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## Recognized Right or Open Question? An Exploration of Johnson and its Progeny

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# RECOGNIZED RIGHT OR OPEN QUESTION? AN EXPLORATION OF *JOHNSON* AND ITS PROGENY

*Richard Simpson*<sup>1</sup>

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<sup>1</sup> J.D. expected 2020, University of Kentucky College of Law. I would like to thank Professor Welling for her insight and feedback as I developed this Note.

On August 21, 2017, the Fourth Circuit affirmed the denial of Thilo Brown's motion to be resentenced.<sup>2</sup> Brown attempted to rely on the Supreme Court's decision in *Johnson v. United States*,<sup>3</sup> which declared the residual clause of the Armed Career Criminal Act ("ACCA") unconstitutional.<sup>4</sup> Because Brown was sentenced under an identical clause in the federal Sentencing Guidelines ("Guidelines") when the Guidelines were still mandatory, Brown argued that his enhanced sentence as a "career offender" was also unconstitutional.<sup>5</sup> Relying on Supreme Court precedent, the Fourth Circuit concluded that Brown's motion was not based on a newly recognized right and, therefore, was untimely.<sup>6</sup>

Like the Fourth Circuit, the Third, Sixth, and Ninth Circuits have all concluded that an individual sentenced under the residual clause of the mandatory Guidelines does not have a timely § 2255(f)(3) claim under *Johnson v. United States*.<sup>7</sup> The Supreme Court denied certiorari and declined to address whether Brown could rely on the right recognized in *Johnson*.<sup>8</sup> In a dissent from the order, Justice Sotomayor noted the decision not to hear the case "denies petitioners, and perhaps more than 1,000 like them, a chance to challenge the constitutionality of their sentences."<sup>9</sup> Although the Supreme Court declined to hear the case, at least one circuit has concluded that the right announced in *Johnson* is broad enough to include individuals sentenced under an identical residual clause in the mandatory Guidelines.<sup>10</sup>

This Note explores the scope of the right announced in *Johnson* and concludes that individuals sentenced under the residual clause of the mandatory Guidelines have a meritorious claim to be resentenced under § 2255(f)(3). Part I of this Note outlines the sentencing process and how a defendant may attack a sentence under § 2255. Part II reviews the decision in *Johnson* and the Court's clarifications in later cases. Part III analyzes the arguments about the scope of the right announced in *Johnson*. Part IV concludes that the right announced in *Johnson* extends to individuals sentenced under the mandatory Sentencing Guidelines regime.

## I. THE SENTENCING PROCESS

This Note focuses on individuals sentenced as "career offenders" under the mandatory sentencing regime. The first Part highlights several important aspects of the sentencing process. Section A gives a brief history of the sentencing Guidelines and the transition from mandatory to advisory Guidelines. Section B continues by outlining the introduction of the career offender designation and the impact this has on a defendant's sentence under the Guidelines. Section C concludes by explaining

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<sup>2</sup> *United States v. Brown*, 868 F.3d 297, 298–99 (4th Cir. 2017).

<sup>3</sup> *Id.* at 300.

<sup>4</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

<sup>5</sup> *Brown*, 868 F.3d at 300.

<sup>6</sup> *Id.* at 303–04.

<sup>7</sup> *United States v. Blackstone*, 903 F.3d 1020, 1023 (9th Cir. 2018); *United States v. Green*, 898 F.3d 315, 316 (3d Cir. 2018); *Raybon v. United States*, 867 F.3d 625, 627 (6th Cir. 2017).

<sup>8</sup> *Brown v. United States*, 139 S. Ct. 14, 14 (2018).

<sup>9</sup> *Id.* (Sotomayor, J., dissenting).

<sup>10</sup> *Cross v. United States*, 892 F.3d 288, 291 (7th Cir. 2018).

the process by which a petitioner may attack a sentence he believes has become unconstitutional through 28 U.S.C. § 2255. Specifically, the Note focuses on the one-year limitation on motions to attack a sentence after the Supreme Court has announced a new right.<sup>11</sup> ‘

### A. History of the Guidelines

Before 1987, the trial court exercised almost complete discretion over the sentence given to a convicted offender.<sup>12</sup> On review, the appellate court gave “virtually unconditional deference” to the sentencing judge’s discretion.<sup>13</sup> This discretionary regime led to disparities in sentences, and critics questioned the success of a rehabilitative model of sentencing.<sup>14</sup> In place of this regime, Congress established the United States Sentencing Commission “to devise guidelines to be used for sentencing.”<sup>15</sup> These “guidelines were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors.”<sup>16</sup> The Guidelines became effective in 1987.<sup>17</sup> The Guidelines, promulgated by the Sentencing Commission, “ha[d] the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them [would] be reversed.”<sup>18</sup> In 2005, the Supreme Court, in *United States v. Booker*, held that the mandatory nature of the Guidelines violated the Sixth Amendment right to a jury trial, and it made the Guidelines advisory.<sup>19</sup> This Note focuses on individuals sentenced under the mandatory version of the Sentencing Guidelines from 1987 to 2005.

### B. Career Offender Designation

Congress passed the Sentencing Reform Act of 1984 to establish a number of sentencing goals and policies to implement those goals.<sup>20</sup> The Sentencing Commission explained one portion of the Sentencing Reform Act as follows:

The SRA directs the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized by statute” for offenders . . . who have been convicted of a crime of violence . . . and who previously have been convicted of two or more such offenses.<sup>21</sup>

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<sup>11</sup> 28 U.S.C. § 2255(f)(3) (2018).

<sup>12</sup> 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 521 (4th ed. 2011).

<sup>13</sup> *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court*, Viewed from Above, 22 SYRACUSE L. REV. 635, 663 (1971)).

<sup>14</sup> *Id.* at 365.

<sup>15</sup> *Id.* at 367.

<sup>16</sup> *Id.* at 368.

<sup>17</sup> 3 WRIGHT & MILLER, *supra* note 12, at § 521.

<sup>18</sup> *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting).

<sup>19</sup> *United States v. Booker*, 543 U.S. 220, 226, 245 (2005).

<sup>20</sup> U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 11 (2004).

<sup>21</sup> *Id.* at 133.

This directive resulted in the “career offender” guideline.<sup>22</sup> Individuals sentenced under this guideline have received “some of the most severe penalties imposed under the guidelines.”<sup>23</sup> Under this guideline, a crime of violence includes any crime that “has an element [of] use, attempted use, or threatened use of physical force against the person of another.”<sup>24</sup> The guideline identifies specific offenses that are “crimes of violence” and includes a catch-all provision for “conduct that presents a serious potential risk of physical injury to another.”<sup>25</sup> The catch-all provision has come to be known as the residual clause.<sup>26</sup> If an individual had two convictions that were considered crimes of violence under the residual clause, the Guidelines deemed him a career offender and made him subject to a near maximum sentence.<sup>27</sup>

### C. § 2255 Motions

After direct review of a criminal sentence is complete, 28 U.S.C. § 2255 is the mechanism by which an individual can obtain judicial review of his sentence.<sup>28</sup> Congress limited the availability of § 2255 relief in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).<sup>29</sup> In the AEDPA, Congress imposed a one-year statute of limitations period on motions to attack a sentence that included limited exceptions.<sup>30</sup> Normally, a petitioner has one year to attack a sentence after the judgment becomes final.<sup>31</sup> One exception to this statute of limitations gives a petitioner a new one-year period to attack the sentence from “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.”<sup>32</sup>

In *Dodd v. United States*, the Supreme Court took up the issue of whether the first or second clause of the exception in § 2255(f)(3) determines the date from which this statute of limitations runs.<sup>33</sup> *Dodd* argued that the second clause governs the statute of limitations, and the statute of limitations could not begin until the right recognized by the Supreme Court was made retroactive.<sup>34</sup> The Court concluded that the first clause governs, and the statute of limitations began to run on the date the

<sup>22</sup> *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM’N 2018).

<sup>23</sup> U.S. SENTENCING COMM’N, *supra* note 21, at 133.

<sup>24</sup> U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1) (U.S. SENTENCING COMM’N 2018).

<sup>25</sup> U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENTENCING COMM’N 2015) (amended 2018).

Note that the Guidelines were revised in 2016 to remove this residual clause. U.S. SENTENCING GUIDELINES MANUAL app. C supp., amend. 798 (U.S. SENTENCING COMM’N 2016).

<sup>26</sup> *United States v. Brown*, 868 F.3d 297, 300 (4th Cir. 2017); see also *Johnson v. United States*, 135 S. Ct. 2551, 2555–56 (2015).

<sup>27</sup> U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM’N 2018).

<sup>28</sup> Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 89 (2012).

<sup>29</sup> *Id.* at 96.

<sup>30</sup> *Id.*; see 28 U.S.C. § 2255(f) (2018).

<sup>31</sup> 28 U.S.C. § 2255(f)(1) (2018).

<sup>32</sup> *Id.* § 2255(f)(3).

<sup>33</sup> *Dodd v. United States*, 545 U.S. 353, 354–55 (2005).

<sup>34</sup> *Id.* at 357–58.

asserted right was recognized by the Supreme Court.<sup>35</sup> The Court determined the second clause was meant to limit the applicability of the section to cases where the recognized right had been made retroactive, but not meant to serve as a prerequisite for the statute of limitations.<sup>36</sup> Recognizing that this may cause harsh results in the case of successive § 2255 motions, the Court noted that the text of the statute reflected a congressional intent to create stringent procedural requirements for the retroactive application of rules.<sup>37</sup>

In effect, this decision requires a petitioner to file a motion within a year of the Supreme Court recognizing a new right, even if the right has not yet been made retroactively applicable. If not, the petitioner risks being time-barred by § 2255(f).<sup>38</sup> In some instances, this will force a petitioner to interpret the scope of the Court's holding when determining whether to file a petition under § 2255. This places petitioners in a potential catch-22: if they do not interpret a right broadly enough, they may be time-barred, but if they interpret the right too broadly, their claims may be denied, and they'll be forced to run an even longer procedural gauntlet to file a successive § 2255 motion.

Because the Supreme Court's initial recognition of a right triggers the beginning of the one-year statute of limitations, it is important to understand how the Supreme Court declares a new right upon which a criminal may rely in sentencing cases. If *Johnson* broadly described a right, petitioners hoping for relief need to have filed within a year of *Johnson* to obtain relief. If not, they must wait on a ripe claim for the Supreme Court to address the residual clause of the mandatory Guidelines explicitly.<sup>39</sup>

## II. *JOHNSON* AND ITS PROGENY

This Part of the Note discusses the Court's decision in *Johnson* that declared the residual clause of the ACCA unconstitutionally vague. From there, it reviews the decision that made the right retroactively applicable and the decision that declared that the residual clause of the advisory guidelines is not subject to vagueness challenges. Reviewing this line of decisions provides the background necessary to analyze whether the right announced in *Johnson* extends to individuals sentenced under the residual clause of the mandatory Guidelines.

### A. *Johnson v. United States*

In *Johnson*, the Supreme Court declared the residual clause of the ACCA unconstitutionally vague.<sup>40</sup> The residual clause defined a "violent felony" as "any crime . . . that . . . involves conduct that presents a serious potential risk of physical

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<sup>35</sup> *Id.* at 357.

<sup>36</sup> *Id.* at 358–59.

<sup>37</sup> *Id.* at 359–60.

<sup>38</sup> 28 U.S.C. § 2255(f)(3) (2018).

<sup>39</sup> Waiting to assert a ripe claim may be contrary to the AEDPA's goal of promoting finality with respect to sentencing. *United States v. Hammond*, 351 F. Supp. 3d 106, 129 (D.D.C. 2018).

<sup>40</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015).

*injury to another.*<sup>41</sup> The sentencing court determined that three of Johnson's prior convictions qualified as violent felonies, increasing his sentence to fifteen years.<sup>42</sup> The case arose out of Samuel Johnson's conviction for being a felon in possession of a firearm.<sup>43</sup> Initially, the Court granted certiorari to determine whether Johnson's prior conviction for possession of a short-barreled shotgun qualified as a violent felony under the residual clause, but on re-argument, the Court took up the issue of whether the residual clause violated the Due Process Clause of the Fifth Amendment.<sup>44</sup> Prior to concluding that the residual clause was unconstitutional, the Court had attempted, on four previous occasions, to apply the clause to various state criminal offenses.<sup>45</sup>

The Due Process Clause prohibits a criminal law that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."<sup>46</sup> This principle applies to statutes that fix sentences.<sup>47</sup> When determining whether a crime qualifies as a violent felony, the Court does not look at the crime of the individual offender, but instead it uses the categorical approach and looks at the ordinary case of how the law defines the offense.<sup>48</sup> The Court determined that the use of the of the categorical approach was appropriate in this case.<sup>49</sup> Applying the categorical approach to the residual clause, the Court found that the residual clause violated the Due Process Clause because the clause "combin[ed] indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony."<sup>50</sup>

The Court's repeated failures to craft a principled standard further supported the conclusion that the ACCA's residual clause was unconstitutionally vague.<sup>51</sup> Even though the Court had found that some prior convictions fit into the residual clause, its holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."<sup>52</sup> The government argued that this would put other criminal laws that used

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<sup>41</sup> *Id.* at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B) (2012)). This language is identical to the residual clause in the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENTENCING COMM'N 2015) (amended 2018) (nothing that a "crime of violence . . . involves conduct that presents a serious potential risk of physical injury to another").

<sup>42</sup> *Johnson*, 135 S. Ct. at 2556.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; *see generally* *Sykes v. United States*, 564 U.S. 1, 4 (2011) (finding that an intentional flight in a vehicle is a violent felony); *Chambers v. United States*, 555 U.S. 122, 123 (2009) (holding that the failure to report was not a violent felony); *Begay v. United States*, 553 U.S. 137, 139 (2008) (holding that a DUI is not a violent felony); *James v. United States*, 550 U.S. 192, 195 (2007) (holding that attempted burglary is a violent felony).

<sup>46</sup> *Johnson*, 135 S. Ct. at 2556 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

<sup>47</sup> *Id.* at 2557.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2562. There is a debate about the merits of the categorical approach, but that discussion is beyond the scope of this Note. The Supreme Court recently rejected a challenge to viability of the categorical approach. *See United States v. Davis*, 139 S. Ct. 2319, 2327 (2019) (rejecting an attempt to save a residual clause by using a case-specific approach instead of the categorical approach).

<sup>50</sup> *Johnson*, 135 S. Ct. at 2558.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2561.

the term “substantial risk” in “constitutional doubt,” but the Court rejected this contention by pointing out that the residual clause was invalid because it applied its “serious potential risk” standard to the categorical approach that considers an “idealized ordinary case of the crime.”<sup>53</sup> Although the Court concluded it was unconstitutional to enhance a criminal’s sentence using the indeterminate language of the residual clause, the Court did not address the retroactivity of the rule it announced.<sup>54</sup>

### B. *Welch v. United States*

In *Welch v. United States*, the Supreme Court addressed whether the right announced in *Johnson* applied retroactively to cases on collateral review.<sup>55</sup> Gregory Welch was sentenced under the ACCA in 2010 before *Johnson* was decided.<sup>56</sup> The Court used the *Teague* framework to determine whether *Johnson* is retroactive.<sup>57</sup> Under the *Teague* framework, the general rule is that new constitutional rules of criminal procedure will not apply to cases decided before the new rule is announced.<sup>58</sup> But there are two exceptions to the general rule.<sup>59</sup> New substantive rules and new “watershed rules of criminal procedure” apply retroactively.<sup>60</sup> A new rule is substantive if it “place[s] particular conduct or persons covered by the statute beyond the State’s power to punish.”<sup>61</sup> The Court concluded that the decision in *Johnson* was substantive because it limited the range of conduct the ACCA punishes.<sup>62</sup> As a result, the Court concluded the decision in *Johnson* retroactively applied to individuals sentenced under the residual clause.<sup>63</sup>

The decision in *Welch* made it clear that individuals convicted under the residual clause of the ACCA before the decision in *Johnson* could use § 2255 to seek collateral review of their sentences.<sup>64</sup> According to the rule set forth in *Dodd*, petitioners would need to have filed a motion under § 2255(f)(3) within a year of *Johnson* because the *Johnson* Court announced the right, not within a year of *Welch* which made the right retroactive.<sup>65</sup> While this decision was a victory for individuals sentenced pre-*Johnson* under the residual clause of the ACCA, it was still unclear whether the scope of *Johnson* extended beyond the residual clause of the ACCA.

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<sup>53</sup> *Id.*

<sup>54</sup> *See id.* at 2563.

<sup>55</sup> *Welch v. United States*, 136 S. Ct. 1257, 1261 (2016).

<sup>56</sup> *Id.* at 1262.

<sup>57</sup> *Id.* at 1264.

<sup>58</sup> *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1264–65 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004)).

<sup>62</sup> *Id.* at 1265.

<sup>63</sup> *Id.* at 1268.

<sup>64</sup> *Id.* at 1265.

<sup>65</sup> *See Dodd v. United States*, 545 U.S. 353, 358–59 (2005).



*C. Beckles v. United States*

In *Beckles*, the Court examined whether the decision in *Johnson* rendered the residual clause in the advisory Guidelines unconstitutionally vague.<sup>66</sup> Beckles was convicted in 2007 for possession of a firearm by a convicted felon and deemed a career offender under the residual clause of the Guidelines.<sup>67</sup> The district court sentenced Beckles to 360 months in prison in accordance with the Guidelines' recommended range.<sup>68</sup> Beckles argued that because the residual clause in the Guidelines was identical to the ACCA's residual clause that the *Johnson* Court held unconstitutional, *Johnson* had determined Beckles's sentence was void for vagueness.<sup>69</sup> Writing for the Court, Justice Thomas concluded that "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause."<sup>70</sup>

A criminal law is unconstitutional when it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."<sup>71</sup> Under the "void for vagueness" doctrine, the Court has invalidated criminal laws "that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses."<sup>72</sup> *Johnson* applied the vagueness rule to a statute that fixes permissible sentences.<sup>73</sup> But "[u]nlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences."<sup>74</sup> Because the Guidelines "merely guide the district courts' discretion, the Guidelines are not amenable to a vagueness challenge."<sup>75</sup> Therefore, the Court concluded that the petitioner's claim that the residual clause of the advisory Guidelines was unconstitutional failed because the advisory Guidelines are not subject to vagueness challenges.<sup>76</sup>

In a concurring opinion, Justice Sotomayor criticized the majority for immunizing the advisory Guidelines as a whole from vagueness challenges.<sup>77</sup> Justice Sotomayor argued that the Guidelines "play a central role" in fixing sentences, even after the Court determined that they no longer bind federal courts.<sup>78</sup> In a footnote, Justice Sotomayor pointed out the majority's overly broad opinion:

The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether the defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*—that is, during the period in which the Guidelines *did* "fix the

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<sup>66</sup> *Beckles v. United States*, 137 S. Ct. 886, 890 (2017).

<sup>67</sup> *Id.* at 890–91.

<sup>68</sup> *Id.* at 891.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 890.

<sup>71</sup> *Id.* at 892 (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 894.

<sup>76</sup> *Id.* at 890.

<sup>77</sup> *Id.* at 898 (Sotomayor, J., concurring).

<sup>78</sup> *Id.* at 899.

permissible range of sentences,”—may mount vagueness attacks on their sentences.<sup>79</sup>

This concurring opinion played a significant role in the development of the current circuit split.

### III. THE SCOPE OF THE RIGHT ANNOUNCED IN *JOHNSON*

This Part explores the arguments that have led to the circuit split. It begins by exploring the majority approach to the issue, which has concluded that individuals sentenced under the residual clause of the mandatory Guidelines do not have timely claims. While this answer at first may appear to be correct, a deeper review of the Court’s characterization of *Johnson* makes it clear that the scope of the right announced in *Johnson* includes individuals sentenced under the residual clause of the mandatory Guidelines.

#### *A. The Right Announced in Johnson is Limited to the ACCA, and therefore the Motion is Untimely*

The Fourth Circuit’s decision in *Brown* illustrates the circuits’ majority approach to individuals sentenced under the mandatory Guidelines who attempt to rely on *Johnson* for relief. Within one year of *Johnson*, *Brown* filed a motion to vacate his sentence, arguing that one of his prior convictions could no longer qualify him for “career offender” status and, thus, an enhanced sentence.<sup>80</sup> *Brown* argued that the decision in *Johnson* invalidated not just the residual clause of the ACCA, but also the identically worded residual clauses in the Guidelines.<sup>81</sup> Although *Brown* acknowledged that the Supreme Court’s decision in *Beckles* held that *Johnson* did not apply to the advisory Guidelines, he nonetheless argued that the mandatory Guidelines “cabined a sentencing judge’s discretion in a manner that raises the same concerns animating the Supreme Court’s decision in *Johnson*.”<sup>82</sup>

In rejecting this claim, the Fourth Circuit relied on two separate arguments. First, the court rejected *Brown*’s claim that *Johnson* established the right for individuals sentenced under the residual clause in the mandatory Guidelines to be resentenced.<sup>83</sup> The court read *Johnson* as narrowly addressing the constitutionality of the residual clause of the ACCA.<sup>84</sup> Because the decision in *Johnson* did not discuss the mandatory Guidelines’ residual clause, *Johnson* did not create a right on which *Brown* could rely.<sup>85</sup>

Next, the court addressed *Brown*’s claim that a reading of *Booker* through *Beckles* established the right to be resentenced because the *Beckles* Court specifically

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<sup>79</sup> *Id.* at 903 n.4 (citations omitted).

<sup>80</sup> *United States v. Brown*, 868 F.3d 297, 300 (4th Cir. 2017).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 302.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

limited its holding to the advisory version of the Guidelines.<sup>86</sup> Here, the Court turned to a plain language approach to interpret the statute.<sup>87</sup> After looking at the Merriam-Webster definition of “recognized,” the court concluded that “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.”<sup>88</sup> The court latched onto a footnote in Justice Sotomayor’s concurrence in *Beckles* and concluded that the Supreme Court explicitly left the right Brown asserted as an open question.<sup>89</sup> Therefore, the court concluded that Brown did not have a timely petition under § 2255(f)(3) because he did not assert a right initially recognized by the Supreme Court.<sup>90</sup>

While the *Brown* decision is not an exact replica of the other circuit decisions, it illustrates the two main arguments against claims that *Johnson* created a right to be resentenced for individuals sentenced under the residual clause of the mandatory Guidelines. The Ninth Circuit added another point worth noting. After it concluded that the right in *Johnson* was narrower than the petitioner claimed,<sup>91</sup> the court highlighted the Supreme Court’s admonition “against framing [the Supreme Court’s] precedents at such a high level of generality.”<sup>92</sup>

This interpretation of § 2255(f)(3), in conjunction with the right announced in *Johnson*, is certainly plausible. Given the adoption of this interpretation by four of the federal courts of appeal, it is clear that the interpretation has an immediate, persuasive effect. A plain reading of the statute, in combination with Justice Sotomayor’s concurrence in *Beckles*, could persuasively foreclose the possibility of timeliness for individuals sentenced under the residual clause of the mandatory Guidelines. But upon a deeper review of the Supreme Court’s interpretation of § 2255(f)(3) and its decision in *Johnson*, the circuits’ majority approach concluding a petitioner such as Brown does not have a timely case is misguided.

#### *B. The Right Announced in Johnson Forbids the Courts from Fixing a Sentence Using the Unconstitutionally Vague Language of the Residual Clause*

The Seventh Circuit is the only circuit to conclude that individuals sentenced under the residual clause of the mandatory Guidelines have a right to be resentenced under *Johnson*.<sup>93</sup> A close review of *Dodd* shows that such criminals do have a timely claim, and thus courts should consider the substantive nature of the claim. The Supreme Court’s decision in *Sessions v. Dimaya* counsels that the right announced in *Johnson* is broad enough to include criminals sentenced under the residual clause of the mandatory Guidelines.<sup>94</sup> Further, the residual clause in the mandatory

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 301.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 299, 302.

<sup>90</sup> *Id.* at 304.

<sup>91</sup> *United States v. Blackstone*, 903 F.3d 1020, 1022–23 (9th Cir. 2018).

<sup>92</sup> *Id.* at 1026 (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014)).

<sup>93</sup> *Cross v. United States*, 892 F.3d 288, 291 (7th Cir. 2018).

<sup>94</sup> *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).

Guidelines suffers from the same two fatal deficiencies as the residual clause in the ACCA that was invalidated in *Johnson*.<sup>95</sup>

i. Timeliness of § 2255 Claim

In *Dodd*, the Supreme Court made clear that the timeliness question in a § 2255(f)(3) claim is determined by the first clause in the provision.<sup>96</sup> Thus, an individual sentenced under the residual clause of the mandatory Guidelines has a timely claim if he filed a § 2255 motion within one year from “the date on which the right asserted was initially recognized by the Supreme Court.”<sup>97</sup> The Seventh Circuit concluded the arguments accepted by the other circuits “improperly read[] a merits analysis into the limitations period.”<sup>98</sup> Requiring that the petitioner prove that the right in *Johnson* applied to his situation would “require reading ‘asserted’ out of the statute.”<sup>99</sup> Thus, the purported plain language of the statute would be contrary to another “theory of” statutory construction which attempts to give effect to every word of a statute.<sup>100</sup> Additionally, reading a merits requirement into the first clause would make “newly recognized by the Supreme Court” in the second clause of § 2255(f)(3) superfluous. Judge Howell provided further analysis of this issue in *United States v. Hammond*.<sup>101</sup> She pointed out that requiring the petitioner to prove the right applied to him “emphasizes the wrong clause” of § 2255(f)(3).<sup>102</sup> Thus, “[i]f the petitioner seeks the benefit of a right purportedly recognized by the Supreme Court within the preceding year, the petition is timely.”<sup>103</sup>

Under this view of § 2255(f)(3), individuals sentenced under the residual clause of the mandatory Guidelines would have a timely claim if they filed the motion within one year of the Court’s decision in *Johnson*. One immediate concern this may raise is that individuals would raise frivolous claims by asserting rights the Supreme Court has clearly not recognized. But the second clause of § 2255(f)(3) provides courts with a tool to summarily dismiss claims based on rights the Supreme Court has not “‘newly recognized . . .’ or ‘made retroactively applicable to cases on collateral review.’”<sup>104</sup> By following the Court’s guidance in *Dodd* to determine when the statute of limitations begins to run, this interpretation of § 2255(f)(3) most accurately describes the requirements a petitioner must satisfy to bring a timely § 2255 claim. Therefore, if individuals filed claims about the constitutionality of a clause identical to the ACCA’s residual clause within one year of *Johnson*, the petitions should be timely.

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<sup>95</sup> *Id.*

<sup>96</sup> *Dodd v. United States*, 545 U.S. 353, 358 (2005) (“Paragraph 6(3) identifies *one date and one date only* as the date from which the 1-year limitation period runs: ‘the date on which the right asserted was initially recognized by the Supreme Court.’”).

<sup>97</sup> 28 U.S.C. § 2255(f)(3) (2018).

<sup>98</sup> *Cross*, 892 F.3d at 293.

<sup>99</sup> *Id.* at 294.

<sup>100</sup> *Id.* (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

<sup>101</sup> 351 F. Supp. 3d 106, 119 (D.D.C. 2018).

<sup>102</sup> *Id.* at 120.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (quoting *Dodd v. United States*, 545 U.S. 353, 358 (2005)).

## ii. Merits of § 2255 Claim

Even if an individual sentenced under the residual clause of the mandatory Guidelines has a timely § 2255 claim, he must still show that the Supreme Court has recognized the asserted right and made it retroactive.<sup>105</sup> By concluding that such claims are not timely, the majority approach of the federal circuits has not reached this question. While the majority approach does not reach the issue, many of the arguments that the § 2255 motion is untimely overlap with a substantive consideration of the merits of such a motion. Before evaluating these arguments, the Note first argues that the residual clause of the mandatory Guidelines suffers from the same two fatal deficiencies outlined in *Johnson*.

In *Johnson*, the Court invalidated the residual clause of the ACCA because the combination of two features created more indeterminacy than the Due Process Clause allows.<sup>106</sup> The first feature was the uncertainty judges faced in using the categorical approach to estimate “the risk posed by a crime.”<sup>107</sup> In the words of Justice Scalia, “[t]he residual clause offers no reliable way to choose between [] competing accounts of what ‘ordinary’ attempted burglary involves.”<sup>108</sup> While this risk alone would not have been enough to violate the Due Process Clause, when combined with a second form of indeterminacy, the residual clause violated the Due Process Clause.<sup>109</sup> The second form of indeterminacy comes from the “serious potential risk” standard.<sup>110</sup> Applying this standard to a “judge-imagined abstraction,” the residual clause of the ACCA created a level of unpredictability that the Due Process Clause will not tolerate in a statute that fixed sentences.<sup>111</sup>

The residual clause of the Guidelines suffers from these same deficiencies.<sup>112</sup> This is easily seen because the two clauses are “materially identical” and include the “serious potential risk” standard.<sup>113</sup> The Supreme Court has required the use of the categorical approach for the ACCA because of the textual focus on “convictions” and the impracticability of asking a sentencing court to evaluate the conduct underlying a conviction that occurred long ago.<sup>114</sup> The “career offender” Guideline uses the same “convictions” language and presents the same difficulty of reconstructing the conduct of a prior conviction.<sup>115</sup> Moreover, like the ACCA, the

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<sup>105</sup> 28 U.S.C. § 2255(f)(3) (2018).

<sup>106</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2557–58 (2015).

<sup>107</sup> *Id.* at 2557.

<sup>108</sup> *Id.* at 2558.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Cross v. United States*, 892 F.3d 288, 299–300 (7th Cir. 2018).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 300–01. Looking to the underlying conduct might also raise concerns under the *Apprendi v. New Jersey* case. 530 U.S. 466 (2000). In that case, the Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. By using the categorical approach, a court does not raise concerns of finding facts about the nature of a past offense that cause a sentencing enhancement in violation of *Apprendi*.

<sup>115</sup> *Cross*, 892 F.3d at 300–01.

mandatory version of the Guidelines fixed the sentence of the criminal.<sup>116</sup> Therefore, the right to not have a sentence fixed by the unconstitutionally vague residual clause of the ACCA should equally apply to its twin, the residual clause of the mandatory Guidelines.

The *Brown* court would respond immediately by saying that the right announced in *Johnson* is narrowly limited specifically to the residual clause of the ACCA.<sup>117</sup> But as a D.C. district court noted, this is simply because “[t]he constitutional question came to the court packaged as an ACCA case.”<sup>118</sup> A dissent in *Johnson* argued that striking this clause could invalidate numerous laws that employ similar or identical standards.<sup>119</sup> Instead of simply saying the decision was limited to the residual clause of the ACCA, the majority responded that most other statutes that employ similar language would not come into “constitutional doubt” because they do not require applying the serious potential risk standard to “imagined crimes.”<sup>120</sup> Therefore, the decision in *Johnson* should apply to vague laws that suffer from the same two deficiencies that made the ACCA residual clause unconstitutional.

The Court’s decision in *Dimaya* further illustrates that the right announced in *Johnson* is not limited to the residual clause of the ACCA. That case involved a statute that allowed removal of an alien who was convicted of an aggravated felony.<sup>121</sup> One of the definitions of “aggravated felony” included a “crime of violence.”<sup>122</sup> The definition of “crime of violence” in 18 U.S.C. § 16 included a residual clause with the same two features that were “constitutionally problematic” for the residual clause of the ACCA.<sup>123</sup> The Court described this case as a “straightforward application” of the *Johnson* decision.<sup>124</sup> Because § 16’s residual clause had the same defects as the ACCA’s residual clause, “*Johnson* effectively resolved the case now before [the Court].”<sup>125</sup> As the *Hammond* court pointed out, the *Dimaya* Court cited only one case in its discussion of the constitutionality of § 16’s residual clause: *Johnson*.<sup>126</sup> This language in *Dimaya* shows that the Court was simply applying a right announced in *Johnson*, not breaking any new ground. This reading of *Dimaya* supports the conclusion that the right announced in *Johnson* applies beyond the residual clause of the ACCA to “vague laws that ‘fix the permissible sentences for criminal offenses.’”<sup>127</sup>

One possible counterargument to this reading of *Dimaya* is that the *Beckles* decision “made clear” that the *Johnson* decision does “not automatically apply to all

<sup>116</sup> *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (“[The Sentencing Guidelines] have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them [would] be reversed.” (citation omitted)).

<sup>117</sup> See *United States v. Brown*, 868 F.3d 297, 302 (4th Cir. 2017).

<sup>118</sup> *United States v. Hammond*, 351 F. Supp. 3d 106, 126 (D.D.C. 2018).

<sup>119</sup> *Id.* (citing *Johnson v. United States*, 135 S. Ct. 2551, 2577 (2015) (Alito, J., dissenting)).

<sup>120</sup> *Id.*

<sup>121</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018).

<sup>122</sup> *Id.* at 1211.

<sup>123</sup> *Id.* at 1213.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *United States v. Hammond*, 351 F. Supp. 3d 106, 127 (D.D.C. 2018) (citing *Dimaya*, 138 S. Ct. at 1214–16).

<sup>127</sup> *Id.* at 126 (quoting *Beckles v. United States*, 137 S. Ct. 886, 892 (2017)).

similarly worded [] clauses.”<sup>128</sup> In the *Beckles* case, the Court held that the residual clause of the advisory Guidelines was not unconstitutionally vague because “the advisory Guidelines are not subject to vagueness challenges.”<sup>129</sup> According to the Fourth Circuit, this decision “demonstrates that quacking like [the] ACCA is not enough to bring a challenge within the purview of the right recognized by *Johnson*.”<sup>130</sup> Although the language in the residual clause of the advisory Guidelines was identical to the residual clause of the ACCA,<sup>131</sup> the court concluded it was different because it did not “implicate the twin concerns underlying [the] vagueness doctrine” in *Johnson*.<sup>132</sup> Thus, the analysis in *Beckles* should not foreclose a challenge to the mandatory Guidelines using *Johnson* because the mandatory Guidelines *do* implicate the twin concerns underlying the vagueness doctrine.

Recently, the Sixth Circuit decided another case on this issue.<sup>133</sup> The majority opinion simply concluded that the three-judge panel was bound by the Sixth Circuit’s precedent in *Raybon v. United States*.<sup>134</sup> But Judge Moore wrote a concurring opinion encouraging the court to hear this case en banc and overrule the *Raybon* precedent.<sup>135</sup> Judge Moore rejected the contention that the right announced in *Johnson* was limited to individuals sentenced under the residual clause of the ACCA.<sup>136</sup> Following the Supreme Court’s conclusion that *Dimaya* was a “straightforward application” of the principle announced in *Johnson*, Judge Moore concluded that cases involving the residual clause of the mandatory Guidelines are even more straightforward because the clauses are identically worded.<sup>137</sup> The Court in *Dimaya* struck down the INA’s residual clause because it contained the same two deficiencies as the ACCA clause in *Johnson*.<sup>138</sup> The residual clause of the mandatory Guidelines is identical to the ACCA residual clause and is subject to the categorical approach.<sup>139</sup> The wording of the mandatory Guideline’s residual clause was even amended to reflect the language from the residual clause of the ACCA.<sup>140</sup> As a result, “[l]ogic dictates that both should suffer the same judgment.”<sup>141</sup> Judge Moore continued that applying *Johnson* to the residual clause of the mandatory Guidelines would not create a new rule.<sup>142</sup> *Teague v. Lane* provides that “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>143</sup> But a case merely applying a principle that governed “a prior decision to a

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<sup>128</sup> *United States v. Brown*, 868 F.3d 297, 302 (4th Cir. 2017) (citing *Beckles*, 137 S. Ct. at 890).

<sup>129</sup> *Beckles*, 137 S. Ct. at 890.

<sup>130</sup> *Brown*, 868 F.3d at 303.

<sup>131</sup> *Beckles*, 137 S. Ct. at 890.

<sup>132</sup> *Id.* at 894.

<sup>133</sup> See generally *Chambers v. United States*, 763 F. App’x 514 (6th Cir. 2019).

<sup>134</sup> *Id.* at 516, 518.

<sup>135</sup> *Id.* at 519 (Moore, J., concurring).

<sup>136</sup> *Id.* at 521–22.

<sup>137</sup> *Id.* at 522.

<sup>138</sup> *Id.* at 523.

<sup>139</sup> *Id.* ..

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 524.

<sup>143</sup> *Teague v. Lane*, 489 U.S. 288, 301 (1989).

different set of facts” does not announce a new rule.<sup>144</sup> This should have been the end of the analysis, but the *Raybon* case misconstrued *Beckles*.<sup>145</sup>

In *Raybon*, the Sixth Circuit relied on a footnote in Justice Sotomayor’s concurrence to conclude that whether *Johnson* applies to the mandatory Guidelines is an open question.<sup>146</sup> But the majority in *Beckles* “simply repeated . . . that, ‘[u]nlike the ACCA, . . . the advisory Guidelines do not fix the permissible range of sentences.’”<sup>147</sup> “Therefore, *Booker* and *Johnson*, together, dictate the answer to *Raybon*’s supposed ‘open question’ when mandatory Guidelines are at issue.”<sup>148</sup> Finally, Judge Moore noted that when the Sentencing Commission removed the residual clause from the advisory Guidelines, it determined that the Guidelines’ residual clause “implicates many of the same concerns cited by the Supreme Court in *Johnson*.”<sup>149</sup>

Judge Moore’s opinion in *Chambers* provides a compelling summary of the arguments discussed in this Note. The residual clause of the mandatory Guidelines suffers from the same two fatal deficiencies that invalidated the ACCA residual clause. Following the Court’s analysis in *Dimaya*, applying *Johnson* to the mandatory Guidelines does not create a new rule, but instead is simply a “straightforward application” of *Johnson* to a different set of facts.<sup>150</sup>

#### CONCLUSION

Although the majority of circuits has determined that individuals sentenced under the residual clause of the mandatory Guidelines do not have a timely claim under *Johnson*, a closer review of the Supreme Court decisions reveals that such petitioners should have timely claims if they filed within a year of *Johnson*. The *Dodd* Court made clear that the statute of limitations is based on the first clause in § 2255(f)(3).<sup>151</sup> Reading a merits analysis into the statute of limitations emphasizes the wrong clause of § 2255(f)(3). Thus, if the petitioners made a claim within a year of the asserted right established in *Johnson*, the claim should be timely.

These petitioners should succeed on the merit of their claims as well because the residual clause of the mandatory Guidelines has the same fatal flaws that made the residual clause of the ACCA unconstitutionally vague. It contains the same combined indeterminacy from the use of the categorical approach in conjunction with estimating a “serious potential risk.” Unlike the residual clause of the advisory Guidelines that does not fix sentences, the residual clause of the mandatory Guidelines does suffer from the same two fatal flaws. Therefore, the residual clause

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<sup>144</sup> *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (citing *Teague*, 489 U.S. at 307).

<sup>145</sup> *Chambers*, 763 F. App’x at 524–25 (Moore, J., concurring).

<sup>146</sup> *Id.* at 525.

<sup>147</sup> *Id.* (quoting *Beckles v. United States*, 137 S. Ct. 886, 892 (2017)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 526 (quoting U.S. SENTENCING GUIDELINES MANUAL app. C supp., amend. 798 (U.S. SENTENCING COMM’N 2016)).

<sup>150</sup> *Id.* at 525; see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018); *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013).

<sup>151</sup> *Dodd v. United States*, 545 U.S. 353, 358 (2005).



of the mandatory Guidelines should suffer the same fate as the unconstitutionally vague residual clause in the ACCA.

The argument that the right in *Johnson* is narrowly defined does not stand up to scrutiny. The Court's decision in *Dimaya* highlights the Court's application of a rule that was already set out in *Johnson*. This understanding of *Johnson* supports the conclusion that the decision in *Johnson* extends beyond the residual clause of the ACCA. Although the Court has specifically taken up the issue on the advisory Guidelines, that Court predicated the decision on the fact that the Guidelines were advisory.<sup>152</sup> Unlike the advisory Guidelines, the mandatory Guidelines had the "force and effect of law,"<sup>153</sup> and they, thus, suffered from the same indeterminacy problems as the residual clause in the ACCA statute.

This conclusion has important impacts. Justice Sotomayor noted in a dissent from an order that this likely affects over 1,000 criminals currently in prison.<sup>154</sup> Given that the purpose of the Career Offender Guideline is to fix a sentence at the statutory maximum, criminals sentenced under the residual clause of the mandatory Guidelines likely face enhanced sentences that they would not have otherwise received. Although the circuits have pointed to a plausible interpretation concerning relief for these criminals under § 2255, this Note demonstrates that such a view is misguided in light of the Supreme Court's precedent following *Johnson*. The Supreme Court's precedent counsels that *Johnson* established a right not to have a sentence fixed by a provision that is unconstitutionally vague. Therefore, individuals who filed a timely motion within a year of *Johnson* have a meritorious claim to be resentenced.

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<sup>152</sup> *Beckles v. United States*, 137 S. Ct. 886, 892 (2017).

<sup>153</sup> *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

<sup>154</sup> *Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting).