No. 17-7563

IN THE

Supreme Court of the United States

LESLEY WILLIAM COTTMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY TO THE BRIEF IN OPPOSITION

The undersigned counsel replies to the government's response to the petition for certiorari and submits that for the following reasons, as well as those raised in the petition, certiorari should be granted after the Court's resolution of *Stokeling v. United States*, cert granted, No. 17-5554 (Apr. 2, 2018).

I. The Petitioner's Florida robbery claim should be held.

The Petitioner and the government agree that Mr. Cottman's Florida robbery claim should be held pending the decision in *Stokeling*. BIO 9, 21.

II. The Petitioner's § 2255 petition is timely because the Petitioner has asserted a new retroactive right.

A. The rule announced in *Johnson* applies where the law fixes sentences within a prescribed range.

In *Johnson*, this Court held that the language in the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is facially void for vagueness. *Johnson,* 135 S. Ct. at 2557. This Court found that the ACCA residual clause "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* Based on vagueness, this Court struck down the residual clause as unconstitutional.

Mr. Cottman asserts the right recognized in *Johnson* applies to the ACCA's residual clause *and* to any other law that fixes sentences using an identically-worded and identically-interpreted residual clause, including the law under which Mr. Cottman was sentenced – the career offender guideline's residual clause in 2001 – a law that fixed sentences within a prescribed range. *See* U.S.S.G. § 4B1.1 & 4B1.2(a)(2) (2001); 18 U.S.C. § 3553(b); *United States v. Booker,* 543 U.S. 220, 227, 233–34, 238 (2005). The career offender guideline's residual clause was adopted from and repeats the ACCA's residual clause verbatim. Mr. Cottman asserted this right by filing his

§ 2255 motion within one year of *Johnson*. However, the United States asserts that, "Petitioner . . . has not shown that he asserts . . . a new retroactive right." BIO 10.

The applicable principles having been announced in *Johnson*, this Court need not expressly create a new rule. Applying *Johnson* to the mandatory Guidelines is a straightforward application of the governing principles in *Johnson* to a law that "fixed sentences" just as the ACCA fixes sentences.

B. Applying the retroactivity principles discussed in *Teague v. Lane*, *Johnson* is retroactively applicable to the mandatory Guidelines.

The United States contends Mr. Cottman's § 2255 motion is not timely. BIO 9-15. In rejecting Mr. Cottman's § 2255 motion, the court failed to use the correct analytical framework—this Court's "new rule" jurisprudence under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Under that framework, Mr. Cottman's claim is merely an application of *Johnson*, and thus his motion is timely.

Section 2255(f)(3) allows a federal prisoner to file a § 2255 motion within one year of this Court recognizing a new "right." This Court recognizes a new "right" for § 2255 purposes whenever it issues a "new rule" within the meaning of *Teague*, 489 U.S. 288. This Court issued a "new rule" when it issued *Johnson*. *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Within one year of issuing *Johnson*'s new rule, Mr. Cottman "asserted" his claim under *Johnson*, and thus his motion is timely. 28 U.S.C. § 2255(f)(3). The court did not even mention *Teague* and failed to recognize that a new "right" under § 2255(f)(3) is the same thing as a "new rule" under *Teague*.

Granted, to decide an open question in the petitioner's favor, a court might have to "break new ground" and thereby issue a new rule. *Teague*, 489 U.S. at 301. But that is not always necessary. Sometimes a court can decide an "open" question in the petitioner's favor without issuing a new rule. *Stringer v. Black*, 503 U.S. 222, 229 (1992). That happens when a court can

decide the question by "merely" making "an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307. In other words, a question can be "open" even when its answer is "dictated by" Supreme Court precedent; that open question is simply answered by "applying" the precedential rule to the pending case, not by issuing a new rule. *Stringer*, 503 U.S. at 229, 237 (reversing Fifth Circuit's contrary resolution of an "open" question).

Teague itself provides a prime example of a court deciding an open question in the petitioner's favor without announcing a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985). *See Teague*, 489 U.S. at 307. *Francis* involved the application of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which this Court had issued a new rule holding that due process prohibits any jury instruction that creates a mandatory presumption regarding *mens rea*. The instruction invalidated in *Sandstrom* involved a mandatory *conclusive* presumption, while the instruction in *Francis* involved a mandatory *rebuttable* presumption. Because the holding in *Sandstrom* did not reach rebuttable presumptions, the dissent argued that using *Sandstrom* to invalidate the *Francis* instruction would "needlessly extend our holding in [*Sandstrom*] to cases" involving rebuttable presumptions. *Francis*, 471 U.S. at 332 (Rehnquist, J., dissenting). But the Court explained that the factual "distinction" between the instructions in the two cases "d[id] not suffice" to call for a qualification of "the rule of *Sandstrom* and the wellspring due process principle from which it was drawn." *Id.* at 316, 326; *see Yates v. Aiken*, 484 U.S. 211, 218 (1988) (holding that *Francis* did not announce new rule). In the parlance of *Teague*, *Francis* shows that rejecting an untenable distinction does not serve to announce a new rule; it simply reinforces an old one in a different but materially equivalent context. In addition, this is precisely what courts have said when holding that *Descamps v. United States*, 133 S. Ct. 2276 (2013), which resolved an open question, is not a new rule.

These examples make it clear that Mr. Cottman's request is merely an application of *Johnson,* not the issuance of a new rule. Specifically, Mr. Cottman asks that this Court hold that *Johnson*'s rule regarding vagueness and the categorical approach applies not just to a sentencing enhancement fixed by statute, but also to a verbatim enhancement fixed by a Guideline that is made binding by statute. The immaterial factual "distinction" between Mr. Cottman's case and the case adjudicated by *Johnson* does "not suffice" to make the Court's favorable new application of *Johnson* a new rule. *Francis*, 471 U.S. at 16.

The court did not actually engage in this analysis, nor use the proper *Teague* framework. Many district court cases, in applying the retroactivity principles discussed in *Teague, Welch*, and related cases, have found that the holding in *Johnson* in retroactively applicable to the residual clause of § 4B1.2(a)(2). *See, e.g., United States v. Jones, Crim. Case. No. 11-cr-00433*, 2016 WL 7178313, at *2 (D. Colo. Dec. 8, 2016)*; United States v. Parks*, No. 16-cv-01565-WYD, 2017 WL 3732078, at *21-25 (D. Colo. Aug. 1, 2017); *see also United States v. Costello*, No. 1:02-cr-089, 2017 WL 2666410, at *2 (S.D. Ohio June 21, 2017); *United States v. Tunstall*, No. 3:00-cr-050, 2017 WL 1881458, at *2, *6 (S.D. Ohio May 8, 2017); *United States v. Harris*, 216 F. Supp. 3d 1296, 1303-04 (W.D. Okla. 2016); *United States v. Aldershof*, No. 07-cr-10034091-JTM, 2016 WL 7219717, at *3 (D. Kan. Dec. 13. 2016); *United States v. Martinez*, No. 10-cr-00214-CMA, 2016 WL 6997266, at *3-4 (D. Colo. Nov. 30, 2016); *United States v. Chu*, No. 14-cr-262-WJM-1, 2016 WL 6892557, at *7-9 (D. Colo. Sept. 30, 2016); *United States v. Daugherty*, No. 07-CR-87-TCK, 2016 WL 4442801, at *5-6 (N.D. Okla. Aug. 22, 2016).[1]

[1] *Compare United States v. Mulay*, No. 01-40033-01-SAC, 2017 WL 373382 (D. Kansas Jan. 26, 2017).

C. The denial of the COA conflicts with decisions of this Court and the purpose of the statute of limitations.

The operative question is whether Mr. Cottman has "asserted" that his sentence violates *Johnson* within one year of *Johnson*. "To 'assert' means '[t]o state positively' or '[t]o invoke or enforce a legal right.'" *United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017). "Thus, in order to be timely under § 2255(f)(3), a § 2255 motion need only 'invoke' the newly recognized right." *Id.*

The circuit court's contrary reading, conflicts with the purpose of a statute of limitations "to encourage plaintiffs to 'pursue diligent prosecution of known claims.'" *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017). It would encourage movants to sit on their claims until this Court decides a case exactly like theirs, a result in conflict with the purpose of the statute of limitations and the interest in finality. "[F]inality provides important incentives to litigants" to "exercise greater diligence and invoke whatever rights they may have early on." *United States v. Surratt*, 797 F.3d 240, 263 (4th Cir. 2015)), *appeal dismissed as moot after reh'g en banc granted*, 855 F.3d 218 (4th Cir. 2017) (en banc).

Reading § 2255(f)(3) to require this Court to announce each reasonable application of its rules is also unworkable and would lead to arbitrary results. The Supreme Court is not a court of error correction; rather, it guides the lower courts not just with technical holdings, but "with general rules that are logically inherent in [its] holdings, thereby ensuring less arbitrariness and more consistency in our law." *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017). Having announced the applicable principles in *Johnson*, the Court need not expressly hold that those principles invalidate the mandatory Guidelines' residual clause.

When Congress first adopted a statute of limitations in AEDPA, it intended § 2255(f)(3) to

codify this Court's "new rule" jurisprudence.[2] Thus, to determine whether "the right asserted has been newly recognized by the Supreme Court" under § 2255(f)(3), the courts must apply *Teague* and its progeny. *See United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013); *United States v. Powell*, 691 F.3d 554, 557 (4th Cir. 2012).[3]

A case announces a "new rule" when it "breaks new ground," but "a case does *not* 'announce a new rule, when it is merely an application of the principle that governed' a prior decision." *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)) (quoting *Yates v. Aiken*, 484 U.S. 211, 217 (1988) (holding *Francis v. Franklin*, 471 U.S. 307 (1985), was not a new rule but "merely an application of the principle that governed our decision in" *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which the question was "almost identical")); *Penry v. Lynaugh*, 492 U.S. 302, 314-19 (1989) (the rule Penry "seeks" requiring instructions permitting the jury to "give effect" to evidence of mental disability is not a "new rule" but an application of prior cases to a "closely analogous" case).

Put another way, "a rule that applies a general principle to a new set of facts typically does not constitute a new rule." *Morgan*, 845 F.3d at 667. If a "factual distinction between the case

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[2] *See 137 Cong. Rec. S8558-02*, 1991 WL 111516, at *45, *48, *53 (June 25, 1991) (floor statement of Senator Hatch) (stating that the same language in precursor legislation was "designed" to "preserve and codify the important Supreme Court rulings in this area," citing *Teague*); H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995) (AEDPA's period of limitations "preserves review … when the United States Supreme Court recognizes a new right that is retroactively applicable").

[3] *See also, e.g.*, *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016) (explaining that § 2255(f)(3) was "enacted against the backdrop" of existing "new rule" precedent and was not intended to "distinguish[] rights that are 'newly recognized' from rights that are recognized in [a] 'new rule' under established retroactivity jurisprudence"); *United States v. Morgan*, 845 F.3d 664, 667-68 (5th Cir. 2017) (applying *Teague* and its progeny to determine that *Descamps* did not recognize a new right under § 2255(f)(3)); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207–08 (11th Cir. 2012) ("In deciding retroactivity issues under § 2255(f)(3), we have applied the rubric developed in *Teague*" to "first answer whether the Supreme Court decision in question announced a new rule").

under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful," and the rule is not new. *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment).

In *Tyler v. Cain*, 533 U.S. 656 (2001), the Court stated that the Court "can make a rule retroactive over the course of … [m]ultiple cases." *Id*. at 666. As Justice O'Connor explained in her controlling concurrence, "a single case that expressly holds a rule to be retroactive is not a *sine qua non* for the satisfaction of this statutory provision." *Id*. at 668 (O'Connor, J., concurring). For example, if the Court holds in Case One that a certain kind of rule is retroactive, and announces a rule of that kind in Case Two, "it necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Id*. at 669. By analogy, having announced *Johnson*, the Court need not expressly hold in another case that identical language analyzed in the identical way in another provision that fixed sentences is void for vagueness.

The conclusion that this Court has not recognized that right that Mr. Cottman asserts directly conflicts with *Teague* and its progeny, which reject the notion that the existence of an "open question" means that a rule is new. *See, e.g.*, *Stringer*, 503 U.S. at 229; *Wright*, 505 U.S. at 304 (O'Connor, J., concurring). This is precisely what courts have said when holding that *Descamps*, which resolved an open question, did not recognize a new right.

D. *Johnson's* applicability to the mandatory Guidelines is recognized.

The right Mr. Cottman asserts is *Johnson*. This Court in *Booker*, and in previous cases, interpreted pre-*Booker* law—18 U.S.C. § 3553(b)—as "mak[ing] the relevant sentencing rules … mandatory and impos[ing] binding requirements on all sentencing judges." *Booker*, 543 U.S. at 259; *see also id*. at 234 (because § 3553(b) made the Guidelines "binding on judges, we have consistently held that the Guidelines have the force and effect of laws") (citing *Mistretta v. United*

States, 488 U.S. 361, 391 (1989); *Stinson v. United States*, 508 U.S. 36, 42 (1993)). In determining whether *Johnson*'s new rule applies to the mandatory Guidelines' residual clause, it would be a "serious mistake" to ignore this Court's interpretation of federal law. *Stringer*, 503 U.S. at 237.

Beckles v. United States, 136 S. Ct. 2510 (2016) does not apply to Mr. Cottman's case because he was sentenced before *Booker*, 543 U.S. 220, and before the advent of the advisory Guidelines. In *Beckles*, this Court concluded that a defendant may not challenge the "advisory Guidelines" as unconstitutionally vague. The Court hinged its holding on the Guideline's advisory nature, noting repeatedly that the Guidelines merely guided a district court's discretion as opposed to mandating a particular sentence.

The critical role that the advisory nature of the Guideline scheme played in the *Beckles* decision is highlighted by the discussion of *Irizarry v. United States*, 555 U.S. 708 (2008). In *Irizarry*, this Court held that the requirement in Fed. R. Crim. P. 32(h) that a district court provide notice to the parties before it imposes a sua sponte departure from the Guidelines did not apply equally to variances. As the Court discussed in *Beckles*, this rule was developed because the "due process concerns that . . . require notice in a world of mandatory Guidelines no longer' apply" in a post-*Booker* world. *Beckles*, 136 S. Ct. at 894 (quoting *Irizarry*, 555 U.S. 714).

This Court decided *Booker* in January 2005. *See Booker*, 543 U.S. at 220. The district court sentenced Mr. Cottman in July 2003. At that time, unlike in *Beckles*, the district court could not have decided that a below-range sentence was appropriate based on the § 3553(a) factors or completely reject the Guidelines on policy grounds.

In short, given the mandatory nature of the Guidelines at the time of Mr. Cottman's sentence, the holding of *Beckles* does not preclude his claim. *Beckles* is limited to due-process challenges to an advisory sentencing scheme did not exist at the time Mr. Cottman was sentenced.

See Beckles, 137 S. Ct. at 904 (Sotomayor, J., concurring) (noting that *Beckles* "leaves open the question" whether defendants sentences pre-*Booker* may advance Due Process vagueness challenges).

Because the mandatory nature of the pre-*Booker* Guidelines is akin to the ACCA in that they fixed a particular sentence,[4] the rule announced in *Johnson* applies retroactively on collateral review in his case for the reasons articulated in *Welch*. *Cf. Beckles,* 137 S. Ct. 886 (2017). *See also, e.g., Vargas v. United States,* 2017 WL 3699225 (2d Cir. May 8, 2017); *Reid v. United States,* No. 3:03-cr-30031-MAP, ECF No. 82 (D. Mass May 18, 2017).

Mr. Cottman needs nothing from *Beckles* to assert the right not to be sentenced under the mandatory Guidelines' residual clause. Nor does *Beckles* suggest that Mr. Cottman needs another new rule. *Beckles* did not leave open or decline to address the issue here; it simply and properly did not resolve a "question [that] is not presented by this case." *Beckles v. United States,* 137 S. Ct. 886, 903 & n.4 (2017) (Sotomayor, J., concurring). No justice said that the assertion of the right recognized in *Johnson* in a mandatory Guidelines case would require the creation of another new right within the meaning of § 2255(f)(3). That this Court has not expressly decided that *Johnson* applies to the mandatory Guidelines' residual clause does *not* mean that the right "by definition" has not been recognized. *Stringer*, 503 U.S. at 229. Justice Sotomayor suggested only that the *merits* of such a challenge have not yet been decided, and noted that *Beckles* did not foreclose such a challenge.

[4] In *Booker*, this Court held that 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, was "incompatible with" the Sixth Amendment. *Booker*, 543 U.S. at 233. In reaching that conclusion, the Supreme Court noted that "[if] the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required" then there would be no constitutional issue. *Id.* But given that the Guidelines were "not advisory" but instead "mandatory and binding on all judges," this Court indicated that it had "constantly held that the Guidelines have the force and effect of laws." *Id.*

Finally, *Johnson* discussed the Guidelines' residual clause in analyzing several Guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently." *Johnson*, 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010), *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

E. Therefore, the § 2255 motion is timely.

Mr. Cottman timely invoked the right recognized in *Johnson*, as required under § 2255(f)(3). He does not seek to break new ground, but asks the Court to apply *Johnson*'s principles to his case. The only distinction between this case and *Johnson* is that the Guidelines fixed the sentence.[5] The text and mode of analysis of the residual clauses of the ACCA and the career-offender Guideline are identical. In addition, "[t]he answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing Guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

Johnson held that the fair notice and arbitrary enforcement concerns underlying the vagueness doctrine apply to laws "fixing sentences." 135 S. Ct. at 2557. The question in *Beckles* was whether the advisory Guidelines "fix the permissible range of sentences" such that they implicate those concerns. 137 S. Ct. at 892. The Court concluded that they do not, contrasting the advisory Guidelines with the mandatory Guidelines, which were "binding." *Id.* at 894–95 (citing *United States v. Booker*, 543 U.S. 220, 233 (2005)). *Beckles* did not disturb that conclusion recognizing that there is no practical difference between a statutory range and a mandatory Guidelines range. *See, e.g., United States v. Foote*, 784 F.3d 931, 942 (4th Cir. 2015) (recognizing

[5] Mr. Cottman was also an Armed Career Criminal. *See* PSR ¶¶ 40-52.

that because the mandatory Guidelines had "legal force," an erroneous mandatory career-offender designation would be "in excess of the maximum authorized by law"); *Hill v. Masters*, 836 F.3d 591, 599 (6th Cir. 2016) (A "sentence imposed under mandatory guidelines (subsequently lowered by retroactive Supreme Court precedent)" and a "sentence imposed above the statutory maximum" are both "beyond what is called for by law."); *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013) ("Before *Booker*, the Guidelines were the practical equivalent of a statute.").

In sum, Mr. Cottman's § 2255 motion asks only for an application of *Johnson*'s retroactive rule and is, therefore, timely.

III. The Petitioner's 28 U.S.C. § 2255 petition is important and requires review.

A. It is important because there is substantial discord among the lower courts.

The Eleventh Circuit's reasoning also conflicts with First and Third Circuit decisions in cases involving *Johnson*'s application to the mandatory Guidelines' residual clause. The First Circuit disagreed in *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017), and expressly held that the defendant's motion challenging his mandatory career offender sentence was *timely* under § 2255(f)(3) because it was filed within one year of *Johnson*. *Moore*, 871 F.3d at 77 n.3. In doing so, the court rejected the reasoning of the Sixth and Fourth Circuits. In *Moore*, the court authorized a successive motion because the applicant had made a prima facie showing that his motion "relies on" *Johnson*. It was not persuaded that it "would need to make new constitutional law in order to hold that the pre-*Booker* SRA fixed sentences." *Id.* at 81. It reasoned that Congress used words such as "rule" and "right" rather than "holding" because it "recognizes 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." *Id.* at 82. The pre-*Booker* Guidelines' residual clause "is not clearly different in any way that would

call for anything beyond a straightforward application of *Johnson*." *Id.* With respect to its reliance on *Beckles* and Justice Sotomayor's footnote, "*Beckles* did not limit *Johnson II* to its facts. Rather, one can fairly and easily read *Beckles* as simply rejecting the application of the rule of *Johnson II* to the advisory Guidelines because, as a matter of statutory interpretation, those Guidelines do not fix sentences." *Id.* at 83. On this framing, "the right Moore seeks to assert is exactly the right recognized by *Johnson*." *Id.*

The Third Circuit, in *In re Hoffner*, 870 F.3d 301 (3d Cir. 2017), also authorized a successive § 2255 petition because the applicant had made a prima facie showing that he "relies on" *Johnson*. The court found that "the way to determine" whether a "motion urges the creation of a second new rule . . . is to undertake a *Teague* analysis" to determine whether the rule relied on "'breaks new ground,'" or instead "'[is] merely an application of the principle that governed' a prior decision to a different set of facts.'" *Id.* at 311 & n.15 (quoting *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013)).

District courts in other circuits have also disagreed with the Eleventh Circuit's analysis, which suggests the rift between the circuits will continue to widen. *See, e.g.*, *Parks*, 2017 WL 3732078 (finding that in *Beckles*, this Court exempted the advisory Guidelines from the due process vagueness doctrine because they are advisory, not because they are Guidelines); *Sarracino v. United States*, 2017 WL 3098262 (D.N.M. June 26, 2017), *report and recommendation adopted, No. CR 95-210 MCA*, 2017 WL 3822741 (D.N.M. Aug. 30, 2017); *United States v. Mock*, No. 2:02-CR-0102-RHW, 2017 WL 2727095 (E.D. Wash. June 23, 2017); *Tunstall*, 2017 WL 1881458, at *6; *Costello*, 2017 WL 2666410, at *1 (finding that the vagueness doctrine applies to the mandatory pre-*Booker* Sentencing Guidelines because they are sufficiently statute-like); *Long v. United States*, No. CV 16-4464 CBM, at 1–7 (C.D. Cal. Sept. 15, 2017) (holding *Johnson*

invalidates the mandatory Guidelines' residual clause and petition was timely).

One district court within the Sixth Circuit granting a certificate of appealability and noting that the Sixth Circuit's restrictive reading of § 2255(f)(3) "invites Potemkin disputes about whether [this Court] has explicitly applied its precedents to a specific factual circumstance rather than asking whether the *right* the Supreme Court has newly recognized applies to that circumstance." *United States v. Chambers*, No. 1:01-CR-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). Members of the Sixth Circuit have noted "the irony that a defendant in a similar position to that of the defendant in *Johnson* seems unable even to seek the same relief." *Gipson v. United States*, 710 F. App'x 697, 698 (6th Cir. 2018) (Kethledge, J.).

B. The Petitioner's case may be substantially affected by review.

The government states "Petitioner offers no specific reason to believe that [Mr. Cottman] would receive a lower sentence" at resentencing. BIO 17. If this case is held and *Stokeling* is resolved in Mr. Cottman's favor so that robbery is not a "violent felony" for purposes of ACCA, the government agrees that Mr. Cottman would be resentenced. BIO 20. The ACCA and the sentencing guidelines, U.S.S.G. § 4B1.2(a)(1), have identically worded "elements" clauses. *See United States v. Fritts*, 841 F.3d 937, 940 n.4 (11th Cir. 2016). And as recently stated by Eleventh Circuit in the unpublished decision of Mr. Cottman's codefendant:

> We have repeatedly read the definition of a violent felony under § 924(e) of the Armed Criminal Career Act ("ACCA") as virtually identical to the definition of a crime of violence under U.S.S.G. § 4B1.2. *Archer*, 531 F.3d at 1352. Because of this strong similarity, we consider cases interpreting one as authority in cases interpreting the other. *See United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010).

United States v. Dixon, No. 17-10952, 717 F. App'x 958, 959 (11th Cir. 2018). The residual clause was removed from the advisory sentencing guidelines in 2016, so if *Stokeling* determines that Florida robbery is not a "violent felony" under the elements clause, it will not be interpreted as a

"crime of violence" under the "elements" clause either under Eleventh Circuit precedent. Furthermore, it may affect the precedent on whether Florida robbery is "generic," as Mr. Cottman disputes.

Without the ACCA or career offender enhancement, Mr. Cottman's advisory guidelines at resentencing would be a base offense level of 32, with an adjustment of three levels for timely acceptance, yielding a total offense level of 29. PSR ¶¶ 30-38.[6] Mr. Cottman's previously enhanced total offense level was 34, under the mandatory guidelines.[7] PSR ¶¶ 40-52. Thus, at resentencing, under the now advisory guidelines, without the errant ACCA and Career Offender enhancements, with a 5 level guideline reduction it is reasonable to believe Mr. Cottman would receive a lower sentence at resentencing. *See Peugh v. United States*, 133 S. Ct. 2072 (2013). Even assuming *arguendo* that he did not receive a downward departure or variance, a resentence again to the low-end of the guidelines would result in a 111-month sentence reduction.[8]

[6] The § 924(c) conviction would remain separately grouped, as before, at 5 years consecutive to any other term of imprisonment imposed upon the defendant. PSR ¶ 39.

[7] The United States does not contest that Mr. Cottman was sentenced pre-*Booker*, and as such, the Guidelines were mandatory at his sentencing. BIO 5. And while suggesting that a Court could depart in an "exceptional" case, the United States does not contend that a departure was legally permissible in Mr. Cottman's sentencing. BIO 13.

[8] Mr. Cottman's co-defendant on this case, Ronnie Dixon had his ACCA sentence vacated pursuant to a successive § 2255 he was resentenced pursuant to *Johnson* — although he remained a career offender and had no reduction in his guideline total offense level. *United States v. Ronnie Dixon*, 8:02-cr-397; Crim. Doc. 85. That said, after a full resentencing hearing under the now advisory guidelines, Mr. Dixon received a 42-month reduction in his term of imprisonment pursuant to a downward variance. *Id.* Thus, it is reasonable that Mr. Cottman may expect the same upon an opportunity to present argument and mitigation, even if only his ACCA sentence his vacated.

C. The class of mandatory career offenders is significant.

The United States asserts this issue affects a "now-closed set of cases." BIO 15. However, it is not of diminishing importance. An estimate based on data from the Sentencing Commission suggests that a holding that *Johnson* applies to the mandatory Guidelines could affect approximately 1,187 cases nationally, including 268 in the Eleventh Circuit. *See* Reply to the Br. in Opp., *Allen v. United States*, No. 17-5684, App'x at A-1–A-7. For many of these individuals, a favorable ruling would render them eligible for immediate or near immediate release.

CONCLUSION

For the reasons stated above and in his petition for writ of certiorari, Mr. Cottman respectfully requests that the petition be granted after the Court's resolution of *Stokeling.*

Respectfully submitted,

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