NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ALFRED RAY CESSPOOCH,

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, Alfred Ray Cesspooch, 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, Alfred Ray Cesspooch, 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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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION PRESENTED

On June 21, 2016, Petitioner Alfred Cesspooch 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 Alfred Cesspooch 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The Tenth Circuit's unpublished decision is available at 790 Fed. App'x 881 and is included in the appendix at A2. The district court's written ruling on the § 2255 motion is at A8, and its order denying COA is at A13.

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

Petitioner Alfred Cesspooch was convicted at a jury trial on October 3, 1996, of two counts of assault in violation of 18 U.S.C. § 113(c), (f) and one count of aggravated sexual abuse in violation of 18 U.S.C. § 2241(a). At sentencing, the court concluded that he was a career offender under USSG §4B1.2, which carried a mandatory guideline range of 360 months to life in prison. The court imposed a sentence of 390 months in prison. (Vol. IV at 33.)

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. Cesspooch sought relief under 28 U.S.C. § 2255. He moved to vacate his sentence on June 6, 2016, 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 and denied a certificate of appealability (COA). App. A8-15.

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. Cesspooch could then ask the full court to reconsider *Greer* and *Pullen*.

REASONS FOR GRANTING THE WRIT

The court should not be deterred 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. Cesspooch 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. Cesspooch 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. Cesspooch 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. Cesspooch 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. Cesspooch 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. Cesspooch 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
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Salt Lake City, Utah
July 17, 2020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ANTHONY WANYE CESSPOOCH,

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

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ANTHONY WAYNE CESSPOOCH,

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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.

/S/ Benjamin C. McMurray
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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

October 7, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALFRED RAY CESSPOOCH,

Defendant - Appellant.

No. 17-4160
(D.C. Nos. 2:16-CV-00662-JNP &
2:93-CR-00281-JNP-1)
(D. Utah)

ORDER

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

The issue in this appeal involves the timeliness of Mr. Alfred Ray Cesspooch's motion to vacate his sentence. The district court dismissed the motion on the ground that the limitations period had expired. Mr. Cesspooch 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. Cesspooch committed the offense in 1993; 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)(1)(ii) (1993).[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. Cesspooch contends that given the mandatory nature of the guidelines in 1993, their residual clause should be subject to a vagueness challenge. For this contention, Mr. Cesspooch 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).

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1 The sentencing court used the 1993 version of the guidelines.

To raise this contention on appeal, Mr. Cesspooch needs a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This certificate is available only if Mr. Cesspooch 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. Cesspooch 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. Cesspooch 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. Cesspooch 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. Cesspooch's motion to vacate was untimely.

Mr. Cesspooch's sentence became final in 1998. *United States v. Cesspooch,* 145 F.3d 1346 (1998) (unpublished). He then had one year to move to vacate his sentence; but he waited nearly seventeen years, missing the limitations period by about sixteen years. Because Mr. Cesspooch'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. Cesspooch, No. 17-4160, Bacharach, J., dissenting.

I agree with the majority that Mr. Cesspooch's claim fails under *Greer* and *Pullen*. But I believe that Mr. Cesspooch 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

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[1] Mr. Cesspooch 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. Cesspooch 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. Cesspooch 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. Cesspooch 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[4] and affirm the dismissal of Mr. Cesspooch's motion to vacate his sentence.

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[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. Cesspooch 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.

[4] Mr. Cesspooch's motion is his fifth motion to vacate his sentence. If he were to obtain a certificate of appealability, we could reach the merits only if we were to grant leave to pursue a second or successive motion. *See* 28 U.S.C. § 2255(h)(2). The majority's dismissal of the appeal obviates our need to consider the possibility of leave to file a successive motion to vacate the sentence.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

ALFRED CESSPOOCH, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	**MEMORANDUM DECISION AND ORDER** Case No. 2:16-CV-00662-JNP District Judge Jill N. Parrish

This matter comes before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Respondent's motion to dismiss the same. For the reasons below, the Court denies Petitioner's motion and grants Respondent's.

I. BACKGROUND

In 1996, Petitioner Alfred Cesspooch was convicted of two counts of assault and one count of aggravated sexual abuse. Petitioner's criminal history featured prior convictions for assault with a deadly weapon, assault on a police officer, and rape. Consequently, the presentence report designated him a career offender under USSG §4B1.1, and he was sentenced to 390 months in prison. Petitioner appealed his judgment, but the Tenth Circuit affirmed on January 28, 2003. The ninety-day period to file a petition for writ of *certiorari* expired on April 28, 2003.

Now Petitioner asks this Court to correct his sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The United States argues that Petitioner's motion should be dismissed because, among other things, *Johnson* does not apply to Petitioner's case and therefore his motion is untimely. The Court agrees with the United States.

II. TIMELINESS

This Court may "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). Title 28 U.S.C. § 2255 grants this Court that jurisdiction, but only within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). Convictions become final upon conclusion of direct review. *United States v. Carbajal-Moreno*, 332 Fed. App'x 472, 474 (10th Cir. 2009). When, as here, the defendant takes a direct appeal to the court of appeals, the judgment of conviction becomes final when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of *certiorari*, or when the time for filing a *certiorari* petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003). Petitioner's ninety-day period to file a petition for writ of *certiorari* expired on April 18, 2003. He filed the motion at issue here on June 21, 2016—well beyond the one-year limit. Consequently, Petitioner's motion is untimely unless, as he argues, *Johnson* recognized a new right that is retroactively applicable to his case, restarting the one-year period under 28 U.S.C. § 2255(f)(3).[1]

Here, Petitioner asserts that he has the right not to be sentenced as a career offender under the mandatory guidelines' residual clause. If the Supreme Court has recognized that right and the right has been made retroactively applicable to cases on collateral review, Petitioner's motion is timely. *See id.* Otherwise, it is not, and this Court must dismiss it.

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

[1] Section 2255(f)(3) provides that the one-year limitation period may run from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . .").

guarantee of due process" because the residual clause of the ACCA is unconstitutionally vague. 135 S. Ct. at 2563. Therefore, Petitioner argues, "the identical language in §4B1.2(a)(2) is also unconstitutionally vague." ECF No. 1 at 3. In support, Plaintiff cites the Tenth Circuit's opinion in *United States v. Madrid*, which held § 4B1.2(a)(2) void for vagueness under *Johnson*. 805 F.3d 1204, 1211 (10th Cir. 2015). However, after Petitioner filed his motion, *Madrid* was abrogated by the Supreme Court's holding in *Beckles v. United States*, 137 S. Ct. 886 (2017). *Beckles* instructed that because the guidelines are advisory, they "are not amenable to a vagueness challenge." *Id.* at 894.

The United States repeats the *Beckles* holding, insisting that it controls here.[2] This is incorrect. In *Beckles*, the Supreme Court's clear holding was 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." *Id.* at 895 (emphasis added). Writing for the majority, Justice Thomas distinguished between the mandatory and advisory guidelines. And as Justice Sotomayor noted in her concurring opinion, "The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*] . . . may mount vagueness attacks on their sentences." *Id.* at 903 n.4.

Beckles did not deny the right Petitioner asserts. But *Johnson* did not recognize it. And if *Madrid* did recognize such a right, that opinion was abrogated by *Beckles*.[3] Therefore, whether Petitioner may challenge his sentencing under the residual clause of § 4B1.2(a) remains an open question. *See United States v. Miller*, No. 16-2229, 2017 WL 3658833, at *3 n.3 (10th Cir. 2017)

[2] ECF No. 10 at 2, 3, 4, 7–8, 10; No. 13 at 4, 5.

[3] And if it had not been, *Madrid* would remain irrelevant. Section 2255(f)(3) requires that the right be initially recognized by the Supreme Court. The Tenth Circuit is not the Supreme Court.

("[W]e express no opinion on whether the Supreme Court has recognized the right [not to be sentenced as a career offender under the residual clause of the mandatory guidelines] for purposes of § 2255(f)(3)."); *United States v. Brown*, No. 16-7056, 2017 WL 3585073, at *4 (4th Cir. Aug. 21, 2017) (noting that the Supreme Court "has yet to recognize a broad right invalidating all residual clauses as void for vagueness" and holding that petitioner's motion was therefore untimely); *Raybon v. United States*, 867 F.3d 625, 629 (6th Cir. 2017) ("[W]hether [*Johnson*] applies to the mandatory guidelines . . . is an open question."); *but see Moore v. United States*, No. 16-1612, 2017 WL 4021654 (1st Cir. Sept. 13, 2017) (granting petitioner sentenced pre-*Booker* certification to argue in the district court that *Johnson* invalidates the residual clause of the career offender guideline). As such, the right Petitioner asserts has not been recognized by the Supreme Court and certainly has not been "made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3); *see generally Tyler v. Cain*, 533 U.S. 656, 663–64 (2001) (holding that "made" means "held" under identical language in § 2244(b)(2)(A) and that it must be held retroactive by the Supreme Court). Consequently, Petitioner's motion is untimely.

This Court's decision is consistent with other decisions in this district. In *Ellis v. United States*, the petitioner challenged his pre-*Booker* guidelines enhancement under *Johnson*. No. 2:16-cv-484, 2017 WL 2345562 (D. Utah, May 30, 2017). And in *Rith v. United States*, the petitioner similarly asked the court to correct his sentence based on *Johnson*. No. 2:16-cv-00351, 2017 WL 3738549 (D. Utah Aug. 29, 2017). In both cases, the courts ruled the §2255 motions untimely.

III. ORDER

For the reasons above, Petitioner's motion is untimely. The Court **GRANTS** the United States' motion to dismiss.

Signed October 4, 2017.

BY THE COURT

Jill N. Parrish
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

ALFRED CESSPOOCH, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	**ORDER DENYING CERTIFICATE OF APPEALABILITY** Case No. 2:16-cv-662 District Judge Jill N. Parrish

I. BACKGROUND

On October 4, 2017, this court issued an order denying Petitioner Alfred Cesspooch's § 2255 motion to vacate, set aside, or correct his sentence. *See* ECF No. 16.

Mr. Cesspooch seeks to appeal the court's order, but he cannot take his appeal to the Tenth Circuit without a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1). And Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts requires that a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Until September 2017, the Tenth Circuit relied on its decision in *United States v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000) to deem a COA denied if district courts did not rule within thirty days of the filing of the notice of appeal. However, in *United States v. Higley*, No. 17-1111, at *6–7 (10th Cir. Sep. 29, 2017) (unpublished), the Tenth Circuit held that *Kennedy* was no longer good law and that, "if the district court has not ruled on COA, this court should order a limited remand for the district court to rule on COA."

When this court denied Mr. Cesspooch's § 2255 motion, it did not address whether a COA should issue. Consequently, and in light of *Higley*, the Tenth Circuit directed a limited remand for this court "to consider whether to issue a COA for this appeal." *United States v. Cesspooch*, No. 17-4160 (10th Cir. Feb. 13, 2018).

II. DISCUSSION

Under 28 U.S.C. § 2253(c)(2), this court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." The proper standard for that determination is a simple question: Could "reasonable jurists . . . debate whether (or, for that matter, agree that) 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) (citation omitted), *rev'd on other grounds*, *Miller-El v. Dretke*, 545 U.S. 231 (2005). With this standard in mind, Mr. Cesspooch has not made the requisite showing.

In its October 4, 2017 order, this court considered whether Mr. Cesspooch's motion was untimely under 28 U.S.C. § 2255, which requires that post-conviction motions for *habeas* relief be brought within one year of the date on which "the judgment of conviction becomes final" or "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)(1), (3). Mr. Cesspooch argued that the Supreme Court had recognized a new right applicable to his case in *Johnson v. United States*, 135 S. Ct. 2551 (2015). But the court disagreed and held that his motion was untimely.

At the time, the court relied upon its own interpretation of § 2255(f) and its application by several circuit courts and other holdings in this district. But on February 6, 2018, the Tenth Circuit addressed the same question in *United States of America v. Greer*, No. 16-1282 (10th Cir. Feb. 6, 2018). In that case, the Tenth Circuit held that Mr. Greer asserted a right "not to be

sentenced under the residual clause of § 4B1.2(a)(2) of the mandatory Guidelines." *Id.* at *10. However, "[t]he Supreme Court has recognized no such right." *Id.* Therefore, "Mr. Greer [had] not asserted a right recognized in *Johnson*," and the panel held that his motion was untimely. *Id.*

Greer speaks directly to the issue Mr. Cesspooch raised in his petition. As did Mr. Greer, Mr. Cesspooch asserted a right not to be sentenced under the residual clause of § 4B1.2(a)(2) of the mandatory Guidelines. But as this court held then and as the Tenth Circuit held in *Greer*, the Supreme Court has recognized no such right. Considering the Tenth Circuit's clear holding resolving this precise issue earlier this month, Mr. Cesspooch has not made a substantial showing that he was denied a constitutional right. No reasonable jurist could debate whether Mr. Cesspooch's petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.[1]

III. ORDER

For the reasons above, the court denies Mr. Cesspooch a COA as to his § 2255 motion.

Signed February 26, 2018

BY THE COURT

Jill N. Parrish
United States District Court Judge

[1] Mr. Cesspooch disagrees. While he recognizes the Tenth Circuit's holding in *Greer*, he cites the First Circuit's contrary holding in *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017), and argues that "the fact that a panel of the Tenth Circuit has rejected Mr. Cesspooch's position does not mean that the issue is not debatable." ECF No. 27 at 5. The issues Mr. Cesspooch raises may be debatable, but under *Greer*, the proper resolution of his petition is not. This court is bound by Tenth Circuit law, and the holding in *Greer* is directly controlling here.

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.

ALFRED RAY CESSPOOCH,

Defendant - Appellant.

No. 17-4160
(D.C. Nos. 2:16-CV-00662-JNP & 2:93-CR-00281-JNP-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