

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

MICHAEL WAYNE ELLIS,

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, Michael Wayne Ellis, 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, Michael Wayne Ellis, respectfully requests
that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION PRESENTED

On June 6, 2016, Petitioner Michael Ellis 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 filed 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 Michael Ellis 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The Tenth Circuit's unpublished decision is available at 779 Fed. App'x 580 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 Its unpublished order authorizing a successive § 2255 motion is included in the appendix at A8.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.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its decision on October 7, 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

Mr. Ellis pleaded guilty on January 23, 2003, to one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). At sentencing, he faced a mandatory guideline range of 262-327 months in prison because he had been designated a career offender under the Guidelines. At the time of his sentencing, the Guidelines were mandatory, and the court was required to impose a sentence within the range required by the career offender guideline. The court imposed a low-end sentence of 262 months in prison.

On June 26, 2015, the Supreme Court struck down the residual clause of the Armed Career Criminal Act (ACCA) as being unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Asserting he had been unconstitutionally sentenced under the identical residual clause in USSG §4B1.2, Mr. Ellis sought relief under 28 U.S.C. § 2255. Because he had previously sought relief under § 2255, Mr. Ellis first requested authorization from the Tenth Circuit to file a successive § 2255 motion in the district court. 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.

On June 6, 2016, Mr. Ellis moved to vacate his sentence, asserting 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. 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. A14.

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. Ellis 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. Ellis 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” precedents.

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. Ellis 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 with this Court’s precedents: that Mr. Ellis 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 of 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. Ellis 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. Ellis 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. Just 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. 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. Ellis 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,
District of Utah
Counsel of Record for Petitioner
46 W Broadway Ste, 110
Salt Lake City, UT 84101

Salt Lake City, Utah
July 17, 2020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

MICHAEL WAYNE ELLIS,

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
Salt Lake City, UT 84101

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

MICHAEL WAYNE ELLIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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.

/S/ Benjamin C. McMurray
Assistant Federal Public Defender
Counsel of Record for Petitioner
46 West 300 South, Suite 110
Salt Lake City, UT 84101
(801) 524-4010

APPENDIX

| | |
|--|-----|
| Decision of the Tenth Circuit Court of Appeals, denying COA <i>United States v. Ellis</i> , Case No. 17-4097, 779 Fed. App'x 580 (10th Cir. Oct. 7, 2019) | A2 |
| Decision of the Tenth Circuit Court of Appeals, authorizing successive § 2255 motion <i>In re Ellis</i> , Case No. 16-4076 (10th Cir. May 9, 2016) | A8 |
| District Court's written ruling, denying § 2255 as untimely <i>Ellis v. United States</i> , Case No. 2:16-cv-484 (D. Utah May 30, 2017) | A10 |

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 7, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL WAYNE ELLIS,

Defendant - Appellant.

No. 17-4097

(D.C. Nos. 2:16-CV-00484-DAK &
2:01-CR-00411-DAK-1)
(D. Utah)

ORDER

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

The issue in this appeal involves the timeliness of Mr. Michael Wayne Ellis's motion to vacate his sentence. The district court dismissed the motion on the ground that the limitations period had expired. Mr. Ellis 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. Ellis committed the offense in 2001; 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) (2001).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. Ellis contends that given the mandatory nature of the guidelines in 2001, their residual clause should be subject to a vagueness challenge. For this contention, Mr. Ellis 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. Ellis needs a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This

¹ The sentencing court used the 2001 version of the guidelines.

certificate is available only if Mr. Ellis 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. Ellis 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. Ellis 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. Ellis 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. Ellis's motion to vacate was untimely.

Mr. Ellis's sentence became final in 2004. *United States v. Ellis*, 100 F. App'x 824, 825, 827 (2004) (unpublished). He then had one year to move to vacate his sentence; but he waited roughly eleven years, missing the limitations period by about ten years. Because Mr. Ellis'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. Ellis, No. 17-4097, Bacharach, J., dissenting.

I agree with the majority that Mr. Ellis's claim fails under *Greer* and *Pullen*. But I believe that Mr. Ellis 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.¹ 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);² 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

¹ Mr. Ellis 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. Ellis 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. Ellis 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. Ellis from asking the en banc court to revisit the holding in *Greer* or *Pullen*.

² 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).³ I would thus grant a certificate of appealability and affirm the dismissal of Mr. Ellis's motion to vacate his sentence.

³ 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. Ellis 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

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 9, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: MICHAEL WAYNE ELLIS,

Movant.

No. 16-4076
(D.C. Nos. 2:01-CR00411-DAK-1 &
2:05-CR-00767-DAK)
(D. Utah)

ORDER

Before **KELLY, BRISCOE**, and **HARTZ**, Circuit Judges.

Movant Michael Wayne Ellis, 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). 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 another,” *id.*

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

§ 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*, ___ S. Ct. ___, 2016 WL 1551144, at *8 (Apr. 18, 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 Michael Wayne Ellis 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

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker".

ELISABETH A. SHUMAKER, Clerk

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

MICHAEL WAYNE ELLIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM DECISION AND
ORDER

Case No. 2:16-CV-484-DAK

The Honorable Dale A. Kimball

This matter is before the court on the United States of America's Motion to Dismiss Petitioner Michael Wayne Ellis's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. On January 23, 2003, Mr. Ellis pleaded guilty to one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Based on his guilty plea, the court entered judgment as to Mr. Ellis on May 12, 2003, and sentenced Mr. Ellis to 262 months of imprisonment followed by a term of supervised release of 60 months. Mr. Ellis appealed his judgment, but the United States Court of Appeals for the Tenth Circuit affirmed the judgment on June 14, 2004. After the United States Supreme Court issued its decision in *United States v. Booker*, 543 U.S. 220 (2005), Mr. Ellis filed a *pro se* motion under 28 U.S.C. § 2255, which the court denied on January 24, 2006. On June 12, 2006, the court also denied Mr. Ellis's *pro se* motion under Federal Rule of Civil Procedure 60(b).

On May 9, 2016, the Tenth Circuit authorized Mr. Ellis to file a second or successive 28 U.S.C. § 2255 motion to assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Based on that authorization, Mr. Ellis filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 on June 6, 2016. Although the case was stayed for a time

pursuant to a General Order of the court, the stay was lifted on January 31, 2017. On March 16, 2017, Mr. Ellis filed a Notice of Supplemental Authority to inform the court of the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). On March 20, 2017, the United States filed a Motion to Strike Notice of Supplemental Authority, and on March 21, 2017, the United States filed a Motion to Dismiss Mr. Ellis's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255.

In its motion, the United States argues that the court should dismiss Mr. Ellis's 28 U.S.C. § 2255 motion because, among other things, *Johnson* does not apply to Mr. Ellis's case and Mr. Ellis's petition is untimely. Because the timeliness of Mr. Ellis's petition affects the court's jurisdiction to entertain the merits of the petition, the court will address timeliness first. Because the court concludes that Mr. Ellis's petition is not timely, the court will not address the other arguments in the motion to dismiss.

"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 in custody can move the court to vacate, set aside, or correct a sentence if the sentence was unconstitutional, illegal, in excess of the maximum authorized by law, or otherwise subject to collateral attack. A one-year statute of limitation applies to motions brought under § 2255.

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

28 U.S.C. § 2255(f).

The Judgment in Mr. Ellis's underlying criminal case was entered on May 12, 2003. Mr. Ellis filed an appeal, which was decided on June 14, 2004, and the Judgment became final, and the one-year statute of limitations began to run, on that date. Absent an event restarting the one-year period, Mr. Ellis would be time barred from filing a petition after June 14, 2005, which would include his § 2255 petition, which he filed on June 6, 2016. However, Mr. Ellis argues that the Supreme Court decision in *Johnson*, decided June 26, 2015, asserted a new right that is retroactively applicable to Mr. Ellis's case and that, therefore, restarted the one-year period per 28 U.S.C. § 2255(f)(3).

Mr. Ellis is correct that *Johnson* asserted a new right that was made retroactively applicable to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257 (2016). However, the right recognized by the Supreme Court in *Johnson* does not apply to Mr. Ellis's case. In *Johnson*, the Supreme Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act ["ACCA"] violates the Constitution's guarantee of due process" because the residual clause of the ACCA is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Mr. Ellis's sentence was increased under the residual clause of the United States Sentencing Commission Guidelines ("USSG") § 4B1.2, not under the residual clause of the ACCA. Therefore, the right recognized in *Johnson* does not apply to Mr. Ellis's case.

But Mr. Ellis argues that, because the language in the residual clause of USSG § 4B1.2 is "virtually identical" to the language in the residual clause of the ACCA, that the right recognized in *Johnson* should apply to his case. See *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015). As support for his position, Mr. Ellis cites *United States v. Madrid*, where the Tenth Circuit

relied on the reasoning in *Johnson* to “hold that the residual clause of § 4B1.2(a)(2) is void for vagueness.” *Id.* at 1211.

The court disagrees with Mr. Ellis’s argument for two major reasons. First, a right recognized by the Tenth Circuit is not sufficient under the terms of the relevant statute to grant the court the jurisdiction to modify Mr. Ellis’s sentence. *See* 28 U.S.C. § 2255(f)(3) (requiring a right to be “newly recognized by the *Supreme Court* and made retroactively applicable to cases on collateral review” (emphasis added)). Second, assuming a right recognized by the Tenth Circuit was sufficient to grant the court jurisdiction to modify Mr. Ellis’s sentence, *Madrid* is not directly applicable to Mr. Ellis’s case. The defendant in *Madrid* was sentenced under USSG 4B1.2 after the Supreme Court decided in *United States v. Booker*, 543 U.S. 220 (2005), that the sentencing guidelines are advisory and not mandatory. In *Beckles v. United States*, the Supreme Court addressed whether the holding in *Johnson* applies to the advisory sentencing guidelines and held “that the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)’s residual clause is not void for vagueness.” 137 S. Ct. 886, 895 (2017); *see also United States v. Pena*, No. 16-6340, 2017 WL 1826848, at *1 (10th Cir. May 4, 2017) (recognizing that “the U.S. Supreme Court overruled [*Madrid*] in *Beckles v. United States*”). Therefore, neither the Supreme Court in *Beckles* nor the Tenth Circuit in *Madrid* directly addressed “the question whether defendants sentenced to terms of imprisonment before [the Supreme Court’s] decision in *United States v. Booker*, 543 U.S. 220 (2005) . . . may mount vagueness attacks on their sentences.” *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). Because Mr. Ellis was sentenced under the mandatory sentencing guidelines before the Supreme Court’s decision in *Booker*, the court concludes that neither the Tenth Circuit’s decision in *Madrid* nor the Supreme Court’s decision in *Beckles* directly applies to Mr. Ellis’s case.

Because the court concludes that *Johnson* does not apply to Mr. Ellis's case and that neither the Supreme Court nor the Tenth Circuit has directly recognized a right to modify a sentence increased under the residual clause of USSG § 4B1.2 before *Booker*, the court concludes that the United States' Motion to Dismiss should be granted because Mr. Ellis's petition is untimely.

The United States also moves to strike Mr. Ellis's Notice of Supplemental Authority because Mr. Ellis failed to comply with DUCivR 7-1(b)(4) by not including a reference to the relevant page within the supplemental authority and by improperly including argument within the notice. Although the court agrees that Mr. Ellis failed to comply with the local rule in his Notice of Supplemental Authority, the court denies the motion to strike that authority. The court is aware of the portions of the supplemental authority that apply to this case, and the court will only entertain arguments from the parties as they are properly brought before the court.

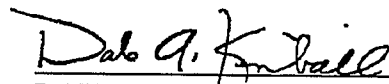
Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253, a certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *United States v. Silva*, 430 F.3d 1096, 1100 (10th Cir.2005) (quoting 28 U.S.C. § 2253(c)(2)). The court finds that "reasonable jurists could not debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The court concludes that Mr. Ellis has not made a substantial showing of the denial of a constitutional right and, therefore, declines to issue a Certificate of Appealability. If Mr. Ellis

wishes to appeal the court's ruling on his motion, he must seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

For the reasons above, the United States' Motion to Dismiss is GRANTED, and the United States' Motion to Strike is DENIED.

DATED this 30th day of May, 2017.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dale A. Kimball", is written over a horizontal line.

DALE A. KIMBALL
United States District Judge

FILED

**United States Court of Appeals
Tenth Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

February 18, 2020

**Christopher M. Wolpert
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL WAYNE ELLIS,

Defendant - Appellant.

No. 17-4097
(D.C. Nos. 2:16-CV-00484-DAK &
2:01-CR-00411-DAK-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