No. 17-5684

IN THE
Supreme Court of the United States

GREGORY EUGENE ALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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REPLY TO THE BRIEF IN OPPOSITION

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REPLY TO THE BRIEF IN OPPOSITION

For the foregoing reasons, the petition should be granted.

I. Mr. Allen's § 2255 petition is timely because Mr. Allen has asserted a new retroactive right.

A. The rule announced in *Johnson* applies where the law fixes sentences within a prescribed range.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the language in the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is facially void for vagueness. *Johnson*, 135 S. Ct. at 2557. This Court found that the ACCA residual clause "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* Based on vagueness, this Court struck down the residual clause as unconstitutional.

Mr. Allen asserts the right recognized in *Johnson* applies to the ACCA's residual clause *and* to any other law that fixes sentences using an identically-worded and identically-interpreted residual clause, including the law under which Mr. Allen was sentenced – the career offender guideline's residual clause in 2000 – a law that fixed sentences within a prescribed range. *See* U.S.S.G. §§ 4B1.1 & 4B1.2(a)(2) (2000); 18 U.S.C. § 3553(b); *United States v. Booker*, 543 U.S. 220, 227, 233–34, 238 (2005). The career offender guideline's residual clause was adopted from and repeats the ACCA's residual clause verbatim. However, the United States asserts that, "Petitioner . . . has not shown that he asserts . . . a new retroactive right." Response at 8.

The applicable principles having been announced in *Johnson*, this Court need not expressly create a new rule. Applying *Johnson* to the mandatory Guidelines is a straightforward application of the governing principles in *Johnson* to a law that "fixed sentences" just as the ACCA fixes sentences.

B. Applying the retroactivity principles discussed in *Teague v. Lane*, *Johnson* is retroactively applicable to the mandatory Guidelines.

The United States contends Mr. Allen's motion is not timely. Response at 8. In rejecting Mr. Allen's motion, the circuit court failed to use the correct analytical framework—this Court's "new rule" jurisprudence under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Under that framework, Mr. Allen's claim is merely an application of *Johnson*, and thus, his motion is timely.

Section 2255(f)(3) allows a federal prisoner to file a § 2255 motion within one year of this Court recognizing a new "right." This Court recognizes a new "right" for § 2255 purposes whenever it issues a "new rule" within the meaning of *Teague*, 489 U.S. 288. This Court issued a "new rule" when it issued *Johnson*. *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Within one year of the issuance of *Johnson*'s new rule, Mr. Allen "asserted" his claim under *Johnson*, and thus his motion is timely. 28 U.S.C. § 2255(f)(3). The circuit court did not even mention *Teague* and failed to recognize that a new "right" under § 2255(f)(3) is the same thing as a "new rule" under *Teague*.

Granted, to decide an open question in the petitioner's favor, a court might have to "break new ground" and thereby issue a new rule. *Teague*, 489 U.S. at 301. But that is not always necessary. Sometimes a court can decide an "open" question in the petitioner's favor without issuing a new rule. *Stringer v. Black*, 503 U.S. 222, 229 (1992). That happens when a court can decide the question by "merely" making "an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307. In other words, a question can be "open" even when its answer is "dictated by" Supreme Court precedent; that open question is simply answered by "applying" the precedential rule to the pending case, not by issuing a new rule. *Stringer*, 503 U.S. at 229, 237 (reversing Fifth Circuit's contrary resolution of an "open" question).

Teague itself provides a prime example of a court deciding an open question in the

petitioner's favor without announcing a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985). *See Teague*, 489 U.S. at 307. *Francis* involved the application of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which this Court had issued a new rule holding that due process prohibits any jury instruction that creates a mandatory presumption regarding *mens rea*. The instruction invalidated in *Sandstrom* involved a mandatory *conclusive* presumption, whereas the instruction in *Francis* involved a mandatory *rebuttable* presumption. Because the holding in *Sandstrom* did not reach rebuttable presumptions, the dissent argued that using *Sandstrom* to invalidate the *Francis* instruction would "needlessly extend our holding in [*Sandstrom*] to cases" involving rebuttable presumptions. *Francis*, 471 U.S. at 332 (Rehnquist, J., dissenting). But the Court explained that the factual "distinction" between the instructions in the two cases "d[id] not suffice" to call for a qualification of "the rule of *Sandstrom* and the wellspring due process principle from which it was drawn." *Id.* at 316, 326; *see Yates v. Aiken*, 484 U.S. 211, 218 (1988) (holding that *Francis* did not announce new rule). In the parlance of *Teague*, *Francis* shows that rejecting an untenable distinction does not serve to announce a new rule; it simply reinforces an old one in a different but materially equivalent context. In addition, this is precisely what courts have said when holding that *Descamps v. United States*, 133 S. Ct. 2276 (2013), which resolved an open question, is not a new rule.

These examples make it clear that Mr. Allen's request is merely an application of *Johnson*, not the issuance of a new rule. Specifically, Mr. Allen asks that this Court hold that *Johnson*'s rule regarding vagueness and the categorical approach applies not just to a sentencing enhancement fixed by statute, but also to a verbatim enhancement fixed by a Guideline that is made binding by statute. The immaterial factual "distinction" between Mr. Allen's case and the case adjudicated by *Johnson* does "not suffice" to make the Court's favorable new application of *Johnson* a new rule.

Francis, 471 U.S. at 16.

The circuit court, of course, did not actually engage in this analysis, nor use the proper *Teague* framework. Numerous district court cases, in applying the retroactivity principles discussed in *Teague*, *Welch*, and related cases, have found that the holding in *Johnson* in retroactively applicable to the residual clause of § 4B1.2(a)(2). *See, e.g., United States v. Jones, Crim. Case. No. 11-cr-00433,* 2016 WL 7178313, at *2 (D. Colo. Dec. 8, 2016)*; United States v. Parks*, No. 16-cv-01565-WYD, 2017 WL 3732078, at *21-25 (D. Colo. Aug. 1, 2017); *see also United States v. Costello*, No. 1:02-cr-089, 2017 WL 2666410, at *2 (S.D. Ohio June 21, 2017); *United States v. Tunstall*, No. 3:00-cr-050, 2017 WL 1881458, at *2, *6 (S.D. Ohio May 8, 2017); *United States v. Harris*, 216 F. Supp. 3d 1296, 1303-04 (W.D. Okla. 2016); *United States v. Aldershof*, No. 07-cr-10034091-JTM, 2016 WL 7219717, at *3 (D. Kan. Dec. 13. 2016); *United States v. Martinez*, No. 10-cr-00214-CMA, 2016 WL 6997266, at *3-4 (D. Colo. Nov. 30, 2016); *United States v. Chu*, No. 14-cr-262-WJM-1, 2016 WL 6892557, at *7-9 (D. Colo. Sept. 30, 2016); *United States v. Daugherty*, No. 07-CR-87-TCK, 2016 WL 4442801, at *5-6 (N.D. Okla. Aug. 22, 2016).[1]

C. The denial of the COA conflicts with decisions of this Court and the purpose of the statute of limitations.

The operative question is whether Mr. Allen has "asserted" that his sentence violates *Johnson* within one year of *Johnson*. "To 'assert' means '[t]o state positively' or '[t]o invoke or enforce a legal right.'" *United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017). "Thus, in order to be timely under § 2255(f)(3), a § 2255 motion need only 'invoke' the newly recognized right." *Id.*

[1] *Compare United States v. Mulay*, No. 01-40033-01-SAC, 2017 WL 373382 (D. Kansas Jan. 26, 2017).

The circuit court's contrary reading, conflicts with the purpose of a statute of limitations "to encourage plaintiffs to 'pursue diligent prosecution of known claims.'" *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017). It would encourage movants to sit on their claims until this Court decides a case exactly like theirs, a result in conflict with the purpose of the statute of limitations and the interest in finality. "[F]inality provides important incentives to litigants" to "exercise greater diligence and invoke whatever rights they may have early on." *United States v. Surratt*, 797 F.3d 240, 263 (4th Cir. 2015)), *appeal dismissed as moot after reh'g en banc granted*, 855 F.3d 218 (4th Cir. 2017) (en banc).

Reading § 2255(f)(3) to require this Court to announce each reasonable application of its rules is also unworkable and would lead to arbitrary results. The Supreme Court is not a court of error correction; rather, it guides the lower courts not just with technical holdings, but "with general rules that are logically inherent in [its] holdings, thereby ensuring less arbitrariness and more consistency in our law." *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017). Having announced the applicable principles in *Johnson*, the Court need not expressly hold that those principles invalidate the mandatory Guidelines' residual clause.

When Congress first adopted a statute of limitations in AEDPA, it intended § 2255(f)(3) to codify this Court's "new rule" jurisprudence.[2] Thus, to determine whether "the right asserted has been newly recognized by the Supreme Court" under § 2255(f)(3), the courts must apply *Teague* and its progeny. *See United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013); *United States v.*

[2] *See 137 Cong. Rec. S8558-02*, 1991 WL 111516, at *45, *48, *53 (June 25, 1991) (floor statement of Senator Hatch) (stating that the same language in precursor legislation was "designed" to "preserve and codify the important Supreme Court rulings in this area," citing *Teague*); H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995) (AEDPA's period of limitations "preserves review … when the United States Supreme Court recognizes a new right that is retroactively applicable").

Powell, 691 F.3d 554, 557 (4th Cir. 2012).[3]

A case announces a "new rule" when it "breaks new ground," but "a case does *not* 'announce a new rule, when it is merely an application of the principle that governed' a prior decision." *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)) (quoting *Yates v. Aiken*, 484 U.S. 211, 217 (1988) (holding *Francis v. Franklin*, 471 U.S. 307 (1985), was not a new rule but "merely an application of the principle that governed our decision in" *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which the question was "almost identical")); *Penry v. Lynaugh*, 492 U.S. 302, 314-19 (1989) (the rule Penry "seeks" requiring instructions permitting the jury to "give effect" to evidence of mental disability is not a "new rule" but an application of prior cases to a "closely analogous" case).

Put another way, "a rule that applies a general principle to a new set of facts typically does not constitute a new rule." *Morgan*, 845 F.3d at 667. If a "factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful," and the rule is not new. *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment).

Moreover, even if *Tyler v. Cain*, 533 U.S. 656 (2001), applied to the statute of limitations, it does not support the requirement of an on-point holding. The *Tyler* Court stated that the Court "can make a rule retroactive over the course of … [m]ultiple cases." *Id*. at 666. As Justice

[3] *See also, e.g.*, *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016) (explaining that § 2255(f)(3) was "enacted against the backdrop" of existing "new rule" precedent and was not intended to "distinguish[] rights that are 'newly recognized' from rights that are recognized in [a] 'new rule' under established retroactivity jurisprudence"); *United States v. Morgan*, 845 F.3d 664, 667-68 (5th Cir. 2017) (applying *Teague* and its progeny to determine that *Descamps* did not recognize a new right under § 2255(f)(3)); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207–08 (11th Cir. 2012) ("In deciding retroactivity issues under § 2255(f)(3), we have applied the rubric developed in *Teague*" to "first answer whether the Supreme Court decision in question announced a new rule").

O'Connor explained in her controlling concurrence, "a single case that expressly holds a rule to be retroactive is not a *sine qua non* for the satisfaction of this statutory provision." *Id*. at 668 (O'Connor, J., concurring). For example, if the Court holds in Case One that a certain kind of rule is retroactive, and announces a rule of that kind in Case Two, "it necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Id*. at 669. By analogy, having announced *Johnson*, the Court need not expressly hold in another case that identical language analyzed in the identical way in another provision that fixed sentences is void for vagueness.

The conclusion that this Court has not recognized that right that Mr. Allen asserts directly conflicts with *Teague* and its progeny, which reject the notion that the existence of an "open question" means that a rule is new. *See, e.g.*, S*tringer*, 503 U.S. at 229; *Wright*, 505 U.S. at 304 (O'Connor, J., concurring). This is precisely what courts have said when holding that *Descamps*, which resolved an open question, did not recognize a new right.

D. *Johnson's* applicability to the mandatory Guidelines is recognized.

The right Mr. Allen asserts is *Johnson*. This Court in *Booker*, and in previous cases, interpreted pre-*Booker* law—18 U.S.C. § 3553(b)—as "mak[ing] the relevant sentencing rules … mandatory and impos[ing] binding requirements on all sentencing judges." *Booker*, 543 U.S. at 259; *see also id*. at 234 (because § 3553(b) made the Guidelines "binding on judges, we have consistently held that the Guidelines have the force and effect of laws") (citing *Mistretta v. United States*, 488 U.S. 361, 391 (1989); *Stinson v. United States*, 508 U.S. 36, 42 (1993)). In determining whether *Johnson*'s new rule applies to the mandatory Guidelines' residual clause, it would be a "serious mistake" to ignore this Court's interpretation of federal law. *Stringer*, 503 U.S. at 237.

Beckles v. United States, 136 S. Ct. 2510 (2016) does not apply to Mr. Allen's case because he was sentenced before *Booker*, 543 U.S. 220, and before the advent of the advisory Guidelines.

In *Beckles*, this Court concluded that a defendant may not challenge the "advisory Guidelines" as unconstitutionally vague. The Court hinged its holding on the Guideline's advisory nature, noting repeatedly that the Guidelines merely guided a district court's discretion as opposed to mandating a particular sentence.

The critical role that the advisory nature of the Guideline scheme played in the *Beckles* decision is highlighted by the discussion of *Irizarry v. United States*, 555 U.S. 708 (2008). In *Irizarry*, this Court held that the requirement in Fed. R. Crim. P. 32(h) that a district court provide notice to the parties before it imposes a sua sponte departure from the Guidelines did not apply equally to variances. As the Court discussed in *Beckles*, this rule was developed because the "due process concerns that . . . require notice in a world of mandatory Guidelines no longer' apply" in a post-*Booker* world. *Beckles*, 136 S. Ct. at 894 (quoting *Irizarry*, 555 U.S. 714).

This Court decided *Booker* in January 2005. *See Booker*, 543 U.S. at 220. The district court sentenced Mr. Allen in April 2001. At that time, unlike in *Beckles*, the district court could not have decided that a below-range sentence was appropriate based on the § 3553(a) factors or completely reject the Guidelines on policy grounds.

In short, given the mandatory nature of the Guidelines at the time of Mr. Allen's sentence, the holding of *Beckles* does not preclude his claim. *Beckles* is limited to due-process challenges to an advisory sentencing scheme that was not in existence at the time Mr. Allen was sentenced. *See Beckles*, 137 S. Ct. at 904 (Sotomayor, J., concurring) (noting that *Beckles* "leaves open the question" whether defendants sentences pre-*Booker* may advance Due Process vagueness challenges).

Because the mandatory nature of the pre-*Booker* Guidelines is akin to the ACCA in that

they fixed a particular sentence,[4] the rule announced in *Johnson* applies retroactively on collateral review in his case for the reasons articulated in *Welch*. *Cf. Beckles,* 137 S. Ct. 886 (2017). *See also, e.g., Vargas v. United States,* 2017 WL 3699225 (2d Cir. May 8, 2017); *Reid v. United States*, No. 3:03-cr-30031-MAP, ECF No. 82 (D. Mass May 18, 2017).

Mr. Allen needs nothing from *Beckles* to assert the right not to be sentenced under the mandatory Guidelines' residual clause. Nor does *Beckles* suggest that Mr. Allen needs another new rule. *Beckles* did not leave open or decline to address the issue here; it simply and properly did not resolve a "question [that] is not presented by this case." *Beckles v. United States*, 137 S. Ct. 886, 903 & n.4 (2017) (Sotomayor, J., concurring). No justice said that the assertion of the right recognized in *Johnson* in a mandatory Guidelines case would require the creation of another new right within the meaning of § 2255(f)(3). That this Court has not expressly decided that *Johnson* applies to the mandatory Guidelines' residual clause does *not* mean that the right "by definition" has not been recognized. *Stringer*, 503 U.S. at 229. Justice Sotomayor suggested only that the *merits* of such a challenge have not yet been decided, and noted that *Beckles* did not foreclose such a challenge.

Finally, *Johnson* discussed the Guidelines' residual clause in analyzing several Guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently." *Johnson*, 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d

[4] In *Booker*, this Court held that 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, was "incompatible with" the Sixth Amendment. *Booker*, 543 U.S. at 233. In reaching that conclusion, the Supreme Court noted that "[if] the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required" then there would be no constitutional issue. *Id.* But given that the Guidelines were "not advisory" but instead "mandatory and binding on all judges," this Court indicated that it had "constantly held that the Guidelines have the force and effect of laws." *Id.*

808 (7th Cir. 2010), *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

E. Therefore, the § 2255 motion is timely.

Mr. Allen timely invoked the right recognized in *Johnson*, as required under § 2255(f)(3). He does not seek to break new ground, but asks the court to apply *Johnson*'s principles to his case. The only distinction between this case and *Johnson* is that the Guidelines, not the ACCA, fixed the sentence. The text and mode of analysis of the residual clauses of the ACCA and the career-offender Guideline are identical. In addition, "[t]he answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing Guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

Johnson held that the fair notice and arbitrary enforcement concerns underlying the vagueness doctrine apply to laws "fixing sentences." 135 S. Ct. at 2557. The question in *Beckles* was whether the advisory Guidelines "fix the permissible range of sentences" such that they implicate those concerns. 137 S. Ct. at 892. The Court concluded that they do not, contrasting the advisory Guidelines with the mandatory Guidelines, which were "binding." *Id.* at 894–95 (citing *United States v. Booker*, 543 U.S. 220, 233 (2005)). *Beckles* did not disturb that conclusion recognizing that there is no practical difference between a statutory range and a mandatory Guidelines range. *See, e.g., United States v. Foote*, 784 F.3d 931, 942 (4th Cir. 2015) (recognizing that because the mandatory Guidelines had "legal force," an erroneous mandatory career-offender designation would be "in excess of the maximum authorized by law"); *Hill v. Masters*, 836 F.3d 591, 599 (6th Cir. 2016) (A "sentence imposed under mandatory guidelines (subsequently lowered by retroactive Supreme Court precedent)" and a "sentence imposed above the statutory maximum" are both "beyond what is called for by law."); *Hawkins v. United States*, 706 F.3d 820, 822 (7th

Cir. 2013) ("Before *Booker*, the Guidelines were the practical equivalent of a statute.").

In sum, Mr. Allen's § 2255 motion asks only for an application of *Johnson*'s retroactive rule and is, therefore, timely.

II. Mr. Allen's 28 U.S.C. § 2255 petition is important and requires review.

A. It is important because there is substantial disagreement among the lower courts.

The circuit court's reasoning also conflicts with First and Third Circuit decisions in cases involving *Johnson*'s application to the mandatory Guidelines' residual clause. The First Circuit disagreed with the lower court in *Moore*, 871 F.3d 72. The court authorized a successive motion because the applicant had made a prima facie showing that his motion "relies on" *Johnson*. It was not persuaded that it "would need to make new constitutional law in order to hold that the pre-*Booker* SRA fixed sentences." *Id.* at 81. It reasoned that Congress used words such as "rule" and "right" rather than "holding" because it "recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* at 82. The pre-*Booker* Guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Id.* With respect to its reliance on *Beckles* and Justice Sotomayor's footnote, "*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 advisory Guidelines because, as a matter of statutory interpretation, those Guidelines do not fix sentences." *Id.* at 83. On this framing, "the right Moore seeks to assert is exactly the right recognized by *Johnson*." *Id.* The court also found that Moore's motion was timely under § 2255(f)(3). *Id*. at 77 & n.3.

The Third Circuit, in *In re Hoffner*, 870 F.3d 301 (3d Cir. 2017), also authorized a

successive petition because the applicant had made a prima facie showing that he "relies on" *Johnson*. The court stated that "the way to determine" whether a "motion urges the creation of a second new rule . . . is to undertake a *Teague* analysis" to determine whether the rule relied upon "'breaks new ground,'" or instead "'[is] merely an application of the principle that governed' a prior decision to a different set of facts.'" *Id.* at 311 & n.15 (quoting *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013)). It determined that this inquiry is "ill-suited" for an appellate court in the § 2255(h)(2) context, and left to the district court to determine "whether [the] petition has merit." *Id*. at 312.

District courts in other circuits have also disagreed with the Eleventh Circuit's analysis, which suggests the rift between the circuits will continue to widen. *See, e.g.*, *Parks*, 2017 WL 3732078 (finding that in *Beckles*, this Court exempted the advisory Guidelines from the due process vagueness doctrine because they are advisory, not because they are Guidelines); *Sarracino v. United States*, 2017 WL 3098262 (D.N.M. June 26, 2017), *report and recommendation adopted, No. CR 95-210 MCA*, 2017 WL 3822741 (D.N.M. Aug. 30, 2017); *United States v. Mock*, No. 2:02-CR-0102-RHW, 2017 WL 2727095 (E.D. Wash. June 23, 2017); *Tunstall*, 2017 WL 1881458, at *6; *Costello*, 2017 WL 2666410, at *1 (finding that the vagueness doctrine applies to the mandatory pre-*Booker* Sentencing Guidelines because they are sufficiently statute-like).

B. Mr. Allen's case may be substantially affected by resentencing.

The United States does not contest that if the residual clause were excised from the Guidelines, Mr. Allen would be subject to resentencing due to his predicate offense of Florida burglary no longer constituting a "crime of violence." Without the residual clause, Mr. Allen was not eligible for sentencing as a career offender. The United States also does not contest that Mr. Allen's total offense level was increased one level due to the career offender enhancement.

Response at 4. The United States further does not contest that Mr. Allen was sentenced pre-*Booker*, and as such, the Guidelines were mandatory at his sentencing. *Id.* The United States further concedes that Mr. Allen was sentenced to the low end of the mandatory Guidelines. *Id.* Finally, the United States does not contend that a departure was legally permissible in Mr. Allen's sentencing.

However, the United States asserts that if successful, the only relief Mr. Allen would receive would be resentencing "to the same guidelines range" now treated as advisory. Response at 13. However, given the errant career offender enhancement based on Florida burglary, Mr. Allen would be resentenced without the career offender enhancement–at one level lower–and with now advisory Guidelines. *See Peugh v. United States*, 133 S. Ct. 2072 (2013). Given that the errant enhancement caused a one level increase, even assuming *arguendo* that he did not receive a downward departure or variance, a resentence again to the low end would be a 27-month reduction in Mr. Allen's term of imprisonment. *See* Petition at n.1.

C. The class of mandatory career offenders is large.

The United States asserts this issue affects a "now-closed set of cases." Response at 14. However, it is not of diminishing importance. An estimate based on data from the Sentencing Commission suggests that a holding that *Johnson* applies to the mandatory Guidelines could affect approximately 1,187 cases nationally, including 268 in the Eleventh Circuit. *See* Appendix at A7. For many of these individuals, a favorable ruling would render them eligible for immediate or near immediate release.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX[5]

Estimated Number of Pending § 2255 Cases for Prisoners Sentenced Under the Mandatory Career Offender Guideline Seeking Relief Under *Johnson*

I. Data Source and Methodology Used to Determine Number of Defendants Sentenced Under the Mandatory Career Offender Guideline Likely to Remain in Prison

Data from fiscal year 1992 (the earliest date for which the Commission has made data available) through fiscal year 2004 (just before the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), on January 12, 2005) were used to estimate the number of offenders sentenced under the career offender guideline likely to remain in prison by district and nationwide. The data used for this analysis were extracted from the U.S. Sentencing Commission's Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project, Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission.[6] The underlying data are publicly available at the Commission's website.[7] The estimate of the number likely to remain in prison is based on the TIMESERV variable, which is calculated from the sentence imposed and assumes the offender will serve the sentence imposed less the maximum good time reduction of 54 days per year. This estimate does not account for early releases after sentencing, including pursuant to motions for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015).

II. Estimated Number of Mandatory Guidelines § 2255 Cases Pending in District Court or Court of Appeals Nationwide

The estimated number of mandatory guidelines § 2255 cases pending nationwide as of October 1, 2017 is 1,187 cases, arrived at as follows:

Using the data described in Part I, 4,926 offenders who were sentenced under the career offender guideline from fiscal year 1992 through fiscal year 2004 would likely remain in prison, not accounting for early releases after sentence was imposed. However, the number of § 2255 motions seeking relief under *Johnson* that remain pending is necessarily lower. First, some such motions have already been favorably resolved. Second, many prisoners sentenced under the mandatory career offender guideline are not eligible for relief under *Johnson* because, among other

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[5] This Appendix was originally prepared by the Sixth Circuit.

[6] For a description of the Datafiles, see U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* app. D at 1 (2004).

[7] *See* Commission Datafiles, http://www.ussc.gov/research-and-publications/commissiondatafiles.

things, the majority of career offender predicates (both instant offense and prior convictions) are "controlled substance offenses,"[8] and some "crimes of violence" qualify under the elements clause or the enumerated offense clause.

To estimate how many cases actually remain pending, all Federal Defender Offices that undertook to represent all prisoners sentenced under the mandatory career offender guideline in the district including those who initially filed *pro se*, and filed motions for all who appeared to be eligible for relief under *Johnson* were identified. Those offices reported the number of cases still pending in the district court or court of appeals as of October 1, 2017. That number was then divided by the number of people sentenced under the mandatory career offender in the district who would likely remain in prison based on the data described in Part I. Among those offices, the average ratio of pending cases to career offenders who would likely remain in prison based on the data described in Part I was 24.1 percent. The total number of people sentenced under the mandatory career offender guideline who would likely remain in prison based on the data described in Part I—4,926—was multiplied by 24.1 percent, yielding 1,187 mandatory guidelines cases estimated to be pending nationwide.

III. Estimated Number of Cases Pending in District Court or Court of Appeals in the Eleventh Circuit

As shown in the table below, in the nine districts in the Eleventh Circuit, 1,113 people sentenced under the mandatory career offender guideline likely remain in prison based on the data described in Part I. That number was multiplied by 24.1 percent, yielding 268 mandatory guidelines cases estimated to be pending in the Eleventh Circuit.

[8] From 1996 through 2016, the instant offense was drug trafficking for 64.9% to 76.2% of career offenders. *See* U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl.22 (1996-2016). The Commission's Datafiles do not contain information regarding the types of prior convictions upon which career offender status was based, but the most common "criminal history event" for career offenders sentenced in fiscal year 2014 was drug trafficking. *See* U.S. Sent'g Comm'n, *Public Data Briefing: "Crime of Violence" and Related Issues* at slide 19, available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20151105/COV_briefing.pdf.

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
D.C.		**58**	**14**
	District of Columbia	58	14
FIRST		**153**	**37**
	Maine	27	7
	Massachusetts	65	16
	New Hampshire	17	4
	Puerto Rico	24	6
	Rhode Island	20	5
SECOND		**135**	**33**
	Connecticut	32	8
	New York Eastern	23	6
	New York Northern	5	1
	New York Southern	61	15
	New York Western	8	2
	Vermont	6	1
THIRD		**294**	**71**
	Delaware	12	3
	New Jersey	44	11
	Pennsylvania Eastern	139	33
	Pennsylvania Middle	43	10
	Pennsylvania Western	52	13
	Virgin Islands	4	1

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
FOURTH		**987**	**238**
	Maryland	109	26
	North Carolina Eastern	168	40
	North Carolina Middle	151	36
	North Carolina Western	120	29
	South Carolina	162	39
	Virginia Eastern	156	38
	Virginia Western	60	14
	West Virginia Northern	25	6
	West Virginia Southern	36	9
FIFTH		**418**	**101**
	Louisiana Eastern	32	8
	Louisiana Middle	2	0
	Louisiana Western	43	3
	Mississippi Northern	21	5
	Mississippi Southern	17	4
	Texas Eastern	59	14
	Texas Northern	91	22
	Texas Southern	69	17
	Texas Western	84	20
SIXTH		**473**	**114**
	Kentucky Eastern	30	7
	Kentucky Western	43	10
	Michigan Eastern	55	13
	Michigan Western	30	7
	Ohio Northern	65	16
	Ohio Southern	30	7

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
	Tennessee Eastern	114	27
	Tennessee Middle	32	8
	Tennessee Western	74	18
SEVENTH		**406**	**98**
	Illinois Central	87	21
	Illinois Northern	91	22
	Illinois Southern	87	21
	Indiana Northern	20	5
	Indiana Southern	42	10
	Wisconsin Eastern	46	11
	Wisconsin Western	33	8
EIGHTH		**382**	**92**
	Arkansas Eastern	34	8
	Arkansas Western	15	4
	Iowa Northern	62	15
	Iowa Southern	58	14
	Minnesota	40	10
	Missouri Eastern	48	12
	Missouri Western	58	14
	Nebraska	46	11
	North Dakota	7	2
	South Dakota	14	3

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
NINTH		**335**	**81**
	Alaska	7	2
	Arizona	25	6
	California Central	89	21
	California Eastern	43	10
	California Northern	20	5
	California Southern	29	7
	Guam	3	1
	Hawaii	11	3
	Idaho	6	1
	Montana	15	4
	Nevada	37	9
	Oregon	30	7
	Washington Eastern	8	2
	Washington Western	12	3
TENTH		**172**	**41**
	Colorado	15	4
	Kansas	35	8
	New Mexico	41	10
	Oklahoma Eastern	10	2
	Oklahoma Northern	12	3
	Oklahoma Western	25	6
	Utah	21	5
	Wyoming	13	3

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
ELEVENTH		**1,113**	**268**
	Alabama Middle	14	3
	Alabama Northern	29	7
	Alabama Southern	16	4
	Florida Middle	326	79
	Florida Northern	173	42
	Florida Southern	361	87
	Georgia Middle	62	15
	Georgia Northern	86	21
	Georgia Southern	46	11
TOTAL		**4,926**	**1,187**

* Rounded to whole number for each district and circuit.