St. John's Law Review

Volume 92, Fall 2018, Number 3 Article 8

Protecting the Fifth Amendment: The Residual Clause in the Mandatory Guidelines is Void for Vagueness

Olivia M. Tourgee

PROTECTING THE FIFTH AMENDMENT: THE RESIDUAL CLAUSE IN THE MANDATORY GUIDELINES IS VOID FOR VAGUENESS

OLIVIA M. TOURGEE[†]

INTRODUCTION

Before 2005, federal judges were mandated to compute a criminal defendant's sentence by following boilerplate, mandatory sentencing Guidelines (the "Mandatory Guidelines") that often doubled or tripled the sentence once applied.[1] For instance, a defendant's sentence could increase from four and one half years to life,[2] or from five years to 155 years.[3] Judges had no discretion to decrease the length or gravity of the sentence based on ameliorating circumstances unique to the crime and defendant at hand.[4] Resulting sentences were thus often unjust. The Mandatory Guidelines present constitutional concerns that disrupt the very foundation of the American legal system: They violate the Fifth Amendment's Due Process Clause by failing to provide notice to individuals and encouraging abritrary enforcement by judges.[5]

Specifically, this Note focuses on defendants who were eligible for a sentencing enhancement as a career offender under the Mandatory Guidelines' residual clause. Under United States Sentencing Guideline § 4B1.1, a presiding judge was mandated to apply a sentencing enhancement under the career offender guideline if a defendant's instant offense was a crime of violence

[†] Notes and Comments Editor, *St. John's Law Review*; J.D. Candidate, 2019, St. John's University School of Law; B.A., 2016, Fairfield University. With overwhelming gratitude to the St. John's Law Review editors and staffers for their dedication and diligent efforts throughout the publication process. The author also thanks her parents and sister for their unwavering love and support.

[1] *See, e.g.*, United States v. Hammoud, 381 F.3d 316, 361–62 (4th Cir. 2004) (*en banc*) (Motz, J., dissenting); United States v. Rodriguez, 73 F.3d 161, 162–63 (7th Cir. 1996) (Posner, C.J., dissenting from denial of rehearing *en banc*).

[2] *Rodriguez*, 73 F.3d at 162–63.

[3] *Hammoud*, 381 F.3d at 361–62.

[4] United States v. Booker, 543 U.S. 220, 233–34 (2005).

[5] *See infra* Part III.A.

and the defendant had at least two prior felony convictions that qualify as crimes of violence.[6] A crime of violence is defined under United States Sentencing Guideline § 4B1.2(a)'s residual clause as any offense punishable by imprisonment for over a year that "otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ."[7]

The Federal Sentencing Guidelines have spurred much debate, which has resulted in constant litigation and attention from the federal courts. Independent of the judiciary, the United States Sentencing Commission (the "Commission") "establish[es] sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."[8] The Commission derives this power from the Sentencing Reform Act of 1984 (the "Act"), which "provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[9] The Commission sets guideline ranges for criminal acts based on a collection of factors.[10] The Act sought to effectuate a "fair sentencing system" through honesty and uniformity in sentencing.[11] Appellate courts can review the trial courts' sentencing decisions.[12]

---

[6] *Booker*, 543 U.S. at 233–34 (Stevens, J., opinion of the Court). The career offender guideline applies 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 . . . ; and (3) the defendant has at least two prior felony convictions of . . . a crime of violence . . . .

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2016).

[7] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2009) (amended 2015). A crime of violence, in full, is defined as:

> 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.

Id.

[8] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A1.1, introductory cmt. (U.S. SENTENCING COMM'N 2016).

[9] *Id.* ch. 1, pt. A1.2.

[10] *Id.*

[11] *Id.* ch. 1, pt. A1.3. In addition, the Commission adopted a "departure policy," meaning that courts can depart from the guideline range, because "it is difficult to

There are four Supreme Court decisions that are of particular relevance to the discussion of Mandatory Guidelines. First, the Court held in *United States v. Booker* that the Mandatory Guidelines are unconstitutional, which rendered the Federal Sentencing Guidelines as only advisory (the "Advisory Guidelines").[13] Second, the Court in *Johnson v. United States* ("*Johnson II*"), held that the Armed Criminal Career Act's (the "ACCA") residual clause, which is identical to the residual clause of the Mandatory Guidelines, is void for vagueness.[14] Third, the Court held in *Beckles v. United States* that the Advisory Guidelines were not vulnerable to vagueness challenges.[15] A unique issue is now presented because there is no clear authority on whether defendant-appellants sentenced under the Mandatory Guidelines can bring a void-for-vagueness claim. In fact, "[w]hether the Mandatory Guidelines are amenable to vagueness challenges is an issue of first impression in [most] circuit[s], and one that is sure to recur in light of *Johnson [II]* and *Beckles*."[16] Fourth and finally, in *Brown v. United States*, the Supreme Court recently denied certiorari to defendant-appellants seeking to challenge the constitutionality of their sentences imposed under the Mandatory Guidelines.[17] Importantly, Justice Sotomayor, joined with Justice Ginsburg, dissented from this denial of certiorari.[18] The dissent outlined many of the arguments discussed in this Note.

The first part of this Note will address the specific problem the Mandatory Guidelines present. First, the Mandatory Guidelines will be defined, and the mandatory and binding nature of these Mandatory Guidelines will be explored in depth.[19]

---

prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." *Id.* ch. 1, pt. A1.4(b).

[12] *Id.*; *see* 18 U.S.C. § 3742 (2012).

[13] 543 U.S. 220, 245 (2005) (Breyer, J., opinion of the Court).

[14] 135 S. Ct. 2551, 2563 (2015); *compare* Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii) (2012), *invalidated by* Johnson v. United States, 135 S. Ct. 2551 (2015) ("[T]he term 'violent felony' means any crime . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .) *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENTENCING COMM'N 2009) (amended 2015) ([T]he term 'crime of violence' means any offense . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .).

[15] 137 S. Ct. 886, 892 (2017).

[16] United States v. Miller, 868 F.3d 1182, 1186–87 (10th Cir. 2017).

[17] 586 U.S. __ (2018).

[18] *Id.* (Sotomayor, J., dissenting).

[19] *Booker*, 543 U.S. at 233–35.

Second, this Note will explain the significance of the Supreme Court's opinion in *Booker* that declared the Mandatory Guidelines unconstitutional.[20] Third, this Note will evaluate *Beckles*, where the Supreme Court held that the Advisory Guidelines were not subject to vagueness challenges.[21] Thus, the first part of this Note will set the stage for the problem that the Mandatory Guidelines present.

The second part of this Note will discuss and provide a solution to the constitutional issues presented by the Mandatory Guidelines. First, defendant-appellants sentenced under the Mandatory Guidelines should not be left without a path to challenge the unconstitutionality of their sentences. Instead, criminal defendants sentenced under the Mandatory Guidelines should be able to challenge their sentences. In support of this argument, this Note focuses on *Johnson II*, where the Supreme Court held that the ACCA's residual clause is void for vagueness.[22] The ACCA is not the same authority as the Mandatory Guidelines; however, this Note argues that the Mandatory Guidelines should be treated the same way as the ACCA was in *Johnson II* because the residual clauses of each authority have identical language.[23]

Second, allowing vagueness challenges to the Mandatory Guidelines is a workable and constitutional solution to the grave issue presented. Here, the Note will rely upon *Welch v. United States*, where the Supreme Court held that *Johnson II* announced a substantive rule that applies retroactively to cases on collateral review.[24] Following the first argument of this section, defendant-appellants sentenced under the Mandatory Guidelines should be able to raise their constitutional challenge under *Welch* because the circumstances surrounding their sentences are identical to those in the ACCA's residual clause.

The third part of this Note comprises the four arguments in favor of allowing vagueness challenges to the Mandatory Guidelines. First, the Mandatory Guidelines implicate

---

[20] *Id.* at 244–45 (Breyer, J., opinion of the Court).

[21] Beckles v. United States, 137 S. Ct. 886, 892 (2017).

[22] Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

[23] *See, e.g.*, United States v. Sumrall, 690 F.3d 42, 42–43 (1st Cir. 2012) (citing United States v. Jonas, 689 F.3d 83, 86 (1st Cir. 2012)).

[24] Welch v. United States, 136 S. Ct. 1257, 1265 (2016). This is important since many defendant-appellants challenge their sentences by seeking leave to file a second or successive motion to vacate their sentence under 28 U.S.C. § 2255(a). *See infra* Part II.B.

vagueness due process concerns. Second, *Johnson II* and *Beckles* permit vagueness challenges to the Mandatory Guidelines. Third, the ACCA and the Mandatory Guidelines should be treated identically because of their similar residual clauses. Fourth, the Supreme Court has recognized a new rule applicable to the Mandatory Guidelines. Accordingly, defendant-appellants sentenced under the residual clause of the Mandatory Guidelines should be able to challenge their sentences as void for vagueness.

I. BACKGROUND

A. The Significance of the Mandatory Guidelines

The Mandatory Guidelines present many constitutional and practical problems. First, judges had no discretion.[25] The Supreme Court held that judges did not have discretion under the Mandatory Guidelines: "The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges . . . . Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws."[26] Although 18 U.S.C. § 3553(a) states that the Mandatory Guidelines were one factor to be considered in imposing a sentence, 18 U.S.C. § 3553(b) orders that a court " '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases."[27] Specifically, the Mandatory Guidelines allowed departures where "the judge 'finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' "[28]

Yet departures were largely unavailable: "In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a

---

[25] United States v. Booker, 543 U.S. 220, 233–34 (2005) (Steven, J., delivering the opinion of the Court in part).

[26] *Id.*

[27] *Id.* at 234 (emphasis in original) (quoting 18 U.S.C. § 3553(b) (2000), *invalidated by* United States v. Booker, 543 U.S. 220 (2005)).

[28] *Id.* (citing 18 U.S.C. § 3553(b)(1) (2000), *invalidated by* United States v. Booker, 543 U.S. 220 (2005)).

sentence within the Guidelines range."[29] Data from the Commission supports this statement.[30] In a period just before the *Booker* decision, judges only departed from the Federal Sentencing Guidelines .8% of the time.[31] Even if a sentencing judge were to depart from the guideline range, the sentence would likely be reversed on appeal.[32]

The Supreme Court has continuously emphasized the history and importance of judicial discretion in sentencing.[33] Historically, Congress granted district courts "wide discretion in deciding whether the defendant should be incarcerated and for how long."[34] This broad discretion permitted district courts to individualize offenders' sentences by considering the facts at hand and the history of the offender.[35] The Supreme Court has stressed the significance of discretionary sentencing, adding that it has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."[36] Judicial discretion, it seems, composes an essential element of the sentencing process. Yet discretion is exactly what the Mandatory Guidelines stripped from district court judges.[37]

Second, the Mandatory Guidelines resulted in arbitrary sentencing.[38] Leading up to *Booker* in 2005, the Supreme Court noticed that judges emphasized "facts that enhanced sentencing ranges," which "increase[d] the judge's power and diminish[ed] that of the jury."[39] Instead, "the judge, not the jury, . . . determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance."[40] In fact, "[a]s the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very

---

[29] *Id.*

[30] *See generally* U.S. SENTENCING COMM'N, *Chapter 3 Adjustments and Plea / Trial Rates Pre-*Booker *2005*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2005/05_chapter3_pre.pdf.

[31] *Id.* at 1.

[32] *Booker*, 543 U.S. at 234–35.

[33] Beckles v. United States, 137 S. Ct. 886, 892–93 (2017).

[34] *Id.* at 893 (quoting Mistretta v. United States, 488 U.S. 361, 363 (1989)).

[35] *Id.*

[36] *Id.* (quoting *Booker*, 543 U.S. at 233).

[37] *See, e.g.*, *Booker*, 543 U.S. at 233–35.

[38] United States v. Parks, No. 03-CR-00490-WYD, 2017 WL 3732078, at *5 (D. Colo. Aug. 1, 2017).

[39] *Booker*, 543 U.S. at 236.

[40] *Id.*

serious indeed."[41] For instance, the sentencing judge in *Booker* enhanced Booker's sentence from 262 months (about twenty-two years) to life.[42] Other examples include judges increasing defendants' sentences from fifteen years to twenty-five years,[43] from seventy-eight months (about six and a half years) to 235 months (about twenty years), from fifty-four months (about four and a half years) to life,[44] and from fifty-seven months (about five years) to 155 years.[45]

Finally, there is a substantial number of defendant-appellants sentenced under the Mandatory Guidelines. The Commission conducted a study on the application of Guideline provisions.[46] From November 2004 to January 2005, the Commission received a staggering 18,788 cases where the Mandatory Guidelines were applied.[47] Therefore, the Mandatory Guidelines presented several problems within the criminal sentencing system.

B. Booker*: The Shockwave that Struck Criminal Sentencing*

The Federal Sentencing Guidelines were mandatory before *United States v. Booker* came down in 2005.[48] In *Booker*, the Supreme Court held that the Mandatory Guidelines were unconstitutional, rendering them only advisory in nature.[49] The Court described how the Mandatory Guidelines fixed sentences: "The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges . . . . Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws."[50] For this reason, judges had no discretion to order a sentence that departed from the mandated guideline range.[51] In fact, the Supreme Court specifically noted that departures were unavailable in most cases

---

[41] *Id.*

[42] *Id.*

[43] Jones v. United States, 526 U.S. 227, 230–31 (1999).

[44] *See* United States v. Rodriguez, 73 F.3d 161, 163 (7th Cir. 1996) (Posner, C.J., dissenting from denial of rehearing *en banc*).

[45] United States v. Hammoud, 381 F.3d 316, 361–62 (4th Cir. 2004) (en banc) (Motz, J., dissenting).

[46] U.S. SENTENCING COMM'N, *supra* note 30.

[47] *Id.* at 1 n.1.

[48] United States v. Booker, 543 U.S. 220, 233 (2005) (Stevens, J., opinion of the Court).

[49] *Id.* at 245 (Breyer, J., opinion of the Court).

[50] *Id.* at 233–34 (Stevens, J., opinion of the Court).

[51] *Id.*

and, if given, would be legally impermissible.[52] Even if a sentencing judge departed from the Mandatory Guidelines, that judge's decision to depart would have been reversed.[53]

Ultimately, *Booker* held that the Mandatory Guidelines were unconstitutional because they violate the Sixth Amendment's requirement that "juries, not judges . . . find facts relevant to sentencing."[54] Thus, the Federal Sentencing Guidelines are now only advisory. It is important to remember that *Booker* only came down in 2005, which means that a multitude of defendant-appellants were sentenced under the Mandatory Guidelines since 1984.[55] In fact, the Supreme Court has recently noted that this precise issue "could determine the liberty of over 1,000 people."[56]

C. The Aftermath of Beckles

Beckles is the most recent Supreme Court case to address the Federal Sentencing Guidelines. Consequently, the importance of *Beckles* has yet to be fully realized or defined. In *Beckles*, the Supreme Court held that the Advisory Guidelines are not void for vagueness under the Due Process Clause of the Fifth Amendment.[57] The Supreme Court explained that the twin concerns of the vagueness doctrine, notice and arbitrary enforcement, do not apply to the Advisory Guidelines.[58] Indeed, the Advisory Guidelines do not invoke notice concerns since they are not mandatory, and there is no fear of arbitrary enforcement because the Advisory Guidelines are not directly enforceable at all.[59]

In particular, *Beckles* states that there are only two kinds of criminal laws that can be challenged for vagueness: "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses."[60] As a result, one of the main issues in *Beckles* was whether the Advisory Guidelines "*fix the permissible sentences* for criminal offenses" so that they could be

---

[52] *Id.* at 234.
[53] *Id.* at 234–35.
[54] *Id.* at 245 (Breyer, J., opinion of the Court).
[55] *See, e.g.*, U.S. SENTENCING COMM'N, *supra* note 30.
[56] Brown v. United States, 586 U.S. __ (2018) (Sotomayor, J., dissenting).
[57] Beckles v. United States, 137 S. Ct. 886, 890 (2017).
[58] *Id.* at 894–95.
[59] *Id.*
[60] *Id.* at 892 (emphasis in original).

challenged under the vagueness doctrine.[61] The Supreme Court held that the Advisory Guidelines "merely guide the exercise of a court's discretion."[62]

The Supreme Court's holding in Beckles addressed the Advisory Guidelines, but it did not directly speak to the Mandatory Guidelines.[63] Yet Justice Sotomayor's concurrence provides a glimmer of hope for defendants sentenced under the mandatory regime. She wrote:

> 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 *United States v. Booker*—that is, during the period in which the Guidelines *did* "fix the permissible range of sentences"—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.[64]

Although the Supreme Court addressed vagueness challenges to the Advisory Guidelines in *Beckles*, the Court did not directly address defendants sentenced under the Mandatory Guidelines. This group of defendant-appellants uncovers a unique angle to *Johnson II*'s application under *Beckles*, which is whether a defendant can challenge his or her Mandatory Guidelines sentence retroactively under *Johnson II*. The case law in the short period of time since *Johnson II* and *Beckles* were decided addresses—and dismisses—challenges to Advisory Guidelines sentences. However, it is less clear what should happen to petitioners challenging their Mandatory Guidelines sentences as void for vagueness. Federal courts are divided on this issue left open by the Supreme Court in *Beckles*.

II. SOLUTIONS TO THIS DEPRIVATION OF DUE PROCESS RIGHTS

Fortunately, there is relevant case law that provides guidance on vagueness challenges. First, *Johnson II*'s analysis of the ACCA demonstrates that a vagueness challenge should be available for defendants sentenced under the identical language of the Mandatory Guidelines' residual clause. Second, *Welch* illustrates that a vagueness challenge to the Mandatory

---

[61] *Id.* (emphasis in original).

[62] *Id.*

[63] *Id.* at 890.

[64] *Id.* at 903 n.4 (Sotomayor, J., concurring) (emphasis in original) (internal citations omitted).

Guidelines is workable in identical circumstances. Third, vagueness challenges in other areas of law provide examples of when such challenges are not only permitted, but also successful.

A. The Framework from Johnson II *and the ACCA*

Currently, the Federal Sentencing Guidelines are advisory.[65] Since *Booker*, the Supreme Court has revisited the Federal Sentencing Guidelines several times. In 2015, the Supreme Court held in *Johnson II* that the ACCA's residual clause is void for vagueness.[66] Again, *Johnson II* is important because the ACCA's residual clause is identical to the residual clause in the Mandatory Guidelines. Implementation of the ACCA in 18 U.S.C. § 924(e)(1) resulted in an enhanced sentence for a defendant if he or she had three prior convictions that qualified as "violent felon[ies]."[67] The residual clause in § 924(e)(2)(B) defined a violent felony to include "any felony that 'involves conduct that presents a serious potential risk of physical injury to another.' "[68] The residual clause was to be applied by first having the court identify an "ordinary case" of the crime at hand; then, the court would determine whether the ordinary case of that crime would constitute a serious potential risk of physical injury to another person.[69]

The Court reasoned that "[b]y combining 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, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause

---

[65] United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J., opinion of the Court).

[66] Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

[67] *Id.* at 2555; Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(1) (2012).

[68] *Johnson*, 135 S. Ct. at 2555 (citing 18 U.S.C. § 924(e)(2)(B)). The full text of the statute defined a violent felony as:

> [A]ny crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924 (e)(2)(B).

[69] Moore v. United States, 871 F.3d 72, 75 (1st Cir. 2017) (citing *Johnson*, 135 S. Ct. at 2557).

tolerates."[70] The Court applied the vagueness doctrine to invalidate the ACCA's residual clause under the Due Process Clause.[71] The Supreme Court's holding in *Johnson II* affects the Mandatory Guidelines because the definition of "crime of violence" in the Mandatory Guidelines is almost identical to the definition of "violent felony" in the ACCA.[72] "Recognizing this resemblance, courts consistently have held that decisions construing one of these phrases generally inform the construction of the other."[73]

B. Welch*'s Helping Hand in Defining* Johnson II*'s Framework*

The Supreme Court's opinion in *Welch* demonstrates that vagueness challenges to the Mandatory Guidelines can be workable. In *Welch*, the Court held that *Johnson II* announced a substantive rule that applies retroactively to cases on collateral review.[74] First, the Court reasoned that *Johnson II* undoubtedly announced a new rule because it was not dictated by precedent.[75] Second, the Court reasoned that *Johnson II* announced a substantive rule because "it alters 'the substantive reach of the [ACCA]' such that a defendant can no longer be sentenced as an armed career criminal 'based on' the residual clause."[76] Because *Johnson II* announced a substantive rule, the Court held that it had retroactive effect in cases on collateral review.[77]

As a result, *Welch* further pushed open the door for defendant-appellants challenging their sentences under the Mandatory Guidelines. After *Beckles*, *Welch*'s reasoning facilitated void-for-vagueness challenges to the Mandatory

---

[70] *Johnson*, 135 S. Ct. at 2558.

[71] *Id.* at 2562–63.

[72] *See* Brown v. United States, 586 U.S. __ (2018) (Sotomayor, J., dissenting) (explaining that the residual clause in the Mandatory Guidelines contained the "exact same language" and was "identical" to the residual clause within the ACCA).

[73] United States v. Sumrall, 690 F.3d 42, 42–43 (quoting United States v. Jonas, 689 F.3d 83, 86 (1st Cir. 2012)). *See* discussion *infra* Part III.C.

[74] Welch v. United States, 136 S. Ct. 1257, 1265 (2016). This is important since many defendant-appellants challenge their sentences as an application for leave to file a second or successive motion to vacate their sentence under 28 U.S.C. § 2255(a). *See Federal Judicial Caseload Statistics 2016*, U.S. COURTS, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016 (last visited Oct. 10, 2018).

[75] *Welch*, 136 S. Ct. at 1264.

[76] In re Hoffner, 870 F.3d 301, 304 (3d Cir. 2017) (alteration in original) (quoting *Welch*, 136 S. Ct. at 1265).

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

Guidelines. Generally, such challenges occur under 28 U.S.C. § 2255.[78] To grant a second or successive motion under § 2255(h)(2), the court must determine that the petition contains (1) a new rule of constitutional law, (2) made retroactive to cases on collateral review by the Supreme Court, (3) that was previously unavailable.[79]

Usually, a petition will meet all three elements. First, the petition will likely lean on *Johnson II*, which announced as a new rule that "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process" because it is void for vagueness.[80] Second, the Supreme Court held that *Johnson II* "announce[s] a substantive rule that has retroactive effect in cases on collateral review."[81] Third, this rule was likely "previously unavailable" for petitioners sentenced before 2005 because *Booker* came down in 2005 and *Johnson II* came down in 2016. Therefore, a court should grant a second or successive motion under § 2255(h)(2) if the appellant relies on *Johnson II*, which announced a new rule of constitutional law applicable retroactively, and the timeline shows that this rule was not previously available.

A successful example of a § 2255(h)(2) claim is demonstrated by the First Circuit in *Moore v. United States*.[82] There, the defendant-appellant Moore sought to file a successive motion to vacate his sentence under § 2255(h).[83] The court illustrated Moore's § 2255(h)(2) claim:

> The new rule upon which Moore's motion relies, according to Moore, is that announced in Johnson [II]. Johnson II declared unconstitutionally vague the residual clause in the Armed Career Criminal Act's (ACCA) definition of a "violent felony." The Supreme Court made Johnson II retroactive to cases on collateral review in Welch v. United States. Moore seeks to argue in the district court that the new rule created by Johnson II invalidates the residual clause of the career offender guideline applied at his sentencing, which occurred before

---

[78] 28 U.S.C. § 2255(h)(2) (2012).
[79] *Id.*
[80] Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).
[81] *Welch*, 136 S. Ct. at 1268.
[82] 871 F.3d 72 (1st Cir. 2017).
[83] *Id.* at 74.

> United States v. Booker, made the guidelines advisory. For the following reasons, we grant Moore the certification he requests.[84]

Moore also instructs that if it is unclear whether the defendant-appellant identified a constitutional rule applicable to his or her situation, and "the question is close," the circuit court should leave the issue for the district court to resolve.[85] Thus, *Moore* demonstrates the legal argument defendant-appellants formulate when challenging their sentences under § 2255(h).[86]

Alternatively, defendant-appellants may also challenge their Mandatory Guidelines sentences under § 2255(f)(3). Because the statute of limitations would often prohibit a defendant sentenced under the Mandatory Guidelines before 2005 from bringing such a challenge, defendant-appellants often use this section of the statute to bring their claim. Section 2255(f)(3) states that there is a one-year statute of limitations for attacking a sentence, and that this limitation period shall run from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[87]

Thus, under § 2255(h)(2) or § 2255(f)(3), defendant-appellants must show that the Supreme Court has recognized a new rule or right. For the same reasons discussed above, defendant-appellants should succeed on their § 2255(f)(3) motions because they are asserting the exact same right recently recognized in *Johnson II*.[88] Therefore, vagueness challenges to the Mandatory Guidelines are workable, and § 2255 can be the vehicle for defendant-appellants to challenge their Mandatory Guidelines sentences.

C. The Vagueness Doctrine and the Path of Other Vagueness Challenges

1. Background on the Vagueness Doctrine

Defendant-appellants challenge their Mandatory Guidelines sentences under the vagueness doctrine. The vagueness doctrine is derived from the Supreme Court's understanding that the Due

---

[84] *Id.* (internal citations omitted).
[85] *Id.* at 80.
[86] *See, e.g.*, Remington v. United States, 872 F.3d 72, 75–76 (1st Cir. 2017).
[87] 28 U.S.C. § 2255(f)(3) (2012).
[88] *See infra* Part III.C.

Process Clause of the Fifth Amendment "prohibits the Government from '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.' "[89] Although limited in scope, the vagueness doctrine addresses two constitutional concerns: "providing notice and preventing arbitrary enforcement."[90] The vagueness doctrine requires clarity to defend the Fifth Amendment's Due Process protections; therefore, laws that are impermissibly vague must be invalidated.[91] Importantly, "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved."[92]

The Supreme Court "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."[93] First, the vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[94] Second, the vagueness doctrine requires that "statutes fixing sentences must specify the range of available sentences with 'sufficient clarity.' "[95] Normally, a person who engages in conduct that is "clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[96]

Although the vagueness doctrine addresses these twin concerns, there is also a third aspect of the vagueness doctrine: "the requirement that a legislature establish minimal guidelines

---

[89] Beckles v. United States, 137 S. Ct. 886, 892 (2017) (quoting Johnson v. United States, 135 S. Ct. 2551, 2556 (2015)); *see* United States v. Williams, 553 U.S. 285, 304 (2008).

[90] *Beckles*, 137 S. Ct. at 894; *see also* F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

[91] *Fox Television Stations*, 567 U.S. at 253.

[92] *Id.*; *see, e.g.*, *Williams*, 553 U.S. at 306 ("Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.").

[93] *Beckles*, 137 S. Ct. at 892 (emphasis in original).

[94] *Id.* (quoting Kolender v. Lawson*,* 461 U.S. 352, 357 (1983)).

[95] *Id.* (internal citations omitted) (citing United States v. Batchelder*,* 442 U.S. 114, 123 (1979)).

[96] *Williams*, 553 U.S. at 304.

to govern law enforcement."[97] Without this requirement, "a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' "[98] The vagueness doctrine provides a basis for appellants to challenge their convictions for various crimes and sentences.

2. Examples of Vagueness Challenges

Other cases with vagueness challenges illustrate how such a challenge is brought and addressed. For instance, in *Coates v. City of Cincinnati*, the Supreme Court invalidated an ordinance that criminalized the assembly of people on a sidewalk if done in an "annoying" manner.[99] The Supreme Court held that this ordinance was unconstitutional, in part, because it violated "the due process standard of vagueness."[100] The Court reasoned that this ordinance was "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct."[101] Moreover, the Court stated that the ordinance was vague because "no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' "[102]

Similarly, in *City of Chicago v. Morales*, the Supreme Court held that Chicago's Gang Congregation Ordinance was unconstitutionally vague.[103] This ordinance made it a crime for people to disobey a police officer's order to disperse and leave an area after the police officer, who reasonably believed that these people were gang members, thought they were remaining in one place with no apparent reason.[104] Notably, any person who disobeyed the police officer's order violated this ordinance,

---

[97] *Kolender,* 461 U.S. at 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[98] *Id.* (alteration in original) (citing *Smith*, 415 U.S. at 575).

[99] 402 U.S. 611, 613 (1971).

[100] *Id.* at 615.

[101] *Id.* at 614.

[102] *Id.* (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)) (explaining that although the ordinance encompassed conduct the city could constitutionally prohibit, the city must enact and enforce ordinances "with reasonable specificity toward the conduct to be prohibited" and not "whether or not a policeman is annoyed").

[103] 527 U.S. 41, 45–46, 51 (1999).

[104] *Id.* at 47.

whether or not he or she was actually a gang member.[105] Echoing the reasoning in *Coates*, the Court stated that an ordinance could be impermissibly vague if it does not establish standards to protect against the arbitrary deprivation of liberty.[106] The Court reasoned that a facial challenge was appropriate because of the vagueness of this ordinance; specifically, the ordinance infringed on constitutionally protected rights and contained no *mens rea* requirement.[107]

The Supreme Court also addressed the vagueness doctrine in *Holder v. Humanitarian Law Project*.[108] There, the plaintiffs brought a void-for-vagueness challenge to 18 U.S.C. § 2339B, which made it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[109] Ultimately, the Court held that the plaintiffs' vagueness challenge lacked merit and thus must fail.[110] The Court noted that a vagueness challenge under the Fifth Amendment does not need to involve a substantial amount of protected expression.[111] However, the plaintiffs there did not argue that the statute permitted too much enforcement discretion for the Government.[112]

Drawing a distinction, the Court in *Holder* reflected on past cases that applied the vagueness doctrine—cases involving "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[113] Yet in *Holder*, the statutory terms of "training," "expert advice or assistance," "service," and "personnel" did not require "untethered, subjective judgments."[114] Furthermore, the Court noted that Congress narrowed the definitions of the statutes over time and also included a knowledge requirement in the statute.[115] Finally, the Court stressed that the vagueness challenge must fail because the statutory terms clearly proscribed the plaintiff's conduct.[116]

---

[105] *Id.*

[106] *Id.* at 52 (citing *Kolender,* 461 U.S. at 358).

[107] *Id.* at 55 ("When vagueness permeates the text of such a law, it is subject to facial attack.").

[108] 561 U.S. 1 (2010).

[109] *Id.* at 8 (alteration in original).

[110] *Id.* at 20–21.

[111] *Id.* at 20.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 20–21.

[115] *Id.* at 21.

[116] *Id.*

In summary, these vagueness cases illustrate that a statute is unconstitutionally vague when it proscribes conduct with an unascertainable standard or with no standard of conduct specified at all. Without such standards defined, wholly subjective statutory definitions lead to the arbitrary deprivation of liberty. These cases demonstrate that the twin concerns underlying the vagueness doctrine, notice and arbitrary enforcement, can lead a court to render a statute unconstitutionally vague.

III. THE CONSTITUTIONAL NEED TO ALLOW VAGUENESS CHALLENGES TO THE MANDATORY GUIDELINES POST-*BECKLES*

Since the Supreme Court decided *Beckles* in 2017, defendant-appellants have flooded the lower federal courts with claims arising from this case. The Court in *Beckles* held that the Advisory Guidelines were not void for vagueness,[117] but it did not decide whether individuals sentenced under the Mandatory Guidelines could successfully raise vagueness challenges.[118] The cases stemming from *Beckles* are divided on whether the Mandatory Guidelines can be challenged as void for vagueness. Yet there are four strong arguments that demonstrate such challenges should be permitted. This Note argues that the Mandatory Guidelines should be vulnerable to vagueness challenges because (1) the Mandatory Guidelines implicate vagueness due process concerns; (2) *Johnson II* and *Beckles* permit vagueness challenges to the Mandatory Guidelines; (3) the ACCA and the Mandatory Guidelines should be treated identically; and (4) the Supreme Court has recognized a new rule applicable to the Mandatory Guidelines. The lower federal courts are divided, and "[t]his important question . . . calls out for an answer."[119] Thus, the Supreme Court should definitively hold that the residual clause of the Mandatory Guidelines is subject to vagueness challenges.

---

[117] Beckles v. United States, 137 S. Ct. 886, 892 (2017).

[118] *Id.* at 903 n.4 (Sotomayor, J., concurring).

[119] United States v. Brown, 586 U.S.__ (2018) (Sotomayor, J., dissenting).

A. The Mandatory Guidelines Implicate Vagueness Due Process Concerns

The Mandatory Guidelines should be subject to vagueness challenges because they implicate the due process concerns underlying the vagueness doctrine.[120] In *United States v. Parks*, the District Court of Colorado held exactly that, specifically stating that the Mandatory Guidelines did not provide notice or prevent arbitrary enforcement.[121] First, the court held that the Mandatory Guidelines did not provide notice because "when a judge found that the [M]andatory Guidelines' residual clause applied, that finding increased a defendant's sentence above the maximum lawful sentence to which the defendant would be exposed without the finding."[122] Second, the court held that the Mandatory Guidelines invited arbitrary enforcement because they had to be enforced by the courts, with rare exceptions, and it was unclear whether the offender would face "a significant enhancement under the language of the clause."[123]

Chief Judge Roger Gregory's dissent in *United States v. Brown* from the Fourth Circuit agreed that the Mandatory Guidelines did not provide notice and invited arbitrary enforcement.[124] Citing both *Johnson II* and *Welch*, Chief Judge Gregory reasoned 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."[125] Similarly, in *Cross v. United States*, the Seventh Circuit concluded that the residual clause of the Mandatory Guidelines implicated the twin concerns of the vagueness doctrine because it "impeded a person's efforts to 'regulate his conduct so as to avoid particular penalties' and left it to the judge to 'prescribe the . . . sentencing range available.' "[126]

---

[120] United States v. Parks, No. 03-CR-00490-WYD, 2017 WL 3732078, at *4 (D. Colo. Aug. 1, 2017).

[121] *Id.*

[122] *Id.*

[123] *Id.* at *5.

[124] 868 F.3d 297, 307–08 (4th Cir. 2017) (Gregory, C.J., dissenting).

[125] *Id.*

[126] 892 F.3d 288, 306 (7th Cir. 2018) (alteration in original) (quoting Beckles v. United States, 137 S. Ct. 886, 894–95 (2017)).

Additionally, the First Circuit in *Moore v. United States* gave the district court discretion to decide whether the Mandatory Guidelines were void for vagueness because the defendant did not qualify for a departure at sentencing.[127] Months later, the District Court of Massachusetts explicitly stated that the Mandatory Guidelines were vulnerable to vagueness challenges because they were binding on judges.[128] Therefore, the Mandatory Guidelines should be subject to vagueness challenges because they implicate the two foundational concerns underlying the vagueness doctrine: providing notice and preventing arbitrary enforcement by judges.[129]

B. Johnson II *and* Beckles *Permit Vagueness Challenges to the Mandatory Guidelines*

Beckles also triggered a series of cases that discussed whether *Johnson II* and *Beckles* permit vagueness challenges to the Mandatory Guidelines. Although the Advisory Guidelines are not vulnerable to vagueness challenges, the Mandatory Guidelines "are not immune from constitutional scrutiny under other due process challenges, the Ex Post Facto clause, or the Eighth Amendment."[130] The Supreme Court held in *Johnson II* that the ACCA's residual clause, which is identical to the residual clause of the Mandatory Guidelines, is void for vagueness.[131] In *Beckles*, the Court held that the Advisory Guidelines were not vulnerable to vagueness challenges,[132] leaving open whether individuals sentenced under the Mandatory Guidelines could bring vagueness challenges.[133] Under the reasoning and holdings in both *Johnson II* and *Beckles*, the Court should permit vagueness challenges to the Mandatory Guidelines.

---

[127] 871 F.3d 72, 84 (1st Cir. 2017).

[128] United States v. Roy, 282 F. Supp. 3d 421, 427 (D. Mass. 2017) ("The reasoning in *Beckles* depends on the advisory status of the Guidelines post-*Booker* and, as such, did not preclude vagueness challenges to the career offender provision as applied pre-*Booker*.").

[129] Beckles v. United States, 137 S. Ct. 886, 894 (2017); *see also* F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253–54 (2012).

[130] Wilson F. Green & Marc A. Starrett, *The Appellate Corner*, 78 ALA. LAW. 224, 232 (2017).

[131] *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

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

[133] *Id.* at 903 n. 4 (Sotomayor, J., concurring).

In *Moore*, the First Circuit agreed.[134] The First Circuit stated that "*Beckles* did not limit *Johnson II* to its facts. Rather, one can fairly and easily read *Beckles* as simply rejecting the application of the rule of *Johnson II* to the [A]dvisory [G]uidelines because, as a matter of statutory interpretation, those guidelines do not fix sentences."[135] The First Circuit further reasoned that *Beckles* left open the issue of the Mandatory Guidelines; consequently, the court acknowledged that the defendant was asserting the same right recognized by *Johnson II*.[136] Thus, a petitioner should be able to successfully challenge his or her Mandatory Guidelines sentence as vague because *Johnson II* recognized this exact right.

Similarly, in *United States v. Roy*, the District Court of Massachusetts held that "*Beckles* does not preclude application of *Johnson II* to the residual clause of the career offender guideline . . . ."[137] The court reasoned that vagueness challenges to the Mandatory Guidelines were not precluded under *Beckles* because the Supreme Court based its decision on the advisory nature of the current Federal Sentencing Guidelines.[138]

In addition, the Second Circuit stated that "*Beckles* did not clearly foreclose the argument" that the Mandatory Guidelines are vulnerable to vagueness challenges.[139] In *Parks*, the District Court of Colorado repeated this assertion.[140] That court explicitly agreed that *Beckles* did not foreclose relief for a defendant sentenced under the Mandatory Guidelines.[141] Even more, that court held that the defendant was entitled to relief under *Johnson II*.[142] Accordingly, *Beckles* should not prohibit a Mandatory Guidelines petitioner from bringing a vagueness claim, and *Johnson II* should provide relief to such petitioners.

Although several courts decided that *Johnson II* and *Beckles* do not apply to the Mandatory Guidelines, those courts applied flawed reasoning.[143] In *Davis v. United States*, the Eastern

---

[134] 871 F.3d 72, 83 (1st Cir. 2017).

[135] *Id.*

[136] *Id.*

[137] 282 F. Supp. 3d 421, 427 (D. Mass. 2017).

[138] *Id.*

[139] Vargas v. United States, No. 16–2112 (L), 2017 WL 3699225, at *1 (2d Cir. May 8, 2017).

[140] No. 03-CR-00490-WYD, 2017 WL 3732078, at *7, *13 (D. Colo. Aug. 1, 2017).

[141] *Id.*

[142] *Id.* at *13.

[143] Some district courts have reiterated the opinion that *Johnson II* solely applied to the ACCA and that *Beckles* intentionally avoids addressing the vagueness

District of Wisconsin held that *Beckles* demonstrated that *Johnson II*'s rationale does not apply to the Mandatory Guidelines.[144] The court continued to find that *Johnson II*'s holding should exclude the expectation of defendants "to be free from a sentence arguably impacted by vague sentencing guidelines."[145] Yet this line of reasoning is inherently flawed: The Fifth Amendment expressly "prohibits the Government from '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.' "[146]

Consequently, on appeal, the Seventh Circuit reversed and remanded the district court's opinion in *Davis*. Citing *Beckles*, the Seventh Circuit reasoned that the Mandatory Guidelines were vulnerable to vagueness challenges because they "impeded a person's efforts to 'regulate his conduct so as to avoid particular penalties' and left it to the judge to 'prescribe the . . . sentencing range available.' "[147] Further, the Seventh Circuit stated that *Johnson II* retroactively applies to the Mandatory Guidelines and provides relief to defendant-appellants sentenced under the Mandatory Guidelines.[148]

Defendants should be free from a sentence affected by vague Federal Sentencing Guidelines. In fact, the Supreme Court has held that impermissibly vague laws must be invalidated.[149] The heart of the vagueness doctrine requires that criminal statutes be defined with sufficient definiteness and clarity.[150] Even more, the Court in *Johnson II* notes that "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant

---

doctrine with respect to the Mandatory Guidelines; thus, these courts assert that *Johnson II* and *Beckles* do not permit vagueness challenges to the Mandatory Guidelines. *See, e.g.*, United States v. Baldwin, No. CR 00–105, 2017 WL 3730503, at *3 (E.D. La. Aug. 30, 2017); Mitchell v. United States, No. 3:00-CR-00014, 2017 WL 2275092, at *4 (W.D. Va. May 24, 2017).

[144] No. 16-C-747, 2017 WL 3129791, at *5 (E.D. Wis. July 21, 2017), *rev'd and remanded by* Cross v. United States, 892 F.3d 288 (7th Cir. 2018).

[145] *Id.*

[146] Beckles v. United States, 137 S. Ct. 886, 892 (2017) (quoting Johnson v. United States, 135 S. Ct. 2551, 2556 (2015)); *see* United States v. Williams, 553 U.S. 285, 304 (2008).

[147] Cross v. United States, 892 F.3d 288, 306 (7th Cir. 2018) (quoting *Beckles*, 137 S. Ct. at 894–95).

[148] *Id.* at 307.

[149] F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

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

alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.' "[151] Therefore, any case law claiming the opposite is relying on unconstitutional principles.

On that same note, the Fourth Circuit in *United States v. Brown* contended that *Beckles* established that *Johnson II*'s rationale could not be applied to similar residual clauses because the Supreme Court's "carefully crafted" holding only addressed the Advisory Guidelines.[152] However, Chief Judge Gregory's dissent in *Brown* is more persuasive. Chief Judge Gregory maintains that "*Beckles* and *Booker* merely reinforce that the right newly recognized in *Johnson* [*II*] is indeed applicable to [the defendant's] claim."[153] He reasoned that *Beckles* only excluded the advisory sentencing provisions from *Johnson II*'s holding, but it "did not disturb *Johnson*[*II*]'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."[154] The dissent summarized that *Beckles* "[shrunk] the universe of sentencing provisions susceptible to attack on vagueness grounds [and] reinforced that a defendant has the due process right—as newly recognized in *Johnson* [*II*]—not to have his sentence fixed by the application of the categorical approach to an imprecise and indeterminate sentencing provision."[155]

In short, the Supreme Court's holding in *Beckles* permits petitioners sentenced under the Mandatory Guidelines to bring vagueness claims under *Johnson II*'s new rule. Although the courts are somewhat split on whether *Johnson II* and *Beckles* allow vagueness challenges to the Mandatory Guidelines, the more persuasive case law explains that such challenges should be permitted under *Johnson II*, *Beckles*, and the Due Process Clause.

---

[151] *Johnson*, 135 S. Ct. at 2556–57 (2015) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

[152] 868 F.3d 297, 302–03 (4th Cir. 2017).

[153] *Id.* at 310 (Gregory, C.J., dissenting).

[154] *Id.* at 308 (emphasis omitted).

[155] *Id.*

C. *The Supreme Court's Treatment of the ACCA Further Supports that the Mandatory Guidelines Should Be Vulnerable to Vagueness Challenges*

The Supreme Court's treatment of the ACCA in *Johnson II* provides additional support for the proposition that void-for-vagueness challenges should be allowed under the Mandatory Guidelines. In *Johnson II*, the Supreme Court held that the ACCA's residual clause, which is identical to the residual clause of the Mandatory Guidelines, is void for vagueness.[156] With such exact similarities, it logically follows that the ACCA and the Mandatory Guidelines should be treated in the same manner.[157] In fact, "[r]ecognizing this resemblance, courts consistently have held that decisions construing one of these phrases generally inform the construction of the other."[158]

The First Circuit explicitly held that "*Beckles* did not limit *Johnson II* to its facts."[159] Following this precedent, the District Court of Massachusetts maintained that "a straightforward application of *Johnson II*" to the Mandatory Guidelines is appropriate because the Mandatory Guidelines' residual clause tracks the residual clause of the ACCA.[160] Furthermore, the District Court of Massachusetts declared that in *Moore*, the First Circuit rejected the reasoning of the Fourth and Sixth Circuits that *Johnson II* only applies to the ACCA.[161]

In *United States v. Costello*, the Southern District of Ohio applied the vagueness doctrine to a defendant sentenced under the Mandatory Guidelines because under those guidelines, "the residual clause of the Guideline Career Offender requirement, which is *textually the same* as the clause declared unconstitutionally vague in *Johnson* [*II*], is also unconstitutionally vague."[162] The District Court of Colorado echoed this reasoning in *Park*s by drawing parallels between the

---

[156] *Johnson*, 135 S. Ct. at 2563.

[157] United States v. Sumrall, 690 F.3d 42, 42–43. *See also* Brown v. United States, 586 U.S. __ (2018) (Sotomayor, J., dissenting) ("You might think that if a sequence of words that increases a person's time in prison is unconstitutionally vague in one legally binding provision, that same sequence is unconstitutionally vague if it serves the same purpose in another legally binding provision.").

[158] *Id.* (quoting United States v. Jonas, 689 F.3d 83, 86 (1st Cir. 2012)).

[159] United States v. Roy, 282 F. Supp. 3d 421, 428 (D. Mass. 2017) (quoting Moore v. United States, 871 F.3d 72, 83 (1st Cir. 2017)).

[160] *Id.* (quoting *Moore*, 871 F.3d at 82).

[161] *Id.*; *Moore*, 871 F.3d at 83.

[162] No. 1:02-CR-089, 2017 WL 2666410, at *2 (S.D. Ohio June 21, 2017) (emphasis added) (internal citations omitted).

Mandatory Guidelines and the ACCA.[163] The court noted that just as a sentencing judge was constrained under the ACCA, the sentencing judge in that case was legally bound to impose a sentence within the Mandatory Guidelines range.[164] Further, the court stated that the Mandatory Guidelines implicate the same due process concerns as the ACCA had.[165] The court observed that the residual clause in both the Mandatory Guidelines and the ACCA deprived the defendant of notice because it drove a defendant's sentence above the maximum lawful sentence otherwise applicable.[166] Additionally, the language in both residual clauses made it unclear whether the defendant risked a significant enhancement under the clause, which could implicate arbitrary enforcement by judges.[167] From these cases, the Mandatory Guidelines clearly implicate the dual concerns underlying the vagueness doctrine, just as the ACCA had.

Chief Judge Gregory's dissent in *Brown* reiterated that the Mandatory Guidelines should be treated the same way as the ACCA was because of the identical language of the residual clauses and due process concerns.[168] He explained that "the residual clause at issue here . . . contained in the Mandatory Sentencing Guidelines, rather than the ACCA, is a distinction without a difference" because 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."[169] Therefore, Chief Judge Gregory argued that *Johnson II*'s new right is applicable to a defendant sentenced under the Mandatory Guidelines because the "residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson* [*II*]."[170] Because the Mandatory Guidelines invoke the same due process concerns as the ACCA, both residual clauses should be treated the same way.

---

[163] *See* United States v. Parks, No. 03-CR-00490-WYD, 2017 WL 3732078, at *5 (D. Colo. Aug. 1, 2017).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.* (citing Johnson v. United States, 135 S. Ct. 2551, 2557 (2015)).

[168] United States v. Brown, 868 F.3d 297, 310 (4th Cir. 2017) (Gregory, J., dissenting).

[169] *Id.*

[170] *Id.*

There is a dearth of case law opposing the above cases on this point, and the courts that do come out on the other side of this particular issue do not provide any effective reasoning. For example, the Western District of Virginia, without explanation, claimed that it is "clear" that *Johnson II*'s holding only applied to the ACCA and did not extend to the Federal Sentencing Guidelines.[171] But such conclusory judgments cannot be upheld when constitutional rights are involved. Few courts support this incomplete finding, but, interestingly, those that do also concede that the text of the residual clauses in the ACCA and Mandatory Guidelines are "identically worded."[172] Although these cases claim that there are "fundamental difference[s]" between the two residual clauses, they do not detail these differences or the effects of these alleged differences.[173] As a result, this argument is without merit. The identical residual clauses within the ACCA and the Mandatory Guidelines should be treated in the same manner, and defendant-appellants should be able to challenge their Mandatory Guidelines sentences as void for vagueness.

D. The Supreme Court Has Recognized a New Rule in Johnson II *that Is Applicable to the Mandatory Guidelines*

Any argument contending that statutory and constitutional interpretations do not permit vagueness challenges to the Mandatory Guidelines is meritless. This argument contends that because only the Supreme Court can announce a new rule that is retroactive on collateral review, and the Supreme Court has not explicitly announced a rule applying to the Mandatory Guidelines under *Johnson II*, no new rule has been announced and therefore cannot be applied to the Mandatory Guidelines. Both the Fourth and Sixth Circuits have maintained this position, claiming that because *Beckles* left open the question whether the Mandatory Guidelines can be void for vagueness, that open question cannot comprise a right recognized by the Supreme Court.[174] Other district courts have agreed, reasoning

---

[171] Mitchell v. United States, No. 3:00-CR-00014, 2017 WL 2275092, at *4 (W.D. Va. May 24, 2017).

[172] *Brown*, 868 F.3d at 302 (internal quotations omitted) (quoting Beckles v. United States, 137 S. Ct. 886, 890 (2017)).

[173] *Id.*; United States v. Hurlburt, 835 F.3d 715, 726 (7th Cir. 2016) (Hamilton, J., dissenting), *abrogated by* Beckles v. United States, 137 S. Ct. 886 (2017).

[174] *Brown*, 868 F.3d at 301; Raybon v. United States, 867 F.3d 625, 630 (6th Cir. 2017).

that defendant-appellants making this argument are asking courts to "extend" *Johnson II*'s holding to the Mandatory Guidelines.[175] These courts state that this would allow the lower federal courts to make a new rule, which is only within the Supreme Court's power.[176] Yet even within those district courts, judges have granted a certificate of appealability on this issue.[177]

Nevertheless, federal courts should apply the vagueness doctrine to the Mandatory Guidelines under *Johnson II* and *Beckles* because doing so would not create a new rule of constitutional law.[178] The Supreme Court in *Chaidez v. United States* specifically held that "a case does *not* announce a new rule, [when] it [is] merely an application of the principle that governed a prior decision to a different set of facts."[179] Thus, a lower federal court that applies *Johnson II*'s holding to the Mandatory Guidelines would not be announcing a new rule; rather, it would be applying *Johnson II*'s principle to the analogous cases of Mandatory Guidelines petitioners.

For example, the First Circuit in *Moore* reasoned that "one can fairly and easily read *Beckles* as simply rejecting the application of the rule of *Johnson II* to the Advisory Guidelines because, as a matter of statutory interpretation, those guidelines do not fix sentences."[180] The court continued, "[w]hat *Beckles* left open, then, was a question of statutory interpretation concerning how mandatory the [Federal Sentencing Guidelines were] before *Booker*."[181] Consequently, the First Circuit held that the defendant sought to assert the right exactly recognized by *Johnson II*.[182]

---

[175] United States v. Kenney, No. 1:92-CR-22, 2017 WL 3602038, at *3 (M.D. Pa. Aug. 22, 2017); *Mitchell*, 2017 WL 2275092, at *5. *See also* United States v. Gholson, No. 3:99CR178, 2017 WL 6031812, at *3 (E.D. Va. Dec. 5, 2017); United States v. Blair, No. 1:01-CR-297, 2017 WL 5451714, at *3 (M.D. Pa. Nov. 14, 2017).

[176] *Kenney*, 2017 WL 3602038, at *3; *Mitchell*, 2017 WL 2275092, at *5. *See also* United States v. Aguilar, No. 02-40035-01-JAR, 2017 WL 3674976, at *2 (D. Kan. Aug. 23, 2017) (claiming that the defendant could not assert a vagueness claim under the Mandatory Guidelines because the Supreme Court has not yet recognized that right).

[177] *See, e.g.*, United States v. Graham, No. 99-10023-01-JTM (Criminal), 2018 U.S. Dist. LEXIS 75419, at *2–3 (D. Kan. May 4, 2018); *Kenney*, 2017 WL 3602038, at *4.

[178] *See* United States v. Roy, 282 F. Supp. 3d 421, 428 (D. Mass. 2017).

[179] 568 U.S. 342, 347–48 (2013) (alterations in original) (internal quotations omitted).

[180] Moore v. United States, 871 F.3d 72, 83 (1st Cir. 2017).

[181] *Id.*

[182] *Id.*

Likewise, the District Court of Massachusetts reasoned that "the task at hand is not fashioning a new rule of constitutional law, but rather simply interpreting a statute."[183] Importantly, the court noted that the Mandatory Guidelines were binding on judges, which made them "vulnerable to vagueness challenges under the rule adopted in *Johnson II*."[184] Applying *Johnson II*'s holding to the Mandatory Guidelines would therefore not be announcing a new rule; instead, it would be applying *Johnson II*'s rule to analogous facts through statutory interpretation. Vagueness challenges to the Mandatory Guidelines should thus be permitted.

CONCLUSION

Criminal defendants sentenced under the Mandatory Guidelines should not be left without a path to challenge the unconstitutional vagueness of their sentences. Multitudes of defendants have been sentenced under the constitutionally problematic Mandatory Guidelines. Specifically, the Mandatory Guidelines invoke the twin concerns of the vagueness doctrine: to protect individuals from lack of notice and from arbitrary enforcement by judges. The Mandatory Guidelines are thus infringing on individuals' constitutional rights. *Johnson II* and *Beckles* permit such vagueness challenges for individuals sentenced under the Mandatory Guidelines; the ACCA's residual clause is identical to that of the Mandatory Guidelines, and the new rule announced in *Johnson II* is applicable to the Mandatory Guidelines. Thus, such challenges are workable under the framework of both *Johnson II* and *Welch*.

Vagueness challenges to the Mandatory Guidelines will provide various benefits. First, such challenges bring practical value. Definitively stating that the Mandatory Guidelines are amenable to vagueness challenges will reduce the eruption of litigation in lower federal courts surrounding such challenges. This solution will alleviate administrative concerns. Second, permitting vagueness challenges to the Mandatory Guidelines will finally close the chapter of ambiguity in federal sentencing. This will be the final step in moving away from the unconstitutionality of the Mandatory Guidelines and the vagueness due process concerns implicated by this sentencing

---

[183] *Roy*, 282 F. Supp. 3d at 428.
[184] *Id.*

regime. To not address this imminent question in the affirmative will jeopardize the constitutional rights of many defendant-appellants.

The Supreme Court must answer this "important question of federal law that has divided the courts of appeals."[185] The "liberty of over 1,000 people" is at stake.[186] As Justice Sotomayor articulated, "[t]hat sounds like the kind of case [the Supreme Court] ought to hear."[187] Therefore, the Supreme Court should hear a case on this important issue and hold that the Mandatory Guidelines are amenable to vagueness challenges.

---

[185] Brown v. United States, 586 U.S. __ (2018) (Sotomayor, J., dissenting).
[186] *Id.*
[187] *Id.*