No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA R. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

QUESTIONS PRESENTED

In 2003, when the guidelines were mandatory, Joshua R. Jones was sentenced as a career offender under U.S.S.G. § 4B1.1. His career offender designation depended on the fact that he had a prior Tennessee conviction for attempted aggravated sexual battery, which at the time qualified as a crime of violence under the residual clause in § 4B1.2(a)(2). In 2015, this Court struck down as void for vagueness the identical residual clause in the Armed Career Criminal Act's definition of "violent felony" at 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 576 U.S. 591 (2015). Within a year, Mr. Jones filed a § 2255 motion challenging his career offender designation in light of the new rule announced in *Johnson*. But the district court dismissed the motion as untimely under 28 U.S.C. § 2255(f)(3), viewing itself bound to do so by the Sixth Circuit's decision in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), in which it held that the new rule announced in *Johnson* does not apply to the mandatory guidelines unless and until this Court says so.

The questions presented are:

I. Whether, for purposes of 28 U.S.C. § 2255(f)(3), the new rule announced in *Johnson* applies to the identical residual clause in the mandatory guidelines, U.S.S.G. § 4B1.2 (2003)?

II. Whether the residual clause in the mandatory guidelines, U.S.S.G. § 4B1.2 (2003), is void for vagueness?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Joshua R. Jones*, No. 3:03-cr-18, District Court for the Eastern District of Tennessee. Judgment entered September 9, 2003.

(2) *Joshua R. Jones v. United States*, Nos. 3:16-cv-253, 3:03-cr-18, District Court for the Eastern District of Tennessee. Decision and order denying motion under 28 U.S.C. § 2255 entered January 14, 2019.

(3) *Joshua R. Jones v. United States*, No. 19-5229, U.S. Court of Appeals for the Sixth Circuit. Decision and judgment affirming denial of § 2255 motion entered October 19, 2020.

(4) *United States v. Joshua R. Jones*, No. 3:03-cr-18, District Court for the Eastern District of Tennessee. Order denying sentence reduction under section 404 of the First Step Act of 2018 entered August 23, 2019.

(5) *United States v. Joshua R. Jones*, No. 19-6008, U.S. Court of Appeals for the Sixth Circuit. Appeal of order denying sentence reduction under section 404 of the First Step Act (pending).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND GUIDELINES

OTHER AUTHORITIES

No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA R. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Joshua R. Jones respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Sixth Circuit appears at pages 1a to 7a of the appendix to this petition, and is reported at 832 F. App'x 929 (6th Cir. 2020). The district court's unpublished decision denying and dismissing Mr. Jones's motion under 28 U.S.C. § 2255 appears along with the accompanying order at pages 8a to 15a of the appendix to this petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' decision affirming the denial of Mr. Jones's § 2255 motion was entered on October 19, 2020. Pet. App. 1a. This petition is timely filed pursuant to Supreme Court Rule 13.1, as extended by order dated March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause provides:

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

28 U.S.C. § 2255(f) provides:

> 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.

U.S.S.G. § 4B1.2(a) (2003) provided:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

Joshua R. Jones is serving a career offender sentence based on a prior conviction that qualified as a crime of violence only under § 4B1.2(a)'s hopelessly vague residual clause, which because the guidelines were mandatory fixed his permissible sentencing range. This Court in *Johnson v. United States*, 576 U.S. 591 (2015), struck down as void for vagueness the identical residual clause in 18 U.S.C. § 924(e), then applied the rule in *Johnson* to strike down as void for vagueness two similar residual clauses in two different statutes. Each was applied in the same categorical way. Yet, the courts of appeals cannot agree on whether *Johnson* likewise invalidates the mandatory guidelines' residual clause, though it was identical to the one struck down in *Johnson* and was applied in the same categorical way to fix sentencing ranges. Because the lower courts have reached a deep and intractable impasse, only this Court can resolve the matter.

This question is extremely important. Its resolution "could determine the liberty of over 1,000 people." *Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting from the denial of certiorari). With the residual clause excised as unconstitutional, Mr. Jones's § 2255 motion should be considered on the merits, and he is entitled to § 2255 relief. If resentenced today, his sentence would likely be reduced by nearly twelve years, to the 10-year statutory minimum, a term he has already overserved by over seven years.

A. Legal background

A federal prisoner may move to vacate his sentence under § 2255 if the sentence violates the Constitution. *See* 28 U.S.C. § 2255(a). Any such motion generally must be filed within one year of the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). However, a federal prisoner may later file a § 2255 motion within one year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

In 2015, this Court in *Johnson* struck down as void for vagueness the residual clause in the Armed Career Criminal Act at 18 U.S.C. § 924(e)(2)(B)(ii), thereby announcing a new, substantive rule retroactively applicable to cases on collateral review. 576 U.S. at 597, 606; *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Then in *Dimaya*, this Court applied *Johnson* to strike down § 16(b)'s residual clause as void for vagueness. 138 S. Ct. at 1214-15. And in *Davis*, the Court applied *Johnson* to strike down the residual clause at § 924(c)(3)(B) as void for vagueness, once it confirmed that the same categorical approach applied to it as to the others. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) ("We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague."). By that time, even the government "acknowledge[d] that, if [the categorical approach applies to § 924(c)(3)(B)], then § 924(c)(3)(B) must be held unconstitutional too." *Id.* at 2326-27.

When Mr. Jones was sentenced in 2003, the guidelines were mandatory. When the guidelines were mandatory, they "impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). It was the "binding" nature of the guidelines that created the constitutional problem in *Booker*: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-34; *see* 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established by the Guidelines). "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker made clear that the availability of departures in no way rendered the guidelines less than mandatory and binding laws. "In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and *no departure will be legally permissible*. In those instances*, the judge is bound to impose a sentence within the Guidelines range*." *Id.* (emphasis added). Indeed, *Booker* acknowledged that had the district court departed from the mandatory guideline range in Booker's case, the judge "would have been reversed." *Id.* at 234-35. And *Booker*'s understanding that the mandatory guideline range fixed the statutory penalty range was well-established. *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the

mandate to apply the Guidelines is itself statutory."); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (noting "the principle that the Guidelines Manual is binding on federal courts"). No doubt in light of these features, the government at oral argument in *Beckles v. United States* recognized that mandatory guidelines, unlike advisory guidelines, "impose[d] an insuperable barrier that requires a specific finding of fact before the judge can sentence outside the guidelines." Tr. Oral Arg. at 41, *Beckles v. United States*, 137 S. Ct. 886 (2017) (No. 15-8544).

The mandatory career offender guideline was one such barrier, creating a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). Congress mandated that the Sentencing Commission "specify a sentence to a term of imprisonment at or near the maximum term authorized" for "categories of defendants" convicted for at least the third time of a "felony that is" a "crime of violence" or "an offense described in" particular federal statutes prohibiting drug trafficking. *See* 28 U.S.C. § 994(h). The Commission implemented the directive by tying the offense level to the statutory maximum for the instant offense of conviction and automatically placing the defendant in Criminal History Category VI if the defendant's instant offense, and at least two prior convictions, constitute a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1(a)-(b). Beginning in 1989 and continuing through 2015, the Commission used the definition of "violent felony" in § 924(e) to define "crime of

violence" as an offense punishable by a term of imprisonment 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." U.S.S.G. § 4B1.2 (1989).

Because Congress mandated that the Commission specify a term of imprisonment at or near the statutory maximum, the Commission's one attempt to ameliorate the severity of the guideline when it was mandatory was held invalid. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997). At the same time, courts applied the guideline broadly under the vague language of the residual clause, imagining all sorts of potential risk posed by the idealized "ordinary" case. *See Johnson*, 576 U.S. at 597-98, 604. Many career offenders sentenced to harsh prison terms based on minor offenses have been unable to obtain relief under guideline amendments or other changes in law. Mr. Jones is one of them.

B. Proceedings below

1. In 2003, Mr. Jones pled guilty in the Eastern District of Tennessee to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), and to conspiracy to possess with intent to distribute fifty grams or more of cocaine base ("crack"), in violation of 21 U.S.C. §§ 846, 841(b)(1)(A). The Presentence Report ("PSR") determined that he qualified as a career offender under U.S.S.G. § 4B1.1 and 4B1.2 based on a finding that he had a prior Tennessee conviction for possession of cocaine for resale and a prior Tennessee conviction for attempted aggravated sexual battery,

then deemed a "crime of violence" under the residual clause at U.S.S.G. § 4B1.2(a)(2), (PSR ¶¶ 54, 56), which was based on, and incorporated much of its language from, the definition of "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). *See* U.S.S.G. App. C, amend. 268 (1989).[1]

2. The career offender designation dictated an enhanced guideline range of 262 to 327 months. (PSR ¶ 77.) Because the guideline range at that time was mandatory, *see United States v. Booker*, 543 U.S. 220, 245 (2005), Mr. Jones was sentenced on September 3, 2003 to serve 262 months in prison to be followed by ten years' supervised release. (Judgment, R. 38.)[2] Mr. Jones did not appeal.

3. On May 13, 2016, within one year of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), Mr. Jones filed a *pro se* § 2255 motion in the district court asserting that his sentence was imposed in violation of the Constitution because he was classified as a career offender based on the residual clause in § 4B1.2. (Motion to Vacate Pursuant to 28 U.S.C. § 2255, R. 48.) A few weeks later, appointed counsel filed a supplemental § 2255 motion in which Mr. Jones repeated and elaborated on his claim for relief, (Supplemental § 2255 Motion, R. 51), to which the government responded, (Response in Opposition, R. 52).

4. While his motion was pending, the Supreme Court decided *Beckles v. United States* and held that *Johnson* does not invalidate the residual clause in the advisory

---

[1] Effective August 1, 2016, the Sentencing Commission amended the crime-of-violence definition to eliminate § 4B1.2(a)(2)'s residual clause. *See* U.S.S.G. App. C, amend. 798 (Supp. 2016).

[2] Mr. Jones's projected release date is currently January 5, 2023.

career offender guideline. 137 S. Ct. 886, 892 (2017). In later filings, and as the government suggested at oral argument in *Beckles*, Mr. Jones argued that *Beckles* does not preclude his claim that the rule announced in *Johnson* invalidates the residual clause under the sentence-fixing *mandatory* career offender guideline at § 4B1.2(a), and that the rule he asks to be applied *is* the rule announced in *Johnson*, without need for any "extension" by the Supreme Court or any court. (*See* Supplemental Brief, R. 59; Reply to Gov't Response, R. 65.) He further maintained that the rule is substantive and applies retroactively to his case, as held in *Welch v. United States*, 136 S. Ct. 1257 (2016), and that his claim is timely filed. (*Ibid*.) Absent the residual clause, he argued, he is not subject to the career offender guideline because his prior Tennessee conviction for attempted aggravated sexual battery had been previously counted only under the residual clause. (Supplemental Brief, R. 59.) As a result, he is entitled to be resentenced.

5. The government opposed the motion. (Gov't Response in Opposition to Supplement, R. 62.) Its position was that applying the rule in *Johnson* to the mandatory guidelines would require an "extension" of that rule, and further that the right Mr. Jones asserts is a non-watershed procedural rule not made retroactively applicable on collateral review. (*See id*.) The government did not dispute that Mr. Jones's conviction for attempted aggravated sexual battery does not qualify as a crime of violence absent the residual clause.

6. Thereafter, in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), the Sixth Circuit concluded that this Court had not yet held that the rule in *Johnson*

applies to the mandatory guidelines and that as a result, a *Johnson*-based § 2255 motion is not timely filed under § 2255(f)(3), but rather is filed too soon. *Raybon v. United States,* 867 F.3d 625, 630 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2661 (2018) (holding that *Johnson* did not create a "right newly recognized and made retroactively applicable" to mandatory guidelines cases for purposes of 28 U.S.C. § 2255(f)(3)). It reasoned that it is "an open question" whether *Johnson* applies to the mandatory guidelines, and "[b]ecause it is an open question," "it is not a 'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review.'" *Id.* (quoting 28 U.S.C. § 2255(f)(3)).

7. Relying on *Raybon*, the district court denied Mr. Jones's motion as untimely, and dismissed the case with prejudice. Pet. App. 8a-15a.

8. Mr. Jones thereafter sought a certificate of appealability on four questions: (1) whether *Raybon* remains good law in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (applying *Johnson* to the materially same residual clause in 18 U.S.C. § 16 in the immigration context); (2) whether his *Johnson*-based § 2255 motion is timely; (3) whether *Johnson* invalidates the Guidelines' residual clause; and (4) whether he is entitled to relief on the merits. On January 15, 2020, the Sixth Circuit granted the certificate of appealability.

9. On October 19, 2020, after full briefing, the Sixth Circuit affirmed the denial of § 2255 relief. It held that even after both *Dimaya* and *Davis* applied the rule in *Johnson* to non-ACCA residual clauses, it remained bound under *Raybon* to deny his motion as untimely. Pet. App. 5a-7a.

Mr. Jones now seeks review of the extraordinarily important question whether the residual clause at § 4B1.2 in the mandatory guidelines is void for vagueness, and consequently whether he is entitled to relief from an unconstitutional mandatory career offender sentence. This question has divided the courts below and warrants the Court's review.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on the question whether, for purposes of 28 U.S.C. § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory guidelines.

The circuits are deeply divided. The First and Seventh Circuits have held that, for purposes of the statute of limitations at 28 U.S.C. § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory guidelines. *United States v. Shea*, 976 F.3d 63, 71 (1st Cir. 2020); *United States v. Cross*, 892 F.3d 288, 299-306 (7th Cir. 2018). In direct conflict, nine circuits (including the Sixth Circuit) have held that *Johnson*'s new retroactive right does not apply to the residual clause in the mandatory guidelines. *Nunez v. United States*, 954 F.3d 465, 471 (2d Cir. 2020); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Brown,* 868 F.3d 297 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 14 (2018); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *United States v. Pullen*, 913 F.3d 1270, 1283-84 (10th Cir. 2019); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Even within these nine circuits, judges sharply disagree. *See, e.g.*, *Chambers*

v. United States, 763 F. App'x 514, 519 (6th Cir. 2019) (Moore, J., concurring), *rh'g denied*, No. 18-3298 (6th Cir. June 26, 2019) (expressing view that *Raybon* "was wrong on this issue"); *Brown*, 868 F.3d at 304-05, 310 (Gregory, C.J., dissenting), *cert. denied*, 139 S. Ct. 14 (2018) ("Because Brown asserts th[e] same right [recognized in *Johnson*], I would find his petition timely under § 2255(f)(3), even though his challenge is to the residual clause under the mandatory Sentencing Guidelines, rather than the ACCA."); *London*, 937 F.3d at 510 (5th Cir.) (Costa, J., concurring in judgment) ("We are on the wrong side of a split. . . . Our approach fails to apply the plain language of the statue and undermines the prompt presentation of habeas claims the statute promotes."); *Hodges v. United States*, 778 F. App'x 413, 414-15 (9th Cir. 2019) (Berzon, J., concurring) ("[I]n my view, *Blackstone* was wrongly decided."); *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., joined by Rosenbaum and J. Pryor, JJ., statement respecting the denial of rehearing en banc) ([T]he opinion in *In re Griffin* is mistaken."); *id.* at 1328-33 (Rosenbaum, J., joined by Martin and J. Pryor, JJ.); *see also In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, JJ.) (calling *Griffin* into question).

Only the D.C. Circuit has not decided the question. But some district courts there have granted *Johnson* relief to individuals sentenced under the residual clause in the mandatory guidelines. *E.g.*, *United States v. Carter*, 2019 WL 5580091 (D.D.C. Oct. 29, 2019); *United States v. Hammond*, 351 F. Supp. 3d 106 (D.D.C. 2018).

The deep disagreement between and within the circuits is unlikely to resolve itself. The Sixth Circuit, though it granted a certificate of appealability in this case

after *Davis* and considered the question after full briefing, concluded that it remains bound by *Raybon*. The Fourth Circuit also recently considered the question after full briefing after *Davis*, concluded it remained bound by *Brown*, and denied rehearing en banc. *See United States v. Rumph*, 824 F. App'x 165, 168-69 (4th Cir. 2020), *reh'g denied*, 2020 U.S. App. LEXIS 38943 (4th Cir. Dec. 11, 2020). The Ninth and Eleventh Circuits too have denied rehearing en banc. Order, *Hodges v. United States*, 778 F. App'x 413 (9th Cir. Oct. 17, 2019) (No. 17-35408); *Lester*, 921 F.3d at 1307. The Third and Eighth Circuits have likewise signaled they will not budge. *United States v. Wolfe*, 767 F. App'x 390, 391 (3d Cir. 2019); *Mora-Higuera v. United States*, 914 F.3d 1152, 1154 (8th Cir. 2019).

Meanwhile, the Seventh Circuit declined the government's suggestion to reconsider *Cross* in *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019), and reaffirmed in October 2019 its view that the mandatory guidelines' residual clause is void for vagueness under *Johnson*. *See Daniels v. United States*, 939 F.3d 898, 900 (7th Cir. 2019). The government did not seek this Court's review of the First Circuit's decision in *Shea*.

This conflict will remain until this Court resolves it. Until then, the liberty of incarcerated persons will continue to depend solely on the luck of geography. If Mr. Jones's sentence violates due process, his continued incarceration without the opportunity to seek redress is a grave injustice. *Nunez v. United States*, 954 F.3d 465, 472 (2d Cir. 2020) (Pooler, J., concurring). As Judge Moore in *Chambers* urged,

> [This] Court should resolve this matter. It is problematic that these individuals are potentially sentenced in violation of the Constitution or

> laws of the United States without clarification as to whether *Johnson* applies to a sentencing provision that is worded identically to, and is equally binding as, the ACCA's unconstitutionally vague residual clause.

Chambers, 763 F. App'x at 526-27 (Moore, J., concurring).

II. The circuits holding that *Johnson* does not apply by its own force to the mandatory guidelines' residual clause are wrong.

1. The Sixth Circuit, like the Third, Fourth, and Tenth Circuits, holds that *Johnson* does not apply beyond cases involving the exact statute at issue in *Johnson*. Pet. App. 5a-7a. *See Brown*, 868 F.3d at 302; *Greer*, 881 F.3d at 1258; *Green*, 898 F.3d at 321-22. But *Dimaya* proves them wrong. It applied *Johnson* to strike down as unconstitutionally vague a similar provision in a different statute, explaining that "*Johnson* is a straightforward decision, with equally straightforward application here," and "tells us how to resolve this [§ 16(b)] case." 138 S. Ct. at 1213, 1223.

Then in *Davis*, this Court applied *Johnson* to strike down as unconstitutionally vague an identical provision in yet another statute, explaining that *Johnson* and *Dimaya* "teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" 139 S. Ct. 2319, 2326 (2019). After *Dimaya*, even the government "acknowledge[d] that, if [the categorical approach applies to § 924(c)(3)(B)], then § 924(c)(3)(B) must be held unconstitutional too." *Id.* at 2326-27; *see also Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2018) (noting that government "appear[ed] to agree that the rule is broader than [*Johnson*'s] technical holding"). Once this Court held that the categorical approach applies to

§ 924(c)(3)(B), the Court simply applied the rule in *Johnson* to invalidate it. *Id.* at 2336 ("We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague.").

Not only does these circuits' exact-statute approach fail to survive *Dimaya* and *Davis*, but it also conflicts with this Court's void-for-vagueness habeas precedent. In *Godfrey v. Georgia*, this Court held unconstitutional a vague Georgia capital-sentencing statute. 446 U.S. 420, 433 (1980). In a later habeas case, *Maynard v. Cartwright*, the Court held unconstitutional a vague Oklahoma capital-sentencing statute. 486 U.S. 356, 363-64 (1988). The decision in *Maynard* was "controlled by *Godfrey*," even though *Godfrey* and *Maynard* involved different sentencing statutes. *Stringer v. Black*, 503 U.S. 222, 228-29 (1992). And *Godfrey* also controlled in *Stringer* even though that case involved a vague Mississippi capital-sentencing scheme of a different character than the one in *Godfrey*. *Id.* at 229. This line of precedent makes clear that an exact-statute approach is wrong. They show that this case is "controlled by [*Johnson*]," even though *Johnson* involved a different law fixing permissible sentences.[3]

The Sixth Circuit also relied heavily on *Beckles* (as did the Ninth Circuit and

[3] Although *Raybon* might be read as limited to the guidelines' context, the Sixth Circuit after *Dimaya* applied *Raybon* before *Davis* as an exact-statute rule in the context of the residual clause in § 924(c)(3)(B) and § 2255(h)(2). *In re Waters*, No. 18-5580, 2018 U.S. App. LEXIS 30510, at *4 (6th Cir. Oct. 26, 2018). It acknowledged that *Johnson* and *Dimaya* may "require the invalidation" of that statute's residual clause, but said that this Court had not yet so held. But under the *Godfrey/Maynard/Stringer* line of precedent, if *Johnson* "*requires* the invalidation" of a criminal provision fixing the scope of criminal liability, as *Davis* has since held, then *Johnson* is the rule.

the Third Circuit in addition to the exact-statute approach). *Raybon*, 867 F.3d at 63; *Blackstone*, 903 F.3d at 1026; *Green*, 898 F.3d at 321-22. *Beckles* held that *Johnson* does not provide relief for individuals sentenced under the advisory guidelines' residual clause because the advisory guidelines "do not fix the permissible range of sentences." 137 S. Ct. at 892. But *Beckles* distinguished advisory guidelines from mandatory guidelines, *id.* at 894, and cabined its decision: "We hold only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine," *id.* at 896. *Beckles* does not hold that *Johnson*'s rule does not apply to the mandatory guidelines.

The Sixth and Ninth Circuits also relied on footnote 4 of Justice Sotomayor's concurrence in *Beckles*. *Blackstone*, 903 F.3d at 1026; *Raybon*, 867 F.3d at 629-30. In that footnote, Justice Sotomayor, like the majority opinion, cabined the decision in *Beckles* to the advisory guidelines:

> The 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 [*Booker*]—that is, during the period in which the Guidelines did "fix the permissible range of sentences"—may mount vagueness attacks on their sentences.

Beckles, 137 S. Ct. at 903 n.4 (cleaned up). Rather than take *Beckles* (and Justice Sotomayor's concurrence) at its word—which is only that *Johnson* does not extend to the *advisory* guidelines—the courts fixate on Justice Sotomayor's use of the phrase "leaves open the question" to conclude that *Johnson* could not apply to the mandatory guidelines because that question is an open one. *Blackstone*, 903 F.3d at 1027; *Raybon*, 867 F.3d at 629-30. But it is the decision in *Beckles*, not *Johnson*, that

purports to leave that question open. *Brown*, 139 S. Ct. at 15 (Sotomayor, J., dissenting). Although the advisory Guidelines are not subject to void-for-vagueness challenges, this does not mean that the mandatory guidelines likewise are not. *Beckles*, 137 S. Ct. at 894-96. *Beckles* did not answer this question because it was not presented. These circuits have misinterpreted *Beckles* to preclude them from doing what they may certainly do: apply the rule in *Johnson* to an identical residual clause applied in the identical categorical way to fix the permissible range of sentences.

The Eleventh Circuit in *Griffin* drew a line between statutes and guidelines and held that a guideline could never be void for vagueness—whether advisory or mandatory. 823 F.3d at 1355. But it used bad reasoning. According to the Eleventh Circuit, guidelines cannot be vague because they "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." *Id.* But this equally describes the recidivist sentencing statute held void for vagueness in *Johnson*. And as mentioned above, this Court declared sentencing provisions void for vagueness in *Godfrey*, *Maynard*, and *Stringer*. The Eleventh Circuit's reasoning also "denies [] reality" by pretending that the mandatory "'were never really mandatory,'" even though courts applied them that way for two decades." *Lester*, 921 F.3d at 1330-31 (Rosenbaum, J., joined by Martin and J. Pryor, JJ.).

The Fifth, Eighth, and Tenth Circuits engaged in a retroactivity analysis under *Teague v. Lane*, 489 U.S. 268 (1989), to define the scope of *Johnson*'s right. *London*, 937 F.3d at 506-07; *Russo*, 902 F.3d at 882-83; *Pullen*, 913 F.3d at 1280-81. That test asks whether the application of the newly recognized right is "dictated by precedent"

and "apparent to all reasonable jurists" as opposed to "susceptible to debate among reasonable minds." *Id.* The Eighth Circuit derived this test from three decisions: *Teague*, 489 U.S. at 301, *Butler v. McKellar*, 494 U.S. 407, 415 (1990), and *Chaidez v. United States*, 568 U.S. 342, 347 (2013).

These decisions dealt with retroactivity, not the scope of a newly recognized right. In *Teague*, this Court conducted a retroactivity analysis and determined that the petitioners' proposed new rule would not apply retroactively to cases on collateral review. 489 U.S. at 301. Thus, this Court declined to consider "whether the fair cross section requirement should be extended to the petit jury." *Id.* at 309-10, 316. Because *Teague* did not address the scope of the right asserted by the defendant, but rather retroactivity, *Teague* provides no direct guidance on that issue. The same is true for *Butler* and *Chaidez*, both involving retroactivity, not the scope of the right in question. *Butler*, 494 U.S. at 411-13; *Chaidez*, 568 U.S. at 344. The issue here is not whether *Johnson* is retroactive. It is. The issue is whether *Johnson*'s right encompasses the mandatory guidelines.

Even so, as the First Circuit has since recognized, *Teague*'s retroactivity analysis can provide a useful test for defining the scope of a newly recognized right, and therefore the timeliness of a § 2255 based on that right. *Shea*, 976 F.3d at 70-71. Under the *Teague* framework, the First Circuit reasoned, *Johnson* dictates the rule that the petitioner asserted: namely, that § 4B1.2(a)(2)'s residual clause was unconstitutionally vague and could not be applied to enhance the permissible range of sentences a judge could impose. As a result, Shea "assert[ed]" the same right "newly

recognized" in *Johnson*, making his petition (filed within a year of that decision) timely. 28 U.S.C. § 2255(f)(3). *Id.* at 72, 82; *see also London*, 937 F.3d at 512 (Costa, J., concurring in the judgment) (recognizing usefulness of *Teague*'s framework to determine timeliness under § 2255(f)(3)).[4]

As *Chaidez* explains, "a case does not announce a new rule when it is merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez*, 568 U.S. at 347-48 (cleaned up).

> Where the beginning point of our analysis is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent. Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.

Id. at 348 (cleaned up). If anything, *Chaidez* confirms that *Johnson*'s newly recognized right applies to the mandatory guidelines. *Dimaya* plainly shows that *Johnson* announced "a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts," *id.*; 138 S. Ct. at 1210-23, while

[4] It makes sense, in terms of symmetry and history, that courts have imported into the timeliness analysis the *Teague* test for whether a decision qualifies as "new." Before 1996, Congress provided no limitations period for filing a § 2255 motion. *See* 28 U.S.C. § 2255 (1995) ("A motion for such relief may be made at any time."). When Congress adopted a one-year limitations period in 1996, it crafted the language of § 2255(f)(3) against the backdrop of *Teague*, which was already well-established precedent governing whether a decision qualifies as "new" for purposes of post-conviction review, which Congress intended to codify. *See* 137 Cong. Rec. S8558-02, 1991 WL 111516, at *45, *48, *53 (June 25, 1991) (floor statement of Sen. Hatch) (stating that the same limitations language in precursor legislation was "designed" to "preserve and codify the important Supreme Court rulings in this area," and citing *Teague* as an example). *E.g. Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016) (recognizing legislative backdrop).

Booker establishes that the mandatory guidelines fixed the permissible range of sentences, satisfying *Beckles*' test for the substantive scope of *Johnson*'s rule. For purposes of the statute of limitations under § 2255(f)(3), Mr. Jones needs no new rule to have timely asserted the right announced in *Johnson*.

2. *Booker* held that the application of the mandatory guidelines violated a defendant's Sixth Amendment right to have a jury find facts "essential to his punishment." 543 U.S. at 232. Because, under a mandatory guidelines scheme, judges were authorized to find facts "necessary to support a sentence exceeding the maximum authorized by" a defendant's guilty plea or a jury's verdict, the mandatory guidelines violated the Sixth Amendment. *Id.* at 244 (emphasis added). *Booker* made clear that the mandatory guidelines "impose[d] binding requirements on all sentencing judges." *Id.* at 233. It was the "binding" nature of the guidelines that triggered a constitutional problem: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-34; 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established by the Guidelines). "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker rejected the idea that the availability of departures rendered the guidelines anything less than mandatory and binding laws. "In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into

account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range." *Id.* (emphasis added). Indeed, *Booker* acknowledged that, had the district court departed from the mandatory guidelines range in Booker's case, the judge "would have been reversed." *Id.* at 234-35.

In *Booker*, the government argued that the guidelines did not violate the Sixth Amendment because they "were promulgated by a Commission rather than the Legislature." *Id.* at 237. But *Booker* rejected the distinction. "In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance." 543 U.S. at 237. It did not matter "whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239. Rather, "the Commission is an independent agency that exercises policymaking authority delegated to it by Congress." *Id.* at 243.

Booker reflects this Court's long understanding that the mandatory guidelines range fixes the statutory penalty range. *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory."); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (noting "the principle that the

Guidelines Manual is binding on federal courts"). In *R.L.C.*, this Court held that the applicable "maximum" term of imprisonment authorized for a juvenile tried and convicted as an adult was the upper limit of the guidelines range that would apply to a similarly situated adult offender. 503 U.S. at 306-07. The decision in *R.L.C.* makes sense only if the mandatory guidelines range was the statutory penalty range.

Beckles cabins *Johnson*'s right to provisions that "fix the permissible range of sentences." 137 S. Ct at 892. The mandatory guidelines did just that. *Booker*, 543 U.S. at 232-243; *Cross*, 892 F.3d at 306 ("as the Supreme Court understood in *Booker*, the residual clause of the mandatory Guidelines did not merely guide judges' discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases"); *Shea*, 976 F.3d at 77 ("[T]he precedent leaves no room for debate: when the pre-*Booker* Guidelines 'bound [the judge] to impose a sentence within' a prescribed range, [] as they ordinarily did, they necessarily 'fixed the permissible range of sentences' (s)he could impose[.]") (quoting *Beckles*, 137 S. Ct. at 892).

3. The First and Seventh Circuits have gotten it right. Nearly three years ago, the Seventh Circuit held that for purposes of § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory guidelines. *United States v. Cross*, 892 F.3d 288, 299-306 (7th Cir. 2018). In doing so, the Seventh Circuit rejected the approach taken by other circuits, explaining that it "suffers from a fundamental flaw" because

> [i]t improperly reads a merits analysis into the limitations period. Section 2255(f)(3) 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). It does not say that the movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that we take the disfavored step of reading "asserted" out of the statute.

Id. at 293-94. The court held that the right asserted "was recognized in *Johnson*." *Id.* "Under *Johnson*, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 294. Because the appellants "assert precisely that right," they therefore "complied with the limitations period of section 2255(f)(3) by filing their motions within one year of *Johnson*." *Id.* To read § 2255(f)(3) any other way, the Seventh Circuit stated, "would require that we take the disfavored step of reading 'asserted' out of the statute." *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also London* 937 F.3d at 511 (Costa, J., concurring in judgment) (recognizing that "our circuit and most others addressing the issue require more than the statute does" and that "[r]estarting the clock only when the Supreme Court has vindicated the prisoner's exact claim transforms a threshold timeliness inquiry into a merits one").

On the merits, the Seventh Circuit concluded that the "same two faults" that render the ACCA's residual clause—the combined indeterminacy of how much risk the crime of conviction posed and the degree of risk required—"inhere in the residual clause of the guidelines." *Id.* at 299. It "hardly could be otherwise" because the clauses are identically worded and the categorical approach applies to both. *Id.* Additionally, the Seventh Circuit held that the mandatory guidelines' residual

clause implicated the twin concerns of the vagueness doctrine because it fixed the permissible range of sentences. *Id.* at 305.

The court explained that *Beckles* "reaffirmed that the void-for-vagueness doctrine applies to 'laws that fix the permissible sentences for criminal offenses.'" *Id.* (quoting *Beckles*, 137 S. Ct. at 892). "As *Booker* described, the mandatory guidelines did just that. They fixed sentencing ranges from a constitutional perspective." *Id.* Because the Guidelines were "'not advisory'" but "'mandatory and binding on all judges,'" *id.* (quoting *Booker*, 543 U.S. at 233-34), "[t]he mandatory guidelines did . . . implicate the concerns of the vagueness doctrine." *Id.*

The First Circuit recently joined the Seventh. *Shea v. United States*, 976 F.3d 63 (1st Cir. 2020). Unlike the Seventh Circuit, which focused on the meaning of "assert," the First Circuit focused instead on the portion of § 2255(f)(3) requiring that the right asserted be "initially" or "newly" recognized by the Supreme Court, and asked "if granting [the petition] would require the habeas court to forge a new rule of law not recognized in *Johnson*." *Id.* at 70. The court then laid out the analytical framework for determining what constitutes a "new rule" established in *Teague v. Lane*, 489 U.S. 288 (1989), and later explained in *Chaidez v. United States*, 568 U.S. 342 (2013):

> [A] case announces a new rule if it breaks new ground or imposes a new obligation on the government – that is, if the result [is] not dictated by precedent[.] And a holding is not so dictated unless it would [be] apparent to all reasonable jurists. But that account has a flipside: a case does not announce a new rule when it is merely an application of the principle that governed a prior decision to a different set of facts. So when a court simply applie[s] the same constitutional principle to a closely analogous case, it does not create a new rule.

Shea, 976 F.3d at 70-71 (alterations in original; internal quotations and citations omitted).

Put another way, the First Circuit stated, "the Supreme Court does not announce a new rule every time it applies the same constitutional principle to a new regulatory scheme." *Id.* at 73-74. Thus, "'[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.'" *Id.* at 74 (quoting *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring)).

Applying this analysis to Shea's case after "an objective reading of the relevant cases," the First Circuit determined that "the government's proffered distinctions between the ACCA and the mandatory Guidelines do 'not change the force with which [*Johnson*'s] underlying principle applies' when, as in most cases, the defendant was ineligible for a departure from the Guideline range." *Id.* at 74-75 (quoting *Stringer v. Black*, 503 U.S. 222, 237 (1992), and *Wright*, 505 U.S. at 304 (O'Connor, J., concurring)). The "jumble of words" in the mandatory guidelines' residual clause, the First Circuit therefore held, is void for vagueness. *Id.* at 65, 74-82.

4. Regardless of whether the *Teague* framework applies to the timeliness question, the plain language of § 2255(f)(3) compels the conclusion that Mr. Jones's motion is timely. The statute provides that a motion is timely if filed within one year of "the date on which the right *asserted* was initially recognized by the Supreme

Court." 28 U.S.C. § 2255(f)(3) (emphasis added). According to Black's Law Dictionary, the word "assert" means to "[t]o state positively" or "[t]o invoke or enforce a legal right." ASSERT, Black's Law Dictionary (11th ed. 2019); *see also United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017) (giving "assert" its ordinary meaning). Thus, a motion is timely under § 2255(f)(3) if it "invokes" a right newly recognized by the Supreme Court, and there is no assumption in common usage or in law that one's assertions are necessarily correct. To the contrary. As this Court has put it, a § 2255 motion is timely if filed within one year of the date of the decision from which it "[seeks] to benefit." *Dodd v. United States*, 545 U.S. 353, 360 (2005). Or, as the Seventh Circuit put it, a movant establishes timeliness simply by "claim[ing] the benefit of a right that the Supreme Court has recently recognized." *Cross*, 892 F.3d at 294.

Here, Mr. Jones has asserted precisely this right. He contends that his sentence is unconstitutional because he faced mandatory punishment under the career-offender guideline due to a residual clause that suffers from the same two features that combined to invalidate the residual clauses in the ACCA, § 16(b), and § 924(c). A claim based on such an assertion should be timely if filed within a year of *Johnson*, and that remains true without regard to whether the claim ultimately prevails on the merits. Again, the government's alternative reading "suffers from a fundamental flaw" in that it "improperly reads a merits analysis into the limitations period." *Cross*, 892 F.3d at 293.

That alternative reading would violate a core principle of statutory interpretation by rendering the word "asserted" superfluous, and for no reason. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (explaining that the rule against surplusage "requir[es] a court to give effect to each word 'if possible,'" unless the word was "'inadvertently inserted or if repugnant to the rest of the statute'" (quoting Karl Llewellyn, *The Common Law Tradition* 525 (1960)). Again, the Seventh Circuit has explained this point succinctly: Section 2255(f)(3) "runs from 'the date on which the right asserted was initially recognized by the Supreme Court.'" *Cross*, 892 F.3d at 293-94. "It does not say that the movant must ultimately prove that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized." *Id.* at 294. To read § 2255(f)(3) any other way, the Seventh Circuit recognized, "would require that we take the disfavored step of reading 'asserted' out of the statute." *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

5. Ignoring this plain language, the Fourth Circuit has doubled down on its analysis in *Brown*, explaining that "*Brown* established an interpretive framework for determining whether the Supreme Court has recognized a right under § 2255(f)(3), holding that the Court has done so *only* if it is 'formally acknowledged th[e] right' in a holding." *Rumph*, 824 F. App'x at 168 (emphasis and alteration in original). But Congress did not use the term "holding"; it used the term "right." This word choice is important because a "right" is broader than the "holding" of a particular case. *Compare* HOLDING, Black's Law Dictionary (11th ed. 2019) ("A court's

determination of a matter of law pivotal to its decision."), *with* RIGHT, Black's Law Dictionary (11th ed. 2019) ("Something that is due to a person by just claim, legal guarantee, or moral principle.").

The First Circuit relied on this point in *Shea*. Specifically, the First Circuit recognized that " 'Congress in § 2255 used words such as "rule" and "right"' because 'it recognizes that the Supreme Court guides'—and indeed binds—'the lower courts not just with technical holdings' confined to the precise facts of each case 'but with general rules that are logically inherent in those holdings.' " *Shea v. United States*, 976 F.3d at 73 (quoting *Moore*, 871 F.3d at 82). Because a "rule or right recognized in one case can (and often does) control another with a 'different set of facts,' . . . "a decision striking one law often compels a court to undo another." *Id.* (citing *Chaidez*, 568 U.S. at 348).

Judge Costa relied on this same distinction, arguing that the Fifth Circuit has erred by "requir[ing] a holding when the statute requires only Supreme Court recognition of the right." *London*, 937 F.3d at 511 (Costa, J., concurring in the judgment).

Judge Gregory also recognized this point in his dissent in the Fourth Circuit's decision in *Brown*. He criticized the majority for limiting the "right" recognized in *Johnson* to the "narrow holding" of the decision. *Brown*, 868 F.3d at 304 (Gregory, J., dissenting); *see id.* at 303 (majority opinion) (explaining its decision by reference to "the narrow nature of *Johnson*'s binding holding"). The statutory language, Judge Gregory reasoned, "is more sensibly read to including the reasoning and principles

that explain it." *Id.* at 304. That reading better effectuates Congress's choice to use the word "right" instead of "holding," and it has since been validated by the conclusions in *Dimaya* that *Johnson*'s rule has a "straightforward application" to other, non-ACCA residual clauses.

This reading also accords with § 2255(f)(3)'s purpose as a limitations period. As the Supreme Court has explained, a statute of limitations is a "threshold bar." *Wood v. Milyard*, 566 U.S. 463, 466 (2012). Any statute-of-limitations analysis necessarily comes before a merits analysis, and parties can freely waive limitations defenses. *See id.* Thus, it makes sense that Congress would frame § 2255(f)'s limitations period in terms of the "right" "asserted" by the prisoner, as that pre-merits requirement matches the threshold nature of a statute of limitations. The contrary interpretation conflates timeliness with the merits, something that Congress surely did not intend. *See Cross*, 892 F.3d at 293 (rejecting government's interpretation because it "improperly reads a merits analysis into the limitations period").

6. The Sixth Circuit's approach also renders the statute of limitations redundant: a motion is timely only if the Supreme Court has already decided the issue it presents on the merits, but if the Supreme Court has not already decided that issue on the merits, the motion is untimely. For defendants like Mr. Jones, *Raybon*'s interpretation of § 2255(f)(3) creates a logical and practical impossibility.

If the "right initially recognized by the Supreme Court" requires a precise holding by the Supreme Court in the specific context of the mandatory guidelines, it is impossible for the Supreme Court to ever recognize the right, or for any court to

adjudicate the merits, given the abrogation of the mandatory guidelines. No prisoners sentenced under the mandatory guidelines has an active direct appeal, and more than one year has passed since their convictions became final. Their § 2255 motions will therefore always be premature because the Supreme Court has not applied *Johnson* to the mandatory guidelines, and that Court could never precisely decide the issue because it would always be too early, in "an infinite loop." *Zuniga-Munoz v. United States*, No. 1:02-cr-124, Doc. 79, at 8 (W.D. Tex. Apr. 26, 2018). Congress could not have meant for those like Mr. Jones to be trapped in an unjust temporal dimension with no opportunity for redress.

In sum, because the Sixth Circuit's decision is inconsistent with both this Court's precedent and the text of § 2255(f)(3), and is incorrect on its own terms, review is necessary.

III. This case is an excellent vehicle for addressing this important question.

"Regardless of where one stands on the merits of how far *Johnson* extends, this case presents an important question of federal law that has divided the courts of appeals and in theory could determine the liberty of over 1,000 people." *Brown*, 139 S. Ct. at 14 (Sotomayor, J., dissenting from the denial of certiorari). And because the guidelines are no longer mandatory, it is impossible to resolve this issue on direct appeal.

It is no answer that some of these offenders ultimately may not be eligible for relief. This Court in *Welch* decided the question of *Johnson*'s retroactivity even though his eligibility for relief remained in dispute. *Welch*, 136 S. Ct. at 1263-64. In

any event, Mr. Jones is plainly eligible, and the government has never contended otherwise. In the absence of the residual clause, he does not have two prior convictions that qualify as a predicate offense under U.S.S.G. § 4B1.2, so he is not a career offender. Without the career offender enhancement, his guideline range for the 52.5 grams of crack for which he was held accountable is 70 to 87 months under the ordinary crack guideline at U.S.S.G. § 2D1.1 (in light of retroactive guideline amendments), based on a total offense level of 23 and a criminal history category of IV. (*See* Supplemental Motion to Vacate Pursuant to 28 U.S.C. § 2255, R. 51.) And now that the Fair Sentencing Act of 2010 has been made retroactive, *see* First Step Act, Pub. L. No. 115-391, sec. 404(b) (2018), his conviction for an offense involving 50 grams or more of crack with a recidivist enhancement requires just a ten-year statutory minimum, which today makes his guideline sentence 120 months. 21 U.S.C. § 841(b)(1)(B); U.S.S.G. § 5G1.1(b). The career offender designation therefore increases the bottom of his guideline range from 120 months to 262 months—an increase of nearly 12 years.

Yet, as the law stands, Mr. Jones must continue to serve this illegal sentence simply because he was sentenced in the Sixth Circuit, while untold numbers of offenders obtain relief from their sentences in the First and Seventh Circuits and in the district courts in the District of Columbia. Unless this Court grants certiorari to resolve the issue, the liberty of federal prisoners sentenced under the mandatory residual clause will continue to depend on the luck of geography.

This case also squarely presents the issue. The Sixth Circuit granted the

certificate of appealability in these § 2255 proceedings and affirmed based on its binding precedent in *Raybon*—and did so after *Dimaya* and *Davis*. Should this Court hold that *Johnson* applies by its own force to the mandatory guidelines, Mr. Jones would prevail on the merits of his claim, and he would be immediately released. It is exceedingly unlikely, should he no longer be deemed a career offender as a legal matter, that the sentencing court would require Mr. Jones to serve longer than the applicable § 2D1.1 sentencing range for his unremarkable drug offense, which he has already overserved by over seven years. *See* U.S. Sent'g Comm'n, *Quick Facts – Crack Cocaine Trafficking Offenses* at 2 (2020) (showing that just 3 percent of crack offenders were sentenced above the applicable range). Mr. Jones's liberty interests are urgent and compelling.

IV. This Court should also resolve whether the mandatory guidelines' residual clause is void for vagueness.

The two circuits (the First and Seventh) that have definitively reached the merits of this issue after *Beckles* has held that the mandatory guidelines' residual clause is void for vagueness. *Cross*, 892 F.3d at 307; *Shea*, 976 F.3d at 80-82. These decisions are correct. The language of § 4B1.2(a)(2)'s residual clause at issue in *Cross* and *Shea* (and here) is identical to the ACCA's residual clause struck down in *Johnson* (§ 924(e)(2)(B)(ii)). When mandatory, the guidelines operated as statutes, so could be void for vagueness like statutes. *See* Part II.2, *supra*. Even the government at one point recognized the inevitability of this conclusion, when it affirmatively asserted at oral argument in *Beckles v. United States* that the mandatory guidelines are subject to vagueness challenges. Tr. Oral Arg. at 28, 41, *Beckles v. United States*,

137 S. Ct. 886 (2017) (No. 15-8544). There, the government easily recognized that mandatory guidelines, unlike advisory guidelines, "impose[d] an insuperable barrier that requires a specific finding of fact before the judge can sentence outside the guidelines." Just as the residual clauses at issue in *Johnson*, *Dimaya*, and *Davis* are void for vagueness, § 4Bl.2(a)(2)'s mandatory residual clause must also be void for vagueness.

CONCLUSION

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

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

Counsel for Joshua R. Jones

March 17, 2021