853(p) authorizes courts to order the forfeiture of substitute property only where property "described in [Section 853(a)]" is rendered unavailable "as a result of any act or omission of the defendant." 21 U.S.C § 853(p). Framed in the past tense, this provision means that a forfeiture order covering substitute property may issue only upon a showing, after conviction, that directly forfeitable assets have been rendered unavailable. *See Jarvis*, 499 F.3d at 1204 (explaining that Section 853(p) "imposes specific preconditions on the government's ability to claim title to the defendant's substitute property, preconditions which can only be satisfied once the defendant has been convicted").

In sum, the Supreme Court has signaled that there is a firm distinction between the government's authority to restrain tainted and untainted assets in construing Section 853 and related restraint provisions. Consistent with this important distinction, when Congress intends to permit the government to restrain both tainted and untainted assets before trial, it has clearly provided for such authority. Lacking such express authorization, Section 853(e) does not by its terms permit pretrial restraint of substitute assets.

III.

In reevaluating our existing precedent, we are mindful of the deference owed to our colleagues and predecessors, whose carefully reasoned conclusions we are called upon to scrutinize. In the nearly three decades since *Billman* was decided, however, federal courts have continued to explore the constitutional and statutory limitations of the government's authority to restrain the property of those who stand accused of violating federal law. With the benefit of these continuing developments, as well as the most recent pronouncements of the Supreme Court and the government's own evolving views, it is now apparent that our existing precedent construing Section 853 cannot be maintained and that reconsideration of our minority rule is appropriate.

By its plain text, Section 853(e) permits the government to obtain a pretrial restraining order over only those assets that are directly subject to forfeiture as property traceable to a charged offense. Consequently, our precedents to the contrary are overruled and the district court's order relying on those authorities is *VACATED*.

UNITED STATES of America, Plaintiff–Appellee,

v.

Thilo BROWN, Defendant–Appellant.

No. 16-7056

United States Court of Appeals, Fourth Circuit.

Argued: May 11, 2017

Decided: August 21, 2017

Background: Federal inmate filed motion to vacate, set aside, or correct sentence. The United States District Court for the District of South Carolina, 2:02-cr-00519-PMD-1; 2:16-cv-268-PMD, Patrick Michael Duffy, Senior Judge, dismissed motion, and inmate appealed.

Holding: The Court of Appeals, Duncan, Circuit Judge, held that Supreme Court's decision in *Johnson v. United States* did not start new one-year period for filing § 2255 motion to vacate.

Affirmed.

Gregory, Chief Judge, dissented and filed opinion.

1. Criminal Law ⚿1586

Courts will consider defendant's § 2255 motion to vacate to be timely if (1) he relies on right recognized by Supreme Court after his judgment became final, (2) he files motion within one year from date on which right asserted was initially recognized by the Supreme Court, and (3) Supreme Court or Court of Appeals has made right retroactively applicable. 28 U.S.C.A. § 2255(f).

2. Statutes ⚿1091

On any question of statutory interpretation, court's analysis begins with statute's plain language.

3. Criminal Law ⚿1586

Supreme Court case has "recognized" asserted right, thereby giving rise to right to seek post-conviction relief for violation of that right, and commencing one-year limitations period for seeking relief, if it has formally acknowledged that right in definite way, but if existence of right remains open question as matter of Supreme Court precedent, then Supreme Court has not "recognized" that right. 28 U.S.C.A. § 2255(f)(3).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⚿1586

Supreme Court's decision in *Johnson v. United States* invalidating Armed Career Criminal Act's (ACCA) residual clause did not recognize due process right for defendant to have his guidelines' range calculated without reference to allegedly vague Sentencing Guidelines' career-offender residual clause, and thus did not start new one-year period for defendant to file § 2255 motion to vacate for violation of that right. U.S. Const. Amend. 5; 28 U.S.C.A. § 2255(f)(3); U.S.S.G. §§ 4B1.1(a), 4B1.2(a).

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(e)(2)(B)(ii)

Appeal from the United States District Court for the District of South Carolina at Charleston. Patrick Michael Duffy, Senior U. S. District Court Judge. (2:02-cr-00519-PMD-1; 2:16-cv-268-PMD)

ARGUED: Alicia Vachira Penn, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, South Carolina, for Appellant. William Camden Lewis, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee. ON BRIEF: Beth Drake, United States Attorney, Columbia, South Carolina, Marshall Taylor Austin, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina, for Appellee.

Before GREGORY, Chief Judge, and DUNCAN and DIAZ, Circuit Judges

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Diaz joined. Chief Judge Gregory wrote a dissenting opinion.

DUNCAN, Circuit Judge:

Petitioner-Appellant Thilo Brown appeals the district court's order dismissing his 28 U.S.C. § 2255 motion. This court granted Petitioner a certificate of appealability on the issue of whether, in light of *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), his prior South Carolina conviction for assault on a police officer while resisting arrest, S.C. Code Ann. § 16-9-320(B) ("Resisting-Arrest Assault Conviction"), qualifies as a

predicate "crime of violence" for career-offender status under the Sentencing Guidelines, U.S.S.G. §§ 4B1.1(a), 4B1.2(a) (2002). For the reasons that follow, we affirm the district court.

Petitioner can succeed only if, inter alia, a Supreme Court precedent has rendered his motion timely by *recognizing* a new right entitling him to relief. 28 U.S.C. § 2255(f)(3). As the dissent acknowledges, neither *Johnson*, nor *Beckles*, nor any other Supreme Court case has recognized the specific right on which Brown seeks to rely.[1] *See Johnson*, 135 S.Ct. at 2555–56, 2560, 2563; *Beckles*, —— U.S. ——, 137 S.Ct. 886, 895, 197 L.Ed.2d 145 (2017); *see also id.* at 903 n.4 (Sotomayor, J., concurring). With respect for its view, we are constrained by the Antiterrorism and Effective Death Penalty Act (AEDPA) jurisprudence from extrapolating beyond the Supreme Court's holding to apply what we view as its "reasoning and principles" to different facts under a different statute or sentencing regime. We are thus compelled to affirm the dismissal of Petitioner's motion as untimely under 28 U.S.C. § 2255(f)(3).

I.

A.

On March 19, 2003, Petitioner pleaded guilty to possession with intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(iii) ("Drug Offense"), and to carrying a firearm during the commission of a drug crime in violation of 18 U.S.C. § 924(c) ("Firearm Offense"). J.A. 83. At sentencing, the district court designated Petitioner a career offender under U.S.S.G. § 4B1.1(a) (2002) because he had a prior felony conviction that qualified as a predicate controlled-substance offense,[2] and his prior Resisting-Arrest Assault Conviction qualified as a predicate crime-of-violence offense. J.A. 90, 91; U.S.S.G. § 4B1.2(a) (2002). Because the district court sentenced Petitioner on July 14, 2003, before *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), Petitioner's career-offender status resulted in a mandatory guideline range of 262–327 months for the Drug Offense and a minimum consecutive sentence of sixty months for the Firearm Offense.[3] J.A. 89–02. Petitioner received a total sentence of 322 months—the low end of the guidelines' range for both offenses and well within the range of permissible statutory sentences that the district court could have imposed. J.A. 8–9. The district court entered judgment against Petitioner on July 21, 2003. J.A. 8–9. Petitioner did not appeal.

B.

On June 26, 2015—after Petitioner's conviction became final for purposes of direct review, but before Petitioner filed any 28 U.S.C. § 2255 motion—the Supreme Court decided *Johnson*. 135 S.Ct. at

1. The dissent specifically recognizes that *Beckles* leaves open the question of whether *Johnson* applies under a mandatory-guidelines regime and quotes from Justice Sotomayor's concurring opinion in *Beckles* to that effect. *See infra* at 309. If a question is expressly left open, then the right, *by definition*, has not been recognized.

2. Petitioner stipulated in his plea agreement that he had a prior felony drug conviction for trafficking crack cocaine, and agreed not to contest the government's filing of an information, rendering him subject to a mandatory minimum sentence of 20 years (240 months) for his Drug Offense. 21 U.S.C. § 851.

3. The Firearm Offense carried a mandatory minimum penalty of five years to life imprisonment, to run consecutively to any other term of imprisonment imposed. 18 U.S.C. § 924(c); J.A. 79–80, 90.

2555. In *Johnson*, the Court held that ACCA's residual clause was void for vagueness. *Id.* at 2560, 2563.[4]

On January 28, 2016, Petitioner filed a 28 U.S.C. § 2255 motion to vacate his sentence. Relying on *Johnson*, Petitioner argued that his prior Resisting-Arrest Assault Conviction could no longer serve as a predicate crime of violence under U.S.S.G. § 4B1.2(a) (2002), and therefore, his earlier designation as a career offender was unjustified. J.A. 19–23, 45–54. Petitioner's argument rested on the premise that *Johnson*'s holding invalidated not only ACCA's residual clause, but also like-worded residual clauses in the Sentencing Guidelines. On June 17, 2016, the district court dismissed Petitioner's motion with prejudice and declined to issue a certificate of appealability. J.A. 37–44. Petitioner appealed and moved for a certificate of appealability on August 5, 2016. On December 7, 2016, this court granted Petitioner a certificate of appealability on the issue of whether his prior Resisting-Arrest Assault Conviction qualifies as a predicate offense for career-offender status in light of *Johnson*.[5]

II.

On appeal, Petitioner relies on 28 U.S.C. § 2255(f)(3) to render his motion timely. Under § 2255(f)(3), a petitioner can file a § 2255 motion relying on a right newly recognized by the Supreme Court provided that, inter alia, he files within a one-year window running from "the date on which the right asserted was initially recognized by the Supreme Court." *Id.* § 2255(f)(3).

Petitioner acknowledges, as he must, that the Supreme Court's recent holding in *Beckles*, forecloses his argument that *Johnson* explicitly invalidated all residual clauses with wording similar to ACCA's invalidated residual clause. Petitioner nevertheless urges this court to extrapolate a recognized right from *Booker*, *Johnson*, and *Beckles*, read together. Petitioner and the dissent maintain that we can find his asserted right in the principles animating these decisions even though none of them, nor any other Supreme Court precedent, have recognized a right to challenge the pre-*Booker* mandatory Sentencing Guidelines as void for vagueness and despite the fact that the *Beckles* Court expressly declined to address the issue of whether the pre-*Booker* mandatory Sentencing Guidelines are amenable to void-for-vagueness challenges. *See Beckles*, 137 S.Ct. at 895; *see also id.* at 903 n.4 (Sotomayor, J., concurring).

4. ACCA imposes a statutorily mandated 15-year minimum prison term for a person who violates 18 U.S.C. § 922(g) and has three previous convictions that qualify as either a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e)(1). Prior to *Johnson*, a crime qualified as a "violent felony" under ACCA's residual clause if it "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii).

5. Although Petitioner raised other arguments for vacating his sentence before the district court, we only granted a certificate of appealability as to whether his prior Resisting-Arrest Assault Conviction qualifies as a predicate offense for career-offender status in light of *Johnson*. If we were inclined to agree with Petitioner's argument that his prior conviction did not qualify under the applicable residual clause, U.S.S.G. § 4B1.2(a)(2) (2002), we would normally have to decide whether his prior conviction would nevertheless qualify as a predicate career-offender conviction under the applicable force clause, U.S.S.G. § 4B1.2(a)(1) (2002). However, before oral argument, the government withdrew its argument that Petitioner's prior Resisting-Arrest Assault Conviction qualifies as a predicate offense for career-offender status under the applicable force clause. Beth Drake, Letter to the Fourth Circuit (May 8, 2017). Therefore, the success of Petitioner's appeal rises and falls on his residual-clause argument.

We review de novo the question presented on appeal. *See United States v. Diaz-Ibarra*, 522 F.3d 343, 347 (4th Cir. 2008); *United States v. Thompson*, 421 F.3d 278, 280–81 (4th Cir. 2005). As explained below, because of the procedural posture we are compelled to affirm.

A.

[1, 2] In accordance with Congress's intent to limit the number of collateral-review cases before federal courts and to respect the finality of convictions, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.) ("AEDPA"), provides for a one-year statute of limitations for § 2255 motions. 28 U.S.C. § 2255(f). Normally, for a motion to be timely under § 2255(f), a petitioner must file for relief within one year of the date that his judgment of conviction becomes final. *See id.* § 2255(f)(1); *Clay v. United States*, 537 U.S. 522, 525, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). However, under § 2255(f)(3), courts will consider a petitioner's motion timely if (1) he relies on a right recognized by the Supreme Court after his judgment became final, (2) he files a motion within one year from "the date on which the right asserted was initially recognized by the Supreme Court," 28 U.S.C. § 2255(f)(3), and (3) the Supreme Court or this court has made the right retroactively applicable. *See Dodd v. United States*, 545 U.S. 353, 358–59, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005); *United States v. Mathur*, 685 F.3d 396, 397–98 (4th Cir. 2012); *United States v. Thomas*, 627 F.3d 534, 536–37 (4th Cir. 2010). Although this court can render a right retroactively applicable, only the Supreme Court can *recognize* a new right under § 2255(f)(3). *See Dodd*, 545 U.S. at 357–59, 125 S.Ct. 2478; *Thomas*, 627 F.3d at 536–37; *see also Mathur*, 685 F.3d at 399–401. Consequently, to find Petitioner's motion timely, we must conclude that it relies on a right "recognized" in *Johnson* or another more recent Supreme Court case. *See Dodd*, 545 U.S. at 357–59, 125 S.Ct. 2478; *see also Mathur*, 685 F.3d at 399–401. "As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009).

[3] To "recognize" something is (1) "to acknowledge [it] formally" or (2) "to acknowledge or take notice of [it] in some definite way." *Recognize*, Merriam-Webster Tenth Collegiate Dictionary 976 (1996); *see also Tapia v. United States*, 564 U.S. 319, 327, 131 S.Ct. 2382, 180 L.Ed.2d 357 (2011). Thus, a Supreme Court case has "recognized" an asserted right within the meaning of § 2255(f)(3) if it has formally acknowledged that right in a definite way. *Cf. Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (interpreting the phrase "clearly established Federal law, as determined by the Supreme Court" within another provision of AEDPA to mean "the holdings, as opposed to the dicta" of Supreme Court precedent). Correspondingly, if the existence of a right remains an open question as a matter of Supreme Court precedent, then the Supreme Court has not "recognized" that right. *Cf. Tyler v. Cain*, 533 U.S. 656, 662–64, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (interpreting the word "made" within another provision of AEDPA—"made retroactive to cases on collateral review by the Supreme Court"—to mean "held").

B.

[4] We now turn to the right Petitioner claims the Supreme Court recognized in *Johnson*. Petitioner's motion relies on a claimed due-process right to have his

guidelines' range calculated without reference to an allegedly vague Sentencing Guidelines' provision, despite the fact that the district court imposed his sentence within permissible statutory limits. Regrettably for Petitioner, the Supreme Court did not recognize such a right in *Johnson*. While *Johnson* did announce a retroactively applicable right, *Welch v. United States*, —— U.S. ——, 136 S.Ct. 1257, 1265, 194 L.Ed.2d 387 (2016), *Johnson* dealt only with the residual clause of ACCA—a federal enhancement statute, *Johnson*, 135 S.Ct. at 2555–56. *Johnson* did not discuss the mandatory Sentencing Guidelines' residual clause at issue here or residual clauses in other versions of the Sentencing Guidelines. *See id.* at 2555–56.

C.

Petitioner urges this court to cobble together a right by combining *Johnson*'s reasoning with that of two other Supreme Court cases, *Booker* and *Beckles*. Petitioner's three-case extrapolation begins with the unobjectionable premise that *Booker* recognized a constitutional distinction between mandatory Sentencing Guidelines and advisory Sentencing Guidelines. *Booker*, 543 U.S. at 245, 125 S.Ct. 738. Moving on from *Booker*, Petitioner argues that the mandatory Sentencing Guidelines cabined a sentencing judge's discretion in a manner that raises the same concerns animating the Supreme Court's decision in *Johnson*: denying fair notice to defendants and inviting arbitrary enforcement by judges. *Johnson*, 135 S.Ct. at 2557. To prove this point, Petitioner points to several related cases in the lower courts, which he claims serve as evidence that "the mandatory Guidelines look and act like the ACCA." Reply Br. at 18. Finally, Petitioner points out that the *Beckles* Court carefully limited its holding to the *advisory* Sentencing Guidelines, thus, in his view, leaving open the question of whether defendants could challenge sentences imposed under the mandatory Sentencing Guidelines as void for vagueness. *Beckles*, 137 S.Ct. at 895; *see also id.* at 903 n.4 (Sotomayor, J., concurring).

Yet Petitioner's argument is self-defeating. If the Supreme Court left open the question of whether Petitioner's asserted right exists, the Supreme Court has not "recognized" that right. *See supra* Part II.A.

While the residual clause at issue here mirrors the residual clause at issue in *Johnson*, the *Beckles* Court made clear that the right announced in *Johnson* did not automatically apply to all similarly worded residual clauses. *See Beckles*, 137 S.Ct. at 890; *see also United States v. Mack*, 855 F.3d 581, 585 (4th Cir. 2017). *Beckles* specifically held that *Johnson* failed to invalidate the advisory Sentencing Guidelines' former definition of "crime of violence," U.S.S.G. § 4B1.2(a)(2) (2006), which was "identically worded" to ACCA's residual clause. *Beckles*, 137 S.Ct. at 890. As Petitioner himself points out, the *Beckles* Court carefully crafted its holding to avoid deciding whether the logic of *Johnson* applied outside the context of ACCA. *See id.*; *see also Mack*, 855 F.3d at 585. Hence, *Beckles* confirms that the Supreme Court has yet to recognize a broad right invalidating all residual clauses as void for vagueness simply because they exhibit wording similar to ACCA's residual clause.[6]

6. Prior to *Beckles*, the majority of circuits held that *Johnson*'s holding extended to like-worded residual clauses in versions of the advisory Sentencing Guidelines, *see Beckles*, 137 S.Ct. at 892 n.2 (surveying cases), but *Beckles* ultimately reached the contrary conclusion, *id.* at 890 ("This Court held in *Johnson* ... that the identically worded residual

In short, Petitioner's cited cases do not recognize, and the dissent does not point to, any right helpful to him.[7] *Johnson* only recognized that ACCA's residual clause was unconstitutionally vague, 135 S.Ct. at 2557; it did not touch upon the residual clause at issue here. Likewise, *Beckles* only recognized that the advisory Sentencing Guidelines are not amenable to vagueness challenges. 137 S.Ct. at 895. In a future case, the Supreme Court may agree with an argument similar to Petitioner's that because the challenged residual clause looks like ACCA and operates like ACCA, it is void for vagueness like ACCA. *See id.* at 892 n.2 (noting former circuit split). But *Beckles* demonstrates that quacking like ACCA is not enough to bring a challenge within the purview of the right recognized by *Johnson*. Accordingly, at least for purposes of collateral review, we must wait for the Supreme Court to recognize the right urged by Petitioner. *See Dodd*, 545 U.S. at 359, 125 S.Ct. 2478. We hold that Petitioner raises an untimely motion in light of § 2255(f)(3)'s plain language, the narrow nature of *Johnson*'s binding holding, and *Beckles*'s indication that the position advanced by Petitioner remains an open question in the Supreme Court.

D.

We note as well that our recent decision in *In re Hubbard*, 825 F.3d 225 (4th Cir. 2016), is not to the contrary. The relief sought by the Petitioner contrasts sharply with the relief this court granted to the movant in *Hubbard.* Here, unlike in *Hubbard*, we consider Petitioner's arguments after authorizing this appeal through a certificate of appealability and in a post-*Beckles* world. To grant Petitioner's requested relief we must confront the timeliness issue: whether he can rely on *Johnson* as a rule "recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3).

The threshold certification inquiry in *Hubbard* concerned whether the movant could make a prima facie showing that his application relied 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); *see also id.* § 2244(b)(3)(C); *In re Hubbard*, 825 F.3d at 228; *In re Vassell*, 751 F.3d 267, 270–71 (4th Cir. 2014). In this circuit, making such a prima facie showing requires the movant to meet a relatively low bar, *In re Hubbard*, 825 F.3d at 231; and this court does not need to reach "the question of the successive motion's timeliness at the gatekeeping stage," *In re Vassell*, 751 F.3d at 271.

Consistent with what is required of this court at the 28 U.S.C. § 2255(h)(2) stage, we did not consider the timeliness of the movant's underlying merits argument. Instead we assumed, prior to the Supreme Court's resolution of *Beckles*, that disagreement among the federal courts of

clause in the [ACCA] was unconstitutionally vague. Petitioner contends that the [advisory] Guidelines' residual clause is also void for vagueness. Because we hold that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.'').

7. Petitioner's motion would also be untimely to the extent it relies on the general principles of due-process jurisprudence noted in *Johnson,* principles recognized long before *Johnson* which provide too broad a standard to constitute a right or rule in other similar contexts. *Cf. Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (noting, for qualified-immunity purposes, that requiring a clearly established rule ''depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified,'' and explaining that the right to ''due process of law'' is too abstract to provide a workable standard in every case); *Chaidez v. United States,* 568 U.S. 342, 347–48, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013).

appeals on *Johnson*'s application to other residual clauses was "likely . . . enough to establish that [the petitioner] has made 'a sufficient showing of possible merit to warrant a fuller exploration by the district court,' . . . confirmed by [this court's] own 'glance' at the government's merits arguments." *In re Hubbard*, 825 F.3d at 232 (internal citation omitted).

Today's narrow holding, like the holding of *Hubbard*, is compelled by this case's procedural posture. Had this case come before us on direct appeal, we might have had the inferential license necessary to credit Petitioner's interpretations of the negative implications found in *Booker*, *Johnson*, and *Beckles*. Unfortunately for Petitioner, we must consider his argument through the narrow lens that § 2255(f) affords this court on collateral review.

III.

We are constrained from reading between the lines of *Booker*, *Johnson*, and *Beckles* to create a right that the Supreme Court has yet to recognize. We are compelled to affirm because only the Supreme Court can recognize the right which would render Petitioner's motion timely under § 2255(f)(3).

AFFIRMED

GREGORY, Chief Judge, dissenting:

To take advantage of 28 U.S.C. § 2255(f)(3), a petitioner must first assert a right newly recognized by the Supreme Court. The majority reads this to mean that a petitioner must assert the right as expressed in the Supreme Court's narrow holding newly recognizing that right, and where the four corners of that holding do not encompass the precise facts underlying a petitioner's claim, § 2255(f)(3) is not satisfied. But § 2255(f)(3) contains no such requirement, and in my view, a newly recognized right is more sensibly read to include the reasoning and principles that explain it. And where a petitioner asserts *that* right, with all its contours and complexities, I would find that he or she satisfies § 2255(f)(3).

In *Johnson*, the Supreme Court recognized a defendant's right not to have his or her sentence fixed by the application of the categorical approach to an imprecise and indeterminate sentencing provision, and it struck down the ACCA's residual clause as inconsistent with that newly recognized right. Because Brown asserts that same right, I would find his petition timely under § 2255(f)(3), even though his challenge is to the residual clause under the mandatory Sentencing Guidelines, rather than the ACCA. I would further find that *Johnson* compels the conclusion that the residual clause under the mandatory Guidelines is unconstitutionally vague, and I would grant Brown's petition and remand for resentencing. Accordingly, I must respectfully dissent.

I.

On March 19, 2003, Brown pleaded guilty to possession with intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii), and to carrying a firearm during the commission of a drug crime, in violation of 18 U.S.C. § 924(c). J.A. 11. The presentence investigation report ("PSR") indicated that Brown was eligible for the career-offender enhancement under the mandatory Sentencing Guidelines, based on his prior felony convictions for drug trafficking and assault on a police officer while resisting arrest. J.A. 90. The PSR assigned Brown an offense level of 34, J.A. 90, and a criminal history category of VI, J.A. 96. According to the PSR, Brown's mandatory Guidelines range was therefore 262–327 months in prison for the drug

charge, and 60 months to life for the firearm charge, to run consecutively to any other term of imprisonment. J.A. 102.

The district court adopted the PSR's factual findings and Guideline applications, and on July 14, 2003, sentenced Brown to 322 months in prison. Brown's sentence consisted of 262 months for the drug charge and 60 months for the firearm charge. J.A. 8–9. Brown did not appeal his sentence.

On January 28, 2016—more than twelve years later—Brown filed a 28 U.S.C. § 2255 motion to vacate his sentence. J.A. 19–23. He argued that the Supreme Court's June 26, 2015 decision in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), rendered his motion timely because he was asserting *Johnson*'s newly recognized right—made retroactively applicable on collateral appeal—within one year of the Court's recognition of that right. *See* 28 U.S.C. § 2255(f)(3). In *Johnson*, the Court held that the ACCA's residual clause was unconstitutionally vague. Brown argued that the identically worded provision in § 4B1.2(a)(2) of the mandatory Sentencing Guidelines was therefore also void for vagueness. J.A. 20. And, he contended, because his assault conviction did not constitute a crime of violence under the Guidelines' force clause and was not an enumerated offense—the only other avenues for categorizing a prior offense as a crime of violence—his conviction did not qualify as a crime of violence under the mandatory Guidelines. J.A. 20–22.[1] He further argued that his felony conviction for drug trafficking was not a controlled substance offense. J.A. 22. Brown argued that in light of these errors, he should not have been designated a career offender under the mandatory Sentencing Guidelines and was entitled to resentencing.

The district court did not address whether Brown's argument regarding the assault claim was timely in light of *Johnson*, but instead went directly to the merits of the claim. J.A. 38. The court concluded that because Brown's assault conviction qualified as a crime of violence under the Guidelines' force clause, it did not need to reach the question of whether the conviction was a crime of violence under the Guidelines' residual clause—or whether the residual clause was still valid in light of *Johnson*. J.A. 40. And, the court found, Brown's argument that his drug trafficking conviction was not a controlled substance offense was "not based at all on *Johnson*," but rather was "simply an unrelated claim that this Court erred when it sentenced Brown in 2003." J.A. 42. The court stated that Brown could not "use *Johnson* to revive an untimely, unrelated claim," and it rejected his drug trafficking claim without discussing the merits. J.A. 42. The court dismissed Brown's § 2255 motion with prejudice and declined to grant a certificate of appealability ("COA"). J.A. 43. Brown timely appealed and moved for a COA.

1. Under the mandatory Sentencing Guidelines, § 4B1.2(a) reads in full:

> 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 as 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 use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

U.S. Sentencing Guidelines Manual § 4B1.2(a) (U.S. Sentencing Comm'n 20002) (emphasis added). Section 4B1.2(a)(1) is the force clause, and § 4B1.2(a)(2) consists of the enumerated-offense and residual clauses, with the residual clause denoted above in italics.

This Court subsequently granted Brown a COA "on the issue of whether assault on a police officer while resisting arrest under South Carolina law qualifies as a predicate offense for career offender status in light of *Johnson v. United States*." Order, *United States v. Thilo Brown*, No. 16-7056 (4th Cir. Dec. 7, 2016), ECF No. 14.[2]

II.

As the majority recognizes, a threshold issue for this Court is whether Brown's § 2255 petition is timely. Under 28 U.S.C. § 2255(f)(1), a petitioner has one year from the date that his or her judgment of conviction becomes final to attack the corresponding sentence. Because Brown's judgment of conviction has been final for more than a decade, to bring a § 2255 petition, he must satisfy one of § 2255(f)'s other conditions for restarting the limitations period. Here, he relies on § 2255(f)(3), which permits a § 2255 petition that "assert[s] . . . a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" within one year of the Supreme Court's recognition of the right. 28 U.S.C. § 2255(f)(3); *see also Dodd v. United States*, 545 U.S. 353, 357–58, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005) (describing § 2255(f)(3) as requiring that "(1) the right asserted by the applicant was initially recognized by this Court; (2) this Court newly recognized the right; and (3) a court must have made the right retroactively applicable to cases on collateral review" (internal quotation marks omitted)). Brown argues that his § 2255 petition is timely because he filed it within one year of the Supreme Court's decision in *Johnson*, which the Court subsequently held retroactively applicable to cases on collateral review in *Welch v. United States*, —— U.S. ——, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). I agree, and unlike the majority, I would find Brown's petition timely.

It is well-settled in this Circuit that the *Johnson* Court recognized a new constitutional rule, and that the *Welch* Court made that rule retroactively applicable to cases on collateral review. *In re Hubbard*, 825 F.3d 225, 228 (4th Cir. 2016) ("*Johnson* announced a new rule of constitutional law that the Supreme Court made retroactive . . . .").[3] And it is undisputed that Brown filed his § 2255 motion within one year of *Johnson* and *Welch*. The only question for this Court's timeliness inquiry, then, is whether Brown *is asserting* that particular right in his § 2255 petition. Or, said another way, the question is whether *Johnson* newly recognized a right that would permit Brown to collaterally attack, through § 2255(f)(3), the constitutionality of his sentence, which was enhanced under the residual clause in the mandatory Sentencing Guidelines. A logical starting point for the analysis is therefore the contours

2. Because we granted a COA only as to Brown's argument regarding his assault conviction, the question of whether his South Carolina drug trafficking conviction constitutes a controlled substance offense under the Guidelines is not before this Court.

3. Although the *Welch* Court describes *Johnson* as newly recognizing a "rule," rather than a "right," courts, including this one, use the terms interchangeably. *See, e.g., United States v. Powell*, 691 F.3d 554 (4th Cir. 2012) (calling it "well settled" that the analysis in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), which discusses what constitutes a newly recognized *rule*, governs whether a new *right* is retroactively applicable under § 2255(f)(3)). And courts have described *Johnson* as recognizing a new "right" for purposes of § 2255(f)(3). *See, e.g., Holt v. United States*, 843 F.3d 720, 723 (7th Cir. 2016) (stating that in *Welch*, the Court "newly recognized the *right* [in *Johnson*] to be retroactive" (emphasis added)). Therefore, I use "rule" and "right" interchangeably.

of the right that the Supreme Court newly recognized in *Johnson*.

A.

In *Johnson*, the Supreme Court held that the ACCA's residual clause was unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. *Johnson*, 135 S.Ct. at 2555–57. It based its holding on the principle that "the Government violates [due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," *id.* at 2556, finding that this principle applies to "statutes fixing sentences" just as it applies to "statutes defining elements of crimes," *id.* at 2557.

The ACCA's residual clause defined a violent felony as "any crime punishable by imprisonment for a term exceeding one year" that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). To determine whether a particular crime qualified as a violent felony under the ACCA's residual clause, courts had to use the "categorical approach" to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction present[ed] a serious potential risk of physical injury." *Johnson*, 135 S.Ct. at 2557 (quoting *James v. United States*, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), *overruled by Johnson*, 135 S.Ct. 2551). According to the *Johnson* Court, this inquiry "le[ft] grave uncertainty about how to estimate the risk posed by a crime" and "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* "The residual clause," the Court concluded, "offer[ed] no reliable way to choose . . . what [an] 'ordinary' [non-enumerated crime] involves." Even more, said the Court, "the residual clause le[ft] uncertainty about how much risk it takes for a crime to qualify as a violent felony" by requiring courts "to apply an imprecise 'serious potential risk' standard . . . to a judge-imagined abstraction." *Id.* at 2558. In light of this, the Court held that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," and thus, "[i]ncreasing a defendant's sentence under the clause denies due process of law." *Id.* at 2557.

In *Welch*, the Court held that *Johnson* is a substantive decision that is retroactively applicable to cases on collateral review. 136 S.Ct. at 1265. Discussing *Johnson*'s holding, the *Welch* Court explained that "[t]he vagueness of the residual clause rests in large part on its operation under the categorical approach, . . . because applying [the residual clause's serious potential risk] standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Id.* at 1262. And because *Johnson* struck down the ACCA's residual clause as void for vagueness, the clause "can no longer mandate or authorize any sentence," explained the *Welch* Court. *Id.* at 1265. "*Johnson* establishes, in other words, that 'even the use of impeccable factfinding procedures could not legitimate' a sentence based on that clause." *Id.* (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971)). In sum, *Johnson* and *Welch* established that a defendant's due process rights are violated when a court, using the categorical approach, fixes that defendant's sentence based on a statute that fails to provide proper notice of what constitutes criminal

conduct and requires courts to apply imprecise and indeterminate standards. *See id*; *see also Johnson*, 135 S.Ct. at 2557.

Subsequently, in *Beckles v. United States*, —— U.S. ——, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017), the Supreme Court sharpened the focus on this newly recognized right. There, the defendant filed a § 2255 motion to vacate his sentence on the grounds that after *Johnson*, the residual clause in the advisory Guidelines' definition of crime of violence was void for vagueness. *Id.* at 891.[4] The Court, relying heavily on the distinction between the advisory and mandatory Guidelines, held that "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause." *Id.* at 890. This is because the advisory Guidelines "merely guide the district court's discretion," the Court explained, and "[u]nlike the ACCA, ... the advisory Guidelines do not fix the permissible range of sentences." *Id.* at 892. "Rather, the Guidelines advise sentencing courts how to exercise their discretion within the bounds established by Congress." *Id.* at 895. Accordingly, the Court observed, "'[t]he due process concerns that ... require notice in a world of mandatory Guidelines no longer' apply." *Id.* at 894 (alterations in original) (quoting *Irizarry v. United States*, 553 U.S. 708, 714, 128 S.Ct. 2198, 171 L.Ed.2d 28 (2008)).

The *Beckles* Court thus excluded from the scope of *Johnson*'s rule those sentencing provisions that advise, but do not bind, a sentencing court. But in so doing, the Court did not disturb *Johnson*'s holding that where a vague sentencing provision operates to *fix* a defendant's sentence under the categorical approach, it *is* susceptible to attack under the Due Process Clause. Indeed, Justice Sotomayor, concurring in the judgment, noted that the majority opinion "at least leaves open the question whether defendants sentenced ... during the period in which the Guidelines *did* fix the permissible range of sentences ... may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring in the judgment) (internal citations and quotation marks omitted).[5] Thus, the decision in *Beckles*, while shrinking the universe of sentencing provisions susceptible to attack on vagueness grounds, reinforced that a defendant has the due process right—as newly recognized in *Johnson*—not to have his sentence fixed by the application of the categorical approach to an imprecise and indeterminate sentencing provision.

With the scope of *Johnson*'s right in mind, I next consider whether Brown can rely on that right to render his § 2255 motion timely.

4. Beckles's § 2255 motion was timely because he brought it within one year of the date on which his conviction became final. *See* 28 U.S.C. § 2255(f)(1); *see also Beckles*, 137 S.Ct. at 891; *United States v. Beckles*, 565 F.3d 832 (11th Cir. 2009), *cert. denied*, 558 U.S. 906, 130 S.Ct. 272, 175 L.Ed.2d 183 (2009). Therefore, he did not need to demonstrate—nor did the Supreme Court need to consider—whether *Johnson* newly recognized a right that would allow Beckles to collaterally attack his advisory Guidelines sentence pursuant to 28 U.S.C. § 2255(f)(3).

5. The majority reads Justice Sotomayor's statement to mean that the question of whether the *Johnson* Court newly recognized a right applicable to a challenge to the mandatory Guidelines is still open. *See* Maj. Op. at 299 n.1, 300, 302. But Justice Sotomayor, in her concurrence, suggested only that the *merits* of such a challenge have not yet been decided. And she noted that the majority's decision in *Beckles* did not foreclose such a challenge. But she said nothing of timeliness under § 2255(f)(3), or whether the Court's *Beckles* decision would in any way undermine a petitioner's ability to bring a § 2255(f)(3) petition challenging the mandatory Guidelines in light of the right newly recognized in *Johnson*.

B.

Brown contends that because the mandatory Sentencing Guidelines' residual clause is identical in text to the ACCA's residual clause, enhancements under both clauses were applied using the categorical approach, and the clauses were similarly used to fix, rather than advise, applicable sentencing ranges, he can rely on the right newly set forth in *Johnson* to challenge his career-offender status under the mandatory Guidelines. I consider his arguments in turn.

First, it is undisputed that the text of the residual clause under the mandatory Guidelines is identical to the text of the ACCA's residual clause. Both definitions include felonies that "involve[ ] conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2); 18 U.S.C. § 924(e)(2)(B)(ii). Section 4B1.2(a)(2)'s text therefore supports Brown's argument that *Johnson*'s newly recognized right is applicable to a challenge to § 4B1.2(a)(2)'s residual clause.

Second, courts applied the categorical approach to both residual clauses. Like courts applying the ACCA, "[i]n determining whether a prior conviction triggers a sentence enhancement under the Sentencing Guidelines, '[courts] approach the issue categorically, looking "only to the fact of conviction and the statutory definition of the prior offense."' " *United States v. Montes-Flores*, 736 F.3d 357, 364 (4th Cir. 2013) (quoting *United States v. Cabrera-Umanzor*, 728 F.3d 347, 350 (4th Cir. 2013)). Accordingly, when courts categorized prior felony convictions as crimes of violence under the mandatory Guidelines' residual clause, they had to engage in the same "arbitrary enforcement," *Johnson*, 135 S.Ct. at 2556, as courts enhancing a sentence under the ACCA's residual clause. This too supports Brown's argument that *Johnson* is applicable to his challenge here.

Finally, like the residual clause at issue in *Johnson*, the mandatory Guidelines' residual clause imposed fixed, rather than advisory, sentencing ranges. When Brown was sentenced, the Supreme Court had not yet decided *United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (establishing Sentencing Guidelines as "effectively advisory"), and the Guidelines were still mandatory, operating like statutes to fix sentences. Before *Booker*, the Guidelines had "the force and effect of laws," *id.* at 234, 125 S.Ct. 738, and were considered indistinguishable from state laws, *id.* at 233, 125 S.Ct. 738 ("[T]here is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)]."). While judges theoretically had the ability to depart from the Guidelines' prescribed range, "departures [were] not available in every case, and in fact [were] unavailable in most." *Id.* at 234, 125 S.Ct. 738.[6] Instead, in most cases, the Guidelines took into account nearly all relevant factors for determining an individual's sentence, such that "no departure [was] legally permissible" and "the judge [wa]s bound to impose a sentence within the Guidelines range." *Id.* Like the ACCA's residual clause, then, the mandatory Guidelines' residual clause bound courts to impose sentences within the prescribed range.

6. Similarly, when district courts fix sentences under the ACCA, they are prohibited from sentencing a defendant below the statutory mandatory minimum, save for the relatively rare cases where the government has filed a substantial assistance motion pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, or where the defendant qualifies for a safety-valve reduction under 18 U.S.C. § 3553(f).

The Court's decision in *Beckles*, while foreclosing void-for-vagueness challenges to the residual clause under the advisory Guidelines, shows that sentencing under the ACCA's residual clause and sentencing under the mandatory Guidelines' residual clause was the same. Indeed, the Court's decision in *Beckles* rested on the distinction between the mandatory and advisory Guidelines, with the advisory nature of the post-*Booker* Guidelines dictating a result different than in *Johnson*. The *Beckles* Court explained that, unlike the ACCA, "[t]he advisory Guidelines . . . do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." *Beckles*, 137 S.Ct. at 894. This is because "even if a person behaves so as to avoid an enhanced sentence under the career-offender guideline, the sentencing court retains discretion to impose the enhanced sentence," *id.*, and the advisory Guidelines only "advise sentencing courts how to exercise their discretion within the bounds established by Congress" and do not " 'establish[ ] minimum and maximum penalties for [any] crime,' " *id.* at 895 (quoting *Mistretta v. United States*, 488 U.S. 361, 396, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)). This is entirely different from the mandatory Guidelines, which "b[ou]nd judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases," *Mistretta*, 488 U.S. at 391, 109 S.Ct. 647, and "ha[d] the force and effect of laws, prescribing the sentences criminal defendants are to receive," *id.* at 413, 109 S.Ct. 647 (Scalia, J., dissenting). The considerations underlining the Court's decision in *Beckles* are simply not implicated here, where the residual clause operated just like a statute to fix Brown's sentence. If anything, then, *Beckles* clarifies *Johnson*'s animating principles and affirms that *Johnson*'s newly recognized right *does* apply to challenges to the residual clause under the mandatory Guidelines. Thus, contrary to the majority's view, Brown need not "cobble together a right by combining these [cases]," Maj. Op. at 302 the right he asserts stems from *Johnson*. *Beckles* and *Booker* merely reinforce that the right newly recognized in *Johnson* is indeed applicable to Brown's claim.

Ultimately, that the residual clause at issue here is contained in the mandatory Sentencing Guidelines, rather than the ACCA, is a distinction without a difference for purposes of this Court's timeliness inquiry. The clauses' text is identical, and courts applied them using the same categorical approach and for the same ends—to fix a defendant's sentence. The right newly recognized in *Johnson* is therefore clearly applicable to Brown's claim, because the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson*. The majority, by finding that a defendant sentenced under a nearly identical provision with nearly identical effects cannot assert the right newly recognized in *Johnson*, unnecessarily tethers that right to the ACCA itself, when the right clearly stems from the due process protections that prohibit such sentencing schemes more generally. This narrow view divests *Johnson*'s holding from the very principles on which it rests and thus unduly cabins *Johnson*'s newly recognized right.

I would find that Brown is asserting the right newly recognized in *Johnson*. And because this Court found that "the rule in *Johnson* is substantive with respect to its application to the [mandatory] Sentencing Guidelines and therefore applies retroactively," *Hubbard*, 825 F.3d at 235, I would find that Brown satisfies all of § 2255(f)(3)'s requirements. I would thus find his petition timely.

III.

Lastly, I would find in favor of Brown on the merits of his claim. As previously discussed, first, the text of § 4B1.2(a)(2)'s residual clause is identical to the text of the ACCA's residual clause, which the Supreme Court held unconstitutionally vague in *Johnson*. Second, courts enhanced sentences under § 4B1.2(a)(2)'s residual clause using the categorical approach, just as they did when enhancing sentences under the ACCA's residual clause. And third, like the ACCA, the mandatory Guidelines fixed minimum and maximum sentences and bound courts to sentence within particular ranges. This case diverges from *Johnson* only because Brown's sentence was enhanced under the mandatory Guidelines, rather than the ACCA, but I can discern no principled reason that such a distinction should dictate an outcome different than in *Johnson*, particularly where the concerns outlined in *Beckles* are not implicated.

As the Court recognized in *Johnson*, defendants have a due process right not to have their sentences enhanced by the application of the categorical approach to an imprecise and indeterminate sentencing provision. 135 S.Ct. at 2558. And as the Court made clear in *Beckles*, when such sentencing provisions set a fixed, rather than advisory, sentence under the categorical approach, they are void for vagueness. *See Beckles*, 137 S.Ct. at 892. Here, the district court applied the categorical approach to § 4B1.2(a)(2)'s residual clause, which fixed Brown's sentencing range—precisely what the *Johnson* Court said runs afoul of the Due Process Clause. These cases therefore compel the conclusion that under the mandatory Guidelines, § 4B1.2(a)(2)'s residual clause is unconstitutionally vague and cannot be the basis for enhancing Brown's sentence.

For all of these reasons, I would grant Brown's § 2255 motion and remand for resentencing.

Lisa ROMAIN; Stacey Gibson; Joanika Davis; Schevelli Robertson; Jericho Macklin; Dameion Williams; Brian Trinchard, Plaintiffs-Appellants

v.

Marketa Garner WALTERS, in her official capacity as Secretary, Department of Children & Family Services, Defendant-Appellee

No. 16-30929

United States Court of Appeals,
Fifth Circuit.

Date Filed: 07/26/2017

Appeal from the United States District Court for the Eastern District of Louisiana

Charles Robert Eskridge, III, Esq., Jonathan Sink, Houston, TX, for Plaintiffs-Appellants.

Celia Marie Williams-Alexander, Esq., Deputy General Counsel, Department of Children & Family Services for State of Louisiana, Baton Rouge, LA, for Defendant-Appellee.

Michael T. Kirkpatrick, Public Citizen Litigation Group, Washington, DC, Amicus Curiae for PUBLIC CITIZEN, INCORPORATED, IMPACT FUND, LEGAL AID SOCIETY EMPLOYMENT LAW CENTER, DISABILITY RIGHTS CALIFORNIA.

Thomas Gregory Jackson, Ann Marie Arcadi, Justin Roel Chapa, Morgan, Lewis

PUBLISHED

FILED: February 26, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-7056
(2:02-cr-00519-PMD-1)
(2:16-cv-00268-PMD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

THILO BROWN

Defendant - Appellant

O R D E R

The court denies appellant's petition for rehearing and rehearing en banc.

Judge Duncan and Judge Diaz voted to deny panel rehearing, and Chief Judge Gregory voted to grant panel rehearing.

A requested poll of the court on the petition for rehearing en banc failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Judge Wilkinson, Judge Niemeyer, Judge Motz, Judge

Traxler, Judge King, Judge Duncan, Judge Agee, Judge Keenan, Judge Wynn, Judge Diaz, Judge Floyd, Judge Thacker and Judge Harris voted to deny rehearing en banc. Chief Judge Gregory voted to grant rehearing en banc and filed a dissenting opinion, which is attached.

Entered at the direction of Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

GREGORY, Chief Judge, dissenting from the denial of rehearing en banc:

I would grant rehearing en banc for the reasons expressed in my dissent to the panel decision. *United States v. Brown*, 868 F.3d 297, 304–11 (4th Cir. 2017) (Gregory, C.J., dissenting). In *Johnson v. United States*, the Supreme Court recognized that defendants have a due process right not to have their sentences fixed by the application of the categorical approach to a vague sentencing provision. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). In *Welch v. United States*, the Court held that *Johnson* announced a new substantive rule with retroactive application. 136 S. Ct. 1257, 1265 (2016). In *United States v. Beckles*, the Supreme Court recognized that *Johnson*'s scope did not extend to advisory sentencing provisions that only *guide* a sentencing court's discretion. 137 S. Ct. 886, 894 (2017). But the Supreme Court did not disturb or redefine the right recognized in *Johnson*: vague sentencing provisions that *fix* a defendant's sentence under the categorical approach violate due process.

Brown's case presents just such a violation. He was sentenced in July 2003, when the Sentencing Guidelines were "mandatory and binding on all judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). Under these Guidelines, he received a career-offender enhancement for a prior conviction that fell within the Guidelines' identically worded residual clause. *Brown*, 868 F.3d at 300 n.5. Pursuant to § 2255(f)(3), Brown filed a habeas petition within one year of *Johnson* and asserted the Supreme Court's newly recognized *Johnson* right to be free from sentences fixed by the unconstitutionally vague residual clause. He argued that *Johnson*'s right also applied to the residual clause of the

pre-*Booker* Guidelines, which used identical language to "fix[]" his sentence. *Johnson*, 135 S. Ct. at 2557. But the majority read *Johnson* too narrowly: Brown's petition was untimely, it concluded, because *Johnson* is limited only to those sentences fixed by the ACCA's residual clause. *Brown*, 868 F.3d at 304.

The majority erroneously conflates the threshold statute-of-limitations inquiry of § 2255(f)(3) with the merits of Brown's claim. To get into court, the petition must be filed within one year of "the date on which the *right asserted* was initially recognized by the Supreme Court." § 2255(f)(3) (emphasis added). It is undisputed that *Johnson* recognizes a new right with retroactive application. *Welch*, 136 S. Ct. at 1265. Brown has asserted that *Johnson*'s new right applies to him and filed his petition within one year of *Johnson*'s publication. And Brown's assertion is eminently reasonable: "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson*." *Brown*, 868 F.3d at 309–10 (Gregory, C.J., dissenting).

Justice Sotomayor's concurrence in *Beckles* is not to the contrary. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). As the First Circuit has recognized, what "*Beckles* left open . . . was a question of statutory interpretation concerning how mandatory the [Sentencing Reform Act] made the guidelines before *Booker*." *Moore v. United States*, 871 F.3d 72, 83 (1st Cir. 2017). This is the merits inquiry—whether the Guidelines' residual clause, when used to fix sentences pre-*Booker*, is void for vagueness. But the statute-of-limitations inquiry cannot be identical to the merits inquiry lest the former

swallow the latter. That the Supreme Court has not issued a formal holding on the merits does not change the fact that Brown has brought within one year a claim that *asserts* the right newly recognized in *Johnson* and made retroactively applicable on collateral review. § 2255(f)(3).

On the merits, I believe that the majority's reading of *Johnson* is too narrow. *Brown*, 868 F.3d at 309–11 (Gregory, C.J., dissenting). Congress used the word "right" instead of "holding" in § 2255 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." *Moore*, 871 F.3d at 82. Supreme Court precedent identifies a new right as one that "breaks new ground or imposes a new obligation," as compared to a case simply "dictated" by existing precedent. *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion)); *see United States v. Powell*, 691 F.3d 554, 557 (4th Cir. 2012) (applying *Teague* when reviewing claim under § 2255(f)(3)); *see generally Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016) (concluding that the *Teague* standard determines what constitutes a "new right" under § 2255(f)(3)). *Johnson* was just such a "new right," breaking "new ground" by concluding that the residual clause is void for vagueness when it serves to "fix[]" a sentence. *Johnson*, 135 S. Ct. at 2557. And because the mandatory Guidelines' identically worded residual clause fixed the sentences of pre-*Booker* career offenders, I would conclude under *Johnson* that it violates due process. *Brown*, 868 F.3d at 309–11 (Gregory, C.J., dissenting).

Ultimately, the constitutionality of pre-*Booker* sentences fixed by the Guidelines' residual clause is a question for the Supreme Court—and one I urge it to answer soon. But the Court today misses an opportunity to provide justice for hundreds of defendants imprisoned because of an unconstitutionally vague sentencing provision.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Thilo Atese Davelle Brown,	)	
	)	
Petitioner,	)	C.A. No.: 2:02-cr-519-PMD
	)	
v.	)	**ORDER**
	)	
United States of America,	)	
	)	
Respondent.	)	
	)	

Petitioner Thilo Brown moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (ECF No. 48). The United States ("Government") has filed a motion to dismiss or, in the alternative, for summary judgment (ECF No. 51). The Court has thoroughly reviewed the record and finds the motions suitable for disposition without an evidentiary hearing. For the reasons set forth herein, the Court grants the Government's motion and, consequently, dismisses Petitioner's motion.

BACKGROUND

In 2003, Brown pled guilty to possession with intent to distribute crack and to carrying a firearm during the commission of a drug crime. The presentence investigation report ("PSR") prepared for Brown designated him a career offender under the U.S. Sentencing Guidelines because he had a prior conviction for trafficking crack and another for felony resisting arrest. *See* U.S.S.G. § 4B1.1 (2002). That career-offender designation set Brown's total offense level at 34 and his criminal history category at VI. Brown's corresponding Guidelines ranges were 262–327 months for possession with intent to distribute and 60 consecutive months for carrying the firearm.

At sentencing, this Court found that Brown was a career offender and sentenced him to 322 months in prison (262 for the drug charge, and 60 months for the gun charge), to be followed by ten years of supervised release. Brown did not appeal.

Brown filed his § 2255 motion on January 28, 2016. The Government filed its competing motion on March 14, and on April 29, Brown replied to the Government's motion. Accordingly, this matter is now ripe for review.

APPLICABLE LAW

Brown proceeds under 28 U.S.C. § 2255, which provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). On a motion to vacate, set aside, or correct a sentence pursuant to § 2255, the petitioner bears the burden of proving the grounds for collateral attack by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958). In deciding a § 2255 motion, the district court need not hold a hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).

ANALYSIS

Under the Sentencing Guidelines, a defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). Brown's motion focuses solely on the third element. At sentencing, the Court determined that element was met because Brown's felony resisting arrest offense was a

crime of violence and his crack trafficking offense was a controlled substance offense. He challenges both parts of that determination.

I. The Felony Resisting Arrest Conviction

The version of the Guidelines in effect at Brown's sentencing defined "crime of violence" as any federal or state offense, punishable by more than a year in prison, that

> (1) has as 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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a) (2002). Although textually bifurcated, this definition is commonly viewed as consisting of three parts. Subsection (1) is the "force clause." The "enumerated-offense clause" is the portion of subsection (2) that begins with "is" and ends with "explosives." Finally, the "residual clause" is the remaining portion of subsection (2). *See United States v. Chisolm*, 579 F. App'x 187, 190 (4th Cir. 2014).

The residual clause's language is not unique. The Armed Career Criminal Act ("ACCA") provides enhanced punishments for recidivists with prior violent felony convictions. *See* 18 U.S.C. § 924(e)(1). The ACCA's definition of "violent felony" includes a residual clause identical to that of the Guidelines. *See* 18 U.S.C. § 924(e)(2)(B)(ii). Last year, in *Johnson v. United States*, the Supreme Court held the ACCA's residual clause was unconstitutional. 135 S. Ct. 2551, 2563. The Fourth Circuit recently held that "the rule in *Johnson* is substantive with respect to its application to the Sentencing Guidelines and therefore applies retroactively" to § 2255 challenges to career-offender designations. *In re Hubbard*, ___ F.3d ___, 2016 WL 3181417, at *7 (4th Cir. June 8, 2016).

Brown was convicted of violating South Carolina code subsection 16-9-320(B), which provides that

> [i]t is unlawful for a person to knowingly and wilfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

Brown argues that under *Johnson*, this offense no longer constitutes a predicate crime of violence. In his view, the now-invalid residual clause is the only portion of the crime of violence definition in which the offense could fit. In the Court's view, however, the offense fits within the force clause.[1]

The phrase "physical force" in the force clause "means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Brown argues felony resisting arrest does not necessarily meet that standard because it can be accomplished "with any touching, no matter how slight." (Mot. Vacate, ECF No. 48, at 3.) The Court disagrees. Wounding someone necessarily involves physical pain or injury, if not both. Beating someone necessarily involves a level of force that can cause physical pain or injury, if not both. It does not include, as Brown contends, the mere unwelcome touching that constitutes common-law battery. *Cf. State v. Mims*, 335 S.E.2d 237,

1. The Fourth Circuit might have already reached the same conclusion. In two cases, it has ruled that felony resisting arrest is a crime of violence under § 4B1.2(a). *See United States v. Cohen*, 599 F. App'x 98, 99 (4th Cir. 2015) (per curiam); *United States v. Gaines*, 239 F. App'x 812, 814 (4th Cir. 2007) (per curiam). However, the Fourth Circuit did not specify in *Cohen* or *Gaines* which clause of § 4B1.2(a) covers felony resisting arrest. Because those two opinions predate *Johnson*, it is conceivable that the Fourth Circuit grounded its decisions in the residual clause. Given that possibility, this Court does not rely upon those decisions.

Likewise, the Court does not rely on *United States v. Hernandez-Sanchez*, 292 F. App'x 230, 231 (4th Cir. 2008) (per curiam). Although the Fourth Circuit in that case appeared to conclude felony resisting arrest "has as an element the use, attempted use, or threatened use of physical force against the person of another," the court pointed out that the question of whether felony resisting arrest is a crime of violence had not been raised. *See id.* at 231 & n.*.

237 (S.C. 1985) (per curiam) (defining common-law assault and battery as "*any* touching of the person of an individual in a rude or angry manner" (emphasis added)).

As for assault, Brown asserts "South Carolina's definition of assault does not meet the demands of the force clause." (Mot. Vacate, ECF No. 48, at 3.) Like Brown, this Court assumes that "assault" in the felony resisting arrest statute carries South Carolina's definition of common-law assault:[2] "an unlawful attempt or offer to commit a violent injury upon the person of another, coupled with a present ability to complete the attempt or offer by a battery." *In re McGee*, 299 S.E.2d 334, 334 (S.C. 1983) (per curiam) (citations omitted); *see also id.* at 334–35 ("While words alone do not constitute an assault, if by words and conduct a person intentionally creates a reasonable apprehension of bodily harm, it is an assault." (citations omitted)). *Chisolm* is instructive on this point. In *Chisolm*, the Fourth Circuit addressed whether South Carolina's criminal domestic violence statute falls under the force clause. 579 F. App'x at 194–96. The CDV statute made it unlawful to, *inter alia*, "'offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.'" *Id.* at 193 (quoting S.C. Code Ann. § 16-25-20(2) (1994)). The Fourth Circuit determined the statute fits within the "threatened use of physical force against the person of another" portion of the force clause. *Id.* at 194. It based that conclusion heavily on its analysis of assault, a lesser-included offense of CDV. *See id.*at 194–95. Synthesizing *McGee*—the case on which Brown primarily relies—and other South Carolina assault cases, the Fourth Circuit stated that "South Carolina courts have characterized the behavior which gives rise to an assault as a type of threat," and that South Carolina required "the attempt or offer to . . . involve a physical effort" in order to constitute assault. *Id.* "The implication of South Carolina's jurisprudence regarding assault," the Fourth Circuit concluded, "is that an 'offer' to cause

2. The Government does not contend otherwise.

physical harm is not created by mere words alone, but by an expression of one's intention or willingness to impose a violent injury *coupled with* a physical effort to actually cause the offered violence—that is, a threat." *Id.*; *see also id.* at 194 (stating South Carolina's courts have indicated that "an offer to commit physical harm constitutes, at the least, a threat to do so." (footnote omitted)).

The *Chisolm* court's analysis of South Carolina assault law compels this Court to conclude the type of assault that the felony resisting arrest statute criminalizes is, at minimum, the threatened use of violent force against a law enforcement officer. Therefore, felony resisting arrest falls entirely within the force clause, which means that Brown's conviction remains a valid career offender predicate crime of violence after *Johnson*.[3]

II. The Trafficking Crack Conviction

Brown next argues that his prior conviction for trafficking crack cocaine should not have been deemed a predicate controlled substance offense. Unlike his other challenge, this one is not based at all on *Johnson*. It is simply an unrelated claim that this Court erred when it sentenced Brown in 2003.

The claim is not timely under 28 U.S.C. § 2255(f), and the Court sees no basis for equitably tolling the statute of limitations. Brown cannot use *Johnson* to revive an untimely, unrelated claim. *See Capozzi v. United States*, 768 F.3d 32, 33 (1st Cir. 2014) (per curiam) ("[T]he period of limitation in 28 U.S.C. § 2255(f) should be applied on a claim-by-claim basis."); *accord Hannigan v. United States*, No. 7:09-CR-133-D, 2015 WL 1056329, at *3 (E.D.N.C. Mar. 10, 2015), *appeal dismissed*, No. 15-4370, 2016 WL 946681 (4th Cir. Mar. 14,

3. Because the Court has concluded felony resisting arrest falls under the force clause, the Court declines to consider whether it also fits under the enumerated-offense clause. *Cf. Chisolm*, 579 F. App'x at 194 (finding no need to consider whether CDV statute falls under the enumerated-offense clause or the residual clause because it falls under the force clause).

2016) (per curiam). The untimeliness of the claim is dispositive. *See Whiteside v. United States*, 775 F.3d 180, 187 (4th Cir. 2014) (en banc). Accordingly, the Court rejects Brown's claim.

CONCLUSION

For the foregoing reasons, it is **ORDERED** that the Government's Motion to Dismiss is **GRANTED** and, consequently, Petitioner's Motion to Vacate is **DISMISSED** with prejudice. The Court declines to issue a certificate of appealability.[4]

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

June 17, 2016
Charleston, South Carolina

4. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that the merits of his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). Petitioner has not satisfied that standard. Accordingly, the Court declines to issue a certificate of appealability. *See* R. 11(a), § 2255 Rules.