circuits hold the opposite. Only the Court can resolve this enduring conflict.

A. The First and Seventh Circuits hold that challenges to the mandatory Guidelines' residual clause are timely if filed within one year of *Johnson*.

If Mr. Nunez were in the First or Seventh Circuit, his § 2255 motion would be timely.

The Seventh Circuit holds that post-conviction motions challenging the residual clause of the mandatory Guidelines are timely under § 2255(f)(3) if filed within one year of *Johnson*. *Cross,* 892 F.3d at 294. The court recognized that § 2255 motions challenging the residual clause of the mandatory Guidelines "assert[]" the same "right" recognized by *Johnson*. As Chief Judge Wood's opinion for the court explained, "[u]nder *Johnson*, a person has a right not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* Because Guidelines challengers "claim the right to be resentenced on the ground that the vague (yet mandatory) residual clause unconstitutionally fixed their terms of imprisonment," such claimants "assert precisely th[e] right" recognized in *Johnson*. *Id.*

Cross further explained that the contrary position suffers from a "fundamental flaw": it is inconsistent with the text of § 2255(f)(3). *Id.* That provision specifies that the time for a § 2255 motion runs from "the date on which the right *asserted* was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3) (emphasis added). Section 2255(f)(3) thus

does not provide "that the movant must ultimately *prove* that the right applies to his situation." *Cross*, 892 F.3d at 293–94. Instead, a movant "need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that [the court] take the disfavored step of reading 'asserted' out of the statute." *Id.* at 294.

In reaching this conclusion, the Seventh Circuit acknowledged it was disagreeing with the Fourth and Sixth Circuits and agreeing with the First Circuit's pre-*Shea* analysis in *Moore v. United States*, 871 F.3d 72, 81–84 (1st Cir. 2017), which arose in the different procedural context of an application to file a second or successive § 2255 motion. *Cross*, 892 F.3d at 293 ("The Fourth and Sixth Circuits have both accepted [the government's] view. The First Circuit has rejected it.") (citations omitted).

The Seventh Circuit then proceeded to the merits of the motion, holding that the retroactive rule announced in *Johnson* applies to the identical language of the mandatory Guidelines' residual clause, thus rendering it void for vagueness. *Id.* at 299–306. The Seventh Circuit has repeatedly reaffirmed this ruling and has rejected the government's suggestion to reconsider it. *E.g.*, *Sotelo v. United States*, 922 F.3d 848, 851–52 (7th Cir. 2019).

Like the Seventh Circuit, the First Circuit holds that § 2255(f)(3) allows post-conviction motions challenging the mandatory Guidelines'

residual clause if filed within one year of *Johnson*. *Shea*, 976 F.3d at 65, 69–83. The court first assumed, without deciding, that such motions would be timely only if *Johnson* "necessarily dictate[d]" that "the residual clause in the pre-*Booker* Guidelines was unconstitutionally vague." *Id.* at 70. The court then ruled that *Johnson* did in fact doom the mandatory Guidelines' residual clause, at least in cases where, as here, no downward departure was available from the mandatory range. *Id.* at 71–83. Thus, Shea's motion was timely. *Id.* at 82–83. The First Circuit recognized that its ruling conflicts with the majority position of the circuits, including the Second Circuit's decision in this case. *Id.* at 69.

B. Other circuits hold that challenges to the mandatory Guidelines' residual clause may not be brought until this Court explicitly holds that *Johnson* applies to the mandatory Guidelines.

Other circuits hold that post-conviction motions challenging the constitutionality of the mandatory Guidelines' residual clause do not "assert[]" a "right" "recognized" by the Court for purposes of § 2255(f)(3). The Second Circuit, for example, reasons that because this Court has not explicitly applied *Johnson* to sentences imposed under the residual clause of the mandatory Guidelines, *Johnson* cannot have "recognized" any "right" applicable in mandatory Guidelines cases. App. 5a–8a (954 F.3d at 469–72).

Seven other circuits agree with the Second Circuit. See *United States v. London*, 937 F.3d 502, 503 (5th Cir. 2019); *United States v. Blackstone*, 903 F.3d 1020, 1023 (9th Cir. 2018); *Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018); *United States v. Green*, 898 F.3d 315, 321 (3d Cir. 2018); *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir. 2018); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625, 629–30 (6th Cir. 2017). And the Eleventh Circuit takes yet another position, holding that the Sentencing Guidelines, whether mandatory or advisory, are immune to constitutional vagueness challenges. *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016) (per curiam).

Many of these courts have acknowledged the split. *E.g.*, *Shea*, 976 F.3d at 69; App. 7a (954 F.3d at 471); *London*, 937 F.3d at 508 & n.12; *Blackstone*, 903 F.3d at 1027 & n.3; *Green*, 898 F.3d at 322 & n.3. And notably, in several of them, judges have disagreed with their own circuit's position. *E.g.*, *London*, 937 F.3d at 510 (Costa, J., concurring) ("I write separately because we are on the wrong side of a split over the habeas limitations statute."); *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. 2019) (Berzon, J., concurring) ("I write separately to note that in my view, *Blackstone* was wrongly decided."), *cert. denied*, 2020 WL 1906599 (Apr. 20, 2020); *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir.

2019) (Moore, J., concurring) ("I write separately because *Raybon* was wrong on this issue. We should accept the invitation to rehear this case en banc and overturn *Raybon*); *In re Sapp*, 827 F.3d 1334, 1337 (11th Cir. 2016) (Moore, Rosenbaum, and Pryor (Jill A.), JJ., concurring) ("Although we are bound by *Griffin*, we write separately to explain why we believe *Griffin* is deeply flawed and wrongly decided."). But the split remains entrenched.

II. The question presented is important and recurring.

As the Second Circuit's decision below and the First Circuit's recent decision in *Shea* demonstrate, the conflict among the courts of appeals has only deepened since the Court denied certiorari in *Brown, Patrick,* and similar cases. The split means many defendants sentenced under the mandatory Guidelines' residual clause remain unable to bring a timely constitutional challenge to their sentences—simply because of geography. Defendants in the First and Seventh Circuits can seek (and often can obtain) relief from sentences imposed without due process. *See, e.g.*, *Boria v. United States*, 427 F. Supp. 3d 143, 147–51 (D. Mass. 2019) (holding challenge to mandatory Guidelines' residual clause both timely and meritorious); *Best v. United States*, 2019 WL 3067241, at *1–*3 (N.D. Ind. July 12, 2019) (same). But the courthouses are closed to

similarly situated prisoners in the rest of the country who must continue to serve arbitrary sentences.

Many lives and liberties depend on this accident of geography. Mr. Nunez and perhaps more than 1,000 others are unable to challenge lengthy sentences imposed under the vague residual clause of the mandatory Guidelines. *Brown* Dissent, 139 S. Ct. at 14, 16 & n.4. Certiorari is warranted so that the Court's judgment, rather than the vagaries of geography, determines their fate.

Review is particularly warranted because the Court repeatedly has recognized the grave due process problems with punishing people based on the same (or nearly the same) vague residual-clause language at issue here. *See Davis*, 139 S. Ct. at 2325–27; *Dimaya*, 138 S. Ct. at 1216; *Johnson*, 576 U.S. at 597–98. In *Johnson*, the Court recognized that a mandatory sentence based on this residual-clause language "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 597. The Court held that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 602.

Then, in *Dimaya*, the Court invalidated the residual clause of the Immigration and Nationality Act ("INA"), ruling that it too suffered from "hopeless indeterminacy." *See Dimaya*, 138 S. Ct. at 1213 (quoting

Johnson, 576 U.S. at 598). As Justice Gorsuch's concurrence explained, both English common law and "early American practice" demonstrated that judges refused to apply vague laws that failed to provide fair notice and opened the door to the abuses of power that could result. *See Dimaya*, 138 S. Ct. at 1225–26 (Gorsuch, J., concurring in part and concurring in the judgment). Further, vague laws present separation of powers concerns insofar as legislators "abdicate their responsibilities for setting the standards of the criminal law" and "leav[e] to judges the power to decide the various crimes includable in [a] vague phrase." *Id.* at 1227 (citation and internal quotation marks omitted). And most recently in *Davis*, the Court invalidated the residual clause in 18 U.S.C. § 924(c)(3)(B), again reaffirming that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *Davis*, 139 S. Ct. at 2326. Once again, the Court reaffirmed the principles that vague laws "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct." *Id.* at 2323.

This case presents the same dangers of arbitrary punishment and "has generated divergence among the lower courts [that] calls out for an answer." *Brown* Dissent, 139 S. Ct. at 14. Since *Brown*, the split has only

deepened, and the number of judges calling for the Court's intervention has only increased. *See London*, 937 F.3d at 514 (Costa, J., concurring); *Chambers,* 763 F. App'x at 526 (Moore, J., concurring); *see also* App. 8a (954 F.3d at 472 (Pooler, J., concurring)) ("Unless and until the Supreme Court addresses whether *Johnson* applies to the mandatory Guidelines, … petitioners like Nunez will be left with no procedural mechanism by which to raise, and seek redress for, constitutional grievances tied to their sentencings."). The Court should therefore "reconsider its reluctance" to grant review. *Patrick*, 140 S. Ct. at 2635 (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari).

III. This case is an appropriate vehicle.

This petition also provides a suitable opportunity for the Court to intervene.

First, the question is cleanly presented. The district court denied petitioner's § 2255 motion on one ground only: untimeliness. App. 15a. Thus, this case is not burdened by alternative holdings (or factual disputes) that could complicate the Court's review. The issue was then fully considered by the court of appeals in a published decision, which also resolved the case solely on timeliness grounds.

Second, this case involves an initial § 2255 motion, not a second or successive one. And Mr. Nunez was sentenced in 2000, before enactment of the PROTECT Act, Pub. L. No. 108–21, 117 Stat. 650 (2003). Under the government's analysis, these factors make this case a better vehicle than earlier petitions. *Cf., e.g.,* Brief for the United States in Opposition 9, *Gipson v. United States*, 139 S. Ct. 373 (2018) (mem.) (No. 17–8637) ("*Gipson* BIO") (arguing *Gipson* was poor vehicle because petitioner's entitlement to relief "would depend not only on the timeliness of his motion, but also on his ability to satisfy the particular requirements of a second or successive collateral attack"); Memorandum for the United States in Opposition 3–4, *Brown v. United States*, 139 S. Ct. 14 (2018) (mem.) (No. 17–9276) ("*Brown* MIO") (arguing *Brown* was "unsuitable vehicle … because petitioner's sentencing postdated enactment of the PROTECT Act").

Third, this case presents a good vehicle because post-conviction relief is the only mechanism through which petitioners like Mr. Nunez can bring a vagueness challenge to the mandatory Guidelines' residual clause. While petitioners challenging other similar residual clauses were able to successfully bring vagueness challenges on direct appeal, *see Johnson*, 576 U.S. at 2551; *Dimaya*, 138 S. Ct. 1204; *Davis*, 139 S. Ct. 2319, petitioners sentenced under the mandatory Guidelines have no such opportunity.

This is because the Court did not recognize the right in *Johnson* until 2015, long after the point at which individuals sentenced under the mandatory Guidelines could seek direct review of their sentences. The only avenue for a court to hear this vagueness challenge, then, is through a § 2255 motion for post-conviction relief. If someone in Mr. Nunez's position cannot bring such a challenge, no one can, and a substantial constitutional claim will never be addressed. *See* App. 8a (954 F.3d at 472 (Pooler, J., concurring)) ("Section 2255 petitioners are the only class of defendants who may raise the question of whether the residual clause in the pre-*Booker* Career Offender Guideline is unconstitutionally vague.").

Fourth, the issue is outcome-determinative. If, as the First and Seventh Circuits hold, Mr. Nunez's § 2255 motion is timely, he would be entitled, at a minimum, to a remand for the district court to decide whether his motion is meritorious and warrants imposition of a lower sentence. *See Shea*, 976 F.3d at 82–83 (vacating and remanding for district court to consider the merits because, as here, the certificate of appealability "only teed up the timeliness issue, and the district court did not broach the merits"). Mr. Nunez is likely to prevail because the circuits that have addressed the issue agree that neither of his instant offenses—Hobbs Act robbery and conspiracy to commit Hobbs Act robbery—qualifies as a Guidelines "crime of violence" absent the vague residual clause. *See,*

e.g., *United States v. Eason*, 953 F.3d 1184, 1187, 1193–94 (11th Cir. 2020) (collecting cases). Thus, since neither of his instant offenses is a "crime of violence," Mr. Nunez should not have been sentenced as a career offender. *See* U.S.S.G. § 4B1.1 (1998). And while Judge Raggi opined that Mr. Nunez would receive the same sentence even absent career-offender treatment (*see* App. 9a (954 F.3d at 473 (Raggi, J., concurring))), the district court said nothing to support that conclusion. On the contrary, there is a reasonable probability the court's erroneous reliance on the elevated career-offender range—the wrong "starting point and … initial benchmark," *Gall v. United States*, 552 U.S. 39, 49 (2007)—influenced the ultimate sentence. *See Molina–Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) ("When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome.").

In any event, the possibility that Mr. Nunez may not ultimately receive a lower sentence is not a basis for denying certiorari. This Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary. *See, e.g.*, *McFadden v. United States*, 576 U.S. 186, 197 (2015); *Rosemond v. United States*, 572 U.S. 65, 83 (2014); *Neder v. United States*,

527 U.S. 1, 25 (1999); *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995). As the government has repeatedly argued, uncertainty as to "the ultimate outcome" does not render a case an improper "vehicle for the Court to consider important questions." Reply Brief for the Petitioners 10, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (Nos. 11–246, 11–247), 2011 WL 5856209; *accord* Reply Brief for the Petitioner 8, *Astrue v. Capato*, 566 U.S. 541 (2012) (No. 11–159), 2012 WL 664932.

Finally on this point, no further percolation is necessary. The government successfully opposed certiorari in earlier cases by arguing, among other things, that the split among the courts of appeals was "both recent and shallow" and could "soon resolve itself" because, at the time, the Seventh Circuit was the lone outlier. *Gipson* BIO at 15; *accord Brown* MIO at 3. But now, more than two years later, and with the First and Second Circuits recently weighing in on opposite sides, the courts of appeals are more firmly and widely divided than ever. Because the division stems from confusion over how broadly to construe the "right" recognized in *Johnson*, only this Court can settle the matter. There is no longer any reason to believe the disagreement among the lower courts will resolve itself.

IV. The Second Circuit's position is wrong.

Review is also appropriate because the Second Circuit's decision is wrong. Mr. Nunez's § 2255 motion arises in the same context as *Johnson*, as both cases involve mandatory sentencing ranges that were increased because of a vague residual clause. And it challenges the exact language held unconstitutional in J*ohnson*, as the residual clause of the mandatory Guidelines is identical to—and was imported directly from—the ACCA's residual clause. *See* U.S.S.G. app. C, amend. 268 ("The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)."). Thus, it "assert[s]" the same "right" "initially recognized" in *Johnson*: the right not to be subjected to a mandatorily increased sentencing range based on the same vague residual clause invalidated in *Johnson*. Nunez's motion therefore satisfies § 2255(f)(3)'s statute of limitations: it was filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court" in *Johnson*. *See* 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 632 (4th ed. 2011 & 2019 Supp.) ("The majority view of the appellate courts adopts the narrower version of the *Johnson* right, but the broader version adopted in the Seventh Circuit is more persuasive because it accounts for the

reasoning and principles that explain *Johnson* and recognizes the necessary implications of the subsequent cases.").

In ruling otherwise, the Second Circuit committed several errors. First, it inaccurately described the "pre-*Booker* Sentencing Guidelines" as only "presumptively binding." App. 3a (954 F.3d at 467). In fact, those Guidelines were mandatory—not merely "presumptively" so. While judges had discretion to depart below the Guidelines range in limited circumstances (not present in this case), that discretion does not mean the Guidelines were only "presumptively" binding. As the Court made clear in *United States v. Booker*, "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. 220, 234 (2005) (citations omitted). *See also Shea*, 976 F.3d at 80–82 (rejecting government's argument that power to depart below mandatory Guidelines range in exceptional cases meant that Guidelines did not "fix[]" Shea's sentencing range, as no basis for a downward departure was available to him).

Second, the court erroneously relied on *Lopez v. Smith*, 574 U.S. 1, 4, 6 (2014), and *Nevada v. Jackson*, 569 U.S. 505, 512 (2013). App. 5a (954 F.3d at 469). The court cited these cases for the proposition that lower courts may not "fram[e] [Supreme Court] precedents at … a high level of generality" in reviewing claims under the Antiterrorism and Effective

Death Penalty Act of 1996 ("AEDPA"). *Id.* Rather, the court said, Mr. Nunez must identify "precedent related to 'the specific question presented by th[is] case.'" *Id.* (quoting *Lopez*, 574 U.S. at 6). But *Lopez* and *Nevada* have nothing to do with § 2255(f)(3) (or any other statute of limitations), or with motions under § 2255 at all. Instead, both cases interpreted 28 U.S.C. § 2254(d)(1), a provision of AEDPA that has no application here, shares no textual similarities with § 2255(f)(3), and serves a different purpose.

Section 2254(d)(l) is a state-prisoner relitigation bar. It precludes a state prisoner from seeking federal habeas review of any claim previously adjudicated by the state courts unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(l). In that context, the Court has cautioned against reading its holdings at a "high level of generality" when describing the boundaries of "clearly established Federal law." *Lopez*, 574 U.S. at 6.

The Court's interpretation of § 2254(d)(l) does not apply to § 2255(f)(3). First, the text is different: the restrictive "clearly established Federal law" language in § 2254(d)(l) appears nowhere in § 2255(f)(3). When Congress employs different language in related statutes "[w]e usually presume [these] differences in language … convey differences in

meaning." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018) (internal quotation marks omitted). Whether a state court decision violates "[c]learly established Federal law" is not the same inquiry as whether a federal prisoner has timely "asserted" a right "initially recognized" by the Court. *See Moore*, 871 F.3d at 82.

Section 2255(f)(3) also serves a different purpose than § 2254(d)(1). Section 2254(d)(1) respects state courts by permitting federal courts to intervene only when the state court's decision is clearly contrary to a prior Court decision. *Woods v. Donald*, 575 U.S. 312, 316 (2015); *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Section 2255(f)(3), in contrast, governs the timing of post-conviction motions by federal prisoners. Comity and federalism concerns have no relevance in this context. *See Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) ("Federalism and comity considerations are unique to federal habeas review of *state* convictions.") (emphasis added).

Unlike § 2254(d)(1), the purpose of the statute of limitations in § 2255(f)(3) is to "encourag[e] prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *See Carey v. Saffold*, 536 U.S. 214, 266 (2002). The Second Circuit's decision thwarts, rather than furthers, that purpose. *See London*, 937 F.3d at 513 (Costa, J., concurring) (noting that "[r]equiring an application of the right

to the prisoner's [specific] circumstances delays the presentation of habeas claims" and thereby undermines "the goal of limitations provisions").

The Circuit's errors led it to hold that the right recognized in *Johnson* is ACCA-specific. But this Court has held otherwise. In *Dimaya*, for example, which involved the somewhat different language of 18 U.S.C. § 16(b), the Court recognized that "*Johnson* tells us how to resolve this case." 138 S. Ct. at 1223; *see also id.* at 1213 ("*Johnson* is a straight-forward decision, with equally straightforward application here."). As the Chief Judge of the District of Columbia has noted, "Surely if the Supreme Court considered the question presented in *Dimaya* a matter of enforcing *Johnson*, the same is true here. The distance between *Dimaya* and *Johnson* is far greater than the distance between this [mandatory Guidelines] case and *Johnson*." *United States v. Hammond*, 354 F. Supp. 3d 28, 47 (D.D.C. 2018), *appeal dismissed*, 2020 WL 3406131 (D.C. Cir. June 12, 2020).

The court also misconstrued the text of § 2255(f)(3). That provision specifies that the statute of limitations runs from "the date on which the right *asserted* was initially recognized by the Supreme Court." § 2255(f)(3) (emphasis added). Under the Seventh Circuit's approach, while the movant must also ultimately prove that the right applies to his situation, that requirement goes to the *merits* of a movant's claim, not its timeliness.

See Cross, 892 F.3d at 293. To satisfy the statute of limitations, a movant "need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that [the court] take the disfavored step of reading 'asserted' out of the statute." *Id.* at 294.

The Second Circuit countered by stating that the Seventh Circuit's reading of § 2255(f)(3) improperly reads the word "recognized" out of the second clause of that provision. Not so. "While a motion will be timely if filed within a year from the date 'on which the right asserted was initially recognized by the Supreme Court,' this motion may be summarily dismissed if the right has not been, in fact, either 'newly recognized by the Supreme Court' or "made retroactively applicable to cases on collateral review.'" *Hammond*, 354 F. Supp. 3d at 41 (quoting *Dodd v. United States*, 545 U.S. 353, 358 (2005)). "That the second clause does not affect timeliness does not mean it has no role to play." *Id.*

The Circuit also relied on a footnote in Justice Sotomayor's concurring opinion in *Beckles v. United States*, 137 S. Ct. 886 (2017), in which she observed that "[t]he Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question of whether defendants sentenced to terms of imprisonment" under the mandatory Guidelines "may mount vagueness attacks on their sentences." App. 6a (954 F.3d at 470) (citing *Beckles*, 137 S. Ct. at 903 n.4

(Sotomayor, J., concurring)). The court construed the footnote to mean that it is still an open question whether *Johnson* recognized a right to challenge the mandatory Guidelines. But the footnote suggested, at most, only that the *merits* of such a challenge had not yet been decided. And Justice Sotomayor noted that the majority's decision in *Beckles* did not foreclose such a challenge. "But she said nothing of timeliness under § 2255(f)(3), or whether the Court's *Beckles* decision would in any way undermine a petitioner's ability to bring a § 2255(f)(3) petition challenging the mandatory Guidelines in light of the right newly recognized in *Johnson*." *Brown*, 868 F.3d at 308 n.5 (Gregory, C.J., dissenting). *See also Shea*, 976 F.3d at 72 n.6, 82–83 (rejecting government's reliance on Justice Sotomayor's *Beckles* concurrence and holding challenge to residual clause of mandatory Guidelines timely); *Hammond*, 354 F. Supp. 3d at 47 (same).

Further, even if the timeliness question under § 2255(f)(3) is inextricably bound up with the merits of a *Johnson* challenge to the mandatory Guidelines, as the First Circuit assumed in *Shea*, 976 F.3d at 70–71, the Court's decision in *Johnson* "necessarily dictate[s]" that the same residual clause in the mandatory Guidelines is unconstitutionally vague. *Id.* Accordingly, motions challenging the mandatory Guidelines' residual clause are timely if filed within one year of *Johnson*.

Finally, the majority position of the circuits unfairly leaves Mr. Nunez and similarly situated prisoners without any avenue to challenge their sentences, while comparable prisoners in the First and Seventh Circuits can not only seek, but can often obtain, sentence reductions. As Judge Pooler acknowledged below, this outcome is unjust not simply for Mr. Nunez, but for perhaps more than 1,000 others like him. *See* App. 8a (954 F.3d at 472 (Pooler, J., concurring)) (writing separately "to emphasize the injustice our decision today creates").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

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November 2, 2020

PETITIONER'S APPENDIX

interest calculations of the court-appointed Referee. None has merit.

[7] First, March argues that the District Court erred by confirming the Referee's Report because the Referee failed to hold a hearing to determine the default date. But March admitted the February 1, 2008 default date in his answer and, in any event, at the summary judgment stage he failed to proffer evidence refuting that date. Under these circumstances, the Referee was not required to hold a hearing. *See Blueberry Inv'rs Co. v. Ilana Realty Inc.*, 184 A.D.2d 906, 585 N.Y.S.2d 564, 566 (1992) (holding hearing unnecessary where defendants admitted in their answer they owed interest from a date certain).

[8, 9] Second, March contends that the 24 percent default interest rate applied by the Referee violates New York's civil usury statute, which caps interest rates at sixteen percent. *See* N.Y. Gen. Oblig. Law § 5-501; N.Y. Banking Law § 14-a. That statute, however, "do[es] not apply to defaulted obligations." *Manfra, Tordella & Brookes, Inc. v. Bunge*, 794 F.2d 61, 63 n.3 (2d Cir. 1986); *see also Kraus v. Mendelsohn*, 97 A.D.3d 641, 948 N.Y.S.2d 119, 120 (2012) ("The defense of usury does not apply where the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity." (internal quotation marks, alterations, and citation omitted)).

Third, March argues that the Referee erred by applying the default interest rate from the date of default rather than from the date of acceleration. But the relevant loan documents, including the note and the mortgage agreement, clearly foreclose this argument. *See* App. at 37 ("Upon the occurrence of any default hereunder, the Note and all other sums secured hereby shall bear interest at the Default Rate."); App. at 54 ("[T]he Lender shall be entitled to interest at the Default Rate . . . from the time of said default to the sale of the premises following foreclosure . . .").

We therefore affirm the District Court's order confirming the Referee's Report.

V.

[10] Finally, we conclude that the District Court did not abuse its discretion by declining to reconsider or adjust its award of *per diem* interest to Madison Street based on the delayed "entry of judgment." *NYCTL 1998-2 Tr. v. Wagner*, 61 A.D.3d 728, 876 N.Y.S.2d 522, 523 (2009). March has not shown that Madison Street's two-month delay in submitting a revised proposed judgment was unexplained or unreasonable.

* * *

We have considered March's remaining arguments and conclude that they are either forfeited or without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

Miguel NUNEZ, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

Docket No. 18-1803-pr
August Term, 2019

United States Court of Appeals, Second Circuit.

Argued: August 29, 2019

Decided: March 30, 2020

Background: Defendant moved to vacate, set aside, or correct his 360-month sen-

tence for substantive and conspiratorial Hobbs Act robbery. The United States District Court for the Southern District of New York, Lewis A. Kaplan, Senior District Judge, denied the motion as untimely. Defendant appealed.

Holdings: The Court of Appeals, Pooler, Circuit Judge, held that *Johnson v. United States* did not restart time for inmate to file motion to vacate challenging Sentencing Guidelines' career offender provision.

Affirmed.

Pooler, Circuit Judge, filed concurring opinion.

Raggi, Circuit Judge, filed concurring opinion.

1. Criminal Law ⚿1139

A district court's conclusions of law are reviewed de novo on appeal from the denial of a motion to vacate, set aside, or correct a sentence. 28 U.S.C.A. § 2255.

2. Criminal Law ⚿1586

Federal inmate's claim that Sentencing Guidelines' career offender provision was unconstitutionally vague did not assert same right initially recognized by Supreme Court in *Johnson v. United States*, and thus did not restart time for inmate to file motion to vacate, set aside, or correct his sentence, even though Guideline's language was same as Armed Career Criminal Act's (ACCA) residual clause declared unconstitutional in *Johnson v. United States*; *Johnson v. United States* could not be read broadly, particularly in light of Supreme Court cautions against expansively construing its precedents in Antiterrorism and Effective Death Penalty Act (AEDPA) context, and question raised possibly remained open in Supreme Court. 28 U.S.C.A. § 2255(f)(3); U.S.S.G. § 4B1.2(a).

3. Criminal Law ⚿1586

The one-year statute of limitations period for a motion to vacate, set aside, or correct a sentence based on a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review begins to run following the Supreme Court's recognition of a right, as opposed to the Court's retroactive application of the right. 28 U.S.C.A. § 2255(f)(3).

4. Criminal Law ⚿1586

On motion to vacate, set aside, or correct his sentence based on a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, a court must consider whether the right a petitioner asserts has been recognized by the Supreme Court as part and parcel of deciding whether a petition is timely. 28 U.S.C.A. § 2255(f)(3).

Appeal from the United States District Court for the Southern District of New York (Lewis A. Kaplan, *J.*)

EDWARD S. ZAS, Federal Defenders of New York, Inc., Appeals Bureau, New York, NY, for Petitioner-Appellant Miguel Nunez.

NATHAN REHN, Assistant United States Attorney (Anna M. Skotko, Assistant United States Attorney, on the brief), for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, for Respondent-Appellee.

Before: POOLER, PARKER, and RAGGI, Circuit Judges.

Judge POOLER and Judge RAGGI each concur in separate opinions.

POOLER, Circuit Judge:

Petitioner Miguel Nunez appeals from the May 24, 2018 judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *J.*) denying as untimely Nunez's 28 U.S.C. § 2255 motion challenging his February 7, 2000 sentence for substantive and conspiratorial Hobbs Act robbery. *See* 18 U.S.C. § 1951(a). Nunez is currently serving 360 months' imprisonment for these crimes, a significant upward departure from the 151-to-188 month Guidelines range calculated by the district court under the presumptively binding pre-*Booker* Sentencing Guidelines. *See United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). That Guidelines range was dictated by the Career Offender Guideline, *see* U.S.S.G. § 4B1.1, which the district court applied upon finding that Nunez's present, and two prior, convictions were all for "crime[s] of violence," as defined in the Guideline's residual clause, *id.* § 4B1.2. Nunez argues that this residual clause is unconstitutionally vague, and thus, his sentencing violates due process. In support, Nunez relies on *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), which struck down an identically worded provision of the Armed Career Criminal Act as unconstitutionally vague. The issue presented to us on appeal is whether the right Nunez asserts was recognized in *Johnson*, rendering his motion timely pursuant to 28 U.S.C. § 2255(f)(3), or whether the right he asserts has yet to be recognized, rendering his motion untimely. We hold that *Johnson* did not itself render the residual clause of the pre-*Booker* Career Offender Guideline unconstitutionally vague and, thus, did not recognize the right Nunez asserts. We therefore affirm the district court's denial of Nunez's Section 2255 motion as untimely.

BACKGROUND

I. Nunez's Conviction

On October 5, 1999, Miguel Nunez pled guilty to Hobbs Act robbery and conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). Nunez and two co-conspirators had broken into the apartment of a male and female couple who ran a florist business and stole between $12,000 and $14,000 in cash, along with other personal items of value. During the course of the robbery, Nunez and one of his co-conspirators tied both victims up with rope and raped the female proprietor of the florist business.

At the time of Nunez's sentencing, a defendant was considered a career offender under the Sentencing Guidelines if,

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1 (1998). Nunez stipulated that he was eighteen years old at the time of his Hobbs Act offenses, he had two prior felony convictions for New York first-degree robbery, and Hobbs Act robbery was a crime of violence.

The Career Offender Guideline defined a crime of violence as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year that—"

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that pres-*

ents a serious potential risk of physical injury to another."

U.S.S.G. § 4B1.2(a) (1998) (emphasis added). The first definition is known as the elements clause. The second definition is known as the enumerated offenses clause. The italicized part of the second definition is known as the residual clause. The district court concluded that Nunez's Hobbs Act robbery, and two prior felony convictions, were "crimes of violence" under the residual clause. Thus, Nunez constituted a career offender.

As a career offender, Nunez's Guidelines range was 151 to 188 months of imprisonment, as opposed to 121 to 151 months. The district court departed upwards from even this higher Guidelines range under provisions of the Guidelines that permit doing so when a defendant has caused extreme psychological injury in the victim and the conduct was extreme. Accordingly, the district court sentenced Nunez to 240 months for Hobbs Act robbery and 120 months for Hobbs Act conspiracy, for a total of 360 months of imprisonment. On appeal, this court upheld the sentence. *United States v. Nunez*, 8 F. App'x 81 (2d Cir. 2001).

II. Subsequent Supreme Court Decisions

Some years later, the Supreme Court decided *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which held that a mandatory application of the Sentencing Guidelines was unconstitutional, *see id.* at 245–46, 125 S.Ct. 738, and to avoid that result, construed the Guidelines as advisory, *see id.* at 245, 259, 125 S.Ct. 738.

More recently, the Supreme Court decided *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015). The Court in *Johnson* held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act"—which contained a residual clause identical to that in the crime of violence definition of the Career Offender Guideline—"violate[d] the Constitution's guarantee of due process" because the clause was unconstitutionally vague. *Id.* at 2563. Using the rationale in *Johnson*, the Court subsequently struck down similarly worded residual clauses in the crime of violence definitions of the Immigration and Nationality Act, *see Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), and in 18 U.S.C. § 924(c)(3)(B), *see United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019).

The Supreme Court also dealt with a vagueness challenge to the residual clause of the Career Offender Guideline as applied after *Booker* in *Beckles v. United States*, —— U.S. ——, 137 S. Ct. 886, 197 L.Ed.2d 145 (2017). In *Beckles*, the defendant argued that the Guideline's residual clause was void for vagueness, making his sentencing pursuant to the clause unconstitutional. *Id.* at 890-91. The Supreme Court rejected the argument, refusing to extend *Johnson*'s reasoning to the post-*Booker* Guidelines. *Id.* at 891–92. The Court explained that unlike the ACCA's residual clause, which mandated certain, higher sentence ranges, "the advisory Guidelines do not fix the permissible range of sentences." *Id.* at 892. The advisory Guidelines were for this reason not subject to a vagueness challenge. *Id.* In her concurring opinion, Justice Sotomayor noted that "[t]he Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker* . . . may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, *J.*, concurring in the judg-

ment) (internal quotation marks and citation omitted).

III. Nunez's Section 2255 Motion

On June 21, 2016, eighteen years after his federal conviction, but less than one year after *Johnson* was decided, Nunez filed a motion under 28 U.S.C. § 2255 to vacate his 30-year sentence. He argued that *Johnson* renders the residual clause of the pre-*Booker* Career Offender Guideline unconstitutionally vague, so he should not have been sentenced as a career offender. *See Nunez v. United States*, No. 16-cv-4742, 2018 WL 2371714, at *1-2 (S.D.N.Y. May 24, 2018). The district court decided the motion was untimely because "the Supreme Court has not itself extended its holding in *Johnson* to the pre-*Booker* guidelines." *Id.* at *2. Nunez timely appealed.

DISCUSSION

[1] On appeal from the denial of a Section 2255 motion, we review a district court's conclusions of law de novo. *Sapia v. United States*, 433 F.3d 212, 216 (2d Cir. 2005).

Motions under Section 2255 are subject to a one-year statute of limitations that runs from several possible dates, only one of which is relevant here: "[T]he date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

[2] Nunez claims that his motion is timely under Section 2255(f)(3) because he filed it less than one year after the Supreme Court in *Johnson* first recognized the right he invokes. Nunez argues that his Section 2255 motion challenging a career-offender sentence imposed under the mandatory Guidelines asserts the same due process right recognized in *Johnson*. He argues that, like the ACCA's residual clause, the residual clause of the mandatory Career Offender Guideline "fixed" his sentencing range and was subject to the same concerns articulated in *Johnson*. Because the ACCA and residual clause of the Career Offender Guideline are identically worded and interpreted, Nunez claims the holding in *Johnson* applies equally to the residual clause in the Guideline and, thus, compels the conclusion that *Johnson* recognized the right he asserts.

We, however, conclude that *Johnson* did not itself render the residual clause of the mandatory Career Offender Guideline vague, as required for Section 2255 purposes. Our decision aligns with that of the majority of circuits to have addressed the issue. *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017).

In coming to the same conclusion, we are mindful that the Supreme Court has admonished lower courts "against framing [its] precedents at ... a high level of generality" in reviewing claims under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), of which Section 2255 is a component. *See Lopez v. Smith*, 574 U.S. 1, 4, 6, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014) (internal quotation marks and citation omitted); *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2013). Instead, the Court has required identification of precedent related to "the specific question presented by th[e] case." *Lopez*, 574 U.S. at 6, 135 S.Ct. 1.

Johnson by its own terms addresses only the ACCA. The Court articulated its holding in that case specifically with regard to the ACCA: "We hold that imposing an increased sentence under the residual clause *of the Armed Career Criminal Act* violates the Constitution's guarantee of due process." 135 S. Ct. at 2563 (emphasis added). In addition, the Court cited exclusively to cases that dealt with the residual clause of the ACCA. *See id.* at 2558-60 (citing *Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011); *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009); *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007)). Furthermore, in *Welch v. United States*, —— U.S. ——, 136 S. Ct. 1257, 194 L.Ed.2d 387 (2016), which applied *Johnson* retroactively, the Court referred only to the effect of its holding on the ACCA. *Id.* at 1265 ("By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the *Armed Career Criminal Act* . . . ." (emphasis added)). These factors strongly signal that the rule established in *Johnson* was specific to the residual clause of the ACCA.

Our conclusion that the Court was not speaking to contexts beyond the ACCA in *Johnson* is reinforced by the fact that the Court has considered challenges to identical residual clauses in other statutes piecemeal. *See Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018); *United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). Nor were the applications in these cases necessarily straightforward. As the Ninth Circuit observed, "[i]t is not always obvious whether and how the Supreme Court will extend its holdings to different contexts," and in *Dimaya*, "it took a lengthy discussion to reach [the] conclusion, and four justices disagreed." *United States v. Blackstone*, 903 F.3d at 1026. These decisions further undermine Nunez's contention that *Johnson* in and of itself dictates the result of a vagueness challenge to the residual clause in the pre-*Booker* Career Offender Guideline.

Nunez relies on *Beckles v. United States*, —— U.S. ——, 137 S. Ct. 886, 197 L.Ed.2d 145 (2017), a case holding that the post-*Booker advisory* Guidelines are *not* subject to vagueness challenges, to argue that the pre-*Booker mandatory* Guidelines *are* so subject. This, however, is not a conclusion reached in *Johnson*. Indeed, Justice Sotomayor's concurrence in *Beckles* explained that the question remains open. *See id.* at 903 n.4 (Sotomayor, *J.*, concurring in the judgment) (stating that the Court "leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*—that is, during the period in which the Guidelines *did* fix the permissible range of sentences—may mount vagueness attacks on their sentences" (internal quotation marks and citations omitted)). In sum, while we agree that *Beckles* does not foreclose a vagueness challenge to the mandatory Sentencing Guidelines, we cannot agree with Nunez that *Johnson* articulated the right he seeks to assert.

Nunez attempts to circumvent this inevitable conclusion by arguing that any discussion of how the Supreme Court defines the right in *Johnson* is not relevant to the timeliness of his petition. He relies on *Dodd v. United States*, 545 U.S. 353, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005) and the Seventh Circuit's decision in *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018). We are not persuaded.

[3] *Dodd* is inapplicable here. That case established that a petitioner is required to bring a claim within one year after the Supreme Court announces a new

rule—not within one year after the Supreme Court announces the rule is retroactive. 545 U.S. at 358-59, 125 S.Ct. 2478. In deciding so, the Supreme Court noted that the first clause in Section 2255(f)(3), which states "the date on which the right asserted was initially recognized by the Supreme Court," is "the operative date." *Id.* at 358, 125 S.Ct. 2478. The second clause, which states "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," merely imposes a condition on the applicability of the subsection. *Id.* Nunez reads *Dodd* as requiring us to focus on the first clause of Section 2255(f)(3) regardless of whether the petitioner has framed the right asserted in a manner consistent with how the Supreme Court articulated it. *Dodd* cannot, however, be stretched to accommodate this interpretation. No aspect of *Dodd* supports Nunez's interpretation that a defendant moving for Section 2255 relief may assert *any* right suggested by the Supreme Court within the past year for his motion to qualify as timely. *Dodd* simply stands for the proposition that the one-year statute of limitations period begins to run following the Supreme Court's recognition of a right, as opposed to the Court's retroactive application of the right. Nunez's invocation of *Dodd* is unavailing.

Nor are we persuaded by *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), the only Circuit decision holding that a Section 2255 motion challenging the residual clause of the pre-*Booker* Career Offender Guidelines is timely if filed within a year of *Johnson*. *Cross*, 892 F.3d at 293-94. In coming to this conclusion, the Seventh Circuit reasoned that the government's argument that *Johnson* did not recognize the right asserted because the Supreme Court has not extended the logic of *Johnson* to the pre-*Booker* mandatory guidelines "suffers from a fundamental flaw. It improperly reads a merits analysis into the limitations period." *Id.* at 293. But this conclusion "effectively reads 'recognized' out of 28 U.S.C. § 2255(f)(3) by not engaging in an inquiry into whether the right asserted by the petitioner is the same right that was recognized by the Supreme Court." *United States v. Green*, 898 F.3d 315, 322 (3d Cir. 2018). For this reason, we decline to adopt the Seventh Circuit's reasoning in *Cross*.

[4] Rather, we join the majority of our sister circuits and hold that Section 2255(f)(3) requires courts to consider whether the right a petitioner asserts has been recognized by the Supreme Court as part and parcel of deciding whether a petition is timely. As such, though Nunez filed his petition within one year after *Johnson*, Nunez's petition may only be considered timely if the right he asserts was in fact recognized in *Johnson*. While Nunez asserts that the reasoning of *Johnson* can apply to the pre-*Booker* Guidelines, *Johnson* did not itself hold the residual clause of the pre-*Booker* Career Offender Guideline unconstitutionally vague. *Johnson* cannot be read so broadly, particularly in light of Supreme Court cautions against expansively construing its precedents in the AEDPA context, and Justice Sotomayor's concurring opinion in *Beckles* indicating that the question raised by Nunez remains open in the Supreme Court. Because *Johnson* has not recognized the right Nunez asserts, his Section 2255 motion is untimely.

CONCLUSION

We hold that *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015) did not recognize a constitutional right not to be sentenced under the residual clause of the pre-*Booker* Career Offender Guideline. The order and judg-

ment of the district court is therefore AFFIRMED.

POOLER, Circuit Judge:

I agree with the legal analysis and conclusion of the majority opinion, but I write separately to emphasize the injustice our decision today creates.

The Constitution guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. A statute, whether defining elements of crimes or fixing sentences, violates this guarantee when it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 2556, 192 L.Ed.2d 569 (2015). "The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Id.* (internal quotation marks and citations omitted).

As the majority explains, *Johnson* struck down an identically worded residual clause in the Armed Career Criminal Act as unconstitutionally vague. It is clear, in my view, that "if a sequence of words that increases a person's time in prison is unconstitutionally vague in one legally binding provision, that same sequence is unconstitutionally vague if it serves the same purpose in another legally binding provision." *Brown v. United States*, —— U.S. ——, 139 S. Ct. 14, 14, 202 L.Ed.2d 302 (2018) (Sotomayor, *J.*, dissenting from denial of certiorari). But due to the precedent laid out in the majority opinion, we are constrained in our ability to allow Nunez's seemingly meritorious claim to move forward.

Section 2255 petitioners are the only class of defendants who may raise the question of whether the residual clause in the pre-*Booker* Career Offender Guideline is unconstitutionally vague. As such, our decision "denies petitioners, and perhaps more than 1,000 like them, a chance to challenge the constitutionality of their sentences." *Brown*, 139 S. Ct. at 14 (Sotomayor, *J.*, dissenting from denial of certiorari). Therein lies the injustice.

I agree with Judge Raggi's observation that Nunez's crime was a "heinous" one. But the Constitution's protection against vague statutes applies no less to a defendant convicted of severe conduct. If Nunez's sentencing violates due process, he should be afforded the opportunity to challenge it. Unless and until the Supreme Court addresses whether *Johnson* applies to the mandatory Guidelines, however, petitioners like Nunez will be left with no procedural mechanism by which to raise, and seek redress for, constitutional grievances tied to their sentencings.

REENA RAGGI, Circuit Judge, concurring:

I join my colleagues in today unanimously affirming the denial of petitioner Miguel Nunez's 28 U.S.C. § 2255 challenge to his 30-year prison sentence for conspiratorial and substantive Hobbs Act robbery as untimely. I write separately only to state that I do not share my concurring colleague's concern that this decision creates any "injustice" for Nunez by denying him the opportunity to pursue a vagueness challenge to the pre-*Booker* use of a residual clause definition of "crime of violence" to identify him as a Career Offender with a Guidelines range of 151–188 months rather than a non-Offender range of 121–151 months. That is because Nunez's sentence was not dictated by, or even anchored to, his Guidelines range. As the record makes plain, the district court sentenced Nunez

to 30 years' imprisonment—almost double the high end of his Guidelines range—based on heinous conduct committed during the robbery that was not adequately factored into his Guidelines calculation. Specifically, Nunez repeatedly raped and sexually assaulted a bound robbery victim. The district court's discussion of these circumstances leaves me with no doubt that, even if Nunez could show that vagueness in the residual clause did not permit him to be denominated a Career Offender under the Guidelines, that would make no difference to the district court's decision to sentence him to 30 years.

I.

At the outset, let me note that I think it far from clear, even after *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), that Nunez has a meritorious vagueness challenge to the residual clause of the Career Offender Guideline as applied prior to *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *See* U.S.S.G. §§ 4B1.1, 4B1.2(a)(2) (1998). The Supreme Court has ruled that the Guidelines, as advisorily applied after *Booker*, are not subject to vagueness challenges. *See Beckles v. United States*, —— U.S. ——, 137 S. Ct. 886, 197 L.Ed.2d 145 (2017). Our court has not yet decided whether any different conclusion applies to the presumptively mandatory pre-*Booker* Guidelines. The Eleventh Circuit, however, has held that it does not. *See In re Griffin*, 823 F.3d 1350, 1354–55 (11th Cir. 2016). That court observed that a holding requiring the Guidelines to satisfy due process vagueness standards "differs fundamentally and qualitatively from a holding that ... the ACCA sentencing statute [at issue in *Johnson*]—that increases the statutory penalty for the underlying new crime—is substantively vague." *Id.* at 1356. It explained that, as applied to ACCA's residual clause, *Johnson*'s vagueness determination "requires the district court to reduce the enhanced sentence to at least the unenhanced applicable statutory maximum." *Id.* at 1355.

> In stark contrast, whether the Guidelines are mandatory or advisory, the district court, even without the invalidated clause, could still impose a sentence within the same statutory penalty range and indeed the same sentence as before. In fact, in former mandatory guidelines cases, the resentencing would now be under an even more discretionary advisory system that would permit the district court to impose the same sentence.

Id.

In *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), the Seventh Circuit took a different view, but not necessarily in a way that helps Nunez.[1] That court read *Johnson* to hold that "a person has a right not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 294 (emphasis in original). Declining to limit that right to sentencing statutes such as ACCA, the court concluded that the *Cross* defendants were prejudiced by "an extended prison term ... imposed on both men as a result of their designation as career offenders" under the pre-*Booker* Guidelines. *Id.* at 295. The emphasis *Cross* placed on the word "dictated" is significant. The defendants in that case were, in fact, sentenced within increased ranges dictated by their Career Offender designation. But the court had no occasion in *Cross* to consider how, if at all, a defendant would be prejudiced by a pre-*Booker* Career Offender designa-

1. We have expressly declined to follow *Cross*'s reasoning with respect to the timeliness of a *Johnson*-based vagueness challenge to the pre-*Booker* Guidelines. *See* Panel Op. at 471.

tion that—as in Nunez's case—did *not* "dictate," or even anchor, the sentence actually imposed.[2]

II.

Nunez cannot here demonstrate prejudice—much less injustice—because his 30-year prison sentence was not dictated by the Career Offender Guideline's residual clause definition of a violent crime. The record convincingly shows that, although Judge Kaplan relied on the residual clause to denominate Nunez a Career Offender in calculating his Guideline range at 151–188 months, the judge did not feel compelled to sentence Nunez within that range rather than the lesser 121–151 month non-Offender range. Rather, Judge Kaplan decided that, in Nunez's case, justice demanded a 30-year sentence, far above—indeed, almost double—*both* these ranges. In so concluding, Judge Kaplan made no reference to Nunez's Career Offender designation or to the other convictions supporting that designation.[3] Rather, he based the departure on Nunez's heinous conduct in the course of the crimes of conviction, conduct not adequately accounted for by the Guidelines. This included Nunez repeatedly raping and sexually assaulting a bound female victim of the Hobbs Act robbery who, as a consequence, suffered serious and years-long psychological harm.

This court did not need to discuss this conduct in any detail to hold Nunez's § 2255 motion untimely. But such a discussion cannot be avoided to explain why our decision today does Nunez no injustice.

Late on the night of February 14, 1994, Nunez and two confederates (one male, one female) lay in wait for a couple to return to their Bronx apartment with the cash proceeds of their florist business. When the couple reached their door, Nunez's male confederate grabbed the female victim from behind, placed his hand over her mouth, put a gun to her neck, and forced her into the apartment. Meanwhile, Nunez put a gun to the male victim's head and forced him inside. In the apartment, the male victim's hands were tied behind his back—tied so tightly as later to require surgery for him to regain their full use. Meanwhile, the female victim was taken into a bedroom where she was placed face down on a bed and bound hand and foot by Nunez's male confederate, who then threw pillows and blankets over her head, threatening to kill her if she tried to look at his face.

2. Like the *Cross* defendants, Nunez failed to raise a vagueness challenge to the Career Offender Guideline's residual clause either in the district court or on appeal and, thus, must show cause and prejudice, or actual innocence, to pursue the argument on a § 2255 motion. *See Bousley v. United* States, 523 U.S. 614, 621–22, 118 S.Ct. 1604, 140 L.Ed.2d 828(1998); *Harrington v. United States*, 689 F.3d 124, 129 (2d Cir. 2012). Even such a showing, however, might not be enough to allow Nunez to pursue his vagueness claim if a court were to find him to have waived the argument by stipulating in his plea agreement that his Hobbs Act robbery crimes of conviction qualified as violent felonies under the Career Offender Guideline. *See United States v. Spruill*, 808 F.3d 585, 597 (2d Cir. 2015) (explaining various circumstances that can manifest waiver, including where defendant "agrees to a course of action that he later claims was error"). For purposes of this concurrence, however, I do not assume waiver.

3. To qualify for Career Offender designation, not only must a defendant's instant offense of conviction be a felony crime of violence or a felony controlled substance offense, but also, the defendant must have two prior felony convictions for either a crime of violence or a controlled substance offense. Nunez concedes that his two prior New York first-degree robbery convictions—one committed at gunpoint, the other with a knife—are for violent crimes. *See United States v. Ojeda*, 951 F.3d 66, 72 (2d Cir. 2020).

With their victims thus restrained, the robbers proceeded to ransack the apartment, stealing cash, credit cards, beepers, liquor, and jewelry, including the female victim's wedding ring.

For the female victim, however, the terror was by no means over. Nunez entered the bedroom where she was restrained, pulled down her pants and proceeded, on four separate occasions, to molest her sexually by digitally penetrating her vagina.

The male confederate also entered the bedroom and threatened to burn the woman's business down and to injure her son—whom he identified by name and business—if she reported the robbery to the police.

Then, with all three robbers in the bedroom, Nunez twice raped the terrified female victim, first vaginally and then anally. When he finished, Nunez's male confederate took his turn, also raping the woman both vaginally and anally. These events reduced the three robbers to laughter.

At sentencing, the district court took a much steelier view of things. Judge Kaplan described Nunez's conduct during the robbery as "barbaric," App. 35, "exceptionally heinous, cruel, brutal and degrading," *id.* at 34, and "close to torture, gratuitous infliction of injury and the prolonging of pain and humiliation," *id.* He concluded that a significant upward departure from Nunez's Sentencing Guidelines range was warranted by U.S.S.G. §§ 5K2.0 (cases outside the "heartland"), 5K2.3 (cases of extreme psychological injury to a victim), and 5K2.8 (cases of "unusually heinous, cruel, brutal, or degrading" conduct toward the victim). Indeed, the district court emphasized that the extent of its departure did not depend on the cumulative effect of these Guidelines. He would depart to the same significant extent under any one of these Guidelines. In so stating, the district court observed that characterizing Nunez's actions as "out of the heartland of robbery cases is such a vast understatement as to be absurd." *Id.* at 35. Referencing the victim's prolonged psychological injury, detailed in the Pre-Sentence Report and, therefore, requiring no elaboration, the district court stated that it could not "readily imagine a case that more readily fits into 5K2.8." *Id.* ("Imagine what went through this victim's mind, lying there going through what this man subjected her to, over and over again").

On this record, which so convincingly supports the district court's upward departure to a 30-year sentence, there is absolutely no reason to think that if vagueness in the residual clause did not permit Nunez to be identified as a Career Offender with a Guidelines range of 151–188 months, the district court would have sentenced him within the non-offender Guidelines range of 121–151 months, or even to any sentence less than 30 years. Thus, insofar as that is Nunez's argument, he cannot show prejudice, much less injustice.[4]

4. Nunez's inability to show prejudice makes it unnecessary for me to address whether he shows cause. Insofar as Nunez further argues that, regardless of prejudice, vagueness in the residual clause would mean he is "actually innocent" of being a Career Offender, I am not convinced. The cases Nunez cites that apply the actual innocence standard to a defaulted Guidelines enhancement challenge—whether before or after *Booker*—all involve defendants claiming that they did not, in fact, commit the enhancing predicate crimes. This comports with precedent which makes clear that "actual innocence" refers to factual, not legal, innocence. *See Bousley v. United States*, 523 U.S. at 623, 118 S.Ct. 1604; *Poindexter v. Nash*, 333 F.3d 372, 381 (2d Cir. 2003) (actual innocence "normally means simply that the defendant did not commit the crime"). Thus, I doubt that Nunez can use legal principles, such as facial vagueness or categorical construction, to show that he is actually innocent

To the extent the district court did anchor its 30-year sentence to a Guidelines range, it was not to the challenged 151–188 month range for Hobbs Act robbery, but rather to the 292–365 month range that would apply to Aggravated Sexual Abuse, 18 U.S.C. § 2241(a)—a crime comparable to the rapes and sexual assaults aggravating Nunez's Hobbs Act robbery and informing the district court's departure decision. Nunez does not challenge the comparison, either generally or specifically for employing a Career Offender enhancement in calculating the resulting 292–365 month range. In fact, any such Career Offender challenge would be to no avail because force is an element of § 2241(a) Aggravated Sexual Abuse, making that comparator offense a crime of violence under U.S.S.G. § 4B1.2(a)(1), without regard to the residual clause definition of U.S.S.G. § 4B1.2(a)(2). Moreover, the district court did not reference the Aggravated Sexual Abuse range as somehow dictating its 30-year sentence. Rather, it drew the comparison simply to demonstrate the reasonableness of its decision to impose a sentence nearly twice the high end of the 151–188 month range applicable to Nunez's robbery crimes of conviction.

In sum, whatever vagueness challenge might be made to U.S.S.G. § 4B1.2(a)(2)'s residual clause definition of a crime of violence, the panel's rejection of Nunez's challenge as untimely does him no injustice because the record plainly shows that his 30-year sentence was not dictated by that Guideline. Rather, the sentence represented a significant, but entirely justified, departure from both the challenged and urged Guideline ranges based on Nunez and his confederate repeatedly raping and sexually assaulting their bound robbery victim.

III.

There is a final reason why I think the panel decision today does Nunez no injustice: the record demonstrates that even a successful vagueness challenge would not secure him a reduced sentence. As already shown, the district court's upward departure to a 30-year sentence was not anchored to Nunez's 151–188 month Career Offender range but, rather, to the fact that his cruel and brutal conduct during the robbery equated to Aggravated Sexual Abuse. There is no reason to think the district court would take a different view of this conduct or impose a lesser sentence if the Guideline's residual clause definition of a violent crime were declared void for vagueness.

That conclusion is only reinforced by the fact that, on remand, Nunez could not be sentenced under the presumptively mandatory Guidelines regime that the Supreme Court declared unconstitutional in *Booker*. Rather, any resentencing would have to be under advisory Guidelines, which afford the district court more—not less—discretion to impose sentences outside the Guidelines. *See In re Griffin*, 823 F.3d at 1355. Moreover, that discretion would allow the district court to consider whether Nunez's Hobbs Act robbery crimes, even if not categorically violent under the elements clause of the Career Offender Guideline, were nevertheless actually so

of having committed a "violent crime" of conviction when the facts of his case demonstrate violence beyond any doubt. *See Poindexter v. Nash,* 333 F.3d at 382 (explaining actual innocence exception does not apply where petitioner "merely makes [a] legal argument"); *Darby v. United States,* 508 F. App'x 69, 71 (2d Cir. 2013) (explaining that defendant's "essentially legal argument that he is innocent of the [career offender] sentencing enhancement because the district court misclassified his predicate offenses ... is insufficient to trigger the actual innocence exception").

violent as to inform statutory sentencing factors and thereby warrant a non-Guidelines sentence. *See* 18 U.S.C. § 3553(a)(2)(A) (referencing seriousness of offense and need to provide just punishment for that offense); *id.* § 3553(a)(2)(B) (referencing need to afford adequate deterrence for defendant's criminal conduct); *id.* § 3553(a)(2)(C) (referencing need to protect public from further crimes of defendant); *see also id.* § 3661 (prohibiting any limitation on information concerning "background, character, and conduct" of defendant that district court may consider in imposing appropriate sentence).[5]

***

To conclude, the panel's rejection of Nunez's vagueness challenge as untimely does him no injustice for three reasons. First, it is not evident that a vagueness challenge can be made to the pre-*Booker* Guidelines. Second, even giving Nunez the benefit of the doubt on that point, he cannot show prejudice because his challenged 151–188 month Guidelines range did not dictate the 30-year sentence imposed by the district court. Rather, the district court based that significantly higher sentence on conduct—repeated rapes and sexual assaults of a robbery victim—that was not adequately factored into the challenged range, and that was more akin to Aggravated Sexual Abuse, a crime that is categorically violent based on its elements, without reference to the challenged residual clause. Third, because the conduct supporting the district court's departure decision would not be mitigated by a successful vagueness challenge to the Guideline's residual clause, and because, on any remand, the district court would have more, not less, discretion to impose a non-Guidelines sentence, I think it clear that remand would not secure Nunez any lesser sentence.

Accordingly, I join in the panel decision to affirm without any reservation about doing Nunez an injustice.

Kenneth MANNING, aka Anthony Manning, aka Bud Manning, aka Kenny Manning, Petitioner,

v.

William P. BARR, United States Attorney General, Respondent.

Docket No. 17-2182-ag
August Term, 2018

United States Court of Appeals, Second Circuit.

Argued: June 14, 2019

Decided: March 31, 2020

Background: Alien, a native and citizen of Jamaica, filed petition for review of a deci-

5. Because Hobbs Act robbery can be committed by using force against persons *or* property, it reaches more broadly than the Career Offender Guideline's elements clause, which is limited to offenses using force against persons. *Compare* 18 U.S.C. § 1951(a), *with* U.S.S.G. § 4B1.2(a)(1); *cf. United States v. Hill*, 890 F.3d 51 (2018) (recognizing Hobbs Act robbery as crime of violence under ACCA, whose element clause references force against person *or* property). It was for this reason that, despite the actual violence of Nunez's Hobbs Act robbery, the district court could not find it a categorical crime of violence under § 4B1.2(a)(1) and, instead, relied on § 4B1.2(a)(2)'s residual clause. *Booker* does not change the categorical application of the Career Offender Guideline, but it does mean that, in exercising their sentencing discretion pursuant to 18 U.S.C. § 3553(a), district courts can consider whether a defendant committed a crime that is not categorically violent in a particularly violent way. Although definitions of violent crime continue to apply categorically after *Booker*, district courts are free to consider the actual violence of a defendant's criminal conduct in deciding whether to impose a within-Guidelines sentence.

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Court, S.D. New York.

Miguel NUNEZ, Movant,
v.
UNITED STATES of
America, Respondent.

16 Civ. 4742 (LAK)
|
[99 Cr. 53 (LAK)]
|
Signed 05/24/2018

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MEMORANDUM OPINION

Lewis A. Kaplan, United States District Judge

***1** The matter is before the Court on Miguel Nunez's motion to vacate his sentence under 28 U.S.C. § 2255. [1]

Background

Movant pleaded guilty to Hobbs Act robbery and conspiracy to commit Hobbs Act robbery and was sentenced on February 7, 2000 to 360 months as a career offender under the then-mandatory U.S.S.G. § 4B1.1 (November 1, 1998). [2] At sentencing, the Court concluded that the application of the career offender guideline was proper because the instant offense of conviction and movant's two prior predicate felonies (both for New York robbery in the first degree [3]) each were considered "crimes of violence" under the residual clause in U.S.S.G. § 4B1.2. [4]

Recent Supreme Court jurisprudence—namely, *Johnson v. United States*, [5] which declared an identically worded residual clause in the Armed Career Criminal Act ("ACCA") unconstitutionally vague, *Welch v. United States*, [6] which gave *Johnson* retroactive effect, and most recently, *Sessions v. Dimaya*, [7] which applied *Johnson* to conclude that a nearly identically worded residual clause in the Immigration and National Act was unconstitutionally vague—has cast some doubt on the constitutionality of the residual clause in the then-mandatory career offender guideline. [8]

***2** Movant asserts that had the career offender designation not applied to his sentence, the pre-departure guideline range in his case would have been 121 to 151 months, rather than 151 to 188 months. He argues, based on the recent Supreme Court holdings, that he should not have been sentenced as a career offender and that any such error was not harmless. He asks the Court to vacate his sentence and resentence him without the career offender designation.

Discussion

The motion on the merits presents at least one interesting question—that is, whether the residual clause in the career offender guideline, insofar as the guideline was mandatory on courts, was unconstitutionally vague and, if so, whether the career offender guideline nonetheless properly was applied. The latter question in turn could depend on whether Hobbs Act robbery and New York robbery in the first degree qualify as "crimes of violence" under U.S.S.G. § 4B1.2(a)(1)—in other words, whether these crimes have "as an element the use, attempted use, or threatened use of physical force against the person of another." But the government argues that the Court should not reach the merits because the motion is untimely.

The statute of limitations on a motion pursuant to 28 U.S.C. § 2255 is one year. This one-year limitations period runs from the latest of:

> "(1) the date on which the judgment of conviction becomes final;
>
> "(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> "(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."[9]

This motion was filed on June 21, 2016. Because movant's judgment of conviction became final in 2000 and neither of subsections (2) or (4) applies, his motion would be timely only if it had been filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[10]

The government argues that the motion is untimely because the Supreme Court's decision in *Johnson* held only that the residual clause of the ACCA was unconstitutional. Although the wording of the unconstitutional ACCA clause is identical to that of the career offender guideline at issue, the Supreme Court has not itself extended its holding in *Johnson* to the pre-*Booker* guidelines. Accordingly, 28 U.S.C. § 2255(f)(3) does not apply.

The Fourth[11] and Sixth Circuits[12] each have held that the Supreme Court has not recognized a new right that applies retroactively because it has not itself held that the residual clause of the pre-*Booker* career offender guideline was unconstitutionally vague. The Second Circuit has not yet reached this question, but I am persuaded by the reasoning in our sister circuits. Accordingly, I conclude that the motion is untimely and must be denied.

Conclusion

***3** The motion [DI 1] is denied, but I grant a certificate of appealability on the issue of whether his motion is timely pursuant to 28 U.S.C. § 2255(f)(3).[13] Should the Supreme Court eventually determine that *Johnson* does apply retroactively to the pre-*Booker* residual clause of the career offender guideline, movant might be in a position at that point to make another motion under 28 U.S.C. § 2255.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 2371714

Footnotes

1 16-cv-4742 (LAK), DI 1.

2 The Court entered judgment in movant's criminal case on February 14, 2000. 99-cr-53 (LAK), DI 16.
U.S.S.G. § 4B1.1 then read, in relevant part:

> "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is ... a crime of violence ..., and (3) the defendant has at least two prior felony convictions of ... a crime of violence...."

3 N.Y. PENAL LAW § 160.15 (McKinney 2007).

4 U.S.S.G. § 4B1.2(a) defined a "crime of violence as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) ... or otherwise involves conduct that presents a serious potential risk of physical injury to another."
The excerpted language from subsection (a)(2) is referred to above as the residual clause.

5 135 S. Ct. 2551 (2015).

6 136 S. Ct. 1257 (2016).

7 138 S. Ct. 1204 (2018).

8 Although the Supreme Court held that the sentencing guidelines are immune from vagueness challenges under the Due Process Clause, *see Beckles v. United States*, 137 S. Ct. 886, 892 (2017), that holding was based on the fact that the sentencing guidelines by then were advisory rather than mandatory. *See Vargas v. United*

States, No. 16-2112, 2017 WL 3699225 (2d Cir. May 8, 2017) (granting motion to file successive § 2255 motion because movant's sentence was imposed prior to *Booker* and *Beckles* "did not clearly foreclose" movant's argument); *see also In re Hoffner*, 870 F.3d 301, 309-10 (3d Cir. 2017) (collecting cases along similar lines). *See generally United States v. Booker*, 543 U.S. 404 (2005) (holding that federal sentencing guidelines are not mandatory on courts).

9 28 U.S.C. § 2255(f).

10 *Id.* § 2255(f)(3).

11 *United States v. Brown*, 868 F.3d 297, 300, 302-03 (4th Cir. 2017) (rejecting a *habeas* movant's argument that it could find a right asserted by the Supreme Court "in the principles animating *[Booker, Johnson*, and *Beckles*] ... despite the fact that the *Beckles* Court expressly declined to address the issue of whether the pre-*Booker* mandatory Sentencing Guidelines are amenable to void-for-vagueness challenges"); *see id.* at 302 ("If the Supreme Court left open the question of whether Petitioner's asserted right exists, the Supreme Court has not 'recognized' that right.").

12 *Raybon v. United States*, 867 F.3d 625, 629-30 (6th Cir. 2017) (holding that because *Beckles* left the question of whether *Johnson* applied to the pre-*Booker* guidelines open, it could not be said that *Johnson* recognized a "right" that was "made retroactively applicable to cases on collateral review"); *see also Beckles*, 137 S. Ct. at 895 (holding only that "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause"). *But see Moore v. United States*, 871 F.3d 72, 77 n.3 (1st Cir. 2017) (finding *habeas* petition filed within one year of *Johnson* and *Welch* on the basis that residual clause in career offender guideline was unconstitutional was timely); *id.* at 82-83 (permitting second or successive motion on the ground that it contained "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" under 28 U.S.C. § 2255(h)(2)).

13 28 U.S.C. 2253.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of June, two thousand twenty.

Miguel Nunez,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER

Docket No: 18-1803

Appellant, Miguel Nunez, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk