NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

MESA RITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Mesa Rith, by and through his court-appointed counsel, Benjamin C. McMurray, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Petition for Writ of Certiorari. In support of this request, Petitioner states that undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for the costs attendant to the proceedings before the Honorable Court.

WHEREFORE, the Petitioner, Mesa Rith, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

/S/ Benjamin C. McMurray
Benjamin C. McMurray
Assistant Federal Public Defender
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No: _____

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION PRESENTED

On April 29, 2016, Petitioner Mesa Rith filed a motion in the district court to vacate sentence under 28 U.S.C. § 2255. His only claim was that his sentence imposed under the residual clause of mandatory sentencing guidelines violated due process under *Johnson v. United States*, 135 S.Ct. 2551 (2015), which was decided on June 26, 2015. Although the petition had been within a year of *Johnson*, *see* 28 U.S.C. § 2255(f)(3), the Tenth Circuit held it was untimely. However, had he been convicted in the First or Fourth circuits, his petition would have been timely. This court should grant certiorari to resolve the circuit split on this question:

Is a § 2255 motion seeking relief under a retroactive Supreme Court decision timely if it is filed within a year of that decision?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mesa Rith respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished decision is available at 778 Fed. App'x 612 and is included in the appendix at A2. Its unpublished order authorizing a successive § 2255 motion is included in the appendix at A8. The district court's written ruling on the § 2255 motion is at A10, and its order denying a certificate of appealability (COA) is at A18.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its decision on October 2, 2019, and denied Petitioner's request for rehearing on February 18, 2020. On March 19, 2020, this court extended the filing deadline to 150 days. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal law provides that motions to vacate a federal sentence must be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

STATEMENT OF THE CASE

Petitioner Mesa Rith was convicted of assaulting a federal officer. At sentencing, the court concluded he was a career offender under USSG §4B1.1 based, in part, on a prior conviction for possessing a sawed-off shotgun. At the time of his sentencing in 2001, the Guidelines were mandatory, and the court was required to impose a sentence within the range required by the career offender guideline.

On June 26, 2015, this court held that the residual clause of 18 U.S.C. § 924(e) (the ACCA) was unconstitutionally vague. *United States v. Johnson*, 135 S.Ct. 2551 (2015). Relying on *Johnson*, Mr. Rith filed a pro se motion to vacate his sentence on April 29, 2016. In this petition he argued that the residual clause of USSG §4B1.2 was no longer valid after *Johnson* and that his sentence imposed under this section violated due process.

Because Mr. Rith had previously filed a § 2255 motion that was denied, the district court transferred the motion to the Tenth Circuit for certification under 28 U.S.C. § 2255(h). The Tenth Circuit authorized a successive § 2255 motion on the ground that "second or successive § 2255 motions that rely on *Johnson* to challenge the career offender guideline qualify for authorization under § 2255(h)(2)." App. A9. With the assistance of counsel, Mr. Rith filed a supplemental § 2255 motion on June 23, 2016, that more fully developed his due process claim.

The government moved to dismiss the petition, on the ground that *Johnson* did not begin a new filing period under 28 U.S.C. § 2255(f)(3) for challenges to a sentence

imposed under the residual clause of the Guidelines. The district court agreed and dismissed the petition as untimely. App. A10. It also denied a certificate of appealability (COA). App A18.

Although the petition seeking relief under *Johnson* was filed within a year of that decision, the Tenth Circuit denied COA on the ground that it "was indisputably untimely." App. A5. The panel reasoned it was bound by circuit precedent—*United States v. Greer*, 881 F.3d 1241, 1247-49 (10th Cir. 2018); *United States v. Pullen*, 913 F.3d 1270, 1284 (10th Cir. 2019)—to conclude that *Johnson* did not start a new statute of limitations for §2255 challenges to sentences imposed under the residual clause of mandatory guidelines.

Judge Bacharach dissented, arguing that the question was sufficiently debatable to pass the "low threshold for a certificate of appealability." App A6 (Bacharach, J., dissenting). Although he agreed *Greer* and *Pullen* required the court to affirm, he would have granted COA so Mr. Rith could then ask the full court to reconsider *Greer* and *Pullen*.

REASONS FOR GRANTING THE WRIT

The court should not be distracted by its repeated denial of requests for certiorari on whether *Johnson* applies to mandatory guidelines. The question presented here is more far reaching and will have a more lasting impact than that question.

This case asks whether a § 2255 motion that seeks relief under one of this Court's retroactive decisions is timely if it is filed within a year of that decision. Circuits are split on this question, and this Court must grant certiorari to resolve that split. The question is vitally important because timeliness is a threshold issue under *any* postconviction petition—not just *Johnson* petitions—and the answer to this question will control not only § 2255 motions but also those filed under 28 U.S.C. § 2254.

I. The circuits are split over whether a petition that seeks relief under *Johnson* is timely if it is filed within a year of *Johnson*.

The Circuits disagree whether a petition seeking relief under *Johnson* is timely if it is filed within a year of that decision, and the Supreme Court must grant certiorari to resolve this split. A postconviction motion is timely if it is filed within a year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). This is true of both state and federal postconviction motions. 28 U.S.C. § 2244(d)(1)(C).

Johnson is a retroactive new rule. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016). For this reason, the Seventh Circuit has held that a petition that seeks relief under *Johnson* is timely if it was filed within a year of that decision, even if the due process error is in the context of mandatory sentencing guidelines rather than the ACCA. *Cross v. U.S.*, 892 F.3d 288 (7th Cir. 2018). In *Cross*, the government argued that "*Johnson* recognized the invalidity of the residual clause only vis-à-vis the

ACCA," so it did not start a new statute of limitations under § 2253(f)(3). *Id.* at 293. Thus, a petitioner raising a due process challenge to a sentence imposed under the mandatory Guidelines' residual clause could not bring his claim "unless and until the Supreme Court explicitly extends the logic of *Johnson* to the pre-*Booker* mandatory guidelines." *Id.*

The Seventh Circuit unequivocally rejected this view because "[i]t improperly reads a merits analysis into the limitations period." *Id.* The court explained:

> 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. Because the petitioners relied on *Johnson* to challenge their sentences under mandatory guidelines, "the requirements of section 2255(f)(3) are met." *Id.* at 294.

In *Moore v. United States*, the First Circuit strongly implied that it would side with the Seventh Circuit. 871 F.3d 72, 81-82 (1st Cir. 2018). Though not a § 2255(f)(3) case, *Moore* considered whether to authorize a successive § 2255 motion that challenged a mandatory guideline sentence under *Johnson*. Similar to § 2255(f)(3), a second-time petitioner must show that "that the claim [contained in the successive motion] relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C.

§ 2255(h)(2), § 2244(b)(2)(A).

Moore explained the interpretive problem in this way:

> Does one describe the rule as being no more than the technical holding that the residual clause as employed in the ACCA is unconstitutionally vague? If so, then arguably only successive § 2255 motions based on the ACCA's residual clause would satisfy § 2255(h)(2). Or, does one describe the rule as being that the text of the residual clause, as employed in the ACCA, is too vague to provide a standard by which courts must fix sentences? If so, then one might reasonably conclude that such a rule could be relied upon directly to dictate the striking of any statute that so employs the ACCA's residual clause to fix a criminal sentence.

871 F.3d at 82. The parties agreed that "the rule is broader than the technical holding of *Johnson* []," which made sense "given that Congress in § 2255 used words such as 'rule' and 'right' rather than 'holding.'" *Id.* The use of this broader language reflected this court's authoritative, interpretative role: "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.* (emphasis added). Thus, *Moore* held that by challenging the identical residual clause in mandatory guidelines, the petitioner was raising "exactly the right recognized by *Johnson* []." 871 F.3d at 83. In light of *Moore*, no court in the First Circuit could reasonably conclude that a due process challenge to a mandatory guideline sentence was untimely if it was filed within a year of *Johnson*.

The Tenth Circuit, like the majority of circuits, has held that *Johnson* did "not set out a new constitutional rule applicable to the guidelines when they were considered mandatory," so § 2255(f)(3) did not apply. App. A4; *see also Nunez v. United States*, 954 F.3d 465 (2d Cir. 2020); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017).

Significantly, these decisions hardly reflect a judicial consensus. 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 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 concurred separately to express her view that the Sixth Circuit's decision in *Raybon* "was wrong on this issue." *Chambers v. U.S.*, 763 F. App'x 514, 519 (6th Cir. 2019). Judge Berzon in the Ninth Circuit has stated her view that "*Blackstone* was wrongly decided" and that "the Seventh and First Circuits have correctly decided" the timeliness question. *Hodges v. U.S.*, 778 F. App'x 413, 414 (9th Cir. 2019) (Berzon, J., concurring). And an entire 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."). And in the decision below, Judge Bacharach dissented from the denial of COA because he believed the underlying claims were debatable and should be presented to the en banc court. App. A6. This intra-Circuit dissension, coming on top of the inter-Circuit split, confirms the need for this Court to take up the timeliness question.

II. The decision below conflicts with this Court's "new rule" jurisprudence.

In addition to resolving the circuit split, the Court should grant certiorari because the decision below conflicts with this Court's "new rule" jurisprudence. As discussed above, § 2255(f)(3) applies when a defendant seeks relief under a "new rule." The decision below (relying on *Pullen* and Greer) conflicts with this Court's precedent about what makes a decision "new." Specifically, when this Court applies a prior decision to a new context, it does not necessarily create a new rule. Thus, the majority of circuits is wrong that another "new rule" is needed from this Court to apply *Johnson* to mandatory guidelines. The central question under § 2255(f)(3) should simply be whether a petition "asserts" or "invokes" a new rule within a year of its announcement. Whether the petitioner is actually entitled to relief under that rule is a merits question that should be reached because the petition is timely under § 2255(f)(3).

Chaidez v. United States, 568 U.S. 342, 347 (2013), is clear that the application of a prior Supreme Court decision to a new set of facts does not require

the creation of a new rule. Under *Chaidez*, a new rule is not needed to reach the merits of whether *Johnson* applies to mandatory guidelines. *Chaidez* explained: "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." 568 U.S. at 347-48. Furthermore, "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.* at 348 (citation omitted). Thus, "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." *Id.*

These principles were clear from this Court's decisions even before *Chaidez*. In *Stringer v. Black*, 503 U.S. 222, 229 (1992), the Court held that its decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988)—which held an Oklahoma aggravating factor was unconstitutionally vague under the Eighth Amendment—was not a new rule but merely an application of the prior decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), which held that a "somewhat different" statute was unconstitutionally vague. And *Yates v. Aiken*, 484 U.S. 211, 217 (1988), held that *Francis v. Franklin*, 471 U.S. 307 (1985), was not a new rule because it was "merely an application of the principle that governed our decision in" *Sandstrom v. Montana*, 442 U.S. 510 (1979), which considered a question that was "almost identical" to the question in *Francis*.

By waiting for this Court to decide whether *Johnson* applied to mandatory guidelines, the Tenth Circuit strayed from this precedent. Mr. Rith did not ask this

court to "*extend*" *Johnson* "outside the scope of the ACCA." *Greer*, 881 F.3d 1241, 1247 n.5. Rather, he asked the court only to *apply* the rule in *Johnson* that a binding residual clause is unconstitutional if it "denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S.Ct. at 2557.

The problem with the majority rule is that it injects a merits question into the statute of limitations analysis. For example, the court below concluded "that *Johnson* had not created a new rule of constitutional law *applicable to the mandatory guidelines*." App. A4 (emphasis added). There is no question that *Johnson* created a new rule of constitutional law—this Court said as much in *Welch*. However, whether that new rule was "applicable" to a different set of facts was a merits question. To hold that it was not "applicable" was to speak to the merits that the court claimed it had no authority to reach. *See Cross*, 892 F.3d at 293-94 ("[The majority rule] improperly reads a merits analysis into the limitations period.").

Under this Court's "new rule" jurisprudence, a petitioner should be able to satisfy § 2255(f)(3) by asserting a claim pursuant to a new rule within a year of that decision. The courts need not worry that this will subject them to frivolous claims because an obviously frivolous claim can easily be denied on the merits—there is no procedural benefit to avoiding the merits of a frivolous claim by a finding that the petition was untimely.

The tension between the Tenth Circuit's own precedents highlights the way that the rule it adopted below is inconsistent with this Court's "new rule" prcedents.

In *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), the Tenth Circuit held that to satisfy §2255(f)(3), "a §2255 motion need only 'invoke' the newly recognized right, regardless of whether or not the facts of record ultimately support the movant's claim." *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017).

Like the petitioner in *Snyder*, Mr. Rith invoked the right described in *Johnson*: "to be free from a sentence purportedly authorized by [an] unconstitutionally vague residual clause" that "'both denies fair notice to defendants and invites arbitrary enforcement by judges'" as a result of "'the indeterminacy of a wide-ranging inquiry.'" *Snyder*, 871 F.3d at 1126 (quoting *Johnson*, 135 S.Ct. at 2557). Because he invoked *Johnson* within a year of that decision, his petition was timely under §2255(f)(3).

The court below erroneously added an additional requirement that was inconsistent this Court's precedents: that Mr. Rith demonstrate conclusively that "the Supreme Court has [] squarely addressed a vagueness challenge to the guidelines when they were considered mandatory." App. A3. A decision specifically issued in this context is not required under *Chaidez*, and it flies in the face this Court's other precedents that concluded a decision announced with respect to one statute dictated the outcome of a similarly worded statute, so a later decision about the other statute would not also be new.

Another Tenth Circuit "new rule" case that illustrates the analytical problems in this case is *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019).

Bowen considered whether this Court's decision in *United States v. Davis*, 139 S.Ct. 2319 (2019) was a "new rule." *Davis* held that the residual clause of 18 U.S.C. §924(c) also violated due process after *Johnson*. The Tenth Circuit explained that *Davis* was new (or "not dictated by *Johnson*") because it "required that the Court resolve the threshold inquiry of whether the categorical approach applied." 936 F.3d at 1100. With respect to mandatory guidelines, however, this threshold inquiry would not be required. It was already settled before *Johnson* that the identical residual clause of §4B1.2 required the same categorical analysis as the ACCA. *See, e.g., United States v. Wray*, 776 F.3d 1182, 1184-85 (10th Cir. 2015). There is no meaningful distinction between the mandatory application of §4B1.2 and the ACCA that would require another "new rule" to apply *Johnson* to §4B1.2. Because §4B1.2 suffers from the very same defects as the ACCA when it is applied mandatorily, *Bowen* makes clear that the court below was wrong to wait for another ruling from this Court.

Mr. Rith asked the lower courts to apply *Johnson*, not some other new right that this Court has not yet recognized. It does not matter that *Snyder* and *Johnson* were ACCA cases while this case challenges the residual clause of mandatory guidelines. The scope of *Johnson* is a merits determination that is separate from the threshold question of timeliness. Mr. Rith asks this Court to hold that his reliance on *Johnson* (not some future case) within a year of that decision was timely.

III. The decision below conflicts with this Court's decision in *Davis*.

If the court below were right that another "new rule" was needed to *extend* *Johnson* to the mandatory Guidelines, its ruling *still* conflicts with this Court's precedents because *United States v. Davis*, 139 S.Ct. 2319 (2019), provides that extension *a fortiori*. *Davis* held that the residual clause of 18 U.S.C. §924(c) violated due process after *Johnson*. While *Davis* did not address mandatory guidelines, it didn't address the ACCA either. Its application of *Johnson* to §924(c) dictates that *Johnson* must also apply to mandatory guidelines.

The bulk of this Court's energy in *Davis* was devoted to deciding whether the similarly worded residual clause of § 924(c) required the use of the categorical approach that undermined the residual clause of the ACCA. However, even the government had to concede that if the residual clause could be applied only through the categorical approach, it must fall under *Johnson*. 139 S.Ct. at 2326-27. And while the language of § 924(c) was not identical to the ACCA, it was virtually identical to the residual clause in 18 U.S.C. § 16(b), which required use of the categorical approach. *Id.* at 2327-28 (discussing *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). "Reading the similar language in § 924(c)(3)(B) and § 16(b) similarly yields sensibly congruent applications across all these other statutes." *Id.* at 2329.

Thus, if the court below was right that another new rule was needed to extend *Johnson* beyond the ACCA, this Court supplied that rule in *Davis*. By holding that *Johnson* "invalidated the similarly worded residual definition" of § 924(c), *United States v. Salas*, 889 F.3d 681, 684 (10th Cir. 2018), *Davis* dictates that *Johnson* also

invalidated the identically worded residual definition of §4B1.2. Julst like you can't get from Boston to Washington on I-95 without going through New York City, analytically speaking, you can't get from the ACCA to the similar provision in § 924(c) without going through the identical provision in §4B1.2. By applying *Johnson* to § 924(c), *Davis* dictated that the residual clause of mandatory guidelines was also unconstitutionally vague. The Tenth Circuit was wrong to wait for yet another new rule when this Court in *Davis* had applied *Johnson* to a statute other than the ACCA.

IV. The decision below conflicts with this Court's COA decisions.

Additionally, the ruling below conflicts with this Court's COA decisions. In addition to the "new rule" question, the court below misapplied the standard for COA. This Court has repeatedly stated that the COA inquiry presents a low bar. *See, e.g., Tennard v. Dretke*, 542 U.S. 274 (2004); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000); *see also* Slip Op. at 5 (Bacharach, J., dissenting). An appellant need not show that his claims are meritorious, and a court should not deny COA "merely because it believes the [movant] will not demonstrate an entitlement to relief." *See Welch v. U.S.*, 136 S.Ct. 1257, 1263-64 (2016) (reversing denial of COA to §2255 movant who raised a *Johnson* claim).

A petitioner satisfies the "substantial showing" standard by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the [§2255 motion] should have been resolved in a different manner." *Id.* at 1263. The movant is "not require[d]" to show "that some jurists would grant" the §2255 motion. *Miller-El,*

537 U.S. at 338. "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the movant] will not prevail." *Id.*

Davis, the circuit split, and the various dissents demonstrate it is at least debatable whether the § 2255 motion here was timely. The court below should have recognized this and granted COA, instead of waiting for another Supreme Court decision. *See* App. A6 ("I believe that Mr. Rith has satisfied the low threshold for a certificate of appealability.") (Bacharach, J., dissenting). The Court should grant certiorari to ensure that lower courts are not improperly creating procedural barriers to avoid the merits of important constitutional claims they should be reaching in postconviction petitions.

V. The correct application of this Court's "new rule" jurisprudence is important because it governs the timeliness of postconviction petitions under § 2255 and § 2254.

The Court should grant certiorari because of the importance of this question in the postconviction setting. The first obvious impact of the ruling below is the way it affects the many defendants who are *still* serving sentences imposed under the mandatory career offender guideline. Justice Sotomayor recognized the exceptional importance of this question because the split "in theory could determine the liberty of over 1,000 people." *Brown v. United States*, 139 S.Ct. 14, 14 (2018) (Sotomayor, J., dissenting from the denial of cert.). By definition, these petitioners are ones who have been in custody since before 2005. The severity of their sentences makes it

extremely important that those who were sentenced unconstitutionally be able to get relief from those errors. Defendants wrongly sentenced under an identical residual clause in the First and Seventh Circuits will be able to get relief under § 2255, but the majority of offenders will not, despite the fact that the residual clause in §4B1.2 is identical to the residual clause in the ACCA. A petitioner's ability to get relief for a constitutional error that resulted in a mandatory increase to his sentence should not depend on the happenstance of which circuit he was convicted in.

This incongruity is magnified by the fact that some of these may be able to seek relief under 28 U.S.C. § 2241, depending on what circuit they are incarcerated in. *See Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020) (holding that a defendant who was unable to challenge his mandatory career offender sentence under § 2255 could do so under § 2241). Thus, if the majority rule is allowed to stand, a defendant's ability to vindicate his constitutional rights will depend not only on what circuit he was convicted in but also on what circuit he was incarcerated in.

While this effect alone should be enough to grant certiorari, the impact of the decision below and the majority rule reaches far beyond this. "New rule" jurisprudence affects *all* petitioners who see relief under a Supreme Court decision. Federal petitioners, of course, can come into court only when the "right asserted" is "new." 28 U.S.C. § 2255(f)(3). Similarly, state petitioners must "show[] that the claim relies on a new rule of constitutional law." 28 U.S.C. § 2244(b)(2)(A). This Court's precedents that are discussed above show that when the Court announces a

rule in the context of one particular statute, lower courts *should* apply that rule to other statutes that present the same constitutional defect without waiting for another decision from this Court. But that's not what the majority of circuits are doing. Instead, like the Tenth Circuit in this case, they are insisting that a petitioner cannot rely on a new Supreme Court rule unless this Court has considered the constitutionality of the very statute they were punished under.

Thus, this question reaches far beyond the large class of petitioners seeking relief from an unconstitutional provision in mandatory sentencing guidelines. The erroneous application of new rule precedents in the majority of circuits means that this Court will have to be the arbiter of every petition that asks a federal court to *apply* this Court's decisions to similar-but-not-identical contexts. This result is untenable and will unfairly keep even clearly meritorious claims out of federal court as untimely, just because lower courts are unwilling to apply this Court's precedents to *identical* laws unless and until this Court speaks first.

This petition does not ask the Court to weigh in on the *Johnson* question it has repeatedly refused to answer. Rather, it exposes the misguided way that lower courts have misapplied "new rule" jurisprudence and the implications of that error. This question is extremely important because of its reach, and the Court should grant certiorari to resolve the circuit split on this important issue.

VI. This case is an excellent vehicle to resolve this conflict.

This case is an ideal vehicle to resolve the conflict. The question presented was preserved below. There are no procedural hurdles to this Court's direct review of the rules governing sentencing in this case. *See Horn v. United States*, 524 U.S. 236, 238-39 (1998) (holding that this Court has jurisdiction to review COA denials).

CONCLUSION

The Court should grant the writ to resolve the circuit split on this important question.

Respectfully submitted,

SCOTT KEITH WILSON
FEDERAL PUBLIC DEFENDER

By:_____
/S/Benjamin C. McMurray
Assistant Federal Public Defender,
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Salt Lake City, Utah
July 17, 2020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

MESA RITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Francisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Postal Service on July 17, 2020, and all parties required to be served have been served.

/S/ Benjamin C. McMurray
Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
46 W Broadway Ste, 110
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AFFIDAVIT OF MAILING

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service on July 20, 2020, and all parties required to be served have been served.

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

October 2, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MESA RITH,

Defendant - Appellant.

No. 17-4149
(D.C. Nos. 2:16-CV-00351-TC &
2:00-CR-00562-TC-1)
(D. Utah)

ORDER

Before **HOLMES**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

The issue in this appeal involves the timeliness of Mr. Mesa Rith's motion to vacate his sentence. The district court dismissed the motion on the ground that the limitations period had expired. Mr. Rith wants to appeal; to do so, he requests a certificate of appealability and initial consideration en banc. We deny the request for a certificate, dismiss the appeal, and deny the request for initial consideration en banc as moot because absent the grant of a certificate we do not have jurisdiction over the merits of this appeal.

Mr. Rith committed the offense in 2000; at that time, the United States Sentencing Guidelines were considered mandatory. *See, e.g.*, *Burns v. United States*, 501 U.S. 129, 133 (1991), *abrogated on other grounds,*

Dillon v. United States, 560 U.S. 817, 820-21 (2010). These guidelines treated an offense as a crime of violence if the offense created "a serious potential risk of physical injury to another." USSG § 4B1.2(a)(2) (2000).[1] (This provision is commonly known as the "residual clause.")

The guidelines are now considered advisory rather than mandatory. *See United States v. Booker*, 543 U.S. 220, 237–39 (2005). After they became advisory, the Supreme Court rejected a vagueness challenge to the guidelines' residual clause. *Beckles v. United States*, 137 S. Ct. 886, 890, 892, 894–95 (2017). But the Supreme Court has not squarely addressed a vagueness challenge to the guidelines when they were considered mandatory. *See id.* at 903 n.4 (Sotomayor, J., concurring).

Mr. Rith contends that given the mandatory nature of the guidelines in 2000, their residual clause should be subject to a vagueness challenge. For this contention, Mr. Rith likens the guidelines' residual clause to an identical statutory clause in the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)(ii)), which was struck down in *Johnson v. United States* as unconstitutionally vague. 135 S. Ct. 2551, 2563 (2015).

To raise this contention on appeal, Mr. Rith needs a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This

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1 The sentencing court used the 2000 version of the guidelines.

certificate is available only if Mr. Rith shows that reasonable jurists could debate the correctness of the district court's ruling. *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). We conclude that Mr. Rith has not made this showing.

A motion to vacate the sentence is ordinarily due one year from when the judgment became final. 28 U.S.C. § 2255(f)(1). An exception exists when the defendant relies on a new rule of constitutional law that has been deemed retroactive to cases on collateral review. 28 U.S.C. 2255(f)(3). Mr. Rith invokes this exception here based on *Johnson*. Though *Johnson* did not address the sentencing guidelines, our later opinion in *United States v. Greer* did, holding that *Johnson* had not set out a new constitutional rule applicable to the guidelines when they were considered mandatory. 881 F.3d 1241, 1247–49 (10th Cir.), *cert denied*, 139 S. Ct. 374 (2018).

The defendant argues that *Greer* was abrogated by *Sessions v. Dimaya*. In *Dimaya*, the Supreme Court applied *Johnson* to the definition of a "crime of violence" in 18 U.S.C. § 16(b). *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213–16 (2018). But after the Supreme Court decided *Sessions v. Dimaya*, we reiterated in *United States v. Pullen* that *Johnson* had not created a new rule of constitutional law applicable to the mandatory guidelines. *United States v. Pullen*, 913 F.3d 1270, 1284 n.17 (10th Cir.

2019), *petition for cert. filed* (U.S. July 17, 2019) (No. 19-5219). So *Dimaya* does not allow Mr. Rith to invoke § 2255(f)(3) based on *Johnson*.

Given our decisions in *Greer* and *Pullen*, we start the one-year period of limitations from the date on which the conviction became final, not from the date on which *Johnson* was decided. Applying this limitations period, any reasonable jurist would conclude that Mr. Rith's motion to vacate was untimely.

Mr. Rith's sentence became final in 2003. *United States v. Rith*, 63 F. App'x 463, 464-65 (2003) (unpublished). He then had one year to move to vacate his sentence; but he waited roughly thirteen years, missing the limitations period by about twelve years. Because Mr. Rith's motion was indisputably untimely, we (1) decline to issue a certificate of appealability, (2) dismiss the appeal, and (3) deny the request for initial consideration en banc as moot because absent the grant of a certificate we do not have jurisdiction over the merits of this appeal.

Entered for the Court

Per Curiam

United States v. Rith, No. 17-4149, Bacharach, J., dissenting.

I agree with the majority that Mr. Rith's claim fails under *Greer* and *Pullen*. But I believe that Mr. Rith has satisfied the low threshold for a certificate of appealability.

As the majority explains, the issue for a certificate is whether "reasonable jurists could debate the correctness of the district court's ruling." Maj. Order at 3 (citing *Slack v. McDaniel*, 529 U.S. 483–84 (2000)). In my view, reasonable jurists could consider the underlying issue debatable if presented to the en banc court.[2] *See United States v. Crooks*, 769 F. App'x 569, 571-72 (10th Cir. 2019) (unpublished) (granting a certificate of appealability on the same issue);[3] *see also Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., dissenting from the denial of cert.) (arguing that the Fifth Circuit should have granted a certificate of appealability, though the claim was foreclosed by a Fifth Circuit

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[2] Mr. Rith has requested an initial en banc, which we can consider only upon the issuance of a certificate of appealability. Even if this request is denied, however, Mr. Rith should at least have an opportunity to seek rehearing en banc, where he could urge reconsideration of the holding in *Greer* or *Pullen*. As an en banc court, we might or might not decide to revisit these issues. But Mr. Rith cannot even ask us to convene as an en banc court in the absence of a certificate of appealability. Thus, denial of a certificate effectively prevents Mr. Rith from asking the en banc court to revisit the holding in *Greer* or *Pullen*.

[3] We also granted a certificate of appealability on this issue in *United States v. Ford*, No. 17-1122, slip op. at *3 (10th Cir. Aug. 8, 2019).

precedent, because judges elsewhere had found the same claim reasonably debatable).[4] I would thus grant a certificate of appealability and affirm the dismissal of Mr. Rith's motion to vacate his sentence.

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[4] I do not suggest that we should grant a certificate of appealability based solely on the fact that judges in our court have granted certificates on the same issue. *See Griffin v. Sec'y*, 787 F.3d 1086 (11th Cir. 2015). "If the fact that one or more judges had granted a [certificate of appealability] on an issue, or even concluded that the issue had merit, required all other judges to grant a [certificate of appealability] on the issue, the standard would be transformed from objective to subjective. It is not a subjective standard." *Id.* at 1095. I simply note that

- some judges in our court have regarded the same issue reasonably debatable even after *Greer* and *Pullen,*
- the en banc court need not be constrained by *Greer* or *Pullen*,
- Mr. Rith has already asked for en banc consideration and, if we were to grant a certificate, he could ask again after issuance of the panel's order.

FILED
United States Court of Appeals
Tenth Circuit

May 23, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MESA RITH,

Movant.

No. 16-4084
(D.C. No. 2:16-cv-00351-TC)
(D. Utah)

ORDER

Before **BRISCOE**, **GORSUCH**, and **BACHARACH**, Circuit Judges.

Movant Mesa Rith, a federal prisoner proceeding through counsel, seeks an order authorizing him to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).[1] *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). Because Movant has made a prima facie showing that he satisfies the relevant conditions for authorization under § 2255(h)(2), we grant authorization.

Movant received a sentence enhanced under the guideline for career offenders, which is triggered by the defendant having "two prior qualifying felony convictions of either a crime of violence or a controlled substance offense," U.S.S.G. § 4B1.1(a). He alleges that at least one of his prior convictions qualified for this purpose by virtue of the residual clause in the guideline's definition of a crime of violence, which encompasses crimes that "involve[] conduct that presents a serious potential risk of physical injury to

[1] The Federal Public Defender for the District of Utah is appointed to represent Mesa Rith pursuant to 18 U.S.C. § 3006A(a)(2)(B).

another," *id.* § 4B1.2(a)(2). An identical clause in the Armed Career Criminal Act was invalidated in *Johnson* on the ground that it was unconstitutionally vague.

To obtain authorization, Movant must make a prima facie showing that his claim meets the gatekeeping requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C); *see Case v. Hatch*, 731 F.3d 1015, 1028–29 (10th Cir. 2013). A claim may be authorized under § 2255(h)(2) if it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Johnson* announced a new rule of constitutional law that was made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). We held in *In re Encinias*, No. 16–8038, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (per curiam), that second or successive § 2255 motions that rely on *Johnson* to challenge the career offender guideline qualify for authorization under § 2255(h)(2).

Accordingly, we grant Mesa Rith authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson v. United States*.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MESA RITH, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	ORDER AND MEMORANDUM DECISION Case No. 2:16-cv-00351 Judge Tena Campbell

In 2001, petitioner Mesa Rith pleaded guilty to assaulting a federal officer in violation of 18 U.S.C. § 111(a)(1). Now, more than a decade after his judgment of conviction became final, Mr. Rith asks the court to correct his sentence based on the United States Supreme Court's decision in Johnson v.

United States, 135 S. Ct. 2551 (2015). Because Johnson does not apply to his case, the court dismisses Mr. Rith's motion as untimely.[1]

BACKGROUND

Mr. Rith pleaded guilty to assaulting a federal officer in 2001. Because of a prior conviction, Mr. Rith's sentence was enhanced under the United States Sentencing Guidelines (Guidelines) and the court sentenced him to 96 months of imprisonment. The court set Mr. Rith's 96-month sentence to run consecutively with a sentence imposed in another federal case.

Mr. Rith appealed his sentence, but the United States Court of Appeals for the Tenth Circuit affirmed the judgment. United States v. Rith, 63 Fed. App'x 463 (10th Cir. 2003) (unpublished). In 2004, Mr. Rith moved under 28 U.S.C. § 2255 to have his sentence vacated. The court denied his motion. (Order & Mem. Decision, Case No. 2:04-cv-787, ECF No. 10.) On April 29, 2016—eleven years after Mr. Rith filed his first § 2255 motion—Mr. Rith filed a second § 2255

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[1] A hearing must be held on a § 2255 motion "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Because the motions and records in this case conclusively show that Mr. Rith is not entitled to relief, the court finds that a hearing is not necessary.

motion, this time seeking to have his sentence corrected after the Supreme Court's decision in Johnson.

The Government moves to dismiss Mr. Rith's § 2255 motion. The Government argues, among other things, that Mr. Rith's motion is barred by § 2255's statute of limitations. Mr. Rith responds that his motion qualifies as timely because the one-year statute of limitations restarted when the Supreme Court decided Johnson in 2015.

ANALYSIS

"A district court is authorized to modify a Defendant's sentence only in specified instances where Congress has expressly granted the court jurisdiction to do so." United States v. Blackwell, 81 F.3d 945, 947 (10th Cir. 1996). Under 28 U.S.C. § 2255, a prisoner can move the court to vacate or correct a sentence if the sentence was unconstitutional or otherwise illegal.

Ordinarily, a petitioner has one year to file his § 2255 motion from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). But when a petitioner asserts a right "recognized by the Supreme Court and made retroactively applicable to cases on collateral review," the one-

year period begins to run from the "date on which the right asserted was initially recognized by the Supreme Court." Id. at § 2255(f)(3).

Here, Mr. Rith pleaded guilty to assaulting a federal officer in 2001. The Court sentenced Mr. Rith that same year. Though Mr. Rith appealed his sentence, the Tenth Circuit rejected his appeal in 2003. Mr. Rith did not seek review with the Supreme Court, nor did he seek a rehearing with the Tenth Circuit. Accordingly, his convictions became final 90 days later—in September 2003. See United States v. Martin, 357 F.3d 1198, 1200 (10th Cir. 2004). Absent an event restarting the one-year statute of limitations, Mr. Rith would be time-barred from filing a petition after September 2004. See 28 U.S.C. § 2255(f)(1).

Acknowledging that his motion would be time-barred, Mr. Rith contends that the Supreme Court in Johnson recognized a right that was made retroactively applicable to cases like his on collateral review. In Johnson, the Supreme Court ruled that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague. 135 S. Ct. at 2563. Mr. Rith asserts that because his sentence was mandatorily enhanced under the residual clause of the Guidelines, and because the language in the residual clause of the ACCA and the Guidelines is identical, Johnson applies to his case.

Mr. Rith also acknowledges that the Supreme Court recently ruled in United States v. Beckles that sentences imposed after the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005)—where the Supreme Court ruled that the Guidelines were advisory, not mandatory—are not subject to vagueness challenges. 137 S. Ct. 886, 890 (2017). However, Mr. Rith was sentenced before the Supreme Court decided Booker. As such, Mr. Rith argues that Beckles does not bar Johnson's application to pre-Booker sentencings.

To determine whether Johnson restarted the one-year statute of limitations for Mr. Rith's motion, the court must ask whether Mr. Rith asserts the same right announced in Johnson, or whether he instead asserts a new right that the Supreme Court has yet to recognize. 28 U.S.C. § 2255(f)(3). A right qualifies as "new" if it "is not dictated by precedent." Chaidez v. United States, 568 U.S. 342, 347 (2013) (citation and internal quotation marks omitted). A right is "dictated by precedent" only if "it is apparent to all reasonable jurists." Id. (citation and internal quotation marks omitted). So the inquiry is whether Johnson dictates invalidation of the Guidelines' residual clause.

After reviewing Johnson, the parties' briefing, and other caselaw, the court concludes that Johnson does not announce the right that Mr. Rith asserts: Johnson

does not dictate invalidation of the Guidelines' residual clause. Johnson explicitly invalidates only the residual clause of the ACCA. 135 S. Ct. at 2563. And Justice Sotomayor confirmed in Beckles that the Supreme Court has not yet answered "whether defendants sentenced to terms of imprisonment before [the Supreme Court's] decision in United States v. Booker . . . may mount vagueness attacks on their sentences." Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring).[2] Because the Supreme Court has not yet answered that question, they have not recognized the right Mr. Rith asserts.

Mr. Rith resists this conclusion. He directs the court to United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015). There, the Tenth Circuit ruled that Johnson invalidates the residual clause in the Guidelines. Id. at 1210. But Madrid was explicitly overturned by Beckles. 137 S. Ct. at 892 n.2, 897. And even if Madrid were still good law as applied to pre-Booker sentencings, in determining whether Mr. Rith's Johnson-based challenge qualifies as timely, the

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[2] Though this statement appears only in Justice Sotomayor's concurring opinion, the court is persuaded that "if a concurring opinion says that the existence of a right remains an open question, and the majority opinion does not explicitly address the right, then the Supreme Court did not previously announce the existence of the same right." Zamora v. United States, No. CR 97-488, 2017 WL 3054645, at *5 (D. N.M. June 29, 2017)

question is whether the Supreme Court has recognized the right at issue, not the Tenth Circuit. See 28 U.S.C. § 2255(f)(3) (measuring the one-year filing deadline from "the date on which the right asserted was initially recognized by the Supreme Court") (emphasis added); E.J.R.E. v. United States, 453 F.3d 1094, 1098 (8th Cir. 2006) (stating that "a decision taken from a federal court of appeals does not provide an independent basis to trigger the one year statute of limitations provided under [§ 2255(f)(3)]"); Ellis v. United States, No. 2:16-CV-484, 2017 WL 2345562, at *2 (D. Utah May 30, 2017) ("[A] right recognized by the Tenth Circuit is not sufficient under the terms of" § 2255(f)(3) to restart the one-year period.)

The court's conclusion is consistent with another decision from this district. In United States v. Ellis, Michael Wayne Ellis challenged his pre-Booker Guidelines enhancement under Johnson. 2017 WL 2345562, at *1. The court dismissed Mr. Ellis's § 2255 motion. It ruled that "the right recognized by the Supreme Court in Johnson does not apply to Mr. Ellis's case." Id. at *2. The court emphasized that Johnson invalidated the ACCA's residual clause and "Mr. Ellis's sentence was increased under the residual clause of the [Guidelines], not under the residual clause of the ACCA." Id. As a result, the court ruled that 28

U.S.C. § 2255(f)(3) did not apply to Mr. Ellis's case and, consequently, his § 2255 motion was untimely. Id.

In sum, it is far from "apparent to all reasonable jurists" that Johnson invalidates pre-Booker sentencings made under the residual clause of the Guidelines. Chaidez, 568 U.S. at 347 (citation and internal quotation marks dismissed). In fact, as mentioned before, the Supreme Court itself has confirmed that it has not yet answered "whether defendants sentenced to terms of imprisonment" before the decision in Booker "may mount vagueness attacks on their sentences." Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). Consequently, Johnson does not announce the right Mr. Rith asserts and his motion is not timely.

ORDER

For the reasons just mentioned, the court GRANTS the Government's motion to dismiss (ECF No. 18).

DATED this 29th day of August, 2017.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MESA RITH, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	ORDER AND MEMORANDUM DECISION DENYING MOTION FOR CERTIFICATE OF APPEAL Civil Case No. 2:16-cv-351-TC (Associated Crim. Case No. 2:00-cr-562-TC)

In August 2017, the court dismissed Petitioner Mesa Rith's § 2255 Motion as untimely. (Aug. 29, 2017 Order & Mem. Decision, ECF No. 24 (§ 2255 Order).) Mr. Rith appealed the court's decision to the Tenth Circuit Court of Appeals on September 21, 2017. Before the appellate court can consider the appeal, it requires a Certificate of Appealability (COA) of the court's Order. The Tenth Circuit abated Mr. Rith's appeal and directed him to obtain "a decision by the district court on whether a COA should issue." United States v. Rith, No. 17-4149, May 21, 2018 Order (10th Cir.) (filed in this case as ECF No. 34). Following the appellate court's direction, Mr. Rith filed a Motion for COA (ECF No. 35) with this court. Because Mr. Rith has not satisfied the standard necessary to obtain a COA, his motion is denied.

I. LEGAL STANDARD

When a court denies a § 2255 petition, the petitioner does not have an automatic right to appeal that decision. Instead, the petitioner must obtain a certificate of appealability from either the district court or the court of appeals. 28 U.S.C. § 2253(c)(1)(B).

When reviewing a COA motion, the court does not fully consider "'the factual or legal bases adduced in support of the claims.'" Buck v. Davis, 137 S. Ct. 759, 773 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)). Rather, the court conducts a "'threshold inquiry into the underlying merit'" of those claims. Id. at 774 (quoting Miller-El , 537 U.S. at 327)).

The court should issue a COA only if "'jurists of reason could disagree with the district court's resolution'" of the claims raised in the § 2255 petition or "'could conclude the issues presented are adequate to deserve encouragement to proceed further.'" United States v. Springer, 875 F.3d 968, 972 (10th Cir. 2017) (quoting Buck, 137 S. Ct. at 773). If "reasonable jurists would not find the district court's decision on these issues debatable or wrong," the court should deny the COA motion. Jones v. Warrior, 805 F.3d 1213, 1222 (10th Cir. 2015).

When the court denies a § 2255 petition on procedural grounds (as occurred here), the petitioner has an additional hurdle. He can obtain a COA only if he shows that both the procedural issue and the underlying claim are reasonably debatable. Springer, 857 F.3d at 981.

For the reasons set forth below, the court finds that Mr. Rith has not shown that reasonable jurists could debate the time-bar issue.

II. ANALYSIS

Mr. Rith was sentenced in 2001 and his judgment of conviction became final in September 2003. Typically, his § 2255 Motion, which was filed on April 29, 2016, would be time-barred under 28 U.S.C. § 2255(f)(1), which imposes a one-year period of limitation running from the date the judgment becomes final. But Mr. Rith relies on an alternative method to obtain review: if the United States Supreme Court recognizes a new right and makes that right

retroactively applicable to cases on collateral review, a petitioner asserting that right may file a § 2255 petition within one year of the Court's decision. 28 U.S.C. § 2255(f)(3).

In his § 2255 Motion, Mr. Rith relied on the United States Supreme Court's 2015 decision in Johnson v. United States, 135 S. Ct. 2551 (2015), to obtain review. As this court explained in the § 2255 Order,

> [i]n Johnson, the Supreme Court ruled that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague. 135 S. Ct. at 2563. Mr. Rith asserts that because his sentence was mandatorily enhanced under the residual clause of the [United States Sentencing] Guidelines, and because the language of the residual clause of the ACCA and the Guidelines is identical, Johnson applies in this case.

(§ 2255 Order at 4.)

The court rejected Mr. Rith's petition as untimely after concluding that Johnson did not recognize the right asserted by Mr. Rith. In the § 2255 Order, the court highlighted language in the Supreme Court's decision in United States v. Beckles, 137 S. Ct. 886 (2017), which addressed the same Guideline language in the non-mandatory Guideline context. Justice Sotomayor, in her concurrence, expressly acknowledged that the court has not yet answered the question of "whether defendants sentenced to terms of imprisonment [under the mandatory Guidelines] . . . may mount vagueness attacks on their sentences." Id. at 903 n.4 (Sotomayor, J., concurring) (emphasis added). Because Mr. Rith raised that unsettled question in his § 2255 Motion, the court found that Mr. Rith did not satisfy the "new rule" requirement of § 2255(f)(3) and could not take advantage of the alternative limitation period.

Now, in his motion for a COA, Mr. Rith points to the April 17, 2018 decision by the United States Supreme Court in Sessions v. Dimaya, to argue that this court's "new rule"

decision is reasonably debatable. In Dimaya, the Court invalidated § 16(b) of the Immigration and Nationality Act (INA) defining "aggravated felony." 138 S. Ct. 1204 (2018). The language of § 16(b) was very similar to the language of the section invalidated in Johnson. When the Court asked "whether a similarly worded clause in a statute's definition of 'crime of violence' suffers from the same constitutional defect" recognized in Johnson, the Court answered, "[a]dhering to our analysis in Johnson, we hold that it does." Id. at 1210. According to the Court, "Johnson is a straightforward decision, with equally straightforward application here." Id. at 1213, quoted in Mot. for COA at 2–3, ECF No. 35.

This, according to Mr. Rith, changed the legal landscape and "made clear that a new rule is not needed to apply the rule in Johnson to statutes other than the ACCA." (Mot. for COA at 2.) He believes that "[b]ecause Dimaya turned on the 'straightforward application' of Johnson, rather than an extension of that decision to a new context, the application of Johnson in this case is even more 'straightforward' than in Dimaya because the residual clause at issue here is identical to the one in Johnson." (Rith Reply at 3 (emphasis added), ECF No. 39.) In other words, he apparently argues that the analysis in Dimaya was "straightforward" because Johnson dictated the result and that reasonable jurists could, consequently, debate whether Johnson's holding was indeed the "new rule" this court needed to review the merits of his petition. The court disagrees for a number of reasons.

First, the INA definition at issue in Dimaya was a "new context" (i.e., an immigration statute). Dimaya does not stand for the proposition that Johnson encompassed any statute that contained the same or similar language. Certainly United States Supreme Court decisions have considered the vagueness arguments anew in each situation arising on certiorari review.

Second, the Dimaya court was not addressing the issues underlying Mr. Rith's argument here. It did not address whether Johnson dictates the conclusion that a clause in a different statute (not just the INA) using the same or similar language as the clause at issue in Johnson is void for vagueness. And it did not address a statute of limitations issue on collateral review.

Third, Mr. Rith, at least in part, raises an argument that must be addressed on direct appeal. In his Motion, he maintains that "[i]f Johnson invalidated § 16(b), as Dimaya said it did, reasonable jurists could at least debate whether (if not agree that) it also invalidated the residual clause in the Guidelines." (Mot. for COA at 3.) Although circuit courts can apply Johnson's reasoning to find that clauses in "similarly worded statutes are unconstitutionally vague on direct appeal," review under § 2255 is "more limited." United States v. Greer, 881 F.3d 1241, 1247 (10th Cir. 2018) (emphasis added). In Greer, the petitioner (who asserted the very same right Mr. Rith asserts) was "attempting to apply the *reasoning of Johnson* in a different context not considered by the Court. . . . [S]uch relief is not available on collateral review." Id. at 1248 (emphasis in original). "[E]ven assuming [the petitioner] presents a compelling argument for finding the clause unconstitutional, such a task exceeds the authority of this court under [§ 2255]." Id. at 1246–47.

To qualify for the § 2255(f)(3) limitation period on collateral review, the petitioner must show that the Supreme Court recognized a new constitutional right that is "formally acknowledged . . . in a definite way." Id. at 1247. Dimaya addressed § 16(b) of the INA. It did not raise, much less answer, the question of whether defendants sentenced under the mandatory Guidelines may attack their sentences on vagueness grounds. And its vague language (recognizing that analysis of § 16(b) was "straightforward" under Johnson) does not overcome

Justice Sotomayor's clear statement in Beckles that the issue of "whether defendants sentenced to terms of imprisonment [under the mandatory Guidelines] . . . may mount vagueness attacks on their sentences" has not been resolved. Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring).

Mr. Rith did not assert the right recognized in Johnson and his reliance on Dimaya does not cast doubt on the court's procedural ruling. Accordingly, the court denies his Motion for a COA (ECF No. 35).

SO ORDERED this 3rd day of July, 2018.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
U.S. District Court Judge

FILED
United States Court of Appeals
Tenth Circuit

February 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MESA RITH,

Defendant - Appellant.

No. 17-4149
(D.C. Nos. 2:16-CV-00351-TC &
2:00-CR-00562-TC-1)

ORDER

Before **HOLMES**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk