No._____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN BOLTON - PETITIONER

vs.

DEBRA A. BRENEMAN - RESPONDENT(S)
"et al"

ON PETITION FOR WRIT OF CERTIORAL TO

Appeal from the United States Court
Of Appeals for the Sixth Circuit
Cincinnati, Ohio

PETITION FOR WRIT OF CERTIORAI

BRIAN BOLTON U.S.M. #47403-074
United States Penitentiary Lee County
P.O. BOX 305
Jonesville, Va. 24263

QUESTIONS PRESENTED FOR REVIEW

Bolton was sentenced under the Career-Offender under the U.S.S.G § 4B1.1. In Johnson v. United Soates, 135 s. ct. 2551 (2015), this court held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924 (e)(2)(B)(ii), is unconstitutionally in Welch v. United States, 136 s. ct. 1257 (2016), the court held that Johnson announced a new "substantive" rule of constitutional law that applies retroactively in an initial collateral challenge under 28 U.S.C. 2255 to a sentence enhanced under the ACCA, 136 s. ct. 1268. Within one year of Johnson, Bolton filed a timely 2255 to challenge his career offender status under the residual clause. The district court found review of Bolton's Johnson claim to be barred from vagueness challenges stating Bolton cannot use Johnson to challenge § 4B1.2's residual clause, applying recent decision in Beckles v. United States, 137 s. ct. 886, 894 (2017).

1. Whether the governments arguments are incorrectly that the Supreme Court's ruling in Johnson v. United States, 135 s. ct. 2551 (2015), is "procedural-as-applied" to guideline sentences and therefore, does not apply retroactively to Mr. Bolton's case on collateral review?

2. Since the residual clause is invalid under Johnson "can the residual clause any longer mandate or authorize any sentence? When this court made it clear in Welch, 136, s. ct. at 1256 that it can no longer do so?

3. Did the trial court commit legal error when it determined that the Defendant qualified as a career offender based on a conviction in State Court for Aggravated Assault, where the State Statute § 39-13-102(c) does not categorically meet the "use of force" clause requirements and thus is not a predicate "crime of violence" that allows for enhancement to career offender status under the residual clause?

4. Whether the Court Of Appeals committed legal error when it determined district court did not misapprehend or overlook any point law reviewing Petitioner's Argument stating in light of United States v. Mathis, No. 15-0609 (Decided June 23, 2016) that conviction of Tennessee drug statue § 39-17-417 is broader than the Federal Definition of

a controlled substance is a violation of the Due Process Clause?

5. Whether Petitioner's right to the effective assistance of counsel was violated on direct appeal when counsel failed to consult with Petitioner concerning his right to direct appeal: failed to make a reasonable effort to discover the Petitioner's desire to appeal and counsel failed to file a notice of appeal or file brief pursuant to Anders v. California, 386 U.S. 738, 875 s. ct. as required by Doe v. Flores S. 28 U.S. 470, 120 S. ct. 1029 145 L. Ed. 2d. 985 (2000)?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgement is the Subject of this petition is as follows:

DEBRA A. BRENEMAN
OFFICE OF THE U.S. ATTORNEY
800 MARKET STREET
SUITE 211
KNOXVILLE, TENNESSEE 37902

THE HONORABLE THOMAS A. VARLAN
CHIEF UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF TENNESSEE
OFFICE OF
800 MARKET ST. SUITE 130
KNOXVILLE, TENNESSEE 37902

SOLICITOR GENERAL OF THE UNITED STATES
ROOM 5614, DEPARTMENT OF JUSTICE,
950 PENNSYLVANIA AVE., N.W.,
WASHINGTON, D.C. 20530-0001

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CONSTITUTIONAL PROVISIONS

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished. It is unpublished as I know of due to the USP-Lee United States Penitentiary being lock down, I the defendant has been unable to check publication on computer.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

STATE OF JURISDICTION

Pursuant to Federal Rule Of Appellate Procedure 28 (a)(4)(A), the Defendant, Brian Bolton, states that the District Court below had subject-matter jurisdiction of this cause based on 18 U.S.C. §3231, as the result of an Indictment charging violations of the following Federal statutes: Of Title 21 U.S.C. §§ 846, 841 (a)(1), and 841(b)(1)(A). Count One (1) also contains forfeiture allegations and a money judgement.

Pursuant to Federal Rule Of Appelate Procedure 28(a)(4)(B), the Defendant, Brian Bolton, states that this court has appelate jurisdiction of this cause based on 28 U.S.C. § 1291, and on Federal rules Of Appelate Procedure 3 and 4(b). A judgement in a criminal case was entered May 18, 2015. The District Court sentenced Petitioner 188 months imprisonment followed by five supervised release. Petitioner filed collateral challenge pursuant to 28 U.S.C. § 2255 [Doc. 950] less than one year latter denied April 19, 2017. Petitioner applies for a certificate of appealability ("COA") Fed. R. App. P.22 (b) denied December 01, United States v. Bolton, No. 17-5578 Petitioner, petitions for rehearing en banc denying a certificate of appealability March 06, 2018.

JURISDICTION

The date on which the UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT decided the Defendants case for certificate of appealability ("COA"), pursuant to 28 U.S.C. §2253 (c)(2) and Fed. R. App. P. 22 (b) following date December 01, 2017 on Docket No. 17-5578.

A timely petition for rehearing en banc was denied by the UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT on the following date: March 06, 2018, on Docket No.: 17-5578, and a copy of the order denying rehearing appears at Appendix _____.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

A. Nature of the case proceeding below

In an Indictment filed within the EASTERN DISTRICT OF TENNESSEE, AT KNOXVILLE, On December 3, 2013, the Defendant, Brian Bolton (herein after "Bolton or Defendant"), was charged with Count One (1) conspiracy to distribute and possess with intent to distribute five (5) kilograms or more of cocaine and (280) grams or more of cocaine base, occuring on or about August 1, 2012, continuing on or about until December 2, 2013, in violation of Tittle 21 U.S.C. §§ 846 (a)(1), and 841(b)(1)(A). Count One (1) also contains forfeiture allegations and a money judgement.

After entering a guilty plea to Count One of the Indictment before the United States District Judge, Honorable Pamela L. Reeves in Knoxville and pleaded guilty to counts on (lessor Included) conspiracy to distribute and process with intent to distribute five hundred (500) grams of cocaine all in violation of 21 U.S.C. §§ 846 and 841 (a)(1), 21 U.S.C. § 841(b)(1)(B) 5 years to 40 years imprisonment/ $5,000,000,00 fine (class B felony) in preparation of sentencing, the U.S. Probation Officer prepared a Presentence Investigation Report stating Petitioner had a prior offense involved a crime of violence. Stating Defendant was over Eighteen years old at the time of the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the Defendant has at least two prior felony convictions of either a crime of violence or a conrolled substance offense; therefore Defendant was convicted of a sale of schedule II drug under 5 grams in the criminal court of Roane County Tennessee, Docket No. 13413; and aggravated assault in criminal court of Anderson County, Tennessee, Docket No. B000-0002. The offense level for a career offender is 34, U.S.S.G. § 4B1.1 (b)(2). In light of Petitioner's career offense states, the Probation Officer calculated advisory guidelines range of 188 months to 235 months of imprisonment.

On May 18, 2015, at Bolton's Sentencing hearing, the District Court adopted the Presentence Report. Including the recommended Guidelines range. Defendant currently remains under that same sentence imposed by this court in the custody of the Bureau Of Prisons within the Commonwealth Of Virginia's U.S.P. Lee County with an inmate register number of 47403-074.

REASONS FOR GRANTING THE PETITION

Pursuant to Supreme Court rules of rule 10, the Defendant Petitioner, Brian Bolton suggests that Writ Of Certiorari of this cause is appropriate for the reasons set forth hereinbelow.

Defendant named hereinabove expresses a belief based on a reasoned and studied the professional judgement that the panel decision of Sixth Circuit is a constitutional error on Five of Petitioners arguments:

1. In light of Johnson v. United States, 135 S. Ct. 2251 (2015), his Aggravated Assault no longer qualifies for Career Offender sentencing enhancement under U.S.S.G. § 4B1.1.

2. In light of Supreme Court's decision in Mathis v. United States, 786 F.3d 1068, (2016), and in light of Descamps v. United States 466 Fed. Appx. 563, (2013) and in light of Hinkle v. United States U.S. App. Lex 15 140 No. 15-1000167, Aug. 11, (2016) that conviction for Sale Of Schedule II substancer no longer qualifies as a career offender.

3. Counsel performed ineffectively during pre-trial proceedings when counsel Mr. Richard L. Gaines failed to object to priors on Presentence investigation Report and was Ineffective by failing to object to prior predicate convictions at the sentencing hearing and failing to consult with Petitioner about appealing his snetence of 188 months as a career offender enhancement, Boltons ineffective counsel claim 1-5 is a constitutional error where (1) Counsel did not file appeal consulting with petitioner about wanting to appeal his sentence (2) counsel did not challenge prior conviction of Tennessee offenses (3) Counsel failed to object to Defendants status as a career offender (4) Counsel did not attempt to join his two prior controlled substance offenses for enhancement purposes, (5) Counsel did not investigate the facts surrounding the prior state convictions.

Herein the above this case presents questions of exceptional importance that should be determinded by the Supreme Court Justice of this court, consequently, Petition for a Writ Of Certiorari is necessary to address whether the instant appeal should have been dismissed or forfeited when the formal pleading was by a pro-se prisoner and the pleadings was not drafted by a ("lawyer") Petitioner cited the Supreme Courts holding in Haines v. Kerner, 404 U.S. 519 (1972) showing the court defandant is a pro-se prisoner and having those claims denied or forfeited those claims is a constitutional error of the decision in Johnson, Bell, Mathis, Descamps and along with Hinkle that invalidates his being deemed a career criminal pursuant to the United states Sentencing Guidelines -

U.S.S.G §4B1.1., it is his assertion that this court should take claims to prevent a Misscarriage Of Justice. Defendant would show unto Court as follows:

ARGUMENT ONE

A. Petitioner's right to effective assistance of counsel was violated at sentencing when counsel failed to make meritotious arguments demonstrating that the career offender enhancement under U.S.S.G. § 4B1.1, did not apply to petitioner.

The Government and District court miscontrues and re-frames petitioner's claim as arguing counsel was ineffective for failing to object to the career offender enhancement based on Supreme Courts decision in Johnson v. United States, 135 S. ct. 2551, 2557, 2561, 192 L.fd. 2d 569 (2015). Although the Johnson, decision is part of the analysis, Pettitioner reasserts that his right to effective assistance of counsel at sentencing was violated when counsel at sentencing was violated when counsel failed to make appropriate and necessary objections demonstrating that his prior convictions for Tenneessee aggravated assault is not a crime of violence for purposes of the career offender finding unde U.S.S.G. §4B1.1.

Objections were not made at sentencing contesting the guidelines calculations listed in the Presentence Investigation Report (PSR) including the application of the career offender enhancement under §4B1.1, and case law established that Johnson "had nothing to do with the range of permissible methods a court might use to determine whether " any sentencing provision applies, but instead "changed the Substantive reach" of the crime of violence definition, thus "altering the range of conduct or class of persons that the [guidelines] punishes". Welch, 136 S. Ct. at 1265 Johnson's alteration of the substance reach of the crime of violence definition of the career offender guideline is obvious:

> (a) The term "crime of violence" means any offense under Federal or State Law, punishable by imprisonment for a term exceeding one year, that-
>
> 1. Has as a element the use, attempted use, or threatened use of physical force against the person of another, or
>
> 2. is burglary of dwelling, arson, or extortion, involves use of explosives, ~~or otherwise conduct that presents a serious potential risk of physical injury to another.~~

U.S.S.G. § 4B1.2(a). Because the residual clause is invalid, "even the use of impecable fact finding procedures could not legitimate a sentence based on that clause. "Welch, 136 S. Ct. at 1256. When a court has applied a guidelines enhancement based on the residual clause, the sentence, whether inside or outside the guideline range is based on that clause, see Peugh v. United States, 133 S. Ct. 2072, 2083 (2013) ("The guidelines are in a real sense the basis for the sentence") (quoting Freeman v. United States, 131 S Ct. 2685, 2692 (2011)(plurality opinion) (emphasis omitted).

Because the residual clause is invalid under Johnson "it can no longer mandate any sentence." Welch, 136, S. Ct. at 1265 (emphasis added).

Petitioner Bolton's case is identical to the Sixth Circuit case law in United States v. bell, 2015 WL 4746360 (6th cir. 2015)(vacating remanding for resentencing in light of Johnson where Tennessee Code Annotated § 39-13-102(c)'s definition of agravated assault does not meet the "use of force" clause requirement. See Mr. Bolton's judgement of criminal circuit court of Anderson County Tennessee prior agravated assault § 39-13-102(c). As of now in the Terrence Bell case cited as [612 fed. Appx 378] petitioner's prior aggravated assault is no longer a crime of violence, in light of the Supreme Court's ruling in Johnson.

Petitioner request that this court revist this issue. This Supreme Court has before overturned it's own binding case law for this very reason. Terrence Bell [612 fed Appx. 378] Aug. 12 (2015), demonstrates the propriety of a panel of the Sixth Circuit revisiting and overturning prior case law in light of Supreme Court precedent petitioner proposes that the same is appropiate here for all these reasons in his pro-se motion to vacate, set aside or correct his sentence pursuant to U.S.S. §2255 [Doc. 950 motion].

This court should revisit that issue of the Eleventh Circuit to review this anomalous opinion cited by the government in support of it's proposition that Johnson should not apply retroactively to guideline cases due to some "procedural as applied" standard, with the recent tied of Supreme Court decisions in favor of expanding Johnson's reach, it is reasonably safe to assume that this court will revisit and fix the issue by resolving it in the Defendants favor. See Welch v. United States, 136 S. Ct. 1257, 1265 (2016); and Mathis v. United States, 579 U.S.___, No. 15-60092. Slip op. (U.S. June 23, 2016). The Sixth Circuit's similar expasion of Johnson is demonstrated by opinions both proceeding and following the Supreme Court's ruling. See United States v. McBride,___f.3d __, 2016 WL 3209496 (6th cir. june 10, 2016) United States Pawlak, f.3d__2016 Wl 2802723 (6th cir. May 13, 2016 and Watkins, 810 f. 3d. 375).

The trial court below erroneously considered the Petitioner's conviction for aggravated assault to be a predicate "crime of violence" mandating the element of career offender status pursuant to U.S. Sentencing Guidelines § 4B1.1(a). Aggravated Assault under Tennessee law, however would not be considered a "crime of violence". Consequently, the trial courts' sentencing decision must be reversed and vacated and this case remand for resentencing. Counsel's failure to appropiately onject to the enhancement fell below an objective standard of reasonableness and resulted in Petitioner recieving a longer sentence.

Because Petitioner recieved ineffective assistance of counsel at sentencing, Petitioner's sentence should be vacated and remanded for new sentencing hearing.

QUESTION 1, 2, & 3 the government along with the court's recent decision in Beckles v. United States, 137 S. Ct. 866, 894 (2017) is incorrectly that the Supreme Court's ruling in Johnson v. United States, 135 S. Ct. 2551 (2015), is "procedural-as-applied to guideline sentences and, therefore does not apply retroactively to Mr. Bolton's case on collateral review.

While the Sixth Circuit has held that Johnson ruling is substantive and applies to the sentencing guidelines on direct review. See United States v. Pawlak,__F.3d__, 2016 WL 2802723 (6th cir. May 13, 2016); and In re Habbard,__F3d__, 2016 WL 3181417 (4th cir. June 8, 2016)("....the rule in Johnson is substantive with respect to it's application to the Sentencing Guidelines and therefore applies retroactively.."); See also e.g. Moring v. United States, No. 2:12-cr-20473, 2016 WL 918050 *5(W.D. Tenn. Mar. 8, 2016) (The Sixth Circuit in re Watkins, 810 F.3d 375, 384, (6th cir. 2015), "made Johnson's rule categorically retroactive to case on collateral review.. and "made no distinction between a Fifth Circuit ACCA case and an Eleventh Circuit Sentencing Guideline case when rejecting both circuits conclusions that Johnson was not retroactive."); United States v. Hawkins, No. 8:13-cr-343 (D. Neb June 30, 2016). (Rejecting the government's procedural-as-applied argument and finding that Welch mandates the conclusion that Johnson categorically applies retroactively to all cases on collateral review); and United States v. Ramirez, No. 1:10-cr-10008 (D. Mass. May 24, 2016. This court should reconsider prior case law holding that the Guidelines could not be susceptible to vagueness challenge are no longer good Law following the Supreme Court's holding in Johnson. This court is entitled to reconsider the Fourth Circuit's ruling in Hubbard as persuasive authority in the absensce of a Sixth Circuit decision to the contrary.

Further the Supreme Court granted a defendant's petition for certiorari recently ruled in opinion that Johnson should not apply retroactively to guideline cases on collateral review. Beckles v. United States, 137 S. Ct. 886, 894 (2017). This court wrong in it's judgement and opinion reviewing the judgement of the United States court Of Appeals for Eleventh Circuit anomalous opinion that binding authority now dictates that the Johnson decision does not provide a basis for vacating setting aside, or correcting Mr. Bolton's sentence. Johnson should apply retroactively to guideline cases on collateral review. The United States Sentencing Guidelines Advisory or Pre-Booker has nothing to do with the decision in Johnson v. United States, 135 S. Ct. 2551, 2563 (2015). The case was concerning the residual clause being a unconstitutionally vague sentence just like Mr. Bolton's sentence being enhanced to career offender status under the residual clause that's unconstitutionally vague. This court should is entitled to consider the Fourth Circuit's rulling in Hubbard as persasive authority in the obsence of a Sixth Circuit decision to the contrary. This court should revisit this issue at the Eleventh Circuit precedent too the anomalous opinion cited by the government in support of it's proposition that Johnson should not apply retroactively to guideline cases due to some "procedural as applied" standard, 1 with the recent tied of Supreme Court decisions in favor of expanding Johnson's reach, it is reasonably safe to assume that this court will revisit and fix the issue by resolving it in the Defendant's favor. 2 See Welch v. United States, 136 S. Ct. 1257, 1265 (2016); and Mathis v. United States, 579 U.S.__, No. 15-60092, Slip op. (U.S. June 23, 2016).

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1. The case cited from the Fifth and Eighth Circuits do little to support the governments claim. Both Donnell v. United States, __F.3d__, 2016 WL 3383487 (5th cir. June 17, 2016). Epouse the idea rejected by the Sixth Circuit in Pawlak- that Johnson may not apply to the guidelines even on direct review. Donnell, 2016 WL 3383831 at *1; Arnick, 2016 WL 3383487 at *1. Because the Sixth Circuit has reached the opposite conclusion in published opinion, Pawlak, 2016 WL 2802723, the rational of Donnell and Arnick carry little weight in this Circuit.

2. Eleven court's, including the Fourth Circuit Court Of Appeals have held that Johnson does apply collaterally to guideline cases. See Hubbard, __F.3d__, 2016 WL 3181417 (4th cir. June 8, 2016) ("...the rule in Johnson is substantive with respect to it's application to the sentencing guidelines and therefore applies retroactively..."); See also Fife v. United States, No. 1:03-cr-149, order (S.D. Ohio July 13, 2016);

The Sixth Circuit's similar expasion of Johnson is demonstrated by opinions both proceeding and following the Supreme Court's rulings. See United States v. McBride,__F.3d__, 2016 Wl 3209496 (6th cir. June 10, 2016); Pawlak,__F.3d__, 2016 WL 2802723 (6th cir. May 13, 2016); and Watkins, 810, F.3d 375. In any case, the Sixth Circuit has not yet had the opportunity to review this,. 3 save for granting leave to file second of successive petitions in guideline cases rejecting the government "procedual as applied" arguments in dicta.4 further Johnson should apply retroactively to guideline cases on collateral review with all respect to this court. Compare Moring, 2016 WL 918050, and Fife, No. 1:03-cr-149 (July 13, 2016 order); with Frazier v. United States, No. 1:09-cr-188, 2016 WL 885082 (E.D. Tenn. Mar. 8, 2016). Therefore this issue is ripe for review in this court.

United States v. Tomisser, No. 2:11-cr-2115, slip op. at 7, n1 (E.D. Wash. July 11, 2016); United States v. Beck, No. 8:13-cr-62, 2015 WL 3576191 (D. Neb. July 6, 2016); United States v. Hopes,__F3d__, 2016 WL 363814 (D Or July 5, 2016); United States v. Stamps, 4:13-cr-238-cw (N.S. Cal. June 29, 2016) (granting: 2255 releif doc. 57; denying government motion to stay resentencing pending Beckles, doc. 62); Gilbert v. United States, No. CVIS-1855-JCC, 2016 WL 3443898 (W.D. Wash. June 23, 2016); Townsley v. United States, No. 3:14-cr-146(M.D. Pa June 23, 2016); United States v. Boone, 2:12-cr-162 (W.D. Pa May 31,2016); United States v. Ramirez, No. 1:10-cr-1008 (D. Mass. May 24, 2016); and Moring v. United States, No. 2;12-cr-20473, 2016 WL 918050, *5(W.D. Tenn. Mar. 8, 2016)

The government, in it's response only cites to courts that have substantively decided against to retroactively of Johnson to guideline cases on collateral review, including the Eleventh Circuit opinion that Beckles is poised to review. See In re Griffin, No. 16-12012,__F.3d__, 2016 WL 3002293, at *5 (11th cir. May 25, 2016); Frazier v. United States, No. 1:09-cr-188, 2016 WL 885082, at *4-6 (E.D. Tenn. Mar. 8, 2016); Cowan v. United States, No. 4:11-cr-3, 2016 WL 3129288 at *3 (W.D. Mo. June 2, 2016) Hallman v. United States, No. 3. 15-cv-468, 2016 WL 593817 at *5(W.D.N.C. Feb. 12, 2016); United States v. Stork, No. 3:10-cr-132, 2015 WL 8056023, at *3-8 (N.D. IND. Dec. 4, 2015). The government also cites numerous other cases occurring in the same courts as those previously listed that have arrived at the same conclusion. Those cases were not listed here. Nor were repeat holdings from the same Districts cited by Petitioner above.

Importantly, all of the opinions cited by the government from this District were pro se cases decided prior to the Sixth Circuit's holding in Pawlak.

Even if government's "procedural as applied" Theory of retroactivity is plausible, Johnson as applied to the guidelines is not a procedural rule but a substantive rule under the difinitions this court actually adopted in Welch. Johnson "had nothing to do with the range of permissible methods a court might use to determine whether" any sentencing provision applies, but instead "changed the substantive" of the crime of violence definition, thus altering the range of conduct or the class of persons that the [guideline] punishes. "Welch, 136 S. Ct. at 1265.

Johnson's alteration of the substantive reach of the crime of violence definition of the career offender is obvious:

> (a)The term "crime of violence" means any offense under Federal or State Law, punishable by

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See Frazier 2016 WL 885082 at *4-6; Lynn v. United States, No. 3:09-cr-571, 2016 WL 1258487 (E.D. Tenn. Mar. 30, 2016); Barnes v. United States, 3:13-cr-45, 2016 WL 1175092 (E.D. Mar. 23, 2016). Each of the Eastern District of Tennessee opinions also relied upon a concept latter rejected in Pawlak that "the guidelines merely guide the excuition of a court's discretion in selecting an appropriate sentence. "Barnes, 2016 WL 1175092, at *3 (emphasis added); Frazier, 2016 WL 885082, at *3n.2*5 (and further citing United States v. Smith, 73 F.3d 1414 (6th cir. 1996) and United States v. Matchett, 802 F.3d 1185, 1189 (11th cir. 2015)-precedent that was expressly in Pawlak, 882 F.3d at 908-09, 911-as support for idea that the guideline are not subject to vagueness challenges); Lynn, 2016 WL 1258487 at *3(same)).

3. While the government listed a litany of cases citations in support it's arguments, none of these cases are binding upon the Sixth Circuit Court Of Appeals.

4. See In re Simmons, No. 16-5015 *2 (6th cir. July 12, 2016) ("the government argues-in a filing that predates the Supreme Court's decision in Welch- that as applied to the sentecing guidelines the rule announced in Johnson is procedural') In re Homrich, No. 15-1999 *2-3 (6th cir. Mar. 28, 2016) ("[d]espite our holding in Watkins and the fact that the residual clause in the ACCA and career-offender guideline mirror each other and are interpreted identically, the government argues the rule extending Johnson to the career-offender guidelines residual clause would announce a procedural rule [and would not retroactively]); In re Swain, No. 15-2040, (6th cir. Feb. 22, 2016) ("The government argues that Johnson does not apply to Swain's case because he was not senteced under the ACCA, and Johnson did not announce a new rule of

imprisonment for a term exceeding one year, that-
(1) has as on element the use, attempted use, or treatened use of physical force against the person of another, or
(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another.~~

U.S.S.G. § 4B1.2(a). Because the residual clause is invalid, "even the use of impecable factfinding procedures could not legitimate a sentence based on that clause." Welch, 136 S. Ct. at 1265. When a court has applied a guidelines enhancement based on the residual clause, the sentence, whether inside or outside the guideline range, is based on that clause, See Peugh v. United States, 133 S. Ct. 2072, 2083 (2013)("[T]he guidelines are in a real sense the basis for the sentence;") (quoting Freeman v. United States 131 S. Ct. 1285, 2692 (2011) (plurality opinion) (emphasis omitted). Because the residual clause is invalid under Johnson "it can no longer mandate or authorize any sentence." Welch, 136 S. Ct. at 1265 (emphasis added).

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constitutional law when applied to the guidelines. However, this court has previously interpreted both residual clauses identically... Futhermore,although Johnson addressed only the residual clause of the ACCA, this court has applied it's holding to the residual clause of §4B1.2(a)(2)... Therefore, Johnson is applicable to Swain's case") (internal citations omitted).

5.Cf. United States v. Mclamb, 1996 WL 79438, at *3n.4 (4th cir. 1996) (Tegue does not bar the retroactive application on collateral review of a decision concerning the reach of a Federal Statue, or as here, a sentencing guideline"); Oliver v. United States, 90Fd. 177, 179, n.2(6th cir. 1996) (holding that decision requiring courts to calculate guideline range based on actual weight of harvested marjuana was "not barred by Teague" because it did not announce a "rule of criminal procedure").

6. See brief for the United States Coley v. United States, 2010 WL 11421164, at *9n.2 (U.S. March 18, 2010) ("The government does not dispute that Begay constitutes a substantive holding concerning the applicability of section 924(e) and that is therefore retroactive to cases on collateral review.")(citing Schriro v. Summerlin, 542 U.S. 348, 353 (2004) Bousley v. United States, 523 U.S. 614, 220-621 (1998)).

Circuit Court's that have addressed similar issues have consistently held that new rules that narrow the ACCA's definition of "violent felony" by interpreting it's terms also apply retroactively to guidelines case on colleteral review. See United States v. Doe, 810 F.3d 132, 154, n.13(3d cir. 2015) (holding that Begay v. United States, 553 U.S. 137 (2008) applies retroactively in guidelines cases, and noting that "[U]nder Teague, either a rule is retroactive or it is not"); Narvaez v. United States, 674 F.3d 621, 625-26 (7th cir. 2011) (holding that Begay and Chambers v. United States, 555 U.S. 122 (2009) are substantive decisions that prohibit [] a certain category of punishment for a class of defendants' because of their status or offenses." and thus apply retroactively in guidelines cases); Brown v. Caraway, 719 F.3d 583, 594-95 (7th cir. 2013) (same) Reina-Rodriguez v. United States, 655 F.3d 1182, 1189 (9th cir. 2011) (holding that decisions limiting the definition of burglary under ACCA is substantive because "it altered the conduct that substantively qualifies as burglary and this applies retroactively in guidelines cases); Rozier v. United States, 701 F.3d 681 (11th cir. 2012)(taking it "as given, that the Supreme Courts'" decision narrowing the ACCA's elements clause "is retroactively applicable" in guideline cases).5

In fact, the government has consistently taken positions in analogous circumstances in the Supreme Court, 6 and in the courts of appeals contrary to it's current position- that new rules affecting the ACCA's residual clause apply retroactively to guideline cases.

As stated by the Appellate Section Of The Department Of Justice, Begay "applies retroactively to ACCA cases, mandatory guideline cases, and advisory guideline cases alike." Supplemental Brief for United States on Rehearing En Banc at 48, Spencer v. United States, 773 F.3d 1132 (11th cir. 2014) (en banc) (No.10-10676). The government emphasized that "Begay's status as a substantive is fixed, "and does not fluctuate based on whether the prisoner is challenging an ACCA enhancement, a mandatory guidelines enhancement, "Id. at 15. The government was "not aware of any such Chameleon-like rules" that "were substantive of some purposes and procedural for others." Id. rather, "a rule either is or is not substantive. Id. further, the government argued, Begay "narrows eligibilty for the advisory career offender enhancement just as much as it narrowed eligibility for the [ACCA]enhancement's "and" as in [ACCA] cases, no procedures can be afforded to render that enhancement applicable." Id. at 55 yet for some unknown reason, the government now takes the opposite position with respect to Johnson.

The government now asserts that rule is substantive only if it changes the "substance of the statutory penalty range and that Johnson is procedural as applied to the guidelines because it "simply changes the procedure by which some

defendants' sentence are selected. "Even before Welch, the Supreme Court rejected the government's argument that in order to be substantive, a rule must alter statutory limits. See Montogomery v. Louisiana, 136 S. Ct. 718, 735 (2016)(holding that opinion in Miller v. Alabama, 132 S. Ct. 2455 (2012), was substantive and that the presence of some "procedural ones[.] "The Court squarely rejected the State's argument in Montgomery that Miller [was] procedural because it did not place any punishment beyond the States power to impose, "explaining that, although Miller " did not bar a punishment for all juveniile offenders". "Montogomery, 136 S. Ct. at 734. The government's argument here is even more untenable because Johnson has no procedure component at all.

The Johnson ruling had nothing to do with procedure. The Supreme Court held in Welch: "Johnson is not a procedural decision. Johnson had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act. "Welch, 136 S. Ct. at 1265. Johnson had no more to do with the procedure of determining whether the ACCA applies.

In any case, the Sixth Circuit has rejected the government's inventive "procedural as-applied "position. See Pawlak, 2016 WL 2802723 at *8 ("After Johnson, no disputes that the identical language of the guidelines residual clause implicates the same constitutional concerns as the ACCA for guidance interpreting § 4B1.2, it stretches credulity to that we apply the residual clause of the guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA. "(citation omitted)); See also e.g., In re Smith, 15-6227 (6th cir. May 24, 2016). Granted, Pawlak's holding addressed a case on direct review, but it's language cannot be any clearer.

In sum, because Johnson invalidated the residual clause of the ACCA, which is identical to the residual clause in the Sentencing Guidelines, and because it created a new substantive rule of law that the Sixth Circuit has applied retroactively to guideline cases, it necessarily applies retroactively to Mr. Bolton's case on collateral review.

This court pronounced upon the meaning of the residual clause in James v. United States, 550 U.S. 192; Begay v. United States, 553 U.S. 137; Chambers v. United States, 555 U.S. 172, and Sykes v. United States, 564 U.S. 1, and had rejected suggestions by dissenting Justices in both James and Sykes that the clause does cover possession of a short-barreled shotgun, and imposed a 15 years under ACCA. The Eighth Circuit affirmed.

Held: Imposing an increased sentence under ACCA's residual clause violates due process. Pp. 3 15.

(a)The government violates the due process clause when it takes away someone life, liberty, or property under a criminal vague that if fails to give ordinary people fair notice of the conduct it punishes or so standardless that invites arbitrary enforcement.

Kolender v. Lawson, 461 U.S. 352, 357, 358, Courts must use the "categorical approach " when deciding whether an offense is a violent felony looking "only to the fact the defendant has been convicted of crimes falling within certain categories and not the facts underlying the prior convictions. "Taylor v. United States, 495 U.S. 575, 600. Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that obstraction presents a serious potential risk of physical injury. James Supra, at 208. Pp. 3 5.

(b)Two features of the residual clause comspire to make it unconstitutionally vague. By trying judical assessment of risk to a judicially imagined "ordinary case" of a crime rather than to real-world facts or statutory elements, the clause leaves grave uncertainty about how to estimate the risk posed by a crime. See James, Supra, at 211. At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. Taken together, these uncertainties, clause to lerates. This court's repeated failure to craft a principled standard out of the residual clause, and lower courts persistent inability to apply the clause in a consistent way confirm it's hopeless indeterminacy. Pp. 5 10.

(c)This courts cases squarely contradict the theory that the residual clause is constitutional merely because some underlying crimes may clearly pose a serious potential risk of physical injury to another, See, e.g. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89. Holding the residual clause void for vagueness does not put other criminal laws that use terms such as "Sub stantional risk" in doubt, because those laws generally require gauging the riskness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime, Pp. 10 13.

We are convinced that the indeterminacy of the wide ranging inquiry requiry required by the residual clause both denies fair notice of defendant's and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of (page 5) of opinion of the court Johnson v. United States cite: 576 U.S.__(2015).

It has been said that the life of the law is experience. Nine years experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but "their sum makes a task for us which at best could be only guesswork." United States v. Evans, 333 U.S. 483, 495 (1948). Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the constitutions guarantee of due process. (page 10) of opinion of the court Johnson v. United States cite as: 576 U.S.___(2015).

The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect" this abstract inquiry offers significantly less predictablity than one "[t]hat deals with the actual, not with an imaginary condition other than the facts" International Harvester Co. of America v. Kentucky, 234 U.S. 216, 223 (1914).

Finally, the dissent urges us to save the residual clause from vagueness by interpreting it to refer to the risk posed by particular conduct in which the defendant engaged, not to the risk posed by the ordinary case of the defendant's crime. See post, at 9-13. In other words, the dissent suggests that we jettison for the residual clause (through not for the enumerated crimes) the categorical approach adopted in Taylor, see 495 U.S., at 599-602, and reaffirmed in each of our four residual clause cases, see James, 550 U.S., at 202; Begay, 553 U.S., at 141; Chambers, 555 U.S., at 125; Skes; 564 U.S. __(Slip op. at 5). We decline the dissent's invitation. In the first place, the government has not asked us to abandon the categorical approach in residual-clause cases. In addition, Taylor had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause then to the enumerated crimes. Taylor explained that the relevant part of the Armed career criminal Act "refers to *a person who... has three previous conviction's for-not a person who has committed-three previous violent felonies or drug offense". 495 U.S., at 600. This emphasis on convictions indicates that Congress intended the Sentencing Court to look only to the fact the defendant has been convicted for crimes falling within certain categories, and not to the facts underlying the prior convictions.

I. bid. Taylor also pointed out the utter impracticability of requiring a Sentencing Court to reconstruct, long after the orginal conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record at underlying facts may be available. "[T]he only plausible interpretation" of the law.

Therefore, requires use of the categorical approach. Id., at 602. (page 13) of opinion of the court Johnson v. United States cite as: 576 U.S.__(2015).

C.

That brings us to stare decisis. This is the first case in which the court has recieved briefing and heard argument from the parties about whether the residual clause is void of vagueness. In James, however, the court stated in a footnote that it was "not persuaded by [the principal dissent's] suggestion... that the residual provision is unconstitutionally vague," 550 U.S. at 216, N.o. In Sykes, the court again rejected a dissenting opinion's claim of vagueness. 564 U.S.,at__-__ (slip op., a 13-14).

The doctrine of stare decisis allows us to revisit an earlier decision where experience with it's application reveals that it is unworkable. Payne v. Tennessee, 501 U.S. 808, 827 (1991). Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions; the inability of latter opinions to import the predictability that the earlier opinion forecast. Here, the experience of the Federal Courts leaves no doubt the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. Even after Sykes tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies Systemic Solution." "a black hole of confusion and uncertainty' that fustrates any effort to impact, "some sense of order and direction. "United States v. Vann. 600 F.3d 771, 787 (CA4 2011) (Agee J. Concurring).

This court's cases make plain that even decisons rendered after full adversarial presentation may have to yield to the lessons of subsequent. See, e.g., United States v. Dixon 509 U.S. 688, 711 (1993); Payne, 501 U.S., at 828-830 (1991). But James and Sykes opined about vagueness without full briefing or argument on that issue-a circumstance that leaves us "less constrained to follow precedent's Hohn v. United States, 524 U.S. 236, 251 (1998). The brief discussions of vagueness in James and Sykes homed in on the imprecision of the phrase " "serious potential risk", neither opinion evaluated the uncertainty introduced by the need to evaluate the riskness of an abstract ordinary case of crime. 550 U.S., at 210, N.6; 564 U.S., at__(slip op., at 13-14). And departing from these decisions does not raise any concerns about upsetting private reliance interests.

Although it is a vital of judicial self-government stare dicisis does not matter for it's own sake.

It matters because it promotes the evenhanded, predictable, and consistent development of legal principles. "Payne, Supra, at 827. Decisions under the residual clause have proved to be anything but evenhanded, predictable or consistent. Standing by James and Sykes would undermine, rather than promote the goals that stare decisis is meant to serve.

We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the constitiution's guanantee of due process. Our contrary holdings in James and Sykes are overruled. Today's decison does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a felony.

This court should reverse the judgement of the court of Appeals for the Sixth Circuit and remand the case for further proceedings consistent with the opinion. See (page 15) of opinion of the court Johnson v. United States cited as: 576 U.S. ____(2015).

While the Supreme Court in Johnson invalidated the residual clause of the ACCA, the Sixth circuit has held that the Supreme Court's holding equally applies to the residual clause of the crime of violence definiton located within U.S.S.G. § 4B1.2(a)(2). United States v. Pawlak, __F.3d__, 2016 WL 2802723 (6th cir. May 13, 2016). The Sixth Circuit expressly held that it's prior case law holding that the guidelines could not be susceptible to vagueness challenge are no longer good law following the Supreme Court's holdings in Johnson and Peugh v. United States, 133 S. Ct. 2072 (2013). Id. at *1, 5-7, 13, overruling United States v. Smith, 73 F.3d 1414 (6th cir. 1996). The Pawlak decision negates each of the government's proposed arguments agianst the application of Johnson to career offender cases.

This court should reverse the judgement of the Court Of Appeals for the Sixth Circuit and remand the case for further proceedings consistent with the opinion of Johnson v. United States as 576 U.S. __(2016). See(page 15) of Johnson decision. The trial court below erroneously considered the Petitioner's conviction for aggravated assault to be predicate "crime of violence" mandating the element to career offender status pursuant to U.S. Sentencing Guidelines §4B1.1(a). Aggravated Assault under Tennessee Law, however would not be considered a "crime of violence". Consequently the trial court's sentencing decision must be reversed and vacated and this case remand for resentencing. Counsel's failure to appropriately object to the enhancement fell below an objective standard of reasonaleness and resulted in Petitioner recieving a longer sentence. Mr. Boltons sentence is void for vagueness, and therefore imposing an increased sentence under the residual clause "violates the constitution's guarantee of due process." Id. at 2563. That the appropriate dispositions is to grant certiorari, vacate the judgement of the Court Of Appeals, and remand the case for further consideration in light of Johnson.

For these reasons, I the Petitioner respectfully suggests that the trial court below committed prejudicial legal error of RESIDUAL CLAUSE in determing that the Defendant's prior conviction in State Court for Aggravated Assault was a predicate crime of violence of career offender status, and thus an enhanced offense level under the U.S. Sentencing Guidelines. Consequently, this court must reverse and vacate the sentence imposed, and reman for resentencing without the Career offender Enhancemnt.

ARGUMENT FIVE

B. In light of United States v. Mathis, No. 15-0609 (Decided June 23, 2016) Petitioner's State conviction is broader that the Federal Definition of a controlled substance therefore making his sentence a violation of the due process clause

The Tennessee drug statue is divisible and the Statue States in relevant part.

§ 39-17-417, Criminal offenses and penalties.-
(a)It is an offense for a defendant to knowingly;
(1)Manufacture a controlled substance;
(2)Deliver a contolled substance;
(3)Sell a contolled substance with intent to manufacture, deliver or sell such controlled substance.

Petitioner makes the argument §39-17-417 proscribes possession with intent to manufacture deliver or sell-terms that do not appear in the guidelines definition of controlled substance offense. "In light of Mathis it's a huge distinction between possessing narcotics with intent to manufacture, import, export, distribute, or dispense".

The government stated in the Hinkle case that it would concede if Hinkle were convicted of delivering a controlled substance offense. Under § 4B1.2 Hinkle contended in the District Court and mantain in the Appeals Court that the definition of delivery sets forth varying means of committing than setting forth elelments of seperate delivery offenses. Hinkle argued that the offense of knowingly delivering a controlled substance is broader than the guidelines definition of a controlled substance offense because the Texas Offense criminalizes on offer to sell while the Federal definition does not include such an offense.

The Tennessee code for §39-17-417 is very similar if not identical to the Texas drug statue in Hinkle's case because both Tennessee and Texas statues are divisible and set one or more elements of the offense in the alternative for example, stating that burglary involves entry into a building or an automobile.

Just recently the Sixth Circuit held that Descamps is retroactively applicable via 2241 in challenge to the career offender enhancement. The 6th cir. has handed down an important decision for defendant seeking to challenge a career offender enhancement in light of Descamps, Mathis, or Hinkle. This decision came in Hill v. Masters, 836 F.3d 591 (6th cir. 2016). Hill was enhanced as a career offender based on a prior Maryland second degree assault conviction. Over the years. Hill tried to attack his sentence in a variety of ways, all which were unsuccessful. Then the Supreme Court decided Descamps v. United States 466 Fed. Appx. 563 (2013).

Descamps is part of a serious of decisions that refined the framework for deciding whether a prior conviction is qualifying under the Armed Career Criminal Act using the so-called "categorical" or "Modified categorical" approach. Since Descamps was decided the Supreme Court brought further clarification to the application of the categorical/modified categorical approach with it's decision in Mathis v. United States. Mathis provides clarity on when a statute is "divisible" or indivisible".

Mathis is turn was recently relied upon by the Fifth Circuit in finding that Texas delivery of a control substance priors are no longer qualifying for career offender enhancement purposes in addition, the court suggested that "if State law fail to provide clear answer", id; the sentencing Judge can look at the charging documents or jury instructions in the particular case to see if they refer to alternative means of commission of the crime or by referencing an alternative term to the exclusion of all others, id. at 2257, that the statute contains a list of elements each one of which goes toward a seperate crime, id.

The court in Mathis instructed District Courts first to look to State court decisions in order to determine whether means of satisfying a single element; Mathis, 136 S. Ct. at 2256, In Mathis the court remained us that "elements" are what prosecutors must prove to secure a conviction and what the jury must find beyond a reasonable doubt to convict the defendant, 136 S. Ct. at 2248. A single statute may list elements in the alternative and thereby define multiple crimes. Id at 2249.

The Supreme Court in Mathis also directed District Courts to examine the State Statute itself to determine whether statutory alternatives carry different punishments then under Apprendi v. New Jersey, 530 U.S. 466 (2000) they must be elements Mathis 136 S. Ct. at 2256. Conversely if the statutory list is drafted to offer illustrative examples than it includes only a crime's means of commission, Id. In some cases a statute will clearly state which things are elements that must be changed and proved and which things are not.

Just recently the Seventh Circuit ruled that Mathis was retroactive on a initial § 2255. See Holt v. United States, (No.16-1793)(7th cir. Dec. 13, 2016)The court stated that while Holt's appeal was pending this court held that the version of the Illinois burglary statute under which he had been convicted was indeed not a violent felony because it did not satisfy the definition of burglary used in Mathis v. United States 136 S. Ct. 2243 (2016), for indivisible statutes. See United States v. Haney, 840 F.3d 472 (7th cir. 2016) Because of a snag in that his motion was a second or successive § 2255 motion, Holt's case was affirmed . However, the important aspect of this is that it was retroactive on initial § 2255 motions.

The argument made in this pro-se motion is that Tennessee code annotated (TCA)§39-17-417 Statute is divisible like the Texas Health and Safety Code § 481, 112(a) statute.

> §481.112(a) provides:
> Except as authorized by this Chapter, a per commits an offense if the person knowingly manufactures, delivers or possess with intent to deliver a control substance listed in Penalty Group 1. Tex. Health and Safety Code Ann.
> Ann. § 481.112 (West 2010)
>
> TCA § 39-17-417 (a) provides:
> It's a criminal offense for a defendant to knowingly: (1) Manufacture a controlled substance: (2)Deliver a controlled substance: (3) Sell a controlled substance: (4)Possess a controlled substance with intent to manufacutre, deliver or sell the controlled substance.

The elements of Petitioner's crime of conviction criminalizes a "greater swath of conduct than the elements of the relevant [guideline] offense. This mismath of elements means that Petitioner's conviction are not controlled substance offenses under the guidelines. The prior convictions cannot serve as predicate offense's under the career offender guideline provision, which is § 4B1.1 provision.

The District Court committed predicial error when it determined that the defendant qualified as a career offender based on a conviction for sale of Schedule II drug in the criminal court of Roane County, Tennessee, docket No. 13413 no longer qualifies as a predicate offense for the career offender enhancement.

The decision in Hill v. Masters, 836 F.3d 591 (6th cir. 2016) allows Petitioner such as Mr. Bolton to benefit from the retroactive effect to Descamps, Hinkle, and Mathis. Moreover, to allow Mr. Bolton to continue serving on enhanced sentence as a career offender is a miscarriage of justice. Where he lack the predicate felonies to justify such a characterzation.

ARGUMENT

Petitioner's right to the effective assistance of counsel was violated on direct appeal when counsel failed to consult with Petitioner concerning his right to appeal: failed to make a reasonable effort to discover the Petitioner's disire to appeal and failed to file a notice of appeal.

The government argues that this claim is forfeited stating Petitioner raised only in passing in his reply to government's response to his § 2255 motion. Mr. Bolton did raise this issue in his § 2255 motion.

Counsel was deficient in failing to file a notice of appeal when Petitioner directed counsel to file a notice of appeal. The government's arguments misses the mark because it fails to address the case law demonstrating that counsel is ineffective on appeal if counsel fails to consult with defendant concerning whether to appeal, determine whether the defendant wishes to appeal and file a notice of appeal when it is apparent a desires to appeal.

If defendant gives a lawyer specific instructions to file a notice of appeal and the lawyer disregards that instruction, the attorney had acted in a professionally unreasonable manner. Roe v. Flores-Ortega , 528 U.S. 470, 476-77, 120 S. Ct. 1029 (2000). Counsel's failure to do so cannot be considered a strategic decision, filing a notice of appeal is a purely ministerial task and the failure to file reflects in attention to the defendant's wishes. Id. at 476-77 a notice of appeal, either when expressly requested to do so by the client or merely when the client has not consented to the failure, constitutes ineffective assistance of counsel. Chance v. United States, 103 F3d 128 (6th cir. 1996).

And attorney questioned by the defendant about whether to appeal has a duty to make a reasonable effort to discover the defendant's whishes. Flores-Ortega, 528 U.S. at 480. In fact, the Supreme Court has held that counsel has a duty to consult with a defendant about an appeal if there is reason to think: 1) that a rational defendant would want to appeal). (for example, because there are non-frivolous grounds for appeal) or 2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Id. at 480. In making this determination, courts must take into account all the information knew or should known. Id. Thus, when a defendant neither instructs counsel to file a notice of appeal nor asks that an appeal not be taken, the attorney may nevertheless be ineffective depending upon the facts of the case. Flores-Ortega, 528 U.S. at 478.

In the present case Petitioner was entitled to files a direct appeal of his conviction and sentence in this matter. Petitioner expressed to his attorney that he wanted to file an appeal and other facts existed at the time of sentencing that demonstrate Petitioner was interested in appealing. Counsel had not objected to the application of the §4B1.1 career offender enhancement and had not argued that a sentence without career offender guidelines imprisonment was sufficient under 18 U.S.C. § 3553(a)(2). Therefore, the sentence of 188 months was entered at sentencing being enhanced under career offender status. Given a sentence without the guidelines of career offender status having big difference between the requested sentence and the sentence imposed by the court, a rationale defendant would want to appeal. Flores-Ortega, 528 U.S. at 480-81. However, counsel's only advice following sentencing was that Petitioner could not appeal.

Additionally, non-frivolous grounds for an appeal existed. Petitioner's conviction for aggravated assault and controlled substance offense did not qualify as a crime of violence under either the residual clause or as one of the enumerated offenses under §4B1.2(a)(2). Thus, Petitioner did not qualify as a career offender under §4B1.1. The court's application of the §4B1.1 enhancement provided meritorious grounds for an appeal. In fact, had Petitioner appealed his sentence would have been vacated because his conviction for Tennessee Aggravated Assault is not a crime of violence under 4B1.2(a)(2). See Terrence Bell v. United States [612 Fed Appx. 378] Aug. 12, (2015).

Despite circumstance demonstrating that Petitioner was interested in filling an appeal, counsel failed to consult with Petitoner about his right to appeal and failed to file a notice of appeal. Petitioner wanted to challenge his sentence, but did not know that he could be achieved because of counsel's failure to appropiately advise him of the appeallate process. Id. had counsel consulted with Petitioner he would have instructed counsel to file a notice of appeal so that the application of the career offender enhancement could be reviewed.

Under the circumstance, counsel's performance fell below on objective standard of reasonableness when counsel failed to consult with Petitioner concerning his right to appeal; and failed to file a notice of appeal. Flores-Ortega, 528 U.S. at 478, 480; Chance v. United States, 103 f.3d 128 (6th cir. 1996). Petitioner demonstrates prejudice in this case because Petitioner would have exercised his right to appeal had counsel consulted with him about the appeal. Id Prejudice is also demonstrated by the fact meritorious grounds for appeal existed with respect to the erroneous application of the career offender enhancement. Id.

Mr. Gaines was ineffective by failing to file Notice Of Appeal. This is a constitutionally error of counsel even if Petitoner waived appeal in his plea agreement. The court held that even after waiver, a lawyer who [442 F.3d 772] believes the requested appeal would be frivolous is bound to file the notice of appeal and submit a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. as required by Roe v. Flores, S. 28 U.S. 470, 120 S. Ct. 1029 145 L. Ed. 2d. 985 (2000). For counsels unprofessional errors the result of proceedings would have insisted on going to trial. Counsel is ineffective during these pretrial proceedings.

Because Petitioner's right to effective assistance of counsel was violated on appeal, this court should vacate and reinstate the judgement so that Petitioner can file a notice of appeal and proceeding to object to the career offender enhancement resulted in Petitioner's sentence being unjustly increased. In light of Johnson, Pawlak, Bell, Welch Hinkle, Descamps v. United States, 133 S. Ct. 2276 (2013); Mathis v. United States 136 S. Ct. 2243 (2016), is no longer a career offender, Petitioner sentence should be vacated and remanded for a new sentecing.

CONCLUSION

For the reasons set forth hereinabove, the Defendant Brian Bolton, respectfully requests that all the considerations Governing Review on Certiorari set forth a Writ to correct the errors as set forth hereinabove, reinstate, Defendant's appeal for cinsideration on this above on the merits. Respectfully requests that this court do the following:

(1) Reverse and vacate the sentence, and remand to the trial court for resentencing using an advisory guidelines range; and or

(2) For such other and further disposition that is not inconsistent with this court's ruling.

Respectfully submitted this X 23 day of May, 2018.

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