No. 17-6877

IN THE
Supreme Court of the United States

TERRANCE ROBINSON,

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

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TABLE OF CONTENTS

REPLY TO THE BRIEF IN OPPOSITION

First, the government and Mr. Robinson disagree on the legal questions presented here: Does Mr. Robinson 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."[3] Finally, Mr. Robinson's case is a suitable vehicle to explore this *Johnson* query.

I. Mr. Robinson'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. Robinson asserted below. In *Johnson v. United States*, this Court held that the language in the residual clause of the Armed Career Criminal Act ("ACCA"),[4] is facially void for vagueness.[5] This Court found that the ACCA residual clause "both denies fair notice to

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[1] *Brief in Opposition* at 8.

[2] *Brief in Opposition* at 10.

[3] *Brief in Opposition* at 14.

[4] 18 U.S.C. § 924(e).

[5] 135 S. Ct. 2551, 2557 (2015).

defendants and invites arbitrary enforcement by judges."[6] 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. Robinson was sentenced in 2000—the career offender guideline—a law that fixed sentences within a prescribed range.[7] 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. It must merely apply *Johnson* to the mandatory sentencing guidelines, a parallel law that "fixed sentences" just as its doppelganger, the ACCA does. Mr. Robinson said so early and often in his application for a COA in the appeals court and petition for certiorari in this Court. Mr. Robinson's was a *Johnson* claim.

B. The *Johnson* rule, as applied to the mandatory sentencing guidelines, is retroactively applicable to Mr. Robinson's and other cases on collateral review. Mr. Robinson's claim is merely an application of *Johnson* and, therefore, his motion is timely. Even in the Eleventh Circuit, Mr. Robinson's own circuit, a motion is timely under 28 U.S.C. § 2255(f)(3) if the movant merely "invokes"

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[6] *Id.*

[7] *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).

Johnson.[8] Mr. Robinson invoked *Johnson* and the red-lined residual clause time and again. "[T]he motion said enough to assert a *Johnson* claim," and because Mr. Robinson filed the motion before *Johnson's* one-year anniversary, it was timely under § 2255(f)(3).[9]

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*.[10] This Court issued a "new rule" when it issued *Johnson*.[11] Within one year of the issuance of *Johnson*'s new rule, Mr. Robinson "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."[12] If a "factual distinction between the case

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[8] *Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017).

[9] *Id.* at 1220-1221.

[10] 489 U.S. 288 (1989).

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

[12] *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (citations omitted); *Penry v. Lynaugh*, 492 U.S. 302, 314-19 (1989) (holding that the rule Penry "seeks" requiring instructions permitting the jury to "give effect" to evidence

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.[13]

In *Tyler v. Cain*, this Court recognized that it "can make a rule retroactive over the course of . . . [m]ultiple cases."[14] 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 statutory provision."[15] For example, if the Court holds in Case One that a certain 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."[16] 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

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of mental disability is not a "new rule" but an application of prior cases to a "closely analogous" case).

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

[14] 533 U.S. 656, 666 (2001).

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

[16] *Id.* at 669.

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.[17] But that is not always necessary. Sometimes a court can decide an "open" question in the petitioner's favor without issuing a new rule.[18] That happens when a court can decide the question by "merely" making "an application of the principle that governed" a prior Supreme Court case.[19] 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.[20]

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*.[21] *Francis* involved the application of *Sandstrom v. Montana*,[22] 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

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

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

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

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

[21] 471 U.S. 307 (1985) (cited by *Teague*, 489 U.S. at 307).

[22] 442 U.S. 510 (1979).

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.[23] 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 drawn."[24] 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. Robinson asks this Court merely to apply the extant rule in *Johnson*, not to issue a new rule. Mr. Robinson 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. Robinson's case and the case adjudicated by *Johnson* does not suffice to make the Court's favorable new application of *Johnson* a new rule.[25]

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

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

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

But the principle question is whether Mr. Robinson 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.'"[26] "Thus, in order to be timely under § 2255(f)(3), a § 2255 motion need only 'invoke' the newly recognized right."[27]

The government's contrary view undermines the goal of a statute of limitations: "to encourage plaintiffs to 'pursue diligent prosecution of known claims.'"[28] 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."[29]

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

[27] *Id.* Although the circuit court below did not say that Mr. Robinson was on time, it presumed that he was. The same court has already held that a motion such as his, one which invokes and cites *Johnson*, fits safely beneath subsection (f)(3)'s umbrella. *See supra* at 2-3.

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

[29] *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).

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."[30] Once this 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 are split.[31] The division widens as time passes. The circuit 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

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

[31] Although the government first says that the Eleventh Circuit's decision below "does not squarely conflict with any decision of this Court or another court of appeals," *Brief in Opposition* at 7, it later concedes that this is not quite so. *Id.* at 13-14. It describes the divergent (and conflicting) paths mapped out by five circuits. Mr. Robinson highlighted these same cases in his petition.

that *Johnson* invalidates the residual clause found in the pre-*Booker*, mandatory sentencing guidelines.[32]

Yet the government insists first that Mr. Robinson "is likely subject to the same guidelines range as in his 2000 sentencing, except with the range treated as advisory."[33] Not so. Once Mr. Robinson 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. Robinson's long-ago South Carolina conviction for assault and battery of a high and aggravated nature. That predicate offense, in the absence of the residual clause, is highly vulnerable. The government's superficial and conclusory discussion of the statute—and its failure to name a single court anywhere that has held the crime to qualify under any clause but the residual—hardly carries the day.[34] Once Mr. Robinson appears for resentencing rid 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 fresh sentence far below Mr. Robinson's current sentence.

The government concedes that following a remand here, Mr. Robinson's new (and correct) guideline range may be as low as 135-168 months imprisonment, which is half of

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[32]Mr. Robinson wrote on this topic in his petition for certiorari and will not repeat himself here.

[33]*Brief in Opposition* at 15. The government mistakenly wrote "2003" in place of the correct date: 2000.

[34]*Brief in Opposition* at 16.

his now-invalid sentence.[35] This Court recently proclaimed 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."[36] Once the district court is untethered by the once-mandatory career-offender range, we must presume it will impose a much lower sentence.

III. Mr. Robinson 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.[37] 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. Robinson's own Eleventh Circuit.[38] For many of

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[35] *Brief in Opposition* at 4.

[36] 136 S. Ct. 1338, 1346 (2016).

[37] *Brief in Opposition* at 15.

[38] *See Gregory Allen v. United States*, No. 17-5684, *Reply to Brief in Opposition*, Appendix at A7 (filed Dec. 27, 2017). Counsel for Mr. Robinson has not duplicated the appendix here, but the data that support this statistical analysis

these individuals, including Mr. Robinson, a favorable ruling would lead to immediate or near immediate release.

CONCLUSION

The mandatory sentencing guidelines scheme, a "rigidly imposed . . . straitjacket,"[39] has been rendered unconstitutional by *Booker*, *Johnson*, and *Beckles*. This Court should now say so.

Respectfully Submitted,

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may be found in the appendix to the *Allen* petitioner's reply brief.

[39] *Reid v. United States*, 252 F. Supp. 3d 63, 67 n.2 (D. Mass. 2017).