

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JASON GREER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a vagueness challenge to the residual clause of the Federal Sentencing Guidelines asserts a violation of the right recognized in *Johnson v. United States*, 135 S. Ct. 2551 (2015), such that it is timely under 28 U.S.C. § 2255(f)(3), where the residual clause was applied in a mandatory (rather than advisory) manner.
2. Whether the residual clause of the Federal Sentencing Guidelines is unconstitutionally vague where it was applied in a mandatory, rather than advisory, manner.

Multiple other petitions on this Court's docket present similar questions, including but not limited to *Allen v. United States*, No. 17-5864, *Gates v. United States*, No. 17-6262, *James v. United States*, No. 17-6769, and *Robinson v. United States*, No. 17-6877.

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PETITION FOR A WRIT OF CERTIORI

Petitioner, Jason Greer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

DECISION BELOW

The opinion of the court of appeals (App. A) is reported at 181 F.3d 1241. The order of the district court denying Mr. Harris's motion to vacate is unreported and unavailable in electronic databases, but that order is attached as App. ,B.

JURISDICTION

The Tenth Circuit entered judgment in this case on February 6, 2018. No petition for rehearing was filed. This Petition is being filed within 90 days after entry of the judgment below, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Although Mr. Greer was released from imprisonment on April 9, 2018, he remains on supervised release, and his claim is not moot because a ruling in his favor could reduce his unexpired term of supervised release. *See United States v. Montgomery*, 508 F.3d 1229, 1231 n.1 (10th Cir. 2008).

Even if Mr. Greer's challenge were moot, this Court would have jurisdiction to vacate the judgment below. *See Claiborne v. United States*, 551 U.S. 87, 87 (2007) (vacating a federal criminal judgment based on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255(f):

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .

(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.

U.S.S.G. § 4B1.2(a) (2002):

The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has an element the use, attempted use, or threatened use of physical force against the person of another, or

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

STATEMENT OF THE CASE

In 2002, Mr. Greer pleaded guilty to bank robbery. He faced sentencing under the Federal Sentencing Guidelines at a time when those guidelines were mandatory, not advisory. *See United States v. Jackson*, 240 F.3d 1245, 1249 (10th Cir. 2001), *abrogated by United States v. Booker*, 543 U.S. 220 (2005). Over Mr. Greer’s objection, the sentencing court applied the career-offender guideline, which provides for substantially increased terms of incarceration for certain defendants who have “two prior felony convictions of either a crime of violence or a controlled substance offense.”

U.S.S.G. § 4B1.1.¹ The district court sentenced Mr. Greer to 188 months' imprisonment. Absent application of the career-offender guideline, Mr. Greer's sentencing range would have been 130 to 162 months' imprisonment.

Less than one year after this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Greer moved to vacate his sentence under 28 U.S.C. § 2255. *Johnson* declared the residual clause of the Armed Career Criminal Act ("ACCA") unconstitutionally vague. The provision invalidated in *Johnson* had defined the term "violent felony" crimes that "involve[] conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. § 924(e)(2)(B). Mr. Greer claimed that his sentence should be vacated under *Johnson* because it was imposed under the residual clause found in U.S.S.G. § 4B1.2, which defines "crime of violence" for purposes of the career-offender guideline using identical wording.

The district court denied Mr. Greer's post-conviction motion, and the Tenth Circuit affirmed. The parties had agreed that Mr. Greer's vagueness challenge was untimely unless saved by 28 U.S.C. § 2255(f)(3), which provides that a post-conviction motion is timely if 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." The Tenth Circuit held that Mr. Greer's motion could not proceed under § 2255(f)(3),

¹ All references to the Federal Sentencing Guidelines are to the 2002 version of the Guidelines Manual that applied at the time of Mr. Greer's sentencing.

and was thus untimely, because this Court’s *Johnson* decision did not recognize any right with respect to the mandatory Federal Sentencing Guidelines. *See United States v. Greer*, 881 F.3d 1241, 1248–49 (10th Cir. 2018).

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Tenth Circuit’s decision conflicts with this Court’s precedents and because the lower courts’ refusal to apply *Johnson* to the mandatory sentencing guidelines adversely impacts numerous prisoners.²

I. The Decision Below Is Wrong; Application of the Mandatory Sentencing Guidelines Violates the Right Recognized in *Johnson* for Purposes of § 2255(f)(3).

The Tenth Circuit’s decision misreads both § 2255(f)(3) and this Court’s decision in *Johnson*.

First, the text of § 2255(f)(3), as relevant here, renders timely a post-conviction motion filed within one year of “the date on which *the right asserted* was initially recognized by the Supreme Court.” (Emphasis added). This text makes clear that the dispositive question is whether Mr. Greer has “asserted” that his sentence violates *Johnson*, not whether *Johnson* ultimately applies to Mr. Greer’s sentence. Mr. Greer’s § 2255 motion unquestionably *claimed*, or “asserted,” that his sentence violates a

² The Fourth, Sixth, and Eleventh Circuits have likewise rejected or refused to consider challenges to the mandatory guidelines’ residual clause. *See United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

right newly recognized by this Court, and whether that right in fact applies to the facts of his case is a separate, merits issue. The Tenth Circuit erred in holding otherwise.

Second, even allowing the Tenth Circuit its erroneous reading of § 2255(f)(3), it misapplied that reading of § 2255(f)(3) to this case. The Tenth Circuit held that § 2255(f)(3) does not apply if ruling for the movant would require answering a question that “remains . . . open as a matter of Supreme Court precedent.” *Greer*, 881 F.3d at 1247 (quoting *United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017)). But the validity of the mandatory sentencing guidelines’ residual clause does not remain an open question as a matter of this Court’s precedent. This Court’s decisions in *Johnson*, *Beckles v. United States*, 137 U.S. 886 (2017), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), leave no principled basis to distinguish the mandatory guidelines’ residual clause from the ACCA’s residual clause, which this Court invalidated as unconstitutionally vague in *Johnson*.

Both the ACCA’s residual clause, 18 U.S.C. § 924(e)(2)(B), and U.S.S.G. § 4B1.2(a)(2) define “violent felony” and “crime of violence” in identical terms—as including crimes that “involve[] conduct that presents a serious potential risk of physical injury to another.” Thus, the provisions are equally vague. In addition, there is no difference in the function that the provisions played. When the sentencing guidelines were mandatory, the bottom of the guideline range functioned as a mandatory minimum, and the top of the guideline range functioned as a legal maximum. *See Booker*, 543 U.S. at 233–35. This Court held in *Beckles* that the vagueness doctrine applies

to legal provisions that “*fix the permissible sentences* for criminal offenses,” 137 S. Ct. at 892, and the mandatory guidelines fixed Mr. Greer’s sentence in the same way that the ACCA fixed the petitioner’s sentence in *Johnson*. So, the provisions cannot be distinguished on that ground, either. The invalidity of the mandatory sentencing guidelines’ residual clause necessarily follows from the invalidity of the ACCA’s residual clause because the provisions use identical words and serve identical functions.

In holding otherwise, the Tenth Circuit reasoned that “language in *Johnson* and *Welch*³ can be read to imply that *Johnson* was not intended to extend outside the scope of the ACCA.” *Greer*, 881 F.3d at 1247 n.5; *see id.* at 1248 (“[T]he only right recognized by the Supreme Court in *Johnson* was a defendant’s right not to have his sentence increased under the residual clause of the ACCA.”). The court of appeals pointed to parts of this Court’s decisions stating that *Johnson* “cast no doubt on the many laws that ‘require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*.’” *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) (quoting *Johnson*, 135 S. Ct. at 2561)). But that caveat in *Johnson*—that laws requiring an assessment of conduct “*on a particular occasion*” survive—plainly has no application to U.S.S.G. § 4B1.2(a)(2). The circuits have unanimously held that § 4B1.2(a)(2) requires courts to evaluate whether “the offense, in the ordinary case,

³ In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court discussed *Johnson*’s holding in the course of holding that *Johnson* should be applied retroactively to cases on collateral review.

presents a serious potential risk of injury to another,” *e.g.*, *United States v. Wray*, 776 F.3d 1182, 1185 (10th Cir. 2015), and “not in terms of how an individual might have committed it on a particular occasion,” *e.g.*, *United States v. Armijo*, 651 F.3d 1226, 1230 (10th Cir. 2011). The caveat in *Johnson*, by its terms and by the logic of that case, does not apply to a provision that, just like the ACCA, “ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts” *Johnson*, 135 S. Ct. at 2257.

Setting aside the particular language that the Tenth Circuit misread, its broader suggestion that *Johnson* may be read to apply only to the ACCA does not survive *Dimaya*. That decision applied *Johnson* to a different statute, 18 U.S.C. § 16(b), which used slightly different wording to define “crime of violence.” *Dimaya* explained that “*Johnson* is a straightford decision, with equally straightford application” to other provisions that, like § 4B1.2(a), require courts to assess whether the “ordinary case” of a crime meets an imprecisely defined threshold of risk. 138 S. Ct. at 1213–16. If there was any doubt before, *Dimaya* makes clear that *Johnson*’s holding extends to all mandatory laws that share the same constitutionally problematic features of the ACCA. This Court need not separately take up and explicitly strike down each and every statute that shares those features to make clear that none of them can stand.

For these reasons, this Court has recognized a right that invalidates the sentencing guidelines’ residual clause. It follows that Mr. Greer’s post-conviction motion

is timely under § 2255(f)(3). It likewise follows that the sentencing guidelines' residual clause, when applied in a mandatory way, is unconstitutionally vague.

II. Numerous Offenders Remain Imprisoned as a Result of the Mandatory Career-Offender Guideline.

Although the sentencing guidelines are no longer mandatory, and the Sentencing Commission recently deleted the residual clause from the guidelines, the question presented remains important because many defendants remain imprisoned under the mandatory career-offender guideline.

The mandatory career-offender guideline required a sentence of between 30 years and life imprisonment for a defendant sentenced for a crime with a statutory maximum of life imprisonment. *See* U.S.S.G. § 4B1.1(b)(A). Defendants convicted of such commonly-prosecuted offenses as kidnapping,⁴ sexual assault,⁵ and large-scale drug trafficking⁶ may have received such a sentence under the career-offender guideline. In addition, the mandatory career-offender required a sentence of between 22 and 27 years for a defendant sentenced for a crime with a statutory maximum of at least 25 years' imprisonment. Defendants convicted of such commonly-prosecuted offenses as aggravated bank robbery,⁷ aggravated robbery of mail or United States

⁴ 18 U.S.C. § 1201(a).

⁵ 18 U.S.C. § 2241.

⁶ 21 U.S.C. § 841(b).

⁷ 18 U.S.C. § 2113(d).

property,⁸ and small-scale drug trafficking⁹ may have received such a sentence under the career-offender guideline.

Due to its severity, numerous defendants sentenced before this Court's 13-year-old decision in *Booker*, which made the sentencing guidelines advisory, remain imprisoned under the mandatory career-offender guideline. Indeed, the petitioner in a related case has estimated that more than a thousand defendants remain in prison under the mandatory career-offender guideline—and many of those would have been sentenced under the residual clause. *See* Reply to the Br. in Opp., *Allen v. United States*, No. 17-5684, App'x at A-1–A-7. In short, the questions presented affects a large class of cases and warrants this Court's attention.

III. If This Court Declines to Grant Plenary Review, It Should Vacate and Remand for Further Proceedings in Light of *Sessions v. Dimaya*.

The Tenth Circuit decided this case before this Court issued *Session v. Dimaya*. As explained above, *Dimaya's* application of *Johnson* to § 16(b) makes untenable the Tenth Circuit's holding that *Johnson* is strictly limited to the ACCA. Accordingly, should this Court decline to grant plenary review, it should grant certiorari, vacate the decision below, and remand for further proceedings in light of *Dimaya*.

⁸ 18 U.S.C. § 2114(a).

⁹ 21 U.S.C. § 841(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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