NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BOBBY JO GIPSON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI[1]

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[1] Pursuant to Supreme Court Rule 12.4, Petitioner Keith Walker, also listed herein, is joining this Petition seeking review of his Sixth Circuit judgment. The cases involve an identical issue.

QUESTION PRESENTED FOR REVIEW

Whether defendants sentenced under the mandatory Guidelines' residual clause definition of "crime of violence" [2] prior to this Court's decision in United States v. Booker, 543 U.S. 220 (2005), when judges were given no discretion, have a retroactive right to be resentenced because they were sentenced under the equivalent of a vague statute.

[2] The 1997 version of the Guidelines were used in Mr. Gipson's case, while the 1995 version was used in Mr. Walker's case. When Petitioners were sentenced, both versions of the Guidelines defined "crime of violence" to include "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another. See USSG § 4B1.2(a)(2) (1997); USSG § 4B1.2(1)(ii) (1995). This is commonly known as the residual clause definition of crime of violence. See, e.g., Beckles v. United States, 137 S. Ct. 886, 890 (2017).

LIST OF PARTIES

Pursuant to Supreme Court Rule 12.4, Petitioners are filing a single petition seeking review of two Sixth Circuit judgments that involve the same issue. The list of parties to each proceeding is as follows:

In Gipson v. United States, the parties are Bobby Jo Gipson, Petitioner, and United States of America, Respondent;

In Walker v. United States, the parties are Keith Walker, Petitioner, and United States, Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

JOINT PETITION FOR WRIT OF CERTIORARI

Petitioner, Bobby Jo Gipson,[3] respectfully prays that a writ of certiorari issue to review the judgment below.

[3] Petitioner Keith Walker joins in this Petition pursuant to Supreme Court Rule 12.4.

OPINIONS BELOW

Pursuant to this Court's Rule 12.4, Petitioners are filing a single petition seeking review of two Sixth Circuit judgments that involve the identical issue. The opinions are available as follows:

1. Gipson v. United States, 710 F. App'x 697 (6th Cir. 2018), submitted in Appendix A; and

2. Walker v. United States, 710 F. App'x 696 (6th Cir. 2018), submitted in Appendix B.

JURISDICTION

On February 7, 2018, the same three-judge panel of the Sixth Circuit Court of Appeals entered its opinions in United States v. Gipson, 710 F. App'x 697 (6th Cir. 2018), and Walker v. United States, 710 F. App'x 696 (6th Cir. 2018). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

"The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . .otherwise involves conduct that presents a serious potential risk of physical injury to another." USSG § 4B1.2(a)(2) (1997).[4]

A 1-year period of limitation shall apply to a motion under [28 U.S.C. § 2255]. The limitation period shall run from the latest of . . . 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. 28 U.S.C. § 2255(f)(3).

[4] Mr. Gipson was sentenced using the 1997 version of the Guidelines, while Mr. Walker was sentenced under the 1995 version. The definition under either version was the same, although in 1995 the citation would have been to USSG § 4B1.2(1)(ii) (1995).

STATEMENT OF THE CASES

Approximately two decades ago, both Mr. Gipson and Mr. Walker were sentenced as career offenders under the residual clause definition of "crime of violence" under the then-mandatory Guidelines. See Gipson, 710 F. App'x at 697; Walker, 710 F. App'x at 696. This provision required higher sentences for defendants with at least two prior convictions for crimes involving "conduct that presents a serious potential risk of physical injury to another." See Gipson, 710 F. App'x at 697 (citing USSG § 4B1.2(a)(2) (1997)); Walker, 710 F. App'x at 696 (citing USSG § 4B1.2(1)(ii) (1995)).

In 2015, this Court determined that the residual clause definition of "violent felony" provided in the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. See Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). Johnson was made retroactive to cases on collateral review in Welch v. United States, 136 S. Ct. 1257, 1265 (2016). Pursuant to Johnson, both Mr. Gipson and Mr. Walker filed motions under 28 U.S.C. § 2255, seeking to vacate their sentences because they were sentenced under an identically worded residual clause, only under the Guidelines, Section 4B1.2(a)(2). See Gipson, 710 F. App'x at 697; Walker, 710 F. App'x at 697.

While their § 2255 motions were pending, this Court entered its decision in Beckles v. United States, 137 S. Ct. 886 (2017). Beckles held that the Sentencing Guidelines are advisory only, and are thus not subject to vagueness challenges under the Due Process Clause. Consequently, the Court ruled that USSG § 4B1.2(a)(2)'s residual clause was not void on vagueness grounds. See Beckles, 137 S. Ct. at 890.

Based upon Beckles, both Mr. Gipson and Mr. Walker's § 2255 motions were denied. The district court, however, noted the following reasoning from the Beckles majority:

> Unlike the [ACCA] . . . the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion

> in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause.

Beckles, 137 S. Ct. at 892. The district court then granted each man a certificate of appealability based upon Justice Sotomayor's concurrence in Beckles, which states as follows:

> 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, 543 U.S. 220 . . . (2005) that is, during the period in which the Guidelines did "fix the permissible range of sentences," . . . may mount vagueness attacks on their sentences.

Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring).

While Mr. Gipson and Mr. Walker's appeals were pending, a Sixth Circuit panel issued its opinion in Raybon v. United States, 867 F.3d 625 (6th Cir. 2017). Raybon held that § 2255 motions filed by defendants sentenced under the mandatory Guidelines' residual clause were untimely under 28 U.S.C. § 2255(f)(3). Id. The reasoning is based on two findings: (1) that Johnson applies only to the ACCA; and (2) Justice Sotomayor's statement that the question of whether defendants sentenced under the mandatory Guidelines could mount vagueness attacks upon their sentences "was left open." See 867 F.3d at 630. According to the Raybon panel, this meant there is no "right" that "has been newly recognized by the Supreme Court," much less one that was "made retroactively applicable to cases on collateral review."[5] Id.

[5] The Raybon defendant was denied en banc review on December 5, 2017. See Raybon v. United States, No. 16-2522, 2017 U.S. App. LEXIS 24713 (6th Cir. Dec. 5, 2017). It is almost certain a petition for certiorari will be filed in that case. Should the Court choose to grant certiorari in that case (or any other case with this issue), Messrs. Gipson and Walker respectfully request this Court hold their Petition in abeyance pending the outcome in Raybon and/or other cases raising the same issue. There are many cases pending in this Court that raise the same issue in various procedural postures. See Allen v. United States, No. 17-5684 (filed Aug. 17, 2017); Gates v. United States, No. 17-6262 (filed Oct. 7, 2017); James v. United States, No. 17-6769 (filed Nov. 9, 2017); Robinson v. United States, No. 17-6877 (filed Nov. 20, 2017); Lester v. United States, No. 17-1366 (filed Mar. 26, 2018).

Though noting the irony that similarly situated defendants to that of Johnson could not seek the same relief, the panel deciding Mr. Gipson and Mr. Walker's appeals found itself bound by the Raybon holding. See Gipson, 710 F. App'x at 698; Walker, 710 F. App'x at 697. Consequently, the district court's denial of their respective § 2255 motions was affirmed. Id.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully request this Court to grant certiorari because the Sixth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Along with the Sixth Circuit, the Fourth and Tenth Circuit Courts of Appeal have held that Johnson did not sufficiently announce a new "right" under which defendants sentenced under the mandatory Guidelines can pursue a vagueness challenge. See United States v. Brown, 868 F.3d 297, 301 (4th Cir. 2017); United States v. Greer, 881 F.3d 1241 (10th Cir. 2018). These decisions rely on the premise that Johnson cannot apply to any Guidelines sentence in light of Beckles and so any claim brought under Johnson pursuant to § 2255 is untimely because this Court has not announced a new right that has been recognized by this Court and made retroactively applicable to cases on collateral review.

Though not a direct circuit conflict because the case was decided in the posture of granting a successive § 2255 motion, the First Circuit Court of Appeals has observed that, "What Beckles left open . . . was a question of statutory interpretation concerning how mandatory the S[entencing] R[eform] A[ct] made the guidelines before Booker." Moore v. United States, 871 F.3d 72, 83 (1st Cir. 2017). Under this framing, the new right Messrs. Gipson and Walker seek to assert is exactly the right recognized by Johnson. Id. ("[O]ne can fairly and easily read Beckles as simply rejecting the application of the rule of Johnson . . . to the advisory guidelines because, as a matter of statutory interpretation, those guidelines do not fix sentences.")

The timeliness holdings of the Sixth, Fourth and Tenth Circuits have affected scores of defendants in these Circuits with meritorious Johnson-based claims.[6] They have been forced to wait to file a challenge to their mandatory career offender sentences until this Court specifically holds that Johnson voids the mandatory Guidelines' residual clause.

Review of Messrs. Gipson and Walker's rulings is urgently needed for several reasons. First, for many defendants in the Sixth Circuit with meritorious claims, the time for relief is likely now or never. Even if this Court later holds that Johnson applies to the mandatory Guidelines, such a ruling might not trigger a new one-year filing period under § 2255(f)(3). And even if it did, certain decisions by the Sixth Circuit barring second or successive claims in § 2255 cases could still preclude new filings raising Johnson-based claims. Second, the panel's timeliness holding is wrong, premised on a mistaken view of what it means for a case to state a "new rule" that is applicable on collateral review. That same incorrect analysis dictated the holdings in Messrs. Gipson and Walker's cases. Third, in applying Raybon's incorrect analysis, no court has actually determined whether applying Johnson to the mandatory Guidelines creates a new rule that is retroactively applicable to cases on collateral review.

A. Denial of certiorari review unnecessarily risks depriving Sixth Circuit defendants of any relief at all.

Under current Sixth Circuit precedent, scores of defendants with meritorious claims must wait for this Court to expressly hold that Johnson applies to the mandatory career offender guideline. Mr. Gipson and Mr. Walker's panel adhered to the Raybon panel's assumption that such a holding would then allow these defendants to pursue relief from their unconstitutional

[6] A group of eight federal defender's offices that filed an amicus brief in Brown, estimated that approximately 1,180 inmates nationwide would qualify for relief if this Court were to grant certiorari in this case and rule in Petitioners' favor. See United States v. Brown, No. 16-7056, Brief of Amici Curiea, Docket Entry 62-1 at pp. 20-23 (4th Cir. filed Oct. 10, 2017).

sentences. See Gipson, 710 F. App'x at 698 ("[T]he fact of the matter is that Gipson can seek relief under § 2255(f)(3) only if the Supreme Court recognizes a new right that applies retroactively to him."); Walker, 710 F. App'x at 697 (same). But, as will be explained later and in depth herein, the Raybon panel was not presented with and did not consider the proper analysis under Teague v. Lane, 489 U.S. 288 (1989), and its progeny to determine whether such a holding would actually constitute a "new" right triggering a new statute of limitations under § 2255(f)(3).

A problem is create when one considers that the only distinction between Messrs. Gipson and Walker's cases and Johnson is that the Guidelines, not the ACCA, fixed the sentence. The text of their respective definitions are identical, United States v. Pawlak, 822 F.3d 902, 905 (6th Cir. 2016), and the "mandate to apply the Guidelines [was] itself statutory." United States v. R.L.C., 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)). In Beckles, this Court recognized that the advisory Guidelines did not "fix the permissible range of sentences," contrasting them with the mandatory Guidelines, which were "binding." 137 S. Ct. at 894–95 (citing Booker, 543 U.S. at 233). Beckles did not upend that conclusion or other courts' conclusions that there is no practical difference between a statutory range and a mandatory Guidelines range. See, e.g., Booker, 543 U.S. at 234 (because Guidelines are binding on judges, Court had consistently held them to have the force and effect of laws); United States v. Taylor, Nos. 16-2243/16-2395, 2017 U.S. App. LEXIS 23550, at *28-29 (6th Cir. Nov. 20, 2017) (Guidelines were materially identical to statutory mandatory minimum under 21 U.S.C. § 841(b), operating to bind the court's discretion); Hawkins v. United States, 706 F.3d 820, 822 (7th Cir. 2013) ("Before Booker, the [G]uidelines were the practical equivalent of a statute no different from statutes . . .," and though departure were permitted, that was "no different from statutes, which often specify exceptions."). Hence, sentencing under the ACCA's residual clause and sentencing under the mandatory

Guidelines' residual clause was the same. Consequently, applying Johnson to the mandatory Guidelines is a straightforward application of the principles that governed in Johnson to a law that fixed sentences just as the ACCA fixes sentences, using an identically-worded and identically-interpreted residual clause.

The applicable principles having already been announced in Johnson, this Court need not, and might never expressly hold that those principles invalidate the mandatory Guidelines' residual clause unless this issue is heard on certiorari. This is particularly true, given the Government's charging practices of late. The absence of favorable authority in the courts of appeals appears to be due, at least in part, to deliberate litigation decisions on the governemnt's part. For example, after the First Circuit issued its decision in Moore emphatically granting authorization to pursue Johnson-based challenges to the mandatory Guidelines, the district court in United States v. Roy, 282 F. Supp. 3d 421 (D. Mass 2017), granted a petitioner's motion and ordered resentencing. The government initially noticed an appeal in Roy, but then voluntarily dismissed it. See United States v. Roy, No. 17-2169, Govt.'s Mot. Dismiss Case, Docket Entry N/A (1st Cir. filed Jan. 8, 2018). Other district courts in the First Circuit have granted relief to petitioners, and the government has not appealed. See, e.g., Reid v. United States, 252 F. Supp. 3d 63, 66-68 (D. Mass. 2017) (stating it could hardly be clearer that Beckles does not bar a § 2255 Johnson claim under the ten-mandatory provisions of the Career Offender provisions of the Sentencing Guidelines). The government similarly dismissed its appeal to the Ninth Circuit of the district court's grant of relief in United States v. Jefferson, 14-cr-00105-EMC-1, 2016 U.S. Dist. LEXIS 181968 (N.D. Cal. Oct. 19, 2016). See United States v. Jefferson, No. 17-10022, Docket Entry 2, Govt.'s Mot. Dismiss (9th Cir. filed Mar. 22, 2017). If the Government continues this practice, it is very unlikely that a direct circuit conflict will develop.

Even if this Court eventually holds that Johnson applies to the mandatory Guidelines, however, the government will almost certainly do an about-face and argue that the ruling isn't "new" under Teague and, thus, doesn't trigger a new limitations period under § 2255(f)(3). The government recently did just that in litigation surrounding the Descamps[7] decision. Before Descamps, it was an "open question" whether the modified categorical approach was limited to divisible statutes, and the circuit courts had reached conflicting decisions. In its merits briefing, the government argued that this Court had "never held that the modified categorical approach is limited to [divisible] crimes." Brief for the United States, Descamps v. United States, 133 S. Ct. 2276 (2013), No. 11-9540, 2012 WL 6054087, at *17. This Court is well aware that the open question was resolved in the defendant's favor, holding "that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." Descamps, 133 S. Ct. at 2282. Since Descamps, the government has repeatedly argued that the Descamps rule is not "new" under Teague because it was dictated by this Court's prior decisions -- even though the government had previously argued that the Court's precedent dictated the opposite rule. No Circuit to have considered the issue has held that Descamps is a new rule. See, e.g., United States v. Morgan, 845 F.3d 664, 667 (5th Cir. 2017); Headbird v. United States, 813 F.3d 1092, 1097 (8th Cir. 2016); Ezell v. United States, 778 F.3d 762, 766 (9th Cir. 2015); United States v. Davis, 751 F.3d 769, 775 (6th Cir. 2014) (noting on direct appeal that Descamps did not announce a new rule).

Complicating matters are decisions by the Sixth Circuit holding that 28 U.S.C. § 2244(b)(1) requires dismissal of claims presented in a second or successive § 2255 that were previously

[7] Descamps v. United States, 133 S. Ct. 2276 (2013).

presented in a prior § 2255 motion. See, e.g., In re Liddell, 722 F.3d 737, 738 (6th Cir. 2013); Charles v. Chandler, 180 F.3d 753, 758 (6th Cir. 1999). While it is debatable that § 2244(b)(1) applies to § 2255 motions,[8] these decisions could operate to preclude new filings raising Johnson based claims. At the very least, they would create further uncertainty and complexity while the issue is litigated. For those serving unconstitutionally severe sentences like Messrs. Gipson and Walker, dismissal of their claims because they brought them too soon would strike an especially cruel blow. Meanwhile, similarly situated defendants in other Circuits will be granted relief and released from prison.

The panel's decisions here have forced Messrs. Gipson and Walker and the many others like them to unnecessarily await this Court's decision, a decision that may never come, and if it does, will likely still leave confusion and litigation in its wake. In the absence of any Teague analysis in Raybon, it is unknown whether that panel considered, or was even aware of, the far-reaching implications of its timeliness holding. A holding that binds Messrs. Gipson and Walker. For Sixth Circuit defendants, the time for relief from an unconstitutional sentence under the mandatory Guidelines is now or never. Messrs. Gipson and Walker respectfully request this Court to grant certiorari and engage in the proper analysis now.

B. The panel's timeliness holding is premised on a mistaken view of what it means for a case to state a "new rule" that is applicable on collateral review.

A motion pursuant to § 2255 must be filed within one year from the date on which a petitioner's conviction becomes final, unless an exception applies. 28 U.S.C. § 2255(f)(1). A petitioner's § 2255 motion is timely if: (1) it "assert[s] . . . [a] right . . . newly recognized by the

[8] See, e.g., Stanko v. Davis, 617 F.3d 1262, 1269 (10th Cir. 2010) (recognizing that § 2244(b)(1) concerns only habeas corpus applications under § 2254); United States v. Winestock, 340 F.3d 200, 204-05 (4th Cir. 2003) (noting that though § 2244(b)(1) is limited by its terms to § 2254 motions, some circuits have applied it to second or successive applications under § 2255).

Supreme Court," 28 U.S.C. § 2255(f)(3); (2) it is filed within one year from "the date on which the right asserted was initially recognized by the Supreme Court," id.; and (3) the Court or controlling Court of Appeals has declared the right retroactively applicable on collateral review, see Dodd v. United States, 545 U.S. 353, 358–59 (2005). The present case turns most immediately on whether the right recognized by this Court in Johnson is the same one asserted by Petitioners. If the Court has yet to recognize the asserted right, then Petitioner's motion is time barred by § 2255(f)(1). If, however, Johnson did recognize the asserted right, then Petitioners' claims are timely under § 2255(f)(3) and they must be resentenced.

The panel's holding on timeliness in Messrs. Gipson and Walker's cases depends on the assertion that the controlling rule is not Johnson, but some yet-to-be announced rule. It claims, in essence, that finding a non-ACCA sentence unconstitutional would go beyond merely applying the principle announced in Johnson, thus creating another new rule. That is contrary to the retroactivity principles of Teague. The "right" Messrs. Gipson and Walker "assert" is the right "initially recognized by the Supreme Court" in Johnson, namely, that the standard set forth in the residual clause is "vague in all its applications." 135 S. Ct. at 2561. Because the reasoning of Johnson itself, along with well-settled principles regarding the binding nature of the mandatory Guidelines, dictates Johnson's application to the present context, no further "new rule" is required.

An application of previously announced principles to a different factual context does not create a new rule within the retroactivity principles applicable to § 2255 Motions. Under the plurality opinion in Teague, "new constitutional rules of criminal procedure" are generally limited to prospective application, subject to only two exceptions for new substantive rules and new watershed rules of criminal procedure. Welch, 136 S. Ct. at 1264. By contrast, Supreme Court decisions that do not announce new rules are binding in all cases, prospectively and retroactively,

including those currently pending on both direct and collateral review.[9] The Raybon panel overlooked the Teague doctrine completely. Yet, Raybon's incomplete analysis was binding upon the disposition of Messrs. Gipson and Walker's appeals.

As the Sixth Circuit has explained, "A case announces a new rule when 'it breaks new ground or imposes a new obligation on the States or the Federal Government,'" or is otherwise "'not dictated by precedent existing at the time the defendant's conviction became final.'" Duncan v. United States, 552 F.3d 442, 444-45 (6th Cir. 2009) (quoting Teague, 489 U.S. at 301; Schriro v. Summerlin, 542 U.S. 348, 352 (2004)). "[A] case does not announce a new rule, when it is merely an application of the principle that governed a prior decision," even to new factual contexts. Chaidez v. United States, 568 U.S. 342, 347 (2013) (citing Teague, 489 U.S. at 307). For instance, in Chaidez, this Court explained that application of the Strickland v. Washington[10] standard for

[9] Although § 2255(f)(3) refers to a new "right" rather than a new "rule," courts recognize that the two terms invoke the same meaning. See, e.g., Headbird, 813 F.3d at 1095 (8th Cir 2016) ("The parties in this case agree that to determine whether a right 'has been newly recognized by the Supreme Court,' we must inquire whether the Supreme Court announced a 'new rule' within the meaning of the Court's jurisprudence governing retroactivity for cases on collateral review."); United States v. Powell, 691 F.3d 554, 557 (4th Cir. 2012) (calling it "well settled" that the Teague new rule analysis governs whether a new right is retroactively applicable under § 2255(f)(3)); Figuereo-Sanchez v. United States, 678 F.3d 1203, 1207 (11th Cir. 2012) (applying Teague new rule analysis to § 2255(f)(3)). Additionally, the First Circuit and other courts have recognized that the § 2255(f)(3) analysis mirrors the § 2255(h)(2) question whether petitioners are relying on the new rule or right recognized in Johnson, which Welch made retroactive, or whether such petitioners require some other new rule of law. Moore, 871 F.3d at 82-83; Sarracino v. United States, Nos. CV 16-734 MCA/CG/CR 95-210 MCA, 2017 U.S. Dist. LEXIS 98165, at *14 n.3 (D.N.M. June 26, 2017) ("Although Respondent frames its argument [that Johnson does not apply] under § 2255(f), Respondent actually substantively argues that Petitioner's motion does not rely on a 'new rule of constitutional law, made retroactive to cases on collateral review' under § 2255(h)(2)."). But, this Court expressly linked the two provisions in Dodd v. United States, 545 U.S. 353, 359 (2005). This Court would therefore be best served by granting review of this Petition to address proper resolution under both § 2255(f)(3) and § 2255(h)(2).

[10] Strickland v. Washington, 466 U.S. 668 (1984).

ineffective assistance of counsel under the Sixth Amendment provides a basis for granting relief "in diverse contexts" without the need to announce a new rule in each new case. Id. at 348.

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. This Court's decision in Stringer v. Black, 503 U.S. 222 (1992), helpfully frames the boundaries between the creation of a new rule and an application of an old rule to a different context. In Stringer, the defendant filed a federal habeas petition challenging his death sentence imposed in Mississippi state court on the basis that the sentencing jury was instructed to consider an impermissibly vague aggravating factor, specifically, whether the killing was "especially heinous, atrocious or cruel." Id. at 226. The district court and court of appeals denied relief, finding that two of the opinions on which Stringer relied -- Clemons v. Mississippi, 494 U.S. 1074 (1990), and Maynard v. Cartwright, 486 U.S. 356 (1988) -- were unavailable because they were not decided until after his sentence was final. Id. at 226-27. This Court reversed, finding that neither Clemons nor Maynard announced a "new rule," but were instead applications of the rule announced in Godfrey v. Georgia, 446 U.S. 420 (1980). Id. at 227. Thus, they applied both retroactively and prospectively.

In Godfrey, the Court had invalidated a death sentence based upon the Georgia aggravating circumstance that the killing was "outrageously or wantonly vile, horrible and inhuman," holding that the formulation was unconstitutionally vague and invited arbitrary and capricious application of the death penalty. 446 U.S. at 428-29. Eight years later, the Court applied the same reasoning in Maynard and held that an Oklahoma statute creating an aggravated circumstance for a killing that was "especially heinous, atrocious, or cruel" was also unconstitutional. 486 U.S. at 359. Considering these two cases in Stringer, the Court held that Maynard did not announce a new rule,

even though it considered a different statute from a different state with different wording, because it did not break new ground:

> Godfrey and Maynard did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling of Godfrey was limited to the precise language before us in that case. In applying Godfrey to the language before us in Maynard, we did not "brea[k] new ground."

Stringer, 503 U.S. at 228-29.

Perhaps even more apt here, the Court held that Clemons also did not announce a new rule when it applied Godfrey to the slightly different sentencing process in Mississippi. Stringer, 503 U.S. at 229. As the Court explained, Mississippi is a "weighing" state, in which the imposition of the death penalty requires the jury to weigh aggravating factors against the mitigating evidence. Id. By contrast, Georgia requires the existence of an aggravating factor as a necessary qualification for imposition of the death penalty, but "aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it[.]" Id. at 229-30.

The Court in Stringer concluded that "those differences [between Mississippi's and Georgia's capital sentencing systems] could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final," and indeed the differences actually supported "application of the Godfrey principle to the Mississippi sentencing process[.]" Id. at 229. That is so, the Court explained, even though the Fifth Circuit had reached a different conclusion in a published opinion, holding that Godfrey did not apply to Mississippi's sentencing process. 503 U.S. at 236-37 (citing Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), and Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986)). The Fifth Circuit's reasoning, the Court held, "made a serious mistake" by failing to correctly analyze Mississippi state law and the significance of aggravating factors in capital sentencing proceedings. Id. at 237.

The Court also expressly rejected the state's argument, similar to the issue here, that Godfrey's application to Mississippi's sentencing process "must have been an open question when petitioner's sentence became final" because Clemons was yet undecided. Id. at 230. The Court explained that the outcome of Clemons was dictated by the well-settled principle that "[u]se of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system."

Teague itself provides another 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 the 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 also Yates v. Aiken, 484 U.S. 211, 217-18 (1988) (holding Francis was not a new rule but "merely an application of the principle that governed our decision in" Sandstrom, in which the question was "almost identical"). 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. And this is precisely what courts have said when holding that Descamps, which resolved an open question, is not a new rule.

Justice O'Connor's concurrence in Wright v. West reaffirms the principle that the new rule inquiry requires only a "closely analogous," not an identical, context:

> To determine what counts as a new rule, Teague requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by [existing] precedent. . . . Cf. Mackey v. United States, 401 U.S. 667, 695 (1971) (inquiry is "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law") . . . . Even though we have characterized the new rule inquiry as whether "reasonable jurists" could disagree as to whether a result was dictated by precedent[,] the standard for determining when a case establishes a new rule is "objective," and the mere existence of conflicting authority does not necessarily mean a rule is new. Stringer v. Black, 503 U.S. 222, 237 (1992). If a proffered 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 any deviation from precedent is not reasonable.

507 U.S. 277, 304 (1992) (O'Coonor, J., concurring) (emphasis in original).

In the end, Stringer and these other cases provide three points of guidance here that run contrary to the panel's holding in Messrs. Gipson and Walker's cases. First, they demonstrate that it is irrelevant whether this Court has expressly applied Johnson to the residual clause in the mandatory Guidelines. The correct question is whether the settled principles and reasoning of existing precedent dictate the result without "breaking new ground." Second, and for the same reason, the fact that this Court might decide in the future whether a previously-announced rule applies to a different context provides no basis to conclude that there is an "open question." And third, the existence of contrary lower court precedent is also irrelevant if the lower court has not correctly applied the principles and reasoning of existing precedent.

Sometimes a court can decide an "open" question in the petitioner's favor without issuing a new rule. Stringer, 503 U.S.at 229. 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.

These examples make it clear that what Messr.'s Gipson and Walker were asking for was merely an application of Johnson, not the issuance of a new rule. Specifically they asked that Johnson's rule regarding vagueness and the categorical approach be applied not just to a sentencing enhancement fixed by statute, but also to a verbatim enhancement fixed by a Guideline made binding by statute. The immaterial factual "distinction" between their cases and Johnson does "not suffice" to make application of Johnson in this context a new rule. Francis, 471 U.S. at 16.

C. Raybon failed to conduct the correct analysis to determine whether applying Johnson to the mandatory guidelines would create a new rule.

The panel deciding Messrs. Gipson and Walker's appeal was bound by prior Sixth Circuit precedent in Raybon. Yet, as has been shown, the courts' opinion in Raybon demonstrated a fundamental misunderstanding of the relevant analysis under § 2255(f)(3), and as a result, the court did not actually determine whether applying Johnson to the mandatory Guidelines would create a new rule.

The Raybon panel followed virtually the same analytical path as the Fourth Circuit did in Brown. In Brown, the Fourth Circuit concluded that it was precluded from "extrapolating beyond the Supreme Court's holding to apply what we view as its 'reasoning and principles' to different facts under a different statute or sentencing regime." 868 F.3d at 299. The Brown court thus found it determinative for purposes of § 2255(f)(3) that Johnson expressly addressed only the residual

clause in the ACCA, and not any equivalent provisions. Id. at 302. Without disputing the defendant's argument that "the mandatory Guidelines look and act like the ACCA," the panel's majority refused the suggestion that it could apply the principles announced in Johnson to any other context. Id. The court further relied on the exception carved out for advisory Guidelines in Beckles as demonstrating that the Supreme Court "has yet to recognize a broad right invalidating all residual clauses as void for vagueness simply because they exhibit wording similar to ACCA's residual clause." Id.

Neither Raybon nor Brown, however, conducted the analysis required by Stringer v. Black to determine whether applying Johnson to the mandatory Guidelines would require the court to break new ground and create a new rule, or whether it would simply involve applying the principles and reasoning of existing precedent. By contrast, Chief Judge Gregory's dissent in Brown follows exactly that analysis and reaches the opposite conclusion. See Brown, 868 F.3d at 304-311 (Gregory, C.J., dissenting).

Chief Judge Gregory disagreed with the majority's strict confinement to Johnson's precise factual context, asserting that "a newly recognized right is more sensibly read to include the reasoning and principles that explain it . . . with all its contours and complexities[.]" Id. at 304. He agreed that the reasoning and principles of Johnson, combined with existing Supreme Court precedent, dictated Johnson's application to the mandatory Guidelines because: (1) the text of the two provisions are identical; (2) both provisions require application of the categorical approach; and (3) both provisions had binding legal effect on sentencing courts. Id. at 309 ("[L]ike the residual clause at issue in Johnson, the mandatory Guidelines' residual clause imposed fixed, rather than advisory, sentencing ranges.")

Chief Judge Gregory further found that departure authority did not distinguish the mandatory Guidelines from sentencing statutes because departures, too, were available only in limited circumstances: "[D]epartures were not available in every case, and in fact were unavailable in most." Id. (quoting Booker, 543 U.S. at 234 (internal quotation marks and alterations omitted)). By footnote, he noted that this rare departure authority under the mandatory Guidelines resembled authority in 18 U.S.C. § 3553(e) and (f) to impose a sentence below the statutory mandatory minimum sentence. Id. at n.6. As to Beckles, he found that the considerations underlying that opinion "are simply not implicated here, where the residual clause operated just like a statute to fix Brown's sentence." Id. Accordingly, Chief Judge Gregory concluded that the right asserted "stems from Johnson," and that "Beckles and Booker merely reinforce that the right newly recognized in Johnson is indeed applicable to Brown's claim." Id. at 310. He thus found that relief should have been granted:

> Ultimately, that the residual clause at issue here is contained in the mandatory Sentencing Guidelines, rather than the ACCA, is a distinction without a difference for purposes of this Court's timeliness inquiry. 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. The right newly recognized in Johnson is therefore clearly applicable to Brown's claim, because the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in Johnson.

Id.

Such persuasive reasoning should be considered by this Court, rather than the panel opinions that ignore the Court's precedent. Indeed, Chief Judge Gregory is not the only court of appeals judge to have expressed sharp disagreement with the decisions that foreclose relief on the same grounds. See, e.g., In re Sapp, 827 F.3d , 1334, 1337-41 (11th Cir. 2016) (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring) (expressing displeasure with the Eleventh Circuit's holding in In re Griffin, 823 F.3d 1350 (11th Cir. 2016), holding because the mandatory

Guidelines operated to fix sentences in the same way as statutes setting minimum mandatory sentences). As one district judge in the Sixth Circuit recently explained "the right vindicated in Johnson was the right to be free from unconstitutionally vague statutes that fail to clearly define 'crime of violence' or 'violent felony,' not simply the right not to be sentenced under the residual clause of the ACCA." United States v. Chambers, Nos. 1:01-cr-172/1:16-cv-1523, 2018 U.S. Dist. LEXIS 45608, at *5 (N.D. Ohio Mar. 20, 2018). The view adopted by Raybon, "invites Potemkin disputes about whether the Supreme Court has explicitly applied its precedents to a specific factual circumstance rather than asking whether the right the Supreme Court has newly recognized applies to that circumstance." Id. at *6.

When such learned jurists cannot even agree, it is evident that Messrs. Gipson and Walker desperately need this Court's intervention to clarify for the lower courts that it is Johnson that is determinative of this issue, not some rule yet to be announced. Although this Court has never expressly held that Johnson applies to the residual clause in the mandatory career offender Guideline, that conclusion is logically dictated by its holding invalidating the identical residual clause in the ACCA.

CONCLUSION

The legal questions resolved by Raybon, and the subsequent panel decisions herein potentially affect scores of defendants with pending claims within the Sixth Circuit alone. This significant number is only magnified when the impact nationwide is considered. Because of the magnitude of the Due Process implications attaching to this issue, and for all of the foregoing reasons, Petitioners respectfully pray that this Court will grant certiorari to review the judgment of the Sixth Circuit in their cases.

DATED: 17th day of April, 2018.

Respectfully submitted,

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