No. 17-6769

IN THE
Supreme Court of the United States

BRODERICK C. JAMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Reply to Government's Brief in Opposition

W. MATTHEW DODGE
Counsel of Record
FEDERAL DEFENDER PROGRAM
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Matthew_Dodge@FD.org

TABLE OF CONTENTS

REPLY TO THE BRIEF IN OPPOSITION

First, the government and Mr. James disagree on the legal questions presented here: Does Mr. James assert a *Johnson* claim?[1] Does his petition rely upon a rule made retroactively applicable to his collateral challenge?[2] Second, the government is wrong to say that the *Johnson* question here is "of limited and diminishing importance." Finally, Mr. James's case is a suitable vehicle to explore this *Johnson* query.

I. Mr. James's *Johnson*-based § 2255 petition is timely because he has asserted a new rule of constitutional law made retroactive to his collateral challenge.

A. The rule announced in *Johnson* applies where the law fixes sentences within a prescribed range, and this is precisely the right Mr. James asserted below. In *Johnson v. United States*, this Court held that the language in the residual clause of the Armed Career Criminal Act ("ACCA"),[3] is facially void for vagueness.[4] This Court found that the ACCA residual clause "both denies fair notice to defendants and invites arbitrary enforcement by judges."[5]

---

[1] *Brief in Opposition* at 8.

[2] *Brief in Opposition* at 10.

[3] 18 U.S.C. § 924(e).

[4] 135 S. Ct. 2551, 2557 (2015).

[5] *Id.*

This Court struck down the residual clause because it is unconstitutionally vague.

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. This includes the law under which Mr. James was sentenced in 1994—the career offender guideline—a law that fixed sentences within a prescribed range.[6] The career offender guideline's residual clause was adopted from and repeats the ACCA's residual clause verbatim. This Court need not create a new rule here. In must merely apply *Johnson* to the mandatory sentencing guidelines, a parallel law that "fixed sentences" just as its doppelganger, the ACCA does. Mr. James said so early and often in his application for a COA in the appeals court and petition for certiorari in this Court. Mr. James's is a *Johnson* claim.

B. The *Johnson* rule, as applied to the mandatory sentencing guidelines, is retroactively applicable to Mr. James's and other cases on collateral review. Mr. James's claim is merely an application of *Johnson* and, therefore, 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 v. Lane*.[7] This Court

---

[6] *See* U.S.S.G. §§ 4B1.1 & 4B1.2(a)(2); 18 U.S.C. § 3553(b); *United States v. Booker*, 543 U.S. 220, 227, 233-234, 238 (2005).

[7] 489 U.S. 288 (1989).

issued a "new rule" when it issued *Johnson*.[8] Within one year of the issuance of *Johnson*'s new rule, Mr. James "asserted" his claim under *Johnson*, and, thus, his motion is timely under § 2255(f)(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."[9] 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.[10]

In *Tyler v. Cain*, this Court recognized that it "can make a rule retroactive over the course of . . . [m]ultiple cases."[11] As Justice 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

---

[8] *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

[9] *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (citations omitted); *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).

[10] *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment).

[11] 533 U.S. 656, 666 (2001).

statutory provision."[12] 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."[13] So having announced *Johnson*, this Court need not expressly hold in another case that identical language analyzed in the identical way in another provision that fixed sentences is also void for vagueness. Through *Johnson*, this Court has already said so.

This Court did note in *Beckles* that the intersection of Johnson and the mandatory-guidelines is an open question. In many cases, a court may have to "break new ground" to answer an open question or, put another way, a court might have to issue a new rule.[14] But that is not always necessary. Sometimes a court can decide an "open" question in the petitioner's favor without issuing a new rule.[15] That happens when a court can decide the question by "merely" making "an application of the principle that governed" a prior Supreme Court case.[16] In other words, a question can be "open" even when its answer is "dictated by" Supreme Court precedent; that open question is simply

---

[12] *Id.* at 668 (O'Connor, J., concurring).

[13] *Id.* at 669.

[14] *Teague*, 489 U.S. at 301.

[15] *Stringer v. Black*, 503 U.S. 222, 229 (1992).

[16] *Teague*, 489 U.S. at 307.

answered by "applying" the precedential rule to the pending case, not by issuing a new rule.[17]

The *Teague* opinion itself provides us an example of this very path, of a court deciding an open question in the petitioner's favor without announcing a new rule: *Francis v. Franklin*.[18] *Francis* involved the application of *Sandstrom v. Montana*,[19] 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.[20] But the Court's majority 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

---

[17] *Stringer*, 503 U.S. at 229, 237 (reversing Fifth Circuit's contrary resolution of an "open" question).

[18] 471 U.S. 307 (1985) (cited by *Teague*, 489 U.S. at 307).

[19] 442 U.S. 510 (1979).

[20] *Francis*, 471 U.S. at 332 (Rehnquist, J., dissenting).

drawn."[21] 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.

Like these historical examples, Mr. James asks this Court merely to apply the extant rule in *Johnson*, not to issue a new rule. Mr. James asks this Court to 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 sentencing guideline that is made binding by statute. The immaterial factual "distinction" between Mr. James's case and the case adjudicated by *Johnson* does not suffice to make the Court's favorable new application of *Johnson* a new rule.[22]

The circuit court below did not engage in this analysis. But the principle question is whether Mr. James has "asserted" within one year of *Johnson* that his sentence violates *Johnson*. He has done exactly that. "To 'assert' means '[t]o state positively' or '[t]o invoke or enforce a legal right.'"[23] "Thus, in order to be timely under § 2255(f)(3), a

---

[21] *Id.* at 316, 326; *see Yates v. Aiken*, 484 U.S. 211, 218 (1988) (holding that *Francis* did not announce new rule).

[22] *Francis*, 471 U.S. at 16.

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

§ 2255 motion need only 'invoke' the newly recognized right."[24]

The government's contrary view conflicts with the purpose of a statute of limitations "to encourage plaintiffs to 'pursue diligent prosecution of known claims.'"[25] The government's preferred rule would encourage movants to sit on their claims until this Court decides a case exactly like their own. This would undermine the statute of limitations' interest in finality. "[F]inality provides important incentives to litigants" to "exercise greater diligence and invoke whatever rights they may have early on."[26]

Any reading of § 2255(f)(3) that requires this Court to announce each and every reasonable application of each and every rule is unworkable and would lead to arbitrary results. The Supreme Court is not a court of error correction. 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."[27] Once this

---

[24] *Id.*

[25] *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017).

[26] *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).

[27] *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017).

Court announced the applicable principles in *Johnson*, we may conclude, without a fresh declaration from this Court, that those very principles invalidate the mandatory guidelines' residual clause.

II. The *Johnson* question presented here is one of deep and lasting importance.

The mandatory guidelines question has vexed the lower courts since *Beckles*. The federal circuit courts (and the federal district courts, for that matter) are deeply split. The division widens as time passes. The circuit courts and district courts are stuck *in medias res* until this Court makes explicit what it has until now said implicitly. This Court ought to finish the work it began in *Beckles*, and declare once and for all that *Johnson* invalidates the residual clause found in the pre-*Booker*, mandatory sentencing guidelines. Mr. James wrote on this topic in his petition for certiorari.

Yet the government insists first that Mr. James "is likely subject to the same guidelines range as in his 1994 sentencing, except with the range treated as advisory."[28] Not so. Once Mr. James earns the § 2255 relief he asks for here, then he will return to the district court entirely free of the career-offender label. That enhancement is based upon Mr. James's long-ago Georgia armed robbery conviction. That predicate offense, in the absence of the residual clause, is highly vulnerable. Indeed, the Eleventh Circuit will soon decide that very question in a series of

---

[28] *Brief in Opposition* at 15.

pending *Johnson*-based § 2255 cases.[29] The government's superficial and conclusory discussion of the statute, and its citation of only one district court decision (a court outside the Eleventh Circuit no less), hardly carries the day. Once Mr. James appears for resentencing freed of the career-offender cloak, the district court will apply a substantially lower guideline range. And armed with that lower range (now advisory, of course), the court will surely impose a sentence far below Mr. James's current sentence.

The government blithely tells us that Mr. James cannot show that "he is likely to receive a significantly different sentence" because the now-invalid range was "discretionary" even in 1994 and the court imposed a sentence then at the high end of the range.[30] But the government ignores this Court's opinion in *Molina-Martinez v. United States*: "[T]he guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar. The guidelines inform and instruct the district court's determination of an appropriate sentence."[31] Once the district court is untethered by the once-mandatory, now-forbidden career-offender range, we must presume it will impose a much lower sentence. And we cannot read into the district judge's decision 24 years

---

[29] *See, e.g.*, Reply Brief at 6, *Lee Butler v. United States*, No. 17-12056 (11th Cir. Dec. 19, 2017).

[30] *Brief in Opposition* at 15.

[31] 136 S. Ct. 1338, 1346 (2016).

ago to land at the high end of the range. That judge is no longer on the bench; indeed, he passed away last year.[32]

III. Mr. James is one of a large class of defendants serving career-offender sentences imposed long ago under the mandatory guidelines.

The government insists that because the "now-closed set of cases" are "decreasing in frequency," this Court should wash its hands of them.[33] However, the *Johnson*/mandatory guidelines issue is not of diminishing importance at all. The Sentencing Commission's data suggests that once this Court applies *Johnson* to the mandatory Guidelines, the holding will affect approximately 1,187 cases around the country, including 268 in Mr. James's own Eleventh Circuit.[34] For many of these individuals, including Mr. James, a favorable ruling would lead to immediate or near immediate release.

---

[32] *See* Bill Rankin, *Former Federal Judge Marvin Shoob Dies at Age 94*, AJC.COM (June 13, 2017), available at http://legal.blog.ajc.com/2017/06/12/former-federal-judge-marvin-shoob-dies-at-age-94/ (last visited January 30, 2018).

[33] *Brief in Opposition* at 15.

[34] *See Gregory Allen v. United States*, No. 17-5684, *Reply to Brief in Opposition*, Appendix at A7 (filed Dec. 27, 2017). This appendix was originally prepared by the Sixth Circuit. Counsel for Mr. James has not duplicated the appendix here, but the data that support this statistical analysis may be found in the appendix to the *Allen* brief.

CONCLUSION

The mandatory sentencing guidelines scheme, a "rigidly imposed . . . straitjacket,"[35] has been rendered unconstitutional by *Booker*, *Johnson*, and *Beckles*. This Court should now say so.

Respectfully Submitted,

W. MATTHEW DODGE
Counsel of Record
FEDERAL DEFENDER PROGRAM
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Matthew_Dodge@FD.org

January 30, 2018

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