No. _____

In the

Supreme Court of the United States

RALPH STEVEN GAMBINA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

1. Whether a § 2255 motion filed within one year of *Johnson v. United States*, claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline, asserts a "right . . . initially recognized" in *Johnson* for timeliness purposes under 28 U.S.C. § 2255(f)(3).

2. Whether federal bank robbery and extortion under 18 U.S.C. § 2113(a) and (d) be a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), where the offense fails to require any intentional use, attempted use, or threat of violent physical force?

Statement of Related Proceedings

- *United States v. Ralph Steven Gambina,*
  2:89-cr-00923-AWT (C.D. Cal. Nov. 4, 1991)
- *United States v. Ralph Steven Gambina,*
  988 F.2d 123, 1993 WL 69160 *4 (9th Cir. 1993) (Table)
- *Ralph Steven Gambina v. United States,*
  2:16-cv-04278-SVW (C.D. Cal. Dec. 29, 2019)
- *Ralph Steven Gambina v. United States,*
  2:16-cv-04583-AWT (C.D. Cal. Aug. 28, 2017)
- *Ralph Steven Gambina. v. United States*,
  17-56308 (9th Cir. Nov. 17, 2020)

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In the

Supreme Court of the United States

RALPH STEVEN GAMBINA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Ralph Steven Gambina petitions for a writ of certiorari to review the memorandum decision entered by the United States Court of Appeals for the Ninth Circuit affirming the denial of Mr. Gambina's motion under 28 U.S.C. § 2255.

Opinions Below

The Ninth Circuit's memorandum disposition affirming the denial of Mr. Gambina's 28 U.S.C. § 2255 motion was not published. (App. 1a-4a.) The district court issued a written order denying Mr. Gambina's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and granting his request for a certificate of appealability. (App. 5a-14a.)

Jurisdiction

The Ninth Circuit issued its memorandum disposition affirming the denial of Mr. Gambina's 28 U.S.C. § 2255 motion on November 17, 2020. (App. 1a-4a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

18 U.S.C. § 2113 defines bank robbery as:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; . . .
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

Introduction

Section 2255(f) states that a one-year statute of limitations applies to federal habeas petitions and runs from the latest of several triggering dates, including "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). This case turns on when, precisely, a "right" has been "recognized" by this Court—and whether it requires that this Court decide a case in the same statutory context, or whether a habeas petitioner should file once this Court issues a decision with clear application to his case. The Circuits are divided on this question, meaning that similarly situated petitioners receive relief, or not, depending of the geography of their conviction. The Court should grant Petitioner's writ.

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 135 S. Ct.

2551 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. Among that number was Mr. Gambina. Mr. Gambina's § 2255 motion challenged both the residual clause in 18 U.S.C. § 924(c) and the residual clause in the career-offender provision of the mandatory guidelines, and argued that both were void for vagueness under *Johnson*. The Ninth Circuit denied his mandatory guideline claim as untimely, in that this Court had yet not decided a case that addressed directly *Johnson*'s impact on the mandatory career-offender guideline, and thus, had not recognized "the right" Petitioner asserted. It denied his Section 924(c) claim based on a prior opinion holding armed bank robbery to be a crime of violence, even after *Johnson*.

This Court should grant plenary review on the first of those two questions: whether a claim raising *Johnson*'s impact on the career-offender provision of the mandatory guidelines is timely under 28 U.S.C. § 2255(f)(3). There is an entrenched division in the Circuits on this question: the First and Seventh Circuits find such claims timely, the Second, Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits find the claims untimely, and the district

courts of the D.C. Circuits are internally divided—as the district courts of the Ninth Circuit were prior to the Court's holding in *Blackstone*. The status quo is intolerable, the circuit split does not appear likely to resolve itself, and the inferior federal courts have struggled without guidance on this issue for too long. The Court should grant the writ and decide, finally, whether a claim that *Johnson* invalidates the residual clause in the mandatory career-offender guideline is timely if filed within a year of *Johnson*.

If it will not, it should grant certiorari to consider whether Mr. Gambina's § 924(c) conviction, where it is ambiguous whether the predicate crime of violence was bank *robbery* or bank *extortion*, should be upheld simply because § 2113(d) requires that the defendant be armed.

Statement of the Case

Mr. Gambina was convicted, following a jury trial, of: (1) one count of armed bank robbery or extortion with forced accompaniment, in violation of 18 U.S.C. § 2113(a), (d), (e) (Count 4); (2) one count of attempted armed bank robbery or extortion with forced accompaniment, in violation of 18 U.S.C. § 2113(a), (d), (e) (Count 6); and (3) two counts of use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 5 and 7). On November 4, 1991, he was sentenced to life plus 25 years under the then-mandatory Sentencing Guidelines—life on each of the bank robbery counts,

plus a mandatory consecutive 300 months for the two Section 924(c) convictions.

Relevant to the instant cause, both § 924(c) convictions were tied to a count of armed bank robbery or extortion with forced accompaniment. He was also deemed a career offender at sentencing.

On June 23, 2016, Mr. Gambina filed a motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his sentence, imposed under the mandatory career-offender guideline was invalid because it was premised on the residual clause. He also argued that his Section 924(c) conviction should be vacated because armed bank robbery was no longer a crime of violence.

After full briefing, the district court denied Mr. Gambina claims, finding both armed bank robbery and assault on a federal officer (one of the career-offender predicate offenses) to be crimes of violence under the residual clause. (App. 9a.)

After full briefing, the Ninth Circuit denied Mr. Gambina's claims in an unpublished memorandum, The Ninth Circuit considered itself bound to deem Mr. Gambina's mandatory guideline claims untimely under its precedential decision in *United States v. Blackstone*, 903 F.3d 1020, 1027-28 (9th Cir. 2018), and thus did not further analyze the career-offender predicate offenses. (App. 4a.) The Court's analysis of the armed bank was limited to a single sentence that merely recited the statute: "We conclude

that 'assault[ing]' someone or putting a life in 'jeopardy . . . by the use of a dangerous weapon,' requires the 'use, attempted use, or threatened use of physical force against the person or property of another.'" (App. 3a.)

Reason or Granting the Writ

A. The Court Should Grant Plenary Review to Clarify the Timeliness of Mandatory Guidelines Claims Based on *Johnson*.

This Court should grant plenary review in order to settle the deep—and expanding—disconnect between the Circuits in their treatment of timeliness of mandatory-guidelines claims.

1. *There is a deep and entrenched inter- and intra-circuit split on the timeliness of mandatory guidelines claims.*

At the beginning of OT 2018, this Court denied a number of claims raising the application of *Johnson* to the mandatory guidelines. *See Brown v. United States*, 139 S. Ct. 14, 14 & n.1 (2018) (Sotomayor, J., dissenting from denial of certiorari). At the time, the Solicitor General represented that the circuit split was shallow and might resolve itself without the intervention of the Court. Today, more than two years later, that prediction has proved false.

a. The Seventh Circuit has held that mandatory guidelines claims based on *Johnson* are timely. *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). Contrary to the United States' prediction, *see* Brief in Opposition, at 15, *United States v. Gipson*, 17-8637 (2018), the Seventh

Circuit has not retreated from that position to align itself with other courts. *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019) ("[W]e reject the government's suggestion to reconsider *Cross*'s holding that *Johnson* recognized a new right as to the mandatory sentencing guidelines."). Instead, it continues to grant petitioners relief under *Cross*. *E.g.*, *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019)

The First Circuit issued a published order finding a mandatory guideline claim timely. *Moore v. United States*, 871 F.3d 72, 81 (1st Cir. 2017). The Solicitor General maintained that that decision did not represent the "settled circuit law on the issue," because it was issued in the context of a second-or-successive application. *See* Brief in Opposition, at 15 n.4, *United States v. Gipson*, 17-8637 (2018). But since that time, *Moore* has been the basis for grants of substantive relief in the First Circuit. *E.g.*, Order, *United States v. Moore*, 1:00-10247-WGY, 2018 WL 5982017 (D. Mass. Nov. 1, 2018) (granting § 2255 relief); *United States v. Roy*, 282 F. Supp. 3d 421, 432 (D. Mass. 2017). The United States has not appealed those decisions.

Thus, in two Circuits, petitioners have been granted substantive relief on claims that would be shut out of court in the Ninth Circuit.

b. Meanwhile, the Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have all held that *Johnson* did not recognize the right not to be sentenced under the ordinary case doctrine in the guideline context,

and thus *Johnson* claims raised by those sentenced under the mandatory career-offender guideline are untimely. *United States v. Green*, 898 F.3d 315, 322-23 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297, 301-03 (4th Cir. 2017); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625, 629-31 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Notably, while those decisions are all final, they have not been uniformly endorsed. The Fourth Circuit issued its decision in *Brown* over the dissent of Chief Judge Gregory. 868 F.3d at 304. Judge Costa concurred in the judgment of the Fifth Circuit's recent decision in *London*, writing separately to express his view that the Fifth Circuit is on "the wrong side of a split over the habeas limitations statute." 937 F.3d at 510. In the Sixth Circuit, Judge Moore wrote a concurring decision expressing her view that the Sixth Circuit's decision in *Raybon* "was wrong on this issue." *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir. 2019). Judge Berzon, in the Ninth Circuit, opined that "Blackstone was wrongly decided" and that "the Seventh and First Circuits have correctly decided" the timeliness question. *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. 2019) (Berzon, J., concurring). An Eleventh Circuit panel called into question that court's decision in *In re Griffin*. *See In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir.

2016) (Jordan, Rosenbaum, Pryor, J.) ("Although we are bound by *Griffin*, we write separately to explain why we believe *Griffin* is deeply flawed and wrongly decided."). Thus even in Circuits that have "settled law," the question continues to vex the courts.

c. Finally, some Circuits have not yet issued decisions. Thus, in some places, the timeliness of the claim depends on which courthouse, or even which courtroom in a single courthouse, one finds oneself. *Compare United States v. Hammond*, 354 F. Supp. 3d 28, 42 (D.D.C. 2018) (finding mandatory guideline claim based on *Johnson* timely) *with* Order, *United States v. Upshur*, 10-cr-251, 2019 WL 936592, at *7 (D.D.C. Feb. 26, 2019) (finding mandatory guideline claim based on *Johnson* untimely).

The split in this case is well-developed and mature, and it's not going away. Nor is the issue continuing to evolve in the lower courts: Instead, as new cases are decided, courts simply decide which side of the split they will join. There is simply no reason to let the lower courts continue to struggle over the question; this is a case that "presents an important question of federal law that has divided the courts of appeal" and merits this Court's review. *See Brown*, 139 S. Ct. at 16 (Sotomayor, J., dissenting from denial of certiorari) (citing Sup. Ct. Rule 10).

2. *The question presented is of exceptional importance.*

a. This disparate caselaw is too important to be left in place.

More than a thousand individuals filed petitions after *Johnson* raising a claim that *Johnson* applied to their career-offender sentence. *See id.* If their claims are not heard, many will spend an additional decade or more in custody, based solely on an improperly imposed guideline sentence. *Cf* Sentencing Resource Counsel Project, Data Analyses 1 (2016), *available* http://www.src-project.org/wp-content/uploads/2016/04/Data-Analyses-1.pdf (citing FY 2014 statistics, the average guideline minimum for career offenders charged with drug offenses was 204 months, and the average minimum for drug offenders not charged as career offenders was 83 months); *see also* App. 1a (career-offender designation in Mr. Gambina's case raised guideline range from 108-135 months to 188-235 months).

Not only will those sentenced under the mandatory guidelines be left out in the cold, but petitioners in the future will be left without clear guidance for what event triggers the statute of limitations for filing a habeas claim. A defendant is permitted to file a single § 2255 petition before he triggers the higher standard for filing a second or successive petition under 28 U.S.C. § 2255(h). If he files too late, or too early, even his meritorious claims will likely never be adjudicated. Where such high stakes decisions have such little margin for error, it is important that litigants have clear rules to apply.

b. Moreover, this Court's failure to address this arbitrariness

has created a secondary market for habeas relief, where petitioners receive differential treatment depending, not only on the Circuit where they sustained their conviction, but on the Circuit in which they happen to be serving their sentence. For example, Petitioner Stony Lester was convicted in the Eleventh Circuit, a circuit which has held *Johnson* does not apply to the mandatory guidelines at all. *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2017) (en banc). Like all others convicted in that Circuit, he was foreclosed from relief via § 2255 motion. *Lester v. United States*, 921 F.3d 1306 (11th Cir. 2019).

Luckily for Mr. Lester, the BOP placed him far from home, in a facility in the Fourth Circuit. That Court has held that a petitioner may file, via 28 U.S.C. § 2241's "escape hatch," a petition arguing that one's mandatory guideline calculation was wrong. *United States v. Wheeler*, 886 F.3d 415, 433 (4th Cir. 2018). Thus, even as the Eleventh Circuit denied his § 2255 petition, the Fourth Circuit found that his career-offender sentence should be vacated, concluded that any route to such relief was blocked in the Eleventh Circuit, and it granted his § 2241 petition. *Lester v. Flournoy*, 909 F.3d 708, 714 (4th Cir. 2018). After two Circuits expended simultaneous efforts writing separate published opinion spanning seventy-five pages (and pointing in different directions), Mr. Lester was released from custody. Notably, all that effort was poured into case where Mr. Lester's substantive eligibility for relief has been

clear for a full decade. *See Lester*, 909 F.3d at 710 (citing *Chambers v. United States*, 555 U.S. 122, 127-28 (2009) as the case that established that Lester's career-offender sentence was erroneous).

If his claim is unique, it soon will not be. Three Circuits deem an error in the calculation of the mandatory guidelines to be a miscarriage of justice cognizable under 28 U.S.C. § 2241. *Wheeler*, 886 F.3d at 433; *Brown v. Caraway*, 719 F.3d 583, 587-88 (7th Cir. 2013); *Hill v. Master*, 836 F.3d 591, 593 (6th Cir. 2016). Others have caselaw foreclosing that route to the prisoners housed within their Circuit. *E.g.*, *McCarthan v. Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1090 (11th Cir. 2017) (en banc). Thus, while it might have seemed like the fight was winding down when the Court denied *Brown v. United States,* et al., this fall, those denials in fact signaled the start of the second round. This second round creates yet another level of disparity even more disconnected from substantive merit for relief. And it requires another set of attorneys and courts, far from the relevant records and unfamiliar with the local state laws, to expend efforts reviewing a case.

This is too much arbitrariness to be tolerated. It cannot be that some federal inmates whose convictions arise in certain circuits or who are housed in certain circuits receive review of their mandatory-guidelines career offender claims, and others are foreclosed from review simply because of

where they were sent to serve out their term. The evolution of this secondary market for relief underscores the need for this Court's immediate intervention.

3. *The Ninth Circuit's decision is wrong.*

On the merits, the Ninth Circuit erred in dismissing Mr. Gambina's claim as untimely—too *early*—because the Court has not yet explicitly applied *Johnson* to the mandatory guidelines.

1. Where a federal prisoner believes he should benefit from a Supreme Court decision, he must file his petition 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).[1] *Johnson* struck down the residual clause of the Armed Career Criminal Act as void for vagueness. 135 S. Ct. at 2557. In so doing, it reiterated that due-process vagueness principles apply, not only to statutes defining the elements of crimes, but also to provisions "fixing sentences." *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). And it concluded that the combination of the ordinary-case analysis and an ill-defined risk threshold "produces more unpredictability and arbitrariness

[1] Section 2255(f)(3) states, in whole: "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." The panel's decision, however, discussed only the first clause.

than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. Mr. Gambina's mandatory-guideline claim asserts the right not to have his sentence fixed by the same residual-clause analysis the Supreme Court already deemed unconstitutionally vague in *Johnson*. He satisfies Section 2255(f)(3) and his claim is timely.

The Ninth Circuit's decision in *Blackstone*, the decision that foreclosed Mr. Gambina's claim in the Ninth Circuit, rested on three errors: disregard for the text of Section 2255(f)(3), a faulty analogy between the statute of limitations for federal prisoners and the "clearly established federal law" standard applicable to state prisoners, and a misreading of this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017).

2. First, the *Blackstone* court's analysis disregards the starting place for any statutory interpretation question: the text of Section 2255(f)(3) itself. Section 2255 uses "right" and "rule," not "holding." *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017). "Congress presumably used these broader terms because it recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* While *Johnson*'s holding struck down the residual clause of the ACCA, the right it recognized was the right not to have one's sentence dictated by a residual clause that combines the hopelessly

vague ordinary-case analysis and an ill-defined risk threshold. That is the same right that Mr. Gambina asserts. A contrary view "divests *Johnson*'s holding from the very principles on which it rests and thus unduly cabins *Johnson*'s newly recognized right." *United States v. Brown*, 868 F.3d 297, 310 (4th Cir. 2017) (Gregory, C.J., dissenting).

Indeed, any uncertainty about the breadth of the "right" recognized by *Johnson* was dispelled by *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). There, the Court held that "*Johnson* is a straightforward decision, with equally straightforward application" to the 18 U.S.C. § 16(b) residual clause. *Id.* Though Section 16(b) uses wholly different statutory language, the Court acknowledged that the residual clause was subject to the same vagueness concerns highlighted in *Johnson*, and thus could not be distinguished. *Id.* at 1213-14. "And with that reasoning, *Johnson* effectively resolved the case now before us." *Id.* at 1213. Just as *Johnson* "effectively resolved" the validity of the residual clause in Section 16(b), a provision that used wholly different statutory language, *Johnson* effectively resolved the issue here.

Moreover, Section 2255(f)(3) requires only that the petitioner *assert* the right recognized by the Supreme Court. It "does not say that 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." *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). To "assert" is "to invoke or

enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014); *see also Dodd v. United States*, 545 U.S. 353, 360 (2005) (describing a § 2255 motion as timely if it was filed within one year of the decision from which it "sought to benefit"). And asserting a right does not require anything more than staking a claim to some potential benefit. *Cf.* 50 U.S.C. § 3996(a) (permitting service members to take steps "for the perfection . . . or further assertion of rights"). The government's contrary reading "would require that [the Court read] 'asserted' out of the statute." *Cross*, 892 F.3d at 294.[2]

3. The Ninth Circuit panel did not grapple with these textual points, concluding that it would violate AEDPA's purpose to read the "right" recognized by *Johnson* as encompassing those sentenced under an analogous statute. *Blackstone*, 903 F.3d at 1026. It's true that, when describing the boundaries of "clearly established federal law" for purposes of Section 2254(d)(1), the Court has cautioned against reading its holdings at a high level of generality. But this faulty analogy disregards the different text, purpose, and nature of the two inquiries.

[2] The statute also requires that the right be "recognized" by the Supreme Court—though, apart from specifying *who* must make the decision, (the Supreme Court as opposed to a circuit court,) the phrase offers little interpretative aid because it depends entirely on how broadly or narrowly one defines "right."

First, the restrictive language in Section 2254(d)(1) (requiring a state decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law") appears nowhere in Section 2555(f)(3). In fact, it does not appear in all of Section 2255. "Where Congress employs different language in related sections of a statute, we presume these differences in language convey differences in meaning." *Lopez v. Sessions*, 901 F.3d 1071, 1077-78 (9th Cir. 2018) (internal alterations omitted).

Moreover, Section 2254(d)(1) serves a different purpose than Section 2255(f)(3). Section 2254(d)(1)—the clearly-established-federal-law standard—is a barrier for state prisoners who claim that a state court has contravened Federal law, as interpreted by the Supreme Court. The strictness of that rule promotes comity and federalism: Section 2254 is a vehicle to correct state courts that go rogue in violation of the Supreme Court's interpretation of the federal constitution. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). In that context, as a matter of respect to state courts, the Supreme Court will intervene only if the state court's decision is clearly answered to the contrary by a prior decision of the Supreme Court. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Thus, the standard is "intentionally difficult to meet." *Id.* Section 2255(f)(3), by contrast, is a statute-of-limitations provision for federal prisoners. Comity and federalism concerns have no relevance when a federal prisoner asks a federal court to vacate a federal judgment. *See Danforth v.*

Minnesota, 552 U.S. 264, 279 (2008) ("Federalism and comity considerations are unique to federal habeas review of state convictions.").

If the Court were to examine the purpose of AEDPA, as the panel suggests it should, *Blackstone*, 903 F.3d at 1027, the proper inquiry is not the purpose of the clearly established federal law requirement in Section 2254(d)(1), but the purpose of the statute-of-limitation provision itself. AEDPA's statute of limitations has the "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 266 (2002). This, too, is a unifying mark of statutes of limitation; they are "designed to encourage [petitioners] 'to pursue diligent prosecution of known claims.'" *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (citation omitted); *see also Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("Statutes of limitation . . . . stimulate to activity and punish negligence."). Mr. Gambina filed as soon as he saw the relevance of *Johnson* to his own case; the Ninth Circuit's decision would thwart the very purpose of § 2255(f)(3) by forcing him to wait and file a later (now potentially successive) petition. Because Congress intended the AEDPA statute of limitations "to eliminate delays in the federal habeas review process," not create them, *Holland v. Florida*, 560 U.S. 631, 648 (2010), a reading of Section 2255(f)(3)

that encourages petitioners to sit on their hands is contrary to the purpose of AEDPA.[3]

4. Even if the panel's reliance on Section 2254(d)(1) were not precluded by the plain language and the animating principles of the statute-of-limitations provision, there is no reason to import the "clearly-established-federal-law" standard, a merits concept, into the decision whether the statute of limitations is satisfied. A statute-of-limitations analysis is a preliminary question, not intended to prejudge the merits of the case. This concept is uniform across bodies of law. *Gambina v. Philip Morris USA*, 582 F.3d 1039, 1045 (9th Cir. 2009) (noting that courts can look at statute-of-limitations affirmative defense to evaluate fraudulent joinder, as that defense is "rather unique" in that it does not "relate to the merits of the case"); *George v. United States*, 672 F.3d 942, 946 (10th Cir. 2012) (Gorsuch, J.) ("The merits of that claim or assertion of adverse interest are irrelevant. . . . Were the rule otherwise, of course, the statute of limitations and merits inquiries would collapse and involve no analytically distinct work."). That is because a statute of limitations is premised on notice of one's claim, not its ultimate validity.

[3] This concern for diligence is manifested in other linguistic choices in the same provision, which requires the petitioner to move when the right is "*initially* recognized" and "*newly* recognized"—reinforcing Congress's desire to encourage diligence, as well as its acknowledgment that a right may be addressed and refined over a number of decision. 28 U.S.C. § 2255(f)(3) (emphasis added).

Nevada v. United States, 731 F.2d 633, 635 (9th Cir. 1984) ("[T]he crucial issue in our statute of limitations inquiry is whether [the City] had notice of the federal claim, not whether the claim itself is valid.").

Like other statutes of limitations, then, Section 2255(f)(3) is merely a triggering point—marking the moment when Mr. Gambina had notice that his sentence was imposed in violation of the Constitution. When Mr. Gambina filed his claim, *Johnson* had held that a provision materially identical to the provision that drove his sentencing was void for vagueness. It had reiterated that, under *Batchelder*, sentencing provisions that fixed sentences were subject to a vagueness challenge. *Johnson*, 135 S. Ct. at 2557. The Ninth Circuit had always applied *Batchelder* to the mandatory guidelines. *United States v. Gallagher,* 99 F.3d 329, 334 (9th Cir. 1996); *United States v. (Linda) Johnson,* 130 F.3d 1352, 1354 (9th Cir. 1997). In other words, *Johnson* was the last piece of the puzzle. Because statutes of limitations generally run from the occurrence of the last circumstance necessary to give rise to a claim, *see (Robert) Johnson v. United States*, 544 U.S. 295, 305-09 (2005), Petitioner was correct in assuming that *Johnson* was the trigger that started the clock.

5. The Ninth Circuit's faulty analogy to the clearly-established-federal-law standard in Section 2254(d) also puts that Court in conflict with settled interpretation given to the "right" as defined in the second clause of

Section 2255(f)(3), which, of course, must have the same meaning as the provision interpreted here. *See* 28 U.S.C. § 2255(f)(3) ("the date on which the right asserted was initially recognized, if *that right* has been newly recognized by the Supreme Court") (emphasis added). The Circuits have broadly read the second clause to invoke *Teague*'s "new rule" jurisprudence.[4] And in that context, this Court has recognized that the "new rule" is the case that "breaks new ground," not a later case that merely applies that rule to a different context. *Chaidez v. United States*, 568 U.S. 342, 342-48 (2013).

In *Stringer v. Black*, the Court held its decisions applying *Godfrey v. Georgia*, 446 U.S. 420 (1980), to similar capital sentencing statutes in Oklahoma and Mississippi did not create new rules. 503 U.S. 222, 229 (1992). For "new rule" purposes, it didn't matter that Oklahoma's statute "involved somewhat different language" than the Georgia statute considered in *Godfrey*. *Id.* at 228-29 ("[I]t would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in

[4] *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015); *Coleman v. United States*, 329 F.3d 77, 81-82 (2d Cir. 2003); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013); *United States v. Morgan*, 845 F.3d 664, 667-68 (5th Cir. 2017); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016); *United States v. Hong*, 671 F.3d 1147, 1148-50 (10th Cir. 2011); *Figueroa-Sanchez v. United States*, 678 F.3d 1203, 1207-08 (11th Cir. 2012);.The Ninth Circuit has said the same, albeit in unpublished opinions. *Simpson v. Evans*, 525 F. App'x 535, 537 (9th Cir. 2013); *United States v. Berkley*, 623 F. App'x 346, 347 (9th Cir. 2015).

that case."). Nor did it matter that Mississippi's sentencing process differed from Georgia's, because those differences "could not have been considered a basis for denying relief in light of [Supreme Court] precedent existing at the time." *Id.* at 229. *Godfrey* may have broken new ground and created a new rule, but the application of *Godfrey* to analogous statutory contexts did not.

Under *Stringer* and *Chaidez*, an application of a new rule to an analogous statutory scheme does not create a second new rule; the second rule is merely derivative of the first. And for the same reason, a new rule recognized by the Supreme Court should not be confined to its narrow holding. Rather, the "right" recognized by a decision of this Court encompasses the principles and reasoning underlying the decision that have applications elsewhere—even if there are minor linguistic or mechanical differences in the provisions at issue.

Applying this standard here, the "right" recognized in *Johnson* must be defined according to the principles it recognized—and not merely its narrow result. *Johnson* did not merely strike down the residual clause of the ACCA; it recognized the right not to have one's sentence fixed by the application of the ordinary-case analysis applied to a hazy risk threshold. And application of Johnson to the pre-*Booker* guidelines "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Moore*, 871 F.3d at 81. Because "the mandatory Guidelines'

residual clause presents the same problems of notice and arbitrary enhancement as the ACCA's residual clause at issue in *Johnson*," Petitioner here is asserting the same right newly recognized in *Johnson*, and he can lay claim to Section 2255(f)(3)'s statute-of-limitation provision. *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

6. At bottom, the Ninth Circuit's decision in *Blackstone* overlearns the lesson of *Beckles v. United States*, 137 S. Ct. 886 (2017). It's true that *Beckles* created an exception to *Johnson*'s reach where the sentencing provision does not "fix the permissible range of" sentences, as with the advisory guidelines. *Id.* at 894-95. But *Beckles* did nothing to disturb *Johnson*'s reasoning that where a vague sentencing provision *does* fix a defendant's sentence, it is subject to attack under the Due Process Clause. If anything, it reiterates that point. *Id.* at 892; *see also Cross*, 892 F.3d at 304-05; *Brown*, 868 F.3d at 308 (Gregory, C.J., dissenting). Nor did it upset *Booker*'s holding that, by virtue of Section 3553(b), the mandatory guidelines fixed sentences; they "had the force and effect of laws" and that, "[i]n most cases . . . the judge [was] bound to impose a sentence within the Guidelines range." *Booker v. United States*, 543 U.S. 220, 234 (2005); *see Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

The Ninth Circuit's decision in *Blackstone* thus read too much into the Justice Sotomayor's statement, in *Beckles*, that the application of *Johnson* to

the mandatory guidelines is an "open" question. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). The concurrence simply clarified that the Court's holding was limited to the advisory guidelines; the case did not present the application of *Johnson* to the mandatory guidelines, and, perforce, did not foreclose it. And it certainly casts no doubt on Mr. Gambina's assertion of the right recognized in *Johnson*.

For all of these reasons, the Ninth Circuit's decision on timeliness is wrong, and should be reversed.

B. This Court Should Also Grant Certiorari to Decide Whether Armed Bank Robbery and Extortion Satisfy the Force Clause of Section 924(c).

The Court should grant the writ of certiorari to address whether a conviction under § 2113 generally—a statute that encompasses both bank robbery and bank extortion—has, as an element, the use, threatened use, or attempted use of physical force. Mr. Gambina's § 2113 conviction is unique, in that the government charged, and the jury was instructed, both on bank robbery and bank extortion. The government did not argue that bank extortion was a crime of violence. Instead, it argued that the "armed" element of armed bank robbery was sufficient to make Mr. Gambina's offense a crime of violence. The Ninth Circuit agreed, breaking new ground on this point in a single sentence that merely recited the statutory language. Given the

ubiquity of the "armed" enhancement under § 2113(d), this Court should revisit its conclusion.

Courts have construed the language of Section 2113(d) so broadly that it encompasses situations where the danger is posed by something other than the device or the person armed with it—and, in particular, the danger posed by police or bystanders who might confront the bank robbery— can satisfy this "jeopardy" element. For instance, in *United States v. Martinez-Jimenez*, 864 F.2d 664 (9th Cir. 1989), the Court found this element satisfied by a defendant's "'extremely light' toy gun" that he "held . . . downward by his side" at all times. *Id.* at 667. The Court held that such conduct was covered by Section 2113(d) "even if he does not make assaultive use of the device." *Id.* Such conduct put lives in jeopardy because the presence of the toy "creat[ed] a likelihood that the reasonable response of police and guards will include the use of deadly force. The increased chance of an armed response creates a greater risk to the physical security of victims, bystanders, and even the perpetrators." *Id.* The defendant in *Martinez-Jimenez* said that he carried the gun "because he 'felt secure with it.'" *Id.* This made the firearm an integral part of the offense and made sufficient the evidence supporting the § 2113(d) conviction. *Id.*

Such reasoning—that a crime of violence finding could be sustained based not on the conduct of the perpetrator, but by the risk occasioned by

third parties who might confront the perpetrator—was valid under the residual clause. *E.g.*, *James v. United States*, 550 U.S. 192, 203-04 (2007). Not so, however, under the elements clause. *See United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) ("There is a material difference between the presence of a weapon, which produces a risk of violent force, and the actual or threatened use of such force. Only the latter falls within ACCA's [elements] clause. Offenses presenting only a risk of violence fall within ACCA's residual clause, [which is now void].").

The other requirement for the § 2113(d) enhancement, the provision for use of a "dangerous weapon or device," is less pernicious than it seems as well. For one thing, because the standard applies from the point of view of the victim, a "weapon" was dangerous or deadly if it "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986).

Relying on *McLaughlin*, the Ninth Circuit affirms armed bank robbery convictions that do not involve actual weapons. In *United States v. Martinez-Jimenez*, for example, the defendant entered a bank and ordered people in the lobby to lie on the floor while his partner took cash from a customer and two bank drawers. 864 F.2d 664 (9th Cir. 1989). The defendant "was holding an object that eyewitnesses thought was a handgun" but was in fact a toy gun he purchased at a department store. *Id.* at 665. His partner testified that "neither he nor [the defendant] wanted the bank employees to believe that

they had a real gun, and that they did not want the bank employees to be in fear for their lives." *Id.* Yet, the defendant was guilty of armed bank robbery even where: (1) he did not "want[] the bank employees to believe [he] had a real gun," and (2) he believed anyone who perceived the gun accurately would know it was a toy. Such a defendant does not intend to threaten violent force.

In *United States v. Jones*, 84 F.3d 1206 (9th Cir. 1996), the Court sustained an enhancement under § 2113(d) where the defendant walked into a bank, and handed the teller a note that demanded money and referenced a gun. The reference must not have been that credible; the teller did not believe that the defendant had a gun. And no gun was ever displayed, though the robber did verbally repeat his claim. *Id.* at 1208-09. Nevertheless, the Court sustained the enhancement under § 2113(d), finding that a note and verbal reference sufficed establish "use" of a firearm. *Id.* at 1211.

Other federal circuits also hold armed bank robbery includes the use of fake guns. "Indeed, every circuit court considering even the question of whether a fake weapon that was never intended to be operable has come to the same conclusion" that it constitutes a dangerous weapon for the purposes of the armed robbery statute. *United States v. Hamrick,* 43 F.3d 877, 882-83 (4th Cir.1995); *see e.g., United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon for purposes of § 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting "toy

gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett,* 3 F.3d 390, 391 (11th Cir.1993) (same); *United States v. Medved,* 905 F.2d 935, 939 (6th Cir.1990) (same).

Indeed, this Court's reasoning in *McLaughlin* holds that an unloaded or toy gun is a "dangerous weapon" for purposes of § 2113(d) because "as a consequence, it creates an immediate danger that a violent response will ensue." 476 U.S. at 17-18. Thus, circuit courts including the Ninth Circuit define a "dangerous weapon" with reference to not only "its potential to injure people directly" but also the risk that its presence will escalate the tension in a given situation, thereby inducing *other people* to use violent force. *Martinez-Jimenez*, 864 F.2d at 666-67. In other words, the armed element does not require *the defendant* to use a dangerous weapon violently against a victim. Rather, the statute can be satisfied where the defendant's gun (even if a toy) makes it more likely that a *police officer* will use force in a way that harms a victim, a bystander, another officer, or even the defendant. *Id.* A statute does not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone *other than* the defendant.

Conclusion

For the foregoing reasons, Mr. Gambina respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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