

IN THE SUPREME COURT
OF THE UNITED STATES

EULOS CEASAR KNIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
A. The Government’s Opposition Minimizes The Degree And Significance Of The Circuit Split Regarding The Showing Necessary To Establish The Sentencing Court’s Reliance On Misinformation Of Constitutional Magnitude.	3
B. If Plenary Review Is Not Granted, The Court Should Grant, Vacate, And Remand For The District Court To Determine In The First Instance The Effect Of The ACCA’s Unconstitutional Vagueness.	11
C. The Statute Of Limitations In 28 U.S.C. § 2255(f)(3) Does Not Provide An Alternative Basis For Affirmance Because Mr. Knight Asserted The Same “Right” Newly Recognized In <i>Johnson</i>	13
Conclusion	15

TABLE OF AUTHORITIES

	Page
SUPREME COURT OPINIONS	
<i>Carey v. Saffold</i> , 536 U.S. 214 (2002)	13
<i>Chaidez v. United States</i> , 568 U.S. 342 (2013)	14
<i>Custis v. United States</i> , 511 U.S. 485 (1994)	6, 7
<i>Gideon v. Wainright</i> , 372 U.S. 335 (1963)	6
<i>Glover v. United States</i> , 531 U.S. 198 (2001)	3
<i>James v. United States</i> , 550 U.S. 192 (2007)	4
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	2, 5, 13
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012)	3, 9
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982)	12
<i>Rivers v. Roadway Exp., Inc.</i> , 511 U.S. 298 (1994)	5
<i>Sykes v. United States</i> , 564 U.S. 1 (2011)	4, 5
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	14
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948)	1

<i>United States v. Addonizio</i> 442 U.S. 178 (1979)	3, 4
<i>United States v. Tucker</i> , 404 U.S. 443 (1972)	1, 3, 7, 8
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016)	5, 13

FEDERAL COURT OPINIONS

<i>Cross v. United States</i> , 892 F.3d 288 (7th Cir. 2018)	15
<i>Moore v. United States</i> , 871 F.3d 72 (1st Cir. 2017)	14
<i>Pressley v. United States</i> , 201 F. Supp. 3d 1277 (W.D. Wash. 2016)	12
<i>United States v. Carty</i> , 520 F.3d 984 (9th Cir. 2008) (en banc)	10
<i>United States v. Christensen</i> , 732 F.3d 1094 (9th Cir. 2013)	7
<i>United States v. Cisneros</i> , 826 F.3d 1190 (9th Cir. 2016)	6
<i>United States v. Eakman</i> , 378 F.3d 294 (3d Cir. 2004)	7
<i>United States v. Geozos</i> , 870 F.3d 890 (9th Cir. 2017)	10
<i>United States v. McGowan</i> , 668 F.3d 601 (9th Cir. 2012)	7
<i>United States v. Suttle</i> , No. 2:14-cr-00083-SAB, 2016 WL 3448598 (E.D. Wash. June 20, 2016)	12
<i>United States v. Terrell</i> , 217 F. Supp. 3d 1277 (W.D. Wash. 2016)	12
<i>United States v. Vanderwerfhorst</i> , 576 F.3d 929 (9th Cir. 2009)	7

United States v. Walls,
291 F. Supp. 3d 1194 (D. Or. 2017), *reconsideration denied*, 293 F. Supp. 3d 1251 (D. Or. 2018), *appeal pending*, No. 18-35265 (9th Cir.). 12

United States v. White,
778 F. App'x 166 (3d Cir. 2019) 7

UNITED STATES CODE

18 U.S.C. § 3553(a) 8, 10

28 U.S.C. § 2255 *passim*

RULES

Federal Rule of Civil Procedure Rule 11(c)(1)(C) 9

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Introduction

This case presents a clean Circuit split on a narrow but important issue of federal law: assuming that misinformation of constitutional magnitude was before the court at sentencing, what standard determines whether a due process error requiring resentencing occurred? This Court in *United States v. Tucker* asked whether the sentence *might have been different* absent the misinformation. 404 U.S. 443, 448 (1972); *see also Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). Since *Tucker* and *Townsend*, the Circuits have split regarding what a petitioner must show to establish a due process violation at sentencing,

with the Ninth Circuit limiting relief to instances when the petitioner can establish affirmative, on-the-record reliance on the erroneous information by the sentencing court, other Circuits looking to the totality of the circumstances for potential reliance, and still other Circuits denying relief only when the record negates potential reliance on the misinformation.

The government’s opposition to certiorari muddies the Circuit split by confusing questions regarding the type of misinformation at issue with questions regarding the necessary showing of reliance required for *Tucker* relief. Here, the Ninth Circuit’s opinion denied relief because the record did not make reliance on the misinformation “abundantly clear,” not based on the type of misinformation at issue. By granting the writ of certiorari in this case, along with the companion case of *United States v. Hill*, No. 19-5274 (S. Ct.), the Court can address the specific issue that has divided the Circuits—the necessary showing required for *Tucker* relief—and then remand for the lower court to address any remaining issues in the first instance based on the correct legal standard.

The government alternatively argues that the district court’s decision can be affirmed on timeliness grounds under 28 U.S.C. § 2255(f)(3). But the Ninth Circuit did not address that argument for good reason. Mr. Knight filed his § 2255 motion within one year of the ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and his claim for relief depends on the identical “right” recognized in that case: that the residual clause in the Armed Career Criminal Act (ACCA) is unconstitutionally vague. Therefore, Mr. Knight § 2255 motion was timely filed.

A. The Government’s Opposition Minimizes The Degree And Significance Of The Circuit Split Regarding The Showing Necessary To Establish The Sentencing Court’s Reliance On Misinformation Of Constitutional Magnitude.

The constitutional requirement of due process protects a defendant from any error in sentencing that may cost a defendant months or years of freedom. *Tucker*, 404 U.S. at 448; *see also Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (“[A]ny amount of [additional] jail time has Sixth Amendment significance.”) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)). In *Townsend* and *Tucker*, the Court established the basic principle that sentencing decisions grounded in constitutional misinformation require resentencing to permit the sentencing judge to determine whether and to what extent the misinformation impacted the sentence.

As an initial matter, the government’s reliance on *United States v. Addonizio*, 442 U.S. 178, 185 (1979), to oppose resentencing here is misplaced for two reasons. First, the government argues that the error in this case does not meet the “miscarriage of justice” standard from *Addonizio*, but a miscarriage of justice need only be established when the claimed error is statutory, not constitutional. *See* 442 U.S. at 185 (“[U]nless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited.” (emphasis added)). Here, Mr. Knight’s claim rests on the constitutional due process requirement that a court must impose sentence based only on reliable information as well as the constitutional insufficiency of the residual clause in the ACCA.

Second, this case does not involve “an incorrect assumption about future developments” or “the subjective intent of the sentencing judge,” as in *Addonizio*. Opposition at 13 (citing *Addonizio*, 442 U.S. at 187). In *Addonizio*, the district court judge granted resentencing under § 2255 because the Parole Commission, after the time of sentencing, changed its policies to the petitioner’s detriment. On certiorari, this Court found that “[t]he claimed error here—that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack.” *Id.* at 186. However, the Court distinguished circumstances when there is “a change in the substantive law” such that the conviction or sentence is no longer lawful. *Id.* at 186-87. The Court further distinguished the circumstances set forth in *Tucker*, when a sentence is imposed based on “misinformation of constitutional magnitude.” *Id.* at 187. By contrast to those errors, the Parole Commission’s policy change merely “affected the way in which the court’s judgment and sentence would be performed but it did not affect the lawfulness of the judgment itself—then or now.” *Id.*

Unlike in *Addonizio*, the error here is grounded in a fully retroactive change in the substantive law that impacts the lawfulness of the sentence, not merely how it will be carried out. At the time of sentencing in 2014, this Court had twice rejected the contention that the residual clause in the ACCA is unconstitutionally vague. *Sykes v. United States*, 564 U.S. 1, 15-16 (2011); *James v. United States*, 550 U.S. 192, 210 n.6 (2007). In *Sykes*, which was the controlling law when Mr. Knight was sentenced, the Court said that the residual clause “states an intelligible principle and provides guidance that allows a person

to ‘conform his or her conduct to the law.’” 564 U.S. at 15. When the Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), struck the residual clause as unconstitutionally vague, abrogating *Sykes* and *James*, that ruling changed the substantive law not only going forward, but retroactively as well. *See Welch v. United States*, 136 S. Ct. 1257 (2016) (“*Johnson* . . . struck down part of a criminal statute that regulates conduct and prescribes punishment. It thereby altered the range of conduct or the class of persons that the law punishes. . . . It follows that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review.” (citation and internal quotation marks omitted)). “A judicial construction of a statute,” as in *Johnson*, “is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.” *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994).

Here, the government’s position at the time Mr. Knight was charged, before *Johnson*, was that Mr. Knight’s prior convictions, enumerated in the indictment, qualified him as an armed career criminal. Based on the established validity of the residual clause, and the corresponding risk of ACCA sentencing, Mr. Knight bargained away important rights to secure the government’s express agreement not to bring a charge under the ACCA. Appellant’s Excerpts of Record (ER) 90 (memorializing the government’s promise “not to bring additional charges against defendant in the District of Oregon arising out of this investigation”). The rights that Mr. Knight bargained away included not only his important trial rights when he pleaded guilty, but also his right to seek pretrial release, ER 115 (requiring that defendant “must agree to stay in custody for the potential of a non ACC

dispo to be put on the table”), and his right to ask the sentencing judge to impose a below-Guidelines sentence, ER 91 (memorializing defendant’s agreement not to “request an upward or downward departure, adjustment or variance”).¹

But pursuant to *Johnson*, Mr. Knight never had constitutionally sufficient notice of the ACCA’s scope. Because of *Johnson*, the presumption that the ACCA’s residual clause provided a constitutional basis for increasing the sentence Mr. Knight faced, from possible probation to a mandatory minimum sentence of 15 years, was an error of “constitutional magnitude.” *See, e.g., United States v. Cisneros*, 826 F.3d 1190, 1192, 1196 (9th Cir. 2016) (holding that Oregon burglary is not a violent felony “in the absence of ACCA’s residual clause”). Mr. Knight is not now, and never lawfully was, an armed career criminal.

The government next asserts that the misinformation in this case is not similar to the misinformation in *Tucker* because that case involved sentencing reliance on uncounseled prior convictions obtained in violation of the rule from *Gideon v. Wainright*, 372 U.S. 335 (1963). Opposition at 14-15. Citing *Custis v. United States*, the government contends that the complete deprivation of counsel is a “unique constitutional defect[.]” 511 U.S. 485, 496 (1994). But *Custis*’s distinction relates to the limited circumstances when a federal petitioner can collaterally challenge prior state convictions. “By challenging the

¹ “Compared to defendants released at some point pending trial, defendants detained for the entire pretrial period are more likely to be sentenced to jail or prison—and for longer periods of time.” *See* Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Nov. 2013), available at https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf

previous conviction, the defendant is asking a district court to deprive the state-court judgment of its normal force and effect in a proceeding that has an independent purpose other than to overturn the prior judgment.” *Custis*, 511 U.S. at 497 (internal quotation marks and alterations omitted). The distinction drawn in *Custis* is not relevant here, where Mr. Knight has no quibble with the validity of his prior state convictions. Here, the challenge involves an error in *federal* law about the sentencing law applicable to the petitioner’s *federal* sentence. Section 2255 is the correct forum to correct such a constitutional error.

Moreover, contrary to the government’s position, the Circuits have framed *Tucker*’s rule broadly to encompass sentencing tainted by “misinformation of constitutional magnitude,” rather than solely the reliance on uncounseled prior convictions. *See United States v. Christensen*, 732 F.3d 1094, 1106 (9th Cir. 2013) (“The Due Process Clause requires that a defendant not be sentenced on the basis of ‘misinformation of constitutional magnitude.’” (quoting *Tucker*, 404 U.S. at 447)); *United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012) (a sentence violates due process when false or unreliable information “demonstrably [formed] the basis for the sentence”); *United States v. Vanderwerfhorst*, 576 F.3d 929, 935-36 (9th Cir. 2009) (same); *United States v. Eakman*, 378 F.3d 294, 302 (3d Cir. 2004) (“[D]ue process clearly guarantees all defendants the right to be sentenced under an accurate understanding of the law[.]”).² In the present case, the “misinformation”

² The unpublished Third Circuit opinion in *United States v. White*, 778 F. App’x 166 (3d Cir. 2019), did not reach the merits of the defendant’s § 2255 motion, instead

was the assumption, reflected in the indictment, the record of the parties' plea bargaining, and the terms of the plea agreement, as objectively confirmed by the background legal environment, that the residual clause provided a constitutional avenue for application of the ACCA to Mr. Knight. Because the Ninth Circuit here presumed that this error would qualify as "misinformation of constitutional magnitude," the Circuit split regarding the correct *Tucker* standard is squarely presented and dispositive of the competing claims on appeal.

The government attempts to minimize the importance of the misinformation here, as compared to the misinformation in *Tucker*. But it is far from obvious that the uncounseled convictions in *Tucker* had a "far more substantial effect" at sentencing than misinformation about facts that govern the applicable statutory minimum and maximum sentence. Opposition at 14. A defendant whose lawful sentencing range should be 15 years to life "appears in a dramatically different light" than one whose statutory maximum sentence cannot exceed ten years. Opposition at 14 (citing *Tucker*, 404 U.S. at 448). The potential application of the ACCA had the potential to bear negatively on several of the relevant 18 U.S.C. § 3553(a) factors at sentencing, including the "history and characteristics of the defendant," "the seriousness of the offense," the "need to protect the public from further crimes of the defendant," and "the kinds of sentences available."

applying the "miscarriage of justice" standard to uphold the defendant's collateral attack waiver, and failed to recognize the retroactive impact of *Johnson*, treating the claim as based "on a favorable change in the law occurring after a plea agreement," rather than a fully retroactive rule of constitutional law.

The government contends that the evidence here was insufficient to establish reliance under any standard because the original indictment did not “expressly allege that Mr. Knight was an armed career criminal,” the ACCA was not expressly invoked in the plea agreement, nor was it mentioned in the presentence report or at the sentencing hearing. However, the threat of ACCA sentencing in this case was express. ER 118 (the prosecutor stated, “I think it is clear that [Mr. Knight] qualifies legally with 3 prior violent felonies under ACC”). The prosecutor made clear in email exchanges with defense counsel that any “non ACC dispo” would be contingent on the defendant agreeing not to seek release, providing sufficient mitigation, and making other sentencing concessions. ER 115-18. The conclusion that Mr. Knight agreed to those terms in order to avoid being charged and sentenced as an armed career criminal is not “speculative.” Opposition at 17.

The government’s argument and the Ninth Circuit’s decision both artificially segregate factors that influence the terms of the plea agreement from the factors expressly identified at sentencing. But, as any practitioner knows, and this Court has recognized, the terms of the plea agreement are often the most influential factor at sentencing. *Lafler*, 566 U.S. at 170 (plea negotiations play a “central role . . . in securing convictions *and determining sentences*” (emphasis added)). Although the government is correct that Mr. Knight did not enter a binding plea agreement under Federal Rule of Civil Procedure Rule 11(c)(1)(C), Opposition at 16, Mr. Knight’s promise not to seek a sentence below the agreed Guidelines range guaranteed for all intents and purposes that the Court would not impose less than the seven-year recommended sentence.

The government also argues that the sentencing court negated reliance on the ACCA by mentioning factors under 18 U.S.C. § 3553(a) at sentencing without reference to the risk of an unlawful ACCA sentence. But the sentencing court is presumed to know the law. *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) (district judges are presumed to know the law and need not “tick off” all of the sentencing factors). The validity of the residual clause as a basis for enhanced sentencing was squarely before the judge because it was the binding law at the time of sentencing. *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (holding that “it is possible to conclude, *using both the record before the sentencing court and the relevant background legal environment at the time of sentencing*, that the sentencing court’s ACCA determination did not rest on the residual clause”) (emphasis added). The sentencing judge said that she was “taking into account all of the factors [she was] required to consider” under § 3553(a). Qualification as an armed career criminal under existing law is included within those relevant factors.

This Court should grant certiorari to hold that resentencing is necessary when, based on the totality of the circumstances, the sentence “might have been different,” but for reliance on misinformation at sentencing. As this case demonstrates, other sources beyond the words spoken at sentencing can provide solid evidence regarding the factors that influenced the court’s sentencing decision. The Ninth Circuit’s requirement of an on-the-record reference to the error elevates magic words over practical effects, and it makes little sense when there is no reason for the judge to articulate reliance or lack of reliance on information not known at the time to be wrong.

B. If Plenary Review Is Not Granted, The Court Should Grant, Vacate, And Remand For The District Court To Determine In The First Instance The Effect Of The ACCA's Unconstitutional Vagueness.

In the alternative to an order granting certiorari for plenary review on the merits, the petitioner respectfully requests that the Court enter an order granting, vacating, and remanding this case for the district court to make factual determinations in the first instance. Petition at 19-22. The sentencing judge denied relief on Mr. Knight's § 2255 motion on timeliness grounds without reaching the merits of the claim. ER 1-9. Thus, the district court never made its own finding about whether the ACCA threat had some impact on the sentence. It was inappropriate for the Ninth Circuit to make the finding in the first instance that the ACCA threat had no effect on the sentence imposed.

The government argues that no remand is appropriate because there must first be a determination that misinformation of constitutional magnitude was before the sentencing judge. Opposition at 18. But Mr. Knight has made that showing: the five felonies listed in the indictment, the explicit plea negotiations threatening to bring a charge under the ACCA and extracting defense concessions to avoid that charge, the resulting terms of the plea agreement, and the background legal environment provide more than enough information to establish that the sentencing court was aware of the unconstitutional ACCA threat and took it into account both directly and indirectly when accepting the parties jointly recommended sentence. The question decided by the Ninth Circuit—whether the unconstitutional ACCA threat influenced the sentence imposed—is a bare factual finding that should properly made in the first instance by the judge who imposed the sentence.

This case presents exactly the reason for the Court's rule that district courts should determine factual questions in the first instance. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982). Other district court judges have described the potential unconstitutional application of the ACCA as a critical fact requiring resentencing, even when the threat's impact was ameliorated through negotiation before the time of sentencing:

- “Without this error, the district court would never have approved the terms of Petitioner’s plea agreement. The fact that the assumption appeared correct at the time of sentencing, as *Tucker* makes clear, is of no consequence given the constitutional nature of the infirmity and *Johnson*’s retroactive applicability.” *United States v. Walls*, 291 F. Supp. 3d 1194, 1200 (D. Or. 2017), *reconsideration denied*, 293 F. Supp. 3d 1251 (D. Or. 2018), *appeal pending*, No. 18-35265 (9th Cir.).
- The court based its sentence on the erroneous ACCA designation where “[t]he fact that Mr. Terrell was potentially ACCA qualified and avoiding a 15-year mandatory minimum sentence was stated in the plea agreement, in the [presentence report], and in probation’s sentencing recommendations to this court.” *United States v. Terrell*, 217 F. Supp. 3d 1277, 1285-88 (W.D. Wash. 2016).
- Relief required because, “in this case the original constitutional error of charging petitioner under the ACCA permeated the entire process leading to his sentencing. For this reason the Court finds that the error in charging petitioner under the ACCA also resulted in actual prejudice, and that *Johnson* compels the Court to grant the petitioner relief.” *Pressley v. United States*, 201 F. Supp. 3d 1277, 1282 (W.D. Wash. 2016).
- Granting relief where parties entered an agreed sentence to avoid the ACCA because “the underlying foundation upon which the resolution of Defendant’s case was based has now crumbled[.]” *United States v. Suttle*, No. 2:14-cr-00083-SAB, 2016 WL 3448598, at *4 (E.D. Wash. June 20, 2016).

If this Court does not accept plenary review, the Court should nevertheless vacate the Ninth Circuit’s appellate fact-finding and require the district court to make the factual determinations in the first instance regarding whether the sentence was “founded,” in any part, on the ACCA threat.

C. The Statute Of Limitations In 28 U.S.C. § 2255(f)(3) Does Not Provide An Alternative Basis For Affirmance Because Mr. Knight Asserted The Same “Right” Newly Recognized In *Johnson*.

The government contends that the Court should not grant certiorari because the original § 2255 motion was untimely filed. The district court agreed with that position, but on appeal the Ninth Circuit rightly ignored the government’s claim of untimeliness and addressed Mr. Knight’s claim on its merits. This Court should do the same because Mr. Knight’s motion timely asserted the same “right” newly recognized in *Johnson*.

A § 2255 motion is timely when filed within one year 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). The purpose of the statute of limitation provision in § 2255(f)(3) is to “encourag[e] prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.” *Carey v. Saffold*, 536 U.S. 214, 266 (2002).

This Court decided *Johnson* on June 26, 2015. That case recognized, for the first time, that the residual clause in the ACCA is unconstitutionally vague, abrogating existing Supreme Court precedent. 135 S. Ct. at 2559-60. And this Court made *Johnson* retroactively applicable to cases on collateral review in *Welch*, 136 S. Ct. at 1268. Mr.

Knight filed the present § 2255 motion on June 23, 2016, within one year of the *Johnson* decision. His § 2255 motion asserts the same “right” recognized in *Johnson*, specifically, that the residual clause in the ACCA is unconstitutionally vague. Therefore, Mr. Knight’s motion was timely filed.

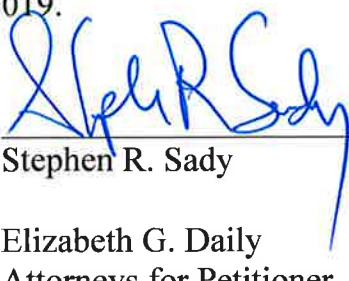
The government argues that the timeliness inquiry actually requires a petitioner to assert the identical *application* of the newly recognized right. Because this Court in *Johnson* applied its vagueness holding to invalidate a sentence imposed under the unconstitutional portion of the residual clause, the government’s argument goes, Mr. Knight’s motion is untimely unless he seeks to apply the vagueness holding in an identical fashion. But ordinarily a Supreme Court opinion will announce a rule broad enough to apply in “diverse contexts” without requiring another new rule. *Chaidez v. United States*, 568 U.S. 342, 348 (2013). This Court in *Chaidez* made clear that a case announces a “new rule” only when it “breaks new ground.” *Id.* at 347-48. A “case does *not* ‘announce a new rule, when it is merely an application of the principle that governed’ a prior decision.” 568 U.S. at 347-48 (emphasis added; internal quotation marks and alterations omitted) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)). As the First Circuit has noted, Congress used broad terms like “right” and “rule” in § 2255 because of its understanding “that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law.” *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017).

Here, Mr. Knight is not seeking to break new ground. His § 2255 motion asserts exactly the same “right” recognized in *Johnson*—that is, his sentence was founded on misinformation because of *Johnson*’s holding that the residual clause in the ACCA is unconstitutional. The government’s attempt to confine *Johnson* to cases involving identical sentencing facts draws no support from the statute of limitations itself, which requires only that a petitioner “assert” the relevance of new Supreme Court precedent when it first becomes available. Section 2255(f)(3) “does not say that the movant must ultimately prove that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized.” *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). Whether *Johnson* ultimately invalidates Mr. Knight’s sentence is a merits question separate from the issue of timeliness. Mr. Knight’s § 2255 was timely filed.

Conclusion

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the Court consolidate this case with *Hill v. United States*, No. 19-5274, and either grant plenary review or grant, vacate, and remand the case for further consideration.

Dated this 5th day of November, 2019.



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