No. 17-_____

IN THE
Supreme Court of the United States

BRODERICK C. JAMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under this Court's opinions in *Booker*, *Johnson*, and *Beckles,* opinions which depended heavily upon the distinction between advisory and mandatory sentencing schemes, the residual clause under the mandatory sentencing guidelines is unconstitutionally vague?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Broderick C. James respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINION & ORDERS BELOW

The unpublished order of the Eleventh Circuit Court of Appeals, in which it denied Mr. James's application for a certificate of appealability, is included in the appendix below. Pet. App. 1a. The order of the United States District Court for the Northern District of Georgia is also included in the appendix below. Pet. App. 2a.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on August 17, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil cases in the courts of appeals.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Section 4B1.2(a) (2002 ed.) of the United States Sentencing Guidelines provided the following:

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

STATEMENT OF THE CASE

In *Beckles v. United States*, this Court declared that vagueness challenges and the advisory guidelines do not mix.[1] But what of the mandatory guideline scheme in place prior to *United States v. Booker*?[2] The *Beckles* opinion explicitly left that query unanswered. Wrote Justice Sotomayor in a 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. . . . That question is not presented by this case and I, like the majority, take no position on its appropriate resolution."[3] However, once we follow together the path of *Beckles* here in a mandatory-guidelines scheme, and spy the Court's heavy reliance upon the distinction between advisory, suggestive sentencing rules and prescriptive, inflexible sentencing mandates, our destination is revealed. The pre-*Booker*, mandatory guidelines scheme is vulnerable to vagueness challenges like Mr. James's. The lower courts' divisions on this question, a split that has widened rapidly in the months since *Beckles*, can be resolved only by this Court. It should do so now.

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[1] 137 S. Ct. 886, 895 (2017).

[2] 543 U.S. 220, 233 (2005).

[3] 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in judgment).

* * *

More than two decades ago, a jury convicted Mr. James of a pair of federal crimes: armed bank robbery in violation of 18 U.S.C. § 2113 (a), (d), and use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). At sentencing, Mr. James found himself in select company; certain defendants convicted of these federal crimes are diverted to the career offender provision of the sentencing guidelines—which sharply enhances the penalty—because they have two or more prior convictions that qualify as controlled substance offenses or crimes of violence.[4] At Mr. James's sentencing hearing on May 19, 1994, the district court imposed a career offender sentence under the then-mandatory United States Sentencing Guidelines because Mr. James had prior convictions for bank robbery and armed robbery.

At the time of Mr. James's sentencing hearing, the sentencing guidelines were mandatory. The district court's application of the career offender enhancement subjected Mr. James to a sentencing guidelines range of 262 to 327

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[4] U.S.S.G. §§ 4B1.1, 4B1.2(a). The term "crime of violence" included an elements clause, an enumerated crimes clause, and a residual clause. The residual clause captured crimes that "otherwise involves conduct that presents a serious potential risk of physical injury to another." This clause is identical to the Armed Career Criminal Act's residual clause red-lined by this Court in *Johnson v. United States*. 135 S. Ct. 2551, 2557 (2015).

months in prison.[5] On the robbery count, the district court imposed a sentence at the high end of that mandatory range: 327 months in prison. The court than added a consecutive term of 60 months on the § 924(c) count, for a total of 387 months in prison. However, without the career offender enhancement, Mr. James's crimes would have carried a significantly lower guideline range.[6] And under the once-mandatory guidelines regime, the district court's ultimate sentence would surely have been lower.

One year ago, Mr. James filed in the district court a motion to vacate his sentence under 28 U.S.C. § 2255. In that motion, he argued that the recent Supreme Court opinion in *Johnson v. United States* rendered his sentence, imposed under the career offender provision of the once-mandatory United States Sentencing Guidelines, unlawful. The § 2255 motion remained pending until this Court issued an opinion in *Beckles v. United States*. In *Beckles*, this Court held that *Johnson* does not apply to the guidelines at all and does not invalidate the guidelines' residual clause.[7] However, this Court explicitly limited the holding to cases sentenced under the *advisory*, rather than

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[5] The career offender range resulted from a total offense level 34 and criminal history category VI.

[6] Without the career offender label, Mr. James's criminal history category would have been merely a Category IV. The guideline range would have been no higher than 210-262 months in prison. *See Sentencing Table*, Chapter 5, Part A, United States Sentencing Guidelines.

[7] 137 S. Ct. at 895.

the mandatory, guidelines system.[8] For a career-offender defendant sentenced since *Booker*, *Beckles* wrote the obituary for any *Johnson*-based § 2255 motion.

But Mr. James's is not such a case. The district court imposed a career offender sentence upon him in 1994, many years before *Booker*. Thus, Mr. James's *Johnson* motion seemed to survive *Beckles*. Alas, it did not. In the district court, Mr. James conceded that, in light of binding Eleventh Circuit precedent, he must nonetheless lose the *Johnson* battle in that court. And he did. In the Eleventh Circuit, both the mandatory and advisory guidelines regimes have been immune to vagueness challenges. *Beckles* did nothing to change the Eleventh Circuit's views on the mandatory guidelines. Therefore, the district court both denied Mr. James's § 2255 motion and denied Mr. James a certificate of appealability. The Eleventh Circuit also declined Mr. James's invitation to issue a COA. This Court now has the opportunity to remedy these errors.

REASONS FOR GRANTING THE PETITION

In *Beckles*, this Court declared that the now-advisory United States Sentencing Guidelines, including its infamous residual clause, is immune from a vagueness challenge.[9] However, the Court explicitly chose not to extend this protection to the former, mandatory sentencing

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[8] *Id.* at 890 ("Because we hold that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.") The advisory guideline scheme was born on January 12, 2005, with the Supreme Court's decision in *Booker*.

[9] *Id.* at 892.

guidelines regime. Instead, the Court left that puzzle unsolved. The majority produced a cliffhanger, like writers on a television series, and left the fate of the *mandatory* guidelines' residual clause up in the air. In the months since *Beckles*, court-watchers, including federal prisoners and federal courts alike, have guessed at the Court's future episode, its next season, and the storyline for the mandatory guidelines. Alas, like television aficionados, the lower courts do not read *Beckles's* hints in the same way.

The Eleventh Circuit, which shielded the mandatory guidelines from vagueness challenges even before *Beckles*, has not changed its view. The court continues to sing the same mandatory-guidelines tune. Yet the Eleventh Circuit's trenchant views are belied by the very text of *Beckles*, as well as the decisions that led to *Beckles*: *Booker* and *Johnson*. The Eleventh Circuit entirely misapprehends this Court's holding in *Beckles*. And, like a virus, that mistake now spreads to Mr. James's case and beyond.

Meanwhile, a split widens in the circuit and district courts. The First Circuit, for one, has hinted strongly since *Beckles* that the residual clause in the mandatory guidelines is, indeed, void for vagueness.[10] And a growing collection of district courts have penned persuasive arguments in favor of applying *Johnson* to the mandatory guidelines. Others have not. Yet this Court's declarations in *Beckles*, as well as the bedrock holdings in *Booker* and

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[10] *Moore v. United States*, 871 F.3d 72, 81 (1st Cir. 2017) ("[W]e find ourselves quite skeptical concerning the government's reliance on recent Eleventh Circuit precedent").

Johnson, lead to one inevitable conclusion: the residual clause in the once-mandatory, pre-*Booker* guidelines system, is unconstitutionally vague.

Under *Booker*, *Johnson*, and *Beckles*, opinions which depended heavily upon the distinction between advisory and mandatory sentencing schemes, the residual clause under the mandatory sentencing guidelines is unconstitutionally vague.

The *Beckles* opinion left open the query pending here: Does *Johnson* apply to the mandatory sentencing guidelines scheme once employed by federal courts, like Mr. James's own district court, prior to *United States v. Booker*? In *Beckles*, the majority passed on an opportunity to tell us no, to offer the same blanket rejection of vagueness principles that it applied to the advisory guideline system.[11] Indeed, this Court intentionally chose not to impose a sweeping rule insulating the guidelines in general, old and new, from a *Johnson* challenge. That may be because the two schemes, one flexible and other inflexible, require contrasting answers. Indeed, they do.

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[11] *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in judgment).

A. The *Beckles* opinion, by declaring that the advisory guideline regime is immune to *Johnson* challenges, implicitly established that the mandatory regime is void for vagueness

The *Beckles* majority opinion—as it analyzed the advisory guidelines scheme—built a strong case for applying *Johnson* to the now-extinct mandatory scheme. As the Court built a safe haven, a wall, around the advisory scheme, it necessarily left the mandatory scheme out in the cold, unprotected from vagueness challenges.

The majority opinion in *Beckles* offers tantalizing clues on this question, and the mystery has been all but solved. For example, Justice Thomas wrote that "the Court has invalidated two kinds of criminal laws as 'void for vagueness': laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses."[12] This passage echoes the holding in *Booker*, which described the former guidelines scheme as follows: "The guidelines as written, however, are not advisory; they are mandatory and binding on all judges. . . . [W]e have constantly held that the guidelines have the force and effect of laws."[13] The mandatory guidelines scheme "fixed the permissible sentences," to use Justice Thomas's phrase, of defendants like Mr. James. Thus, the very rationale that renders the advisory guidelines system (which is decidedly not fixed) immune from a vagueness attack necessarily supports just such an attack on the mandatory regime.

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[12] *Id.* at 892 (emphasis in original).

[13] 543 U.S. at 233-234.

How do we know this? This Court in *Beckles* repeatedly limited its holding to "advisory" guidelines. Indeed, it incanted the word on page after page.[14] The Court's outcome depended on this distinction between sentencing rules that are mandatory and inflexible and those that are advisory and inflexible. Throughout the opinion, the Court drew telling contrasts between mandatory and advisory schemes. The Court drew inspiration from *Booker* by noting that the guidelines "were initially binding on district courts, . . . [but] this Court in *Booker* rendered them 'effectively advisory.'"[15] It sprinkled in many similar observations. For example, courts "may no longer rely exclusively on the guidelines range," and the guidelines no longer "constrain [courts'] discretion."[16] And this: the

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[14] 137 S. Ct. at 890 ("Because we hold that the *advisory* guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.") (emphasis added); *id.* at 895 ("[W]e hold 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.") (emphasis added); *id.* at 896 ("We hold only that the *advisory* sentencing guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine.") (emphasis added); *id.* at 897 ("Because the *advisory* sentencing guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)'s residual clause is not void for vagueness.") (emphasis added).

[15] *Id.* at 894 (quoting *Booker*).

[16] *Id.*

guidelines "do not mandate any specific sentences," but "merely guide the exercise of a court's discretion."[17] Surely the majority opinion reminds us of these truisms for a reason. The outcome of a vagueness challenge must rise (or fall) on this trait of flexibility or inflexibility. In the vagueness battle between the once-mandatory and now-advisory guidelines, a trench lies between the winners (mandatory) and the losers (advisory).

Why do advisory guidelines not interfere with a defendant's due process rights? The advisory guidelines, said the Court, "do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement."[18] Because a district judge may freely parts ways with the Commission's views on a given sentence, the defendant cannot himself know what sentence he will face and, thus, cannot reasonably tailor his behavior toward even the clearest of guideline provisions.[19] This distinction is sensible, instructed this Court in *Beckles*, because "due process concerns that . . . require notice in a world of mandatory guidelines no longer

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[17] *Beckles,* 137 S. Ct. at 892.

[18] *Id.*

[19] The majority found support in *Irizarry v. United States*. *Id.* at 894. In *Irizarry*, the Court held that Rule 32(h)'s requirement that a district court provide notice of its intent to depart from the guideline range did not apply to post-*Booker* guideline variances. 553 U.S. 708, 713-714 (2008).

apply" to an advisory guideline world.[20] And any due process expectation that a sentence will land within the guideline range "did not survive [*Booker*], which invalidated the mandatory features of the guidelines."[21] In the same way, the advisory guidelines "do not implicate" the vagueness doctrine's fear of arbitrary enforcement because district courts do not "enforce" the new guidelines, but merely rely upon them "for advice in exercising discretion."[22]

By telling us exactly why the advisory guidelines are *not* vulnerable to vagueness challenges, the *Beckles* opinion establishes why the mandatory guidelines *are*. As this Court has long said, the mandatory guidelines "[bound] judges and courts . . . in pass[ing] sentence in criminal cases,"[23] and had "the force and effect of laws, prescribing the sentences criminal defendants [were] to receive."[24] As we see in *Booker* and *Beckles*, those principals apply just as strongly today. For that reason, the mandatory guidelines are subject to vagueness challenges. And once we cross that threshold, we know the residual clause written into those guidelines, the doppelganger of the ACCA's forbidden clause, is unconstitutionally vague.

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[20] *Beckles*, 137 S. Ct. at 894 (quoting *Irizarry*, 553 U.S. at 714).

[21] *Id.*

[22] *Id.* at 895.

[23] *Mistretta v. United States*, 488 U.S. 361, 391 (1989).

[24] *Id.* at 413 (Scalia, J., dissenting).

B. The federal circuit and district courts are deeply divided, and growing more so by the day, in applying *Beckles* and *Johnson* to the mandatory, pre-*Booker* sentencing guidelines scheme.

The mandatory guidelines question has vexed the lower courts since *Beckles*. The federal circuit courts (and the federal district courts, for that matter) are deeply split. The division widens as time passes. And the courts are thirsting for a drink that only this Court can offer. This Court primarily grants certiorari in cases that "present contentious legal issues of great national significance."[25] And this is just such an issue.

In Mr. James's home circuit, the Eleventh Circuit, the judges have written competing tracts for and against the application of *Johnson* to the mandatory guidelines system. In *In re Griffin*, one panel held, even before *Beckles*, that *Johnson* does not invalidate the residual clause of the mandatory career offender guideline.[26] However, a second panel, in *In re Sapp*, later offered a sharp rebuke ("we believe *Griffin* is deeply flawed and wrongly decided") that matches Mr. James's views here.[27] The *Sapp* panel noted that "[t]he *Griffin* panel's rationale is completely at odds with Supreme Court precedent, which

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[25] ROBERT M. YABLON, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L. J. FORUM 551, 561 (2014).

[26] 823 F.3d 1350, 1354 (11th Cir. 2016).

[27] 827 F.3d 1334, 1337 (11th Cir. 2016).

has long held that vagueness 'principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentencing.'"[28] Indeed. And a fourth Eleventh Circuit judge has since declared her support for the *Sapp* panel's views.[29] This intra-circuit division is so stark, it is hard to believe these judges are talking of the same issue.

In the First Circuit, the court gave strong hints that it, too, like its Eleventh Circuit peers in *Sapp*, views the application of *Johnson* to the mandatory guidelines to be a *fait accompli*. In *Moore v. United States*, the unanimous panel noted in granting an application to file a successive § 2255 motion that "we see no lack of reasonableness in contending that a statute found to 'bind[]' in *Booker* necessarily 'fix[es]' under *Johnson II*."[30] And this: "[I]f one takes seriously, as we must, the Court's description of the pre-*Booker* guidelines as 'mandatory,' one might describe the residual clause of the pre-*Booker* guidelines as simply the ACCA's residual clause with a broader reach, in that it fixed increased minimum and maximum sentences for a broader range of underlying crimes."[31] The First Circuit's views could not be plainer.

The Fourth Circuit, in *United States v. Brown*, recently spoke at length of the question left open by *Beckles*, and

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[28] *Id.* at 1338 (quoting *Johnson*, 135 S. Ct. at 2557).

[29] *United States v. Matchett*, 837 F.3d 1118, 1134 n.3 (11th Cir. 2016) (Martin, J., dissenting).

[30] 871 F.3d at 81-82.

[31] *Id.* at 82.

invited guidance from this Court. The majority stated: "In a future case, the Supreme Court may agree with an argument . . . that because the challenged residual clause [found in the mandatory guidelines] looks like ACCA and operates like ACCA, it is void for vagueness like ACCA."[32] And this: "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*."[33] However, the court chose not to say so itself, but instead elected to wait for word from above: "[W]e must wait for the Supreme Court to recognize the right urged by petitioner."[34] And like the Eleventh Circuit, the Fourth Circuit's internal discord on the residual clause question blooms. In *Brown*, one judge offered a vivid dissent, complete with a narration of *Booker*, *Johnson*, and *Beckles*, and concluded that this Court has already provided plenty of guidance to lower courts on the question: "I would . . . find that *Johnson* compels the conclusion that the residual clause under the mandatory Guidelines is unconstitutionally vague."[35]

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[32] 868 F.3d 297, 303 (4th Cir. 2017).

[33] *Id.* at 304.

[34] *Id.* The *Brown* court rejected the § 2255 challenge to the mandatory guidelines as untimely because, it held, this Court has not yet "recognized" the right, as it did for the ACCA in *Johnson*. This view is wrong, as Mr. James explains below. *See infra* at 18.

[35] 868 F.3d at 304, 309-310 (Gregory, J., dissenting).

The Sixth Circuit, like the Fourth, has also chosen to punt on the question. In *Raybon v. United States*, the panel recently chose not to respond to this Court's overt signals in *Beckles*, *Booker*, and *Johnson*, but simply opted out of the inquiry: "[W]hether [*Johnson*] applies to the mandatory guidelines, which contain identical language as the ACCA provision at issue in *Johnson*[], is an open question."[36]

Other federal circuit courts have signaled a sympathy with Mr. James's position by permitting applicants to file successive § 2255 petitions with *Johnson* challenges to mandatory guidelines sentences.[37] Even in the months since *Beckles* arrived, the Second Circuit and Third Circuit, for example, have done so.[38] Indeed the latter court explicitly rejected the Eleventh Circuit's views on the mandatory-guidelines topic, thereby illuminating the deepening unease that grows in the circuit courts while they await word from this Court.[39]

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[36] 867 F.3d 625, 629 (6th Cir. 2017). The panel used this claimed uncertainty to rule that Raybon's challenge to his mandatory guidelines sentence was untimely under § 2255(f)(3). Again, Mr. James's exposes the flaw in this reasoning below.

[37] *In re Encinas*, 821 F.3d 1224, 1226 (10th Cir. 2016); *In re Patrick*, 833 F.3d 584, 589 (6th Cir. 2016).

[38] *Vargas v. United States*, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017) (unpublished); *In re Hoffner*, 870 F.3d 301, 312 (3d Cir. 2017).

[39] *Hoffner*, 870 F.3d at 310 n.13.

A growing collection of district courts have also concluded that *Johnson* applies to the residual clause of the mandatory guidelines, and that *Beckles*, by drawing vivid contrasts with the advisory guidelines, rendered the conclusion inevitable.[40] On the other hand, many district courts have held that *Johnson* does not apply to the mandatory guidelines.[41] The circuit courts and district courts are stuck *in medias res* until this Court makes explicit what it has until now said implicitly. This Court ought to finish the work it began in *Beckles*, and declare once and for all that *Johnson* invalidates the residual clause found in the pre-*Booker*, mandatory sentencing guidelines.

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[40] *See, e.g., United States v. Walker*, 2017 WL 3034445, at *5 (N.D. Ohio July 18, 2017) ("Because the pre-*Booker* mandatory Sentencing Guidelines are sufficiently statute-like to be subject to vagueness analysis, *Johnson* directly applies here."); *Reid v. United States*, 252 F. Supp. 3d 63 66-68 (D. Mass. 2017); *United States v. Castaneda*, — F. Supp. 3d —, 2017 WL 3448192, at *1-*2 (C.D. Cal. June 19, 2017); *United States v. Mock*, 2017 WL 2727095, at *7-*8 (E.D. Wash. June 23, 2017); *Sarracino v. United States*, 2017 WL 3098262, at *2-*3 (D. N.M. June 26, 2017).

[41] *See, e.g., Hirano v. United States*, 2017 WL 2661629, at *7 (D. Haw. June 20, 2017) ("Nor does there appear to be any support in the *Beckles* decision itself to suggest that the Supreme Court believes that *Johnson* dictates that the residual clause of the mandatory guidelines is void for vagueness."); *United States v. Beraldo*, 2017 WL 2888565, at *2 (D. Or. July 5, 2017); *Zamora v. United States*, 2017 WL 4221470, at *5 (D. N.M. Sept. 22, 2017).

C. Mr. James's motion is timely because it was filed within one year of the constitutional right recognized in *Johnson*, a right made retroactively applicable to cases on collateral review.

Mr. James's vagueness challenge to his career offender sentence is based upon *Johnson* and is timely. Although the courts below did not say otherwise, this Court may ask this threshold query. A motion under § 2255 is timely when it is 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). In *Johnson*, this Court identified the right to not have one's sentence enhanced by an unconstitutionally vague residual clause;[42] and in *Welch v. United States*, the Court proclaimed that the right applies retroactively to cases on collateral review.[43]

From the beginning, Mr. James argued in his § 2255 motion that under *Johnson* his career offender sentence was unconstitutional. The residual clause invalidated in *Johnson* as unduly vague is the very same language we find here in Mr. James's case. The right Mr. James has asserted from the start, the right not to suffer an enhanced sentence fixed by vague language in violation of the Fifth Amendment's due process clause, is equivalent to this Court's holding in *Johnson*. Thus, it is *Johnson* that

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[42] 135 S. Ct. at 2557-2558.

[43] 136 S. Ct. 1257, 1268 (2016).

answers the question whether the void-for-vagueness doctrine invalidates Mr. James's career offender sentence. And because Mr. James filed his motion in the district court within one year of *Johnson*, this invocation of "a newly recognized right" was timely under 28 U.S.C. § 2255(f)(3).

In order "to be timely under § 2255(f)(3), a § 2255 motion need only invoke" the *Johnson* rule, "whether or not [*Johnson*] ultimately support[s] the movant's claim."[44] The statute's one-year time limit requires simply that a claimant invoke the new right, not that he prove it. Any assumption that a Court must apply a merits analysis to § 2255(f)(3)'s gatekeeping inquiry is flawed. The Tenth Circuit, for one, has rejected such a path: "By its plain language, the statute allows a § 2255 motion to be filed within one year of 'the date on which the right *asserted* was initially recognized by the Supreme Court.'"[45] The verb "to assert" means simply to "state positively" or "to invoke or enforced a legal right."[46] And as this Court once wrote, the one-year clock counts down from the date of the decision from which a claimant "[seeks] to benefit."[47] The invocation is a prelude to a merits victory, it is not that victory itself. Mr. James's motion is timely because his claim (or assertion) for relief follows inexorably from

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[44] *United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017).

[45] *Id.*

[46] *Id.*

[47] *Dodd v. United States*, 545 U.S. 353, 360 (2005).

Johnson and *Johnson* alone. He successfully passed through the § 2255(f)(3) temporal gate and now has earned the merits ruling he presses for earlier in this petition.

The timeliness question, too, like the application of *Johnson* to the mandatory guidelines, has led to divergent answers in the circuit courts. The split includes the First Circuit, which recently held in *Moore* that a motion like Mr. James's is timely.[48] The panel wrote: "We are not sufficiently persuaded that we would need to make a new constitutional law" in order to apply *Booker* and *Johnson* to the mandatory guidelines.[49] In contrast, the Fourth and Sixth Circuits have resisted this view, and closed the door to such challenges as untimely.[50] Yet the issue continues to balance on a razor's edge. In Judge Gregory's dissenting opinion in *Brown*, he constructs an argument in favor of timeliness. He opines that "*Beckles* and *Booker* merely reinforce that the right newly recognized in *Johnson* is indeed applicable to Brown's claim."[51]

We must address one final obstacle: retroactivity. The *Johnson* opinion applies retroactively to collateral challenges to career offender sentences imposed under the mandatory sentencing guidelines. New substantive rules

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[48] 871 F.3d at 82.

[49] *Id.* at 81.

[50] *Brown*, 868 F.3d at 303; *Raybon*, 867 F.3d at 630.

[51] 868 F.3d at 310 (Gregory, J., dissenting).

generally apply retroactively.[52] This Court held in *Welch* that that *Johnson* announced a "substantive rule that has retroactive effect in cases on collateral review."[53] Because *Johnson* "alter[ed] 'the range of conduct or the class of persons that the [Armed Career Criminal Act] punishes,'" that rule was substantive.[54] And because *Johnson* "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the [ACCA]," it was just as clearly not procedural.[55]

So too here. Before *Johnson*, the career offender provision of the mandatory guidelines applied to any person convicted of a "controlled substance offense" who also had two or more similar prior convictions, even if one or more of those requisite convictions qualified only under the residual clause. After *Johnson*, however, the same person engaging in the same conduct is no longer subject to the career offender enhancement. Because the residual clause is invalid under *Johnson*, "it can no longer mandate or authorize any sentence."[56] Thus, *Johnson* applies retroactively to Mr. James's claim.

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[52] *Welch*, 136 S. Ct. at 1265.

[53] *Id.* at 1268.

[54] *Id.* at 1265 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

[55] *Id.*

[56] *Id.*

CONCLUSION

The mandatory sentencing guidelines scheme, a "rigidly imposed . . . straitjacket,"[57] has been rendered unconstitutional by *Booker*, *Johnson*, and *Beckles*. Yet the harsh career offender sentences of countless federal prisoners, including Mr. James, depends most of all upon the fluke of geography. The merging streams of this Court's opinions in that trio of cases continue to flow erratically in the lower courts, a state of affairs this Court may now remedy by granting this *Petition for a Writ of Certiorari*.

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[57] *Reid*, 252 F. Supp. 3d at 67 n.2.