NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BRIGHT,

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

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*?

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PRAYER

Petitioner James Bright 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 order 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 order denying a certificate of appealability on September 20, 2018. 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 March 2001, James Bright, at age 36, was arrested for his role in a drug-trafficking conspiracy. He pled guilty to one count of that offense. If he had two prior convictions for a "crime of violence," he would be subjected to a sentence enhancement as a "career offender." " *See* U.S.S.G. § 4B1.1(a).

The district court classified Bright as a career offender due to two prior convictions under Tennessee law: (1) a sentence imposed in Case No. 84-W-438 on October 26, 1984, for armed robbery, assault with intent to commit robbery, and burglary; and (2) a sentence imposed in Case No. 84-S-1116 on that same date for burglary. (Presentence Report at 9.) Bright concedes that the first Tennessee conviction satisfies that definition; the only issue is the second Tennessee conviction, which was for a 1984 burglary.

To satisfy the crime-of-violence definition, a conviction must satisfy one of the three clauses that compose the definition of "crime of violence," *i.e.,* the force clause, the enumerated-offense clause (which enumerates "burglary of a dwelling"), or the residual clause. *See* U.S.S.G. § 4B1.2(a) (2001). His 1984 Tennessee burglary could not satisfy the force clause because it did not require the use or threatened use of force. *See United States v. Prater*, 766 F.3d 501, 509 (6th Cir. 2014). Nor could it satisfy the enumerated-offense clause because, prior to 1989, Tennessee burglary could be committed by entering a phone booth and then breaking the coin receptacle. *Cradler v. United States,* 891 F.3d 659 (6th Cir. 2018). It could only satisfy the residual clause. *See United States v. Bureau*, 52 F.3d 584, 591 (6th Cir. 1995) ("Bureau's prior conviction for attempted burglary of a business under Tennessee law falls within the 'otherwise clause' of [the ACCA].") The district court found that the 1984 Tennessee burglary was a crime of violence, evidently relying on the residual clause since that was the only legal basis for so

finding. *See generally Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (refusing, on collateral review, to assume the sentencing court would have made a legal error).

Due to this career-offender classification, Bright's sentencing range was 262-327 months. At sentencing in October 2001, this Court imposed a sentence of 270 months, which was within the then-mandatory guidelines range.

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 the new rule. 28 U.S.C. § 2255(f)(3).

Within one year of the issuance of *Johnson*, Bright 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 Bright'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 6-7.) So did the Sixth Circuit. (Apx. A at 3 ("*Raybon* precludes relief").)

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 Bright 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 Bright'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 Bright from even being able to assert their claims under *Johnson*. And it will thereby have the effect of stopping anyone in Bright'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 James Bright respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

Date: December 14, 2018

Respectfully submitted,

s/ Michael C. Holley

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