NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP ANTHONY KENNER,

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

Michael C. Holley
Assistant Federal Public Defender
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805
(615) 736-5047

QUESTION PRESENTED

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." In *Johnson*, the Supreme Court initially recognized a new right. Does § 2255(f)(3) toll the filing period for a defendant asserting that *Johnson* applies in a situation similar to that in *Johnson*, or does it toll the period only for defendants asserting that *Johnson* applies to a situation exactly like that in *Johnson*?

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

Statutes and Rules

Sentencing Guidelines and Other Authorities

PRAYER

Petitioner Phillip Kenner 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 10, 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, Phillip Kenner was convicted and sentenced in federal district court for one count of kidnapping in violation of 18 U.S.C. § 1201(a)(1) and for one count of transporting a stolen vehicle in violation of 18 U.S.C. § 2312. 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 kidnapping or transporting a vehicle – likewise qualified as a "crime of violence." *See* USSG § 4B1.1(a).

The district court, necessarily[1] relying on the residual clause to the definition of "crime of violence" in order to so classify the kidnapping conviction, held that Kenner did qualify as a career offender, triggering a guideline range of 324-405 months. At the time of sentence in 1996, the guideline range was mandatory. *See generally United States v. Booker,* 543 U.S. 220 (2005). The district court imposed a sentence of 405 months.

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." *See, e.g., United States v. Pawlak,* 822 F.3d 902, 907 (6th Cir. 2016). 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

[1] A kidnapping under § 1201 does not qualify under the "elements" (or "force") clause of § 4B1.2 because it can be committed through fraud or deception. *Gooch v. United States*, 82 F.2d 534, 537-38 (10th Cir. 1936); *see United States v. Kaplansky*, 42 F.3d 320, 324 (6th Cir. 1994); *United States v. Cole*, 359 F.3d 420, 428 (6th Cir. 2004) ("Although the crime of kidnapping lacks the element of use or threat of use of physical force against another, it falls under . . . § 4B1.2, as it involves 'conduct that presents a serious potential risk of physical injury to another.'").

the new rule. 28 U.S.C. § 2255(f)(3).

Within one year of the issuance of *Johnson*, Kenner 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 precedential decision holding that a petitioner in Kenner's shoes cannot proceed with a *Johnson* claim because, in the view of the Sixth Circuit, he has no new right to assert. *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 Kenner'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 Kenner 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 Kenner 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 Kenner'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 Kenner from even being able to assert their claims under *Johnson*. And it will thereby have the effect of stopping anyone in Kenner's situation – no matter how clearly entitled to relief – from even getting into court to prove that entitlement. 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 Phillip Kenner respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

Date: August 8, 2018

Respectfully submitted,

s/ Michael C. Holley

MICHAEL C. HOLLEY
Assistant Federal Public Defender
Attorney for Petitioner
810 Broadway, Suite 200
Nashville, Tennessee 37203
Telephone: (615) 736-5047