NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM LEM POSEY, II,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To decide whether a non-generic offense is divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013), does a sentencing court need to take a grammar-based approach or an element-based approach? That is, does the court need to ask:

(1) Whether a prosecutor could, as a grammatical matter, possibly write the indictment such that it describes a generic offense?

or

(2) Whether jury instructions would possibly require the jury to unanimously find elements that would amount to a generic offense?

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PRAYER

Petitioner William Lem Posey, II, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion in petitioner's case is attached as Appendix A. The order of the district court is attached as Appendix B.

JURISDICTION

The Court of Appeals entered its judgment and opinion on May 7, 2018, denying relief. This petition is filed within 90 days of that denial as required by Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 2255(f)(3) of Title 28 of the United States Code tolls the one-year filing period for a § 2255 motion until "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."

STATEMENT OF FACTS

In 1996, William Posey was convicted and sentenced in federal district court. His convictions came in four separate cases for three counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of attempted escape in violation of 18 U.S.C. § 751(a). He had at least two prior convictions that qualified as "crimes of violence" under the career-offender guideline, USSG § 4B1.1. Thus, he would qualify as a career offender if any of his underlying convictions – for bank robbery and attempted escape – likewise qualified as a "crime of violence." *See* USSG § 4B1.1(a).

The district court, possibly relying on the residual clause to the definition of "crime of violence," held that Posey did qualify as a career offender, triggering a guideline range of 188-235 months for the robbery convictions. At the time of sentence in 1996, the guideline range was mandatory. The district court imposed a sentence of 188 months for each robbery count to run concurrently.

In 2015, this Court struck down the residual clause of the Armed Career Criminal Act (ACCA) as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). The residual clause found in the ACCA was virtually identical to the one used in the career-offender guideline's definition of "crime of violence." The Court also held that *Johnson's* new rule is available retroactively on collateral review. *Welch v. United States,* 136 S. Ct. 1257 (2016). To take advantage of a new constitutional rule like *Johnson,* a prisoner must file his petition within one year of issuance of the new rule. 28 U.S.C. § 2255(f)(3).

Within one year of the issuance of *Johnson*, Posey filed his first motion under 28 U.S.C. § 2255 moving to vacate or correct his sentence since it appeared *Johnson* invalidated the residual clause found in the career-offender guideline, and since his mandatory sentencing

guideline range may have depended on the application of that residual clause.

In 2017, this Court held in *Beckles v. United States*, 137 S. Ct. 886 (2017) that *Johnson* does not apply to the guidelines' residual clause if the guidelines were treated as merely advisory. It did not state whether *Johnson* applied to that residual clause when the guidelines were treated as mandatory.

After *Beckles* issued, the Sixth Circuit issued a precedent decision holding that a petitioner in Posey's shoes cannot proceed with a *Johnson* claim because, in the view of the Sixth Circuit, he has no new rule to cite. *Raybon v. United States*, 867 F.3d 625, 629-30 (2017). The Sixth Circuit held that it is an open question whether *Johnson* applies in the context of mandatory guidelines, and it reasoned that "[b]e cause it is an open question," a petitioner in Posey's shoes is not asserting a "'right' that 'has been newly recognized by the Supreme Court.'" (*Id.* at 630 (quoting 28 U.S.C. § 2255(f)(3).)

The district court invoked *Raybon* to deny Posey relief. (Apx. B, Order at 4.) So did the Sixth Circuit. (Apx. A at 4.)

Argument

I. The Court should grant certiorari in order to resolve a circuit split.

Section 2255(f)(3) of Title 28 of the United States Code tolls the one-year filing period for a § 2255 motion until "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) (italics added).

Circuits conflict over the italicized language. The Seventh Circuit has held that the one-year filing deadline runs from the date on which the "right asserted" is recognized by the Supreme Court; the statute "does not say that the movant must ultimately *prove* that the right

applies to his situation." *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018) (italics in original). Because a petitioner like Posey is *asserting Johnson*'s new rule, he can file a petition under § 2255(f)(3) with the goal of *proving* that *Johnson* applies to his situation by invalidating the residual clause of the mandatory guidelines. *Id.*; *accord Moore v. United States,* 871 F.3d 72, 80-84 (1st Cir. 2017).

In contrast, the Sixth Circuit has put the cart before the horse. In *Raybon* it has held that a petitioner in Posey's shoes cannot even file his § 2255 motion to assert *Johnson* applies to his case unless he can already prove that the Supreme Court has held that *Johnson* applies to it. *Raybon*, 867 F.3d at 629-31. At least one other circuit has joined the Sixth. *United States v. Brown*, 868 F.3d 297, 301-04 (4th Cir. 2017). That view is wrong because it "improperly reads a merits analysis into the limitations period." *Cross*, 892 F.3d at 293.

This circuit split is plain and intractable. In some circuits, it is keeping petitioners like Posey from even being able to assert their claims under *Johnson*. The longer the Court waits to resolve this split, the more petitioners will be kicked out of court at the threshold, only delaying justice and only burdening prisoners with having to figure out how to return to court someday if this Court ultimately sides with *Cross* on the issue.

CONCLUSION

For the foregoing reasons, petitioner William Lem Posey, II, respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

Date: August 6, 2018

Respectfully submitted,

s/ Michael C. Holley

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