

IN THE
Supreme Court of the United States

ABELEE BRONSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The government admits that the Circuits are split over whether the new rule announced in *Johnson v. United States*, 135 S.Ct. 2551 (2015), applies to the analogous residual clause in the mandatory guidelines. BIO 8. But the government asks this Court to leave this split in place, rather than resolve it, for four reasons: (1) the conflict is “shallow,” BIO 7; (2) the issue is unimportant (“few claimants would be entitled to relief on the merits”), BIO 8; (3) the Tenth Circuit’s decision below is correct, BIO 7-8; and (4) this case is a poor vehicle to resolve the split, BIO 9-10.

None of the government’s arguments are persuasive. Nor should they deter this Court from resolving this Circuit split. As the government admits, this issue is recurring. BIO 7 (noting that this Court has refused to resolve the issue on at least nine different occasions). Until this Court steps in to resolve the split, it will continue to receive petitions asking it to do just that. And not just in this specific context. This Circuit split affects how courts define the scope of *any* newly recognized retroactive right. Pet. 12. This Court’s primary function is to maintain uniformity in the lower courts. Sup. Ct.R. 10(a). On this issue (both narrow and broad), there is no uniformity (and there never will be uniformity without this Court’s review). Review is necessary.

I. The Circuit split is not “shallow.”

To be clear, there is an established conflict within the courts of appeals over whether *Johnson*’s rule applies to the residual clause of the mandatory guidelines. Pet. 9-12; BIO 8. The government refers to this conflict as “shallow,” however, because only the Seventh Circuit has decided the issue differently. BIO 8. But the government ignores the First Circuit’s decision in *Moore v. United States*, 871 F.3d 72, 81-82 (1st

Cir. 2018), as well as the various dissents/concurrences from judges outside of the Seventh Circuit supporting that Circuit’s position on this issue. Pet. 10-11.

We filed our petition on July 19, 2019. Since then, a Ninth Circuit Judge, Judge Berzon, has authored a concurrence, disagreeing with that Circuit’s precedent and stating her belief that “the Seventh and First Circuits have correctly decided this question.” *Hodes v. United States*, __ Fed. Appx. __, 2019 WL 3384841 (9th Cir. July 26, 2019).

The Fifth Circuit has also published a decision on this issue, siding with the majority position that *Johnson*’s rule does not apply to the residual clause of the mandatory guidelines. *United States v. London*, 937 F.3d 502 (5th Cir. 2019). But the Fifth Circuit’s decision engages in a *Teague*¹ retroactivity analysis to define the scope of *Johnson*’s right. *Id.* at 506-507. We have already explained why this analysis is misplaced. Pet. 14-17. To reiterate, this Court has already held that *Johnson*’s new rule is retroactive. Pet. 14 (citing *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016)). Thus, there is no point in doing a retroactivity analysis. The question is the scope of *Johnson*’s new rule. And this Court defined that scope in *Beckles v. United States*, 137 S.Ct. 886 (2017). *Beckles*, not *Teague* or any other retroactivity decision, defines *Johnson*’s scope: the new rule applies to provisions that “fix the permissible range of sentences.” 137 S.Ct. at 892. The question is whether the mandatory guidelines fixed the permissible range of sentences. The Fifth Circuit (like most others) never answered this dispositive question. See Pet. 14-17.

¹ *Teague v. Lane*, 489 U.S. 268 (1989).

Judge Costa concurred in *London*, noting his belief that the Fifth Circuit was “on the wrong side of a split over the habeas limitations statute.” *London*, 937 F.3d at 510. Judge Costa noted “a unique impediment” to review: because the guidelines are no longer mandatory, “a cramped reading of the limitations provision prevents the only litigants affected by this issue from ever pursuing it.” *Id.* at 513 (citing *Brown v. United States*, 139 S.Ct. 14, 15 (2018) (Sotomayor, J., dissenting)).

As importantly, Judge Costa’s concurrence recognizes that “this limitations issue affects more than the *Johnson* line of cases.” *Id.* Ultimately, the issue involves the appropriate interpretation of § 2255(f)(3), and this issue will arise any time this Court recognizes a new retroactive rule. *See id.* at 510 (“Our approach fails to apply the plain language of the statute and undermines the prompt presentation of habeas claims the statute promotes.”). Judge Costa ended with a plea for this Court’s review: “at a minimum, an issue that has divided so many judges within and among circuits, and that affects so many prisoners, ‘calls out for an answer.’” *Id.* at 513-514 (quoting *Brown*, 139 S.Ct. at 14 (Sotomayor, J., dissenting)).

Also, the Seventh Circuit has again reaffirmed, in yet another published decision, that the mandatory guidelines’ residual clause is void for vagueness under *Johnson*. *Daniels v. United States*, __ F.3d __, 2019 WL 4891991, at *1. *4 (7th Cir. Oct. 4, 2019) (Sykes, J.). This conflict will remain until this Court resolves it.

Finally, this issue is still an open one in the Second and D.C. Circuits. Pet. 10-11. And on August 9, 2019, a district court within the Second Circuit found that a petitioner could bring a *Johnson* challenge to the residual clause of the mandatory guidelines. *Blackmon v. United States*, 2019 WL 3767511, at *6 (D. Conn. Aug. 9,

2019) (Bolden, J.).

In light of the established Circuit conflict, the dissension within the Circuits, and the uncertainty within the Second and D.C. Circuits, this conflict is not shallow, and it is likely to deepen even further soon. There is no good reason for this Court not to resolve it. The government knows that its track record in this area is not good. *See Johnson*, 135 S.Ct. 2551; *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018); *United States v. Davis*, 139 S.Ct. 2319 (2019). It is no surprise that it opposes certiorari here. But the resolution of this issue is as needed as the resolution of the issues in *Johnson*, *Beckles*, *Sessions*, and *Davis*. Without resolution, prisoners suffer different fates based solely on geography. That arbitrariness should not be tolerated. Review is necessary.

II. This issue is extremely important.

The government claims that this is “an issue as to which few claimants would be entitled to relief on the merits.” BIO 8. This is so, according to the government, because this issue “is relevant only to a now-closed set of cases in which a Section 2255 motion was filed within one year of *Johnson*.” BIO 8-9 (citing BIO in *Gipson v. United States*, No. 17-8637, at 16). But the government never attempts to put a number on this “now-closed set of cases.” One data-based estimate puts this number at over 1,000 cases. *Brown*, 139 S.Ct. at 16 & 16 n.4 (Sotomayor, J., dissenting). The government does not dispute that estimate. So, whether these cases are “now-closed” or not, an issue that plausibly affects over 1,000 individuals is indeed one of exceptional importance. *Id.* at 16.

The government also claims that, of these individuals, “many” “could have been deemed qualified for that enhancement irrespective of the residual clause, and thus

would not be entitled to resentencing.” BIO 8-9 (citing BIO in *Gipson*, No. 17-8637, at 16). This is pure speculation. The government offers no empirical data to support its claim. Indeed, in this case, the government conceded below that Mr. Bronson would not qualify as a career offender if *Johnson* applied to his case. Pet. 7-8. And we know that individuals within the First and Seventh Circuits have been granted relief in these circumstances. *See, e.g., United States v. Cross*, 892 F.3d 288, 307 (7th Cir. 2018); *D’Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019); *Swanson v. United States*, 2019 WL 2144796 (C.D. Ill. May 16, 2019); *McCullough v. United States*, 2018 WL 4186384 (C.D. Ill. Aug. 31, 2018); *Zollicoffer v. United States*, 2018 WL 4107998 (C.D. Ill. Aug. 29, 2018); *Cruz v. United States*, 2018 WL 3772698 (S.D. Ill. Aug. 9, 2018); *Best v. United States*, 2019 WL 3067241 (N.D. Ind. July 12, 2019); *United States v. Nelums*, No. 2:02-cr-00147-PP, D.E.285 (E.D. Wis. Jan. 1, 2019); *United States v. Parker*, No. 2:92-cr-00178-PP-6, D.E.310 (E.D. Wis. Dec. 17, 2018); *United States v. Hernandez*, 3:00-cr-00113-BBC, D.E.54, 57 (W.D. Wis. Nov. 2, 2018); *United States v. Moore*, No. 1:00-cr-10247-WGY, D.E.122 (D. Mass. Nov. 14, 2018).

Moreover, if this reason were persuasive, this Court would not have granted certiorari in *Johnson*, *Beckles*, *Sessions*, or *Davis*. Those decisions involved identical or analogous residual clauses, also interpreted via a categorical approach. If “many” defendants are not entitled to relief in the mandatory guidelines context, then the same would hold true in those other contexts as well. But many have obtained relief under these decisions, and many more would obtain relief with a favorable decision here. In the end, this Court has addressed the constitutionality of analogous residual clauses on four separate occasions over the last five years. It has done so because,

inter alia, the issues were exceptionally important. So too here.

Finally, as we have already explained, Pet. 12, and as Judge Costa’s concurrence in *London* explains, “this limitations issue affects more than the *Johnson* line of cases.” 937 F.3d at 510. Thus, it is not true, as the government claims, that the resolution of this question resolves nothing more than the “now-closed set of cases” involving the mandatory guidelines’ residual clause. The resolution of this question would resolve a broader split over the meaning of § 2255(f)(3), and it would provide much needed guidance to the lower courts with respect to cases involving the scope of newly recognized retroactive rights. Review is necessary.

III. The Tenth Circuit erred.

The government never responds to our arguments on the merits. Instead, the government incorporates the arguments it made in its brief in opposition in *Gipson v. United States*, No. 17-8637. BIO 6-7. The brief in *Gipson* was filed 15 months ago (on July 25, 2018). BIO 7. We did not represent the petitioner in *Gipson*, nor did we have anything to do with the writing of the petition in *Gipson*. The petition in *Gipson* looks very little like our petition here. By responding to different arguments, the government has done essentially nothing to undermine the points we’ve made in our petition.

In any event, the government’s arguments in *Gipson* are not persuasive. First, the government claimed in *Gipson* that *Johnson* announced a new “right not to be sentenced pursuant to a vague *federal enhanced-punishment statute*.” *Gipson* BIO 10 (emphasis added). But that’s not how this Court has interpreted the scope of *Johnson*’s right. In *Beckles*, this Court held that *Johnson*’s new rule applies to “laws

that fix the permissible sentences for criminal offenses.” 137 S.Ct. at 892 (emphasis in original). The guidelines, when mandatory, did just that. Pet. 17-20 (citing, *inter alia*, *United States v. Booker*, 543 U.S. 220 (2005)). As far as we are aware, the government has never offered any counterargument on this point. At no point has the government even attempted to explain how *Booker* – which struck down the mandatory guidelines as unconstitutional because those guidelines are “binding on judges” and “have the force and effect of laws” – somehow do not qualify as “laws that fix the permissible sentences for criminal offenses.” Pet. 18 (quoting *Booker*, 543 U.S. at 234); *Beckles*, 137 S.Ct. at 892. Of course they do.

The government’s only *Booker*-related argument goes like this: because no court held *Booker* retroactive on collateral review, it is impossible for a court to hold a mandatory-guidelines-based *Johnson* claim retroactively applicable on collateral review. *Gipson* BIO 14. This argument is a red herring. Regardless of *Booker*’s retroactivity, this Court made *Johnson* retroactively applicable to cases on collateral review in *Welch*. 136 S.Ct. at 1265. *Booker*’s non-retroactivity is irrelevant to *Johnson*’s retroactivity. Again, the question presented here involves the scope of *Johnson*’s already-made retroactive right; it has nothing do with retroactivity (or “watershed rules”) in the first instance.

The *Booker* non-retroactivity argument is also a bad comparator. A *Johnson* claim is premised on a constitutional violation that results in an incorrect penalty range, which in turn results in an illegal sentence. But a *Booker* claim is not. The Sixth Amendment’s guarantee that requires an advisory rather than mandatory guidelines regime has nothing whatsoever to do with whether the guidelines were properly

calculated in any given case. The government’s apples-to-oranges comparison does nothing but confuse the issue.

The government claims that our definition of the scope of *Johnson*’s right “operates at a level of generality and abstraction that is too high to be meaningful.” *Gipson* BIO 10. But our definition comes straight from this Court’s decision in *Beckles*. There is nothing abstract or general about the way in which *Beckles* defined the scope of *Johnson*’s right. And even if there were, *Beckles* is the controlling precedent on the scope of *Johnson*’s right. Section 2255(f)(3) does not “lose force” simply because Mr. Bronson has asked this Court to decide whether the mandatory guidelines fall within *Beckles*’ definition of the scope of *Johnson*’s right. *Gipson* BIO 11. That is a fair question, similar to the one this Court answered in *Beckles* itself. Indeed, it was the government’s position in *Beckles* that *Johnson*’s right encompassed the advisory guidelines. 137 S.Ct. at 892. If an answer to that question (especially an affirmative answer) did not undermine § 2255(f)(3)’s “force,” then the resolution of the question presented here will not undermine that provision’s “force” either.

The government offers no meaningful response to our argument that the mandatory guidelines fall within *Johnson*’s new rule, as the scope of that rule is defined in *Beckles*. Instead, the government, citing Justice Sotomayor’s concurrence in *Beckles*, claims that *Beckles* “leaves open” the question whether mandatory Guidelines would be subject to vagueness challenges.” *Gipson* BIO 12 (quoting *Beckles*, 137 S.Ct. at 903 n.4 (Sotomayor, J., concurring)).

We already addressed this faulty logic. Pet. 13-14. To reiterate, *Beckles* cabined its decision: “[w]e hold only that the *advisory* Sentencing Guidelines, including §

4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." 137 S.Ct. at 896 (emphasis added). *Beckles* did not hold that *Johnson*'s rule does not apply to the *mandatory* guidelines. Although the advisory guidelines are not subject to void-for-vagueness challenges, that does not mean that this same rule applies to the mandatory guidelines. *Beckles*, 137 S.Ct. at 894-896. *Beckles* did not answer this specific question because it was not presented. But by defining the scope of *Johnson*'s right, *Beckles* provides the necessary framework to answer the question.

The government further claims that our definition of the scope of *Johnson*'s right "blurs critical differences between statutes and guidelines." *Gipson* BIO 10. According to the government, the mandatory guidelines differ because of their departure provisions. *Gipson* BIO 13. But, as we have already explained, this Court in *Booker* rejected that very logic. Pet. 18. The government offers no response on this point. Again, it all but ignores *Booker*.

The government spends much time on retroactivity. *Gipson* BIO 12-14. Again, that focus is nonsensical. We know that *Johnson*'s new right is retroactive. *Welch*, 136 S.Ct. at 1265. The question is the scope of that right, and any discussion of retroactivity does not answer that question. Pet. 14-17. But this Court should. The Tenth Circuit erred below. Review is necessary.

IV. This is an excellent vehicle, and, if not, this Court should grant review in a different case and remand this one to the lower courts for further proceedings.

The government's main thrust in this case is to claim that Mr. Bronson's petition is a poor vehicle because he would still qualify as a career offender even if § 4B1.2's residual clause were struck down as void for vagueness. BIO 9-10. The government

claims that Mr. Bronson’s prior Missouri second-degree burglary convictions would still count as crimes of violence because the application note to § 4B1.2 listed “burglary of a dwelling” as a crime of violence. BIO 9. The government also claims that, at the time Mr. Bronson was sentenced, courts employed a conduct-based approach, and not a categorical approach, to determine whether a prior conviction qualified as a crime of violence, and Mr. Bronson’s PSR indicates that he burglarized two residences. BIO 9-10. Neither argument is persuasive.

To begin, it is the text of § 4B1.2, and not its application notes, that defines a “crime of violence.” And here, that definition does not include any enumerated offenses. As it existed in 1988, § 4B1.2 defined a crime of violence as that term was “defined under 18 U.S.C. § 16.” USSG § 4B1.2(1). In turn, § 16 defined a crime of violence as one with an element of violent force or as one “that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in committing the offense.” 18 U.S.C. § 16(a), (b).

Mr. Bronson’s burglary conviction would count only under this latter residual clause. We know this from the Tenth Circuit’s decision in Mr. Bronson’s direct appeal. *United States v. Brunson*, 907 F.2d 117 (10th Cir. 1990). That decision makes clear that Mr. Bronson’s burglary convictions qualified as crimes of violence only under § 4B1.2’s residual clause. *Id.* at 121 (citing three extra-Circuit cases holding that burglary involves a substantial risk of physical force). We also know this from the plain text of Missouri’s burglary statute, which clearly does not have an element of violent force. Pet. 2 (citing the statutory language as requiring nothing more than unlawfully entering or remaining within a building for the purpose of committing a

crime).

With § 4B1.2's residual clause struck down as void for vagueness, Mr. Bronson's prior burglary convictions would not count as crimes of violence. *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (§ 4B1.2's application notes have no independent force, and any enumerated offenses within those notes are "enforceable only as an interpretation of the definition of the term 'crime of violence' in the guideline itself"); *see also United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (same; guidelines commentary "serves only to interpret the Guidelines' text, not to replace or modify it"); *Stinson v. United States*, 508 U.S. 36, 46 (1993) (guidelines commentary is valid only if it interprets or explains the text of the applicable guideline). Hence, the government's concession below that Mr. Bronson is no longer a career offender under *Johnson*. Pet. 7-8.²

The government is also incorrect that courts did not employ a categorical approach when resolving § 16 crime-of-violence issues in 1989. BIO 9. *United States v. Davis*, 139 S.Ct. 2319, 2331 (2019). As the government conceded in *Davis*, "when Congress copied § 16(b)'s language into § 924(c) in 1986, it proceeded on the premise that the language required a categorical approach. By then courts had, as the government puts it, 'begun to settle' on the view that § 16(b) demanded a categorical analysis." *Id.* (cleaned up). There is no reason to think that, when the Sentencing Commission copied § 16's language into § 4B1.2, it proceeded on a different premise. Nor has the

² Even if the enumerated offenses in the application notes are in play, Mr. Bronson's convictions still do not qualify as crimes of violence under the categorical approach. *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc) ("the Missouri second-degree burglary statute covers more conduct than does generic burglary").

government cited a single case where a court applied a conduct-specific analysis, rather than the categorical approach, to determine whether a prior conviction qualified as a crime of violence under § 4B1.2.

The government's argument is also mistaken because it relies on the guidelines commentary's reference to the defendant's "conduct," but that reference is meaningless once the residual clause is struck down as void for vagueness. *Rollins*, 836 F.3d at 742; *Havis*, 927 F.3d at 386; *Stinson*, 508 U.S. at 46. The text of § 4B1.2 did nothing more than incorporate § 16's definition of crime of violence, and we know that courts conducted a categorical analysis under § 16. *Davis*, 139 S. Ct. at 2331. The government is wrong to suggest otherwise.

To reiterate, the government has already conceded, in this case, that Mr. Bronson no longer qualifies as a career offender under *Johnson*'s new rule. Pet. 7-8. That concession was sound. Missouri's second-degree burglary statute simply does not have an element of violent force, Pet. 2, nor is there any doubt that the lower courts relied on the residual clause to count this prior conviction as a crime of violence, *Brunson*, 907 F.2d at 121.

In any event, these purported vehicle problems are not problems at all. The question presented here asks whether *Johnson*'s new rule applies to the mandatory guidelines. If this Court answers that question in the affirmative, it can remand this case to the Tenth Circuit for further proceedings. This would be the proper course because the Tenth Circuit has not yet had an opportunity to address the merits of the crime-of-violence determination in this case. As this Court recently explained: "we are a court of review, not of first view, and the Court of Appeals has not had the

chance to review the District Court's decision under the appropriate standard. That task is for the Court of Appeals in the first instance." *McLane Co. v. E.E.O.C.*, 137 S.Ct. 1159, 1170 (2017) (cleaned up).³

In any event, to avoid any (nonexistent) vehicle problems, this Court could simply grant certiorari in *Pullen v. United States*, No. 19-5219. *Pullen* raises this identical claim, and the petitioner in *Pullen* is, without a doubt, not a career offender post-*Johnson* (he qualified only via a prior escape conviction). Both this case and *Pullen* are excellent vehicles to resolve this conflict. If this Court grants certiorari in *Pullen*, it should hold this case pending a decision in *Pullen*. Either way, this is an important question that has divided the Circuits and that the Tenth Circuit has gotten wrong. Whether here or in *Pullen*, this Court should resolve the question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

³ We do not mean to waive any claim that the government has forfeited or waived its not-a-crime-of-violence argument that it now advances for the first time in this litigation. Especially considering the government's concession below, it might have done just that under Tenth Circuit precedent. *See, e.g., Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189, 1197 (10th Cir. 2019) ("In considering whether to address an alternative theory, we take into account (1) whether the ground was fully briefed and argued here and below; (2) whether the parties have had a fair opportunity to develop the factual record; and (3) whether, in light of factual findings to which we defer or uncontested facts, our decision would involve only questions of law."); *United States v. Gaines*, 918 F.3d 793, 804 (10th Cir. 2019) (refusing to consider the government's alternative theory where the district court did not address the theory and the record was inadequately developed). This is yet another reason for this Court to ignore the government's purported poor-vehicle claims here.

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