No.________________________

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IN THE
SUPREME COURT OF THE UNITER STATES

BRAD BOLTON - PETITIONER

vs.

TRACY L. STONE U.S. ATTORNEY - 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 CERTIORARI

BRAD BOLTON U.S.M. #45253-074
F.C.I. Manchester
P.O. Box 4000
Manchester, KY. 40962

QUESTIONS PRESENTED FOR REVIEW

Bolton was sentenced under the Career - Offender under the U.S.S.G § 4B1.1. In Johnson v. United States, 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 vague. In Welch v. United States, 136 S.C.t 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 by the waiver contained in his plea agreement. The Sixth Circuit, approved that result. The questions presented in this petition are:

1.Whether the district court erred in holding that an appellate and collateral relief waiver entered into as part of a plea agreement acts to bar relief under Johnson v. United States, 135 S.Ct. 2551(2015) as knowing and voluntary wavier, when the waiver was executed more than one year prior to the Johnson ruling?

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 1265 that it can no longer do so?

3.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?

4.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 facilitation of robbery, where the state statute that criminalizes facilitation does not on it's face require any intent to commit the underlying robbery, and thus is not a predicate "crime of violence" that allows for enhancement to career offender status under the residual clause?

5.Whether the Court of Appeals committed legal error when it determined counsel was effective even though counsel failed to address the motion -to- dismiss issue in an Anders brief or for failing to file a notice appeal after being advised to appeal the issue? Did the Court below err when it determined the Ineffective Counsel claim on concerning motion to dismiss claim been precluded by the waiver clause in plea agreement?

6.Whether the Court of Appeals commit legal error by not taking into consideration of the Ineffective Counsel claim by counsels lack of Sixth Circuit Bar Membership while representing Defendant at pretrial proceedings?

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 judgment is the subject of this petition is as follows:

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THE HONORABLE THOMAS A. VARLAN
CHIEF UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF TENNESSEE
OFFICE OF
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SOLICITOR GENERAL OF THE UNITED STATES
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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 S to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. It is unavailable while being at F.C.I. Manchester

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

[X] reported at See Appendix, P, Document 809, and 810; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] 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, Brad Bolton, states that the District Court below had subject-matter jurisdiction of this cause based 18 U.S.C. § 3231, as the result of an Indictment charging violations of the following federal statutes: 21 U.S.C. §§ 846,841(a)(1), 841(b)(1)(A), 841(b)(1)(c); 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h); and 21 U.S.C. § 853(p).

Pursuant to Federal Rule of Appellate Procedure 28(a)(4)(B), the Defendant, Brad Bolton, states that this court has appellate jurisdiction of this cause based on 28 U.S.C. § 1291, and on Federal Rules of Appellate Procedure 3 and 4(b). A Judgement in a criminal case was entered September 10, 2014. The District court sentenced Petitioner to 262 months imprisonment followed by five years supervised release [Doc. 651]. Petitioner appealed, but the Sixth Circuit dismissed the appeal based on the knowing and voluntary waiver contained in Petitioner's plea agreement [Doc. 733]. United States v. Bolton, No. 14-6118(6th cir. May 7, 2015) order. Petition for rehearing en banc denied June 25, 2015. The United States Supreme Court denied Petitioner's request for a writ of certiorari on October 19, 2015 [Doc. 754]. Bolton v. United States, 136 S.Ct. 364(2015) order. Petition for rehearing on certiorari denied January 11, 2016. Less than one year latter on may 9, 2016, Petitioner filed Collateral Challenge Pursuant to 28 U.S.C. § 2255 denied. Petitioner applies for a certificate of appealability ("COA") Fed. R. App. P. 22(b) denied August 3, 2017 United States v. Bolton, No. 17-5196 Petitioner, petitions for rehearing en banc denying a certificate of appealability accordingly to Fed. R. App. P. 40(a). denied September 18, 2017.

JURISDICTION

The date on which the UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT decided the Defendant's case for Certificate of Appealability ("COA"), pursuant to 28 U.S.C. § 2253 (C)(2) and Fed. R. App. P. 22(b) following date: August 3, 2017 on Docket No.:17-5196.

A timely petition for rehearing en banc was denied by the UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT on the following date: October 06, 2017, on Docket No: 17-5196, and a copy of the order denying rehearing appears at Appendix S.

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

STATEMENT OF CASE

A.Nature of the Case and Proceeding Below

In an Indictment filed August 7, 2012, the Defendant, Brad Bolton (herein after "Bolton" or "Defendant"), was charged with conspiracy to distribute and possess with intent to distribute both cocaine base ("crack" cocaine) and cocaine, in violation of 21 U.S.C. §§ 846,841(a)(1), and 841(b)(1)(A); with distribution of cocaine base, in violation of 21 U.S.C §§ 841(a)(1) and 841(b)(1)(c); and with money laundering the proceeds of drug trafficking offenses, in violation of 18 U.S.C §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h); plus related forefeiture allegations, in violation of 21 U.S.C. § 853(p).(R.3, Indictment, at 1-4, 11-15; Page ID 3-6, 13-17).

After entering a guilty plea to count one of the Indictment, R. 476, Plea Agreement, Page ID 1705). Bolton was sentenced to; inter alia, 262 months inprisonment,(R. 651, Judgment on a Criminal case, at 1-2, Page ID 2624-25; sentencing, Tr. [09/05/14] at 33,35; R. 677, Page ID 3054,3056). A notice of Appeal was timely filed on September 10, 2014.(R.652, Notice of Appeal, Page ID 2630). Was dismissed United States v. Bolton, No. 14-6118(6th cir. May 7, 2015). Then filed petition for rehearing en banc denied June 25, 2015. The Supreme court denied petition for a writ of certiorari on October 19, 2015 Bolton v. United States, 136 S.Ct. 364(2015). Petition for rehearing hearing on certiorari denied January 11, 2016. Less than one year later on May 9, 2016, Petitioner filed collateral challenge Pursuant to 28 U.S.C. § 2255 motion which was denied. Request for a Certificate of Appealability ("COA") pursuant to 28 U.S.C § 2253(c)(2) and Fed. R. App. P. 22(b) Denied August 3, 2017 on Docket No. 17-5196. A timely petition for rehearing en banc was denied September 18, 2017 on Docket No.:17-5196.

I the Defendant presently am incarcerated at Federal Correctional Institution in Manchester Kentucky.

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1 References to court documents in the technical record, including transcripts, will be cited with the letter "R" followed by the document number in the trial court's docket sheet, a description or style of the document and page number in the document, if applicable. References to the Presentence Investigation Report will be cited with the letters "PSIR" followed by the paragraph and/or page number of that document. Exhibits to

B. RELEVANT FACTS

1.

Brad Bolton was charged in Count one of a multi-count indictment with conspiracy to distribute and possess with intent to distribute "two-hundred eight (280) grams or more of a mixture and substance containing a detectable amount of cocaine base, also known as "crack" and five (5) Kilograms or more of a mixture and substance containing a detectable amount of cocaine," along with related forfeiture allegations, (R.3, Indictment, at 2-4, Page ID 4-6); in Count Twenty-One with distributing "a mixture and substance containing a detectable amount of cocaine base, also known as "crack", (R.3, Indictment, at 11, Page ID 13); and Count Twenty-Three with conspiracy to commit money laundering in regard to drug trafficking, along with related forfeiture allegations (R.3, Indictment, at 12-15, Page ID 14-17).

Subsequently Bolton entered into a plea agreement where by he pleaded guilty to Count One of the Indictment. (R.476, Plea Agreement, at 1, Page ID 1705); R.485, Courtroom minutes, Page ID 1773).

2.

a.

The Presentence Investigation Report (PSIR) indicated Bolton had a base offense level of 34 pursuant to U.S.Sentencing Guidelines § 2D1.1(c)(3); the PSIR also determined that Bolton was a career offender, with an offense level 37 pursuant to U.S. Sentencing Guidelines § 4B1.1(b)(1); Bolton was also credited with a 3-level downward adjustment based on acceptance of responsibility, pursuant to U.S. Sentencing Guidelines §§ 3E1.1(a) and 3E1.1(b); for a total offense level of 34. (PSIR at 7-8, 28-37; R. 643, Page ID 2579-80). The PSIR also stated that Bolton had a total criminal history category of 19. Establishing a criminal history category of VI; additionally, the PSIR noted that because Bolton qualified as a career offender pursuant to U.S. Sentencing Guideline § 4B1.1(b), he thus would have a criminal history category of VI, based on, inter alia, a conviction in state court for facilitation of robbery. (PSIR at 16-17,61; PSIR at 19, 68-69; R. 643, Page ID 2588, 2591).

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a hearing will be cited with "Ex." followed by exhibit number. Transcripts will also be referenced by the letters "Tr." followed by date of hearing and page number. 6th cir. R. 28(a), 28(c), 30(a), 30(b), 30(f).

The PSIR concluded that the total offense level of 34 a criminal history category of VI provided for a guideline imprisonment range of 262-327 months.(PSIR at 24,100, R. 643, Page ID 2596).

b.

Bolton objected to several factual and legal conclusions in the PSIR, including, inter alia, the proposed enhancement under Sentencing Guidelines § 4B1.1(b)(1) as a career offender, on the grounds that one of the predicate crimes used to elevate him to career offender status was facilitation of a robbery under Tennessee law. (R.633, Defendant's sealed notice of objections to Presentence Investigation Report, at 2-3). If the offense level of 34 based on drug quantity were used instead of the career offender of 37, then a 3-level reduction for acceptance of responsibility would place Bolton at a total offense level of 31 and criminal history category of VI, for an advisory guideline range of 188-235 months.

3.

At sentencing, the trial court indicated that it needed to make a ruling on Bolton's objections to the assessment in the PSIR to his enhancement as a career offender, pursuant to U.S. sentencing Guidelines §§ 4B1.1(a) and 4B1.1(b)(1). (sentencing, Tr. [09/05/14],at 4-5; R.677, Page ID 3025-26). After hearing argument from counsel, the trial court overuled Bolton's objections to the enhancement in the PSIR to career offender status, specifically ruling that Bolton's prior conviction for facilitation of a felony-robbery on September 24, 2009 in Anderson County, Tennessee was a crime of violence. (Sentencing. Tr. [09/05/14], at 8-16; R.677, Page ID 3029-37). The trial then determined that the advisory guidelines range was 262-327 months, based on a total offense level of 34 and a criminal history category of VI.(Sentencing, Tr. [09/05/14] at 16; R.677, Page ID 3037).

REASONS FOR GRANTING THE PETITION

I. The Wavier of Collateral Attack in Plea Agreement is not barred from bringing Mr. Bolton's motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255 because his plea agreement contained a waiver of collateral attack. The Court of Appeals argument is unpersuasive. Although the plea agreement does contain a waiver, that waiver is unenforceable if, indeed, Boltons's sentence is unconstitutional as he argues. Therefore, the collateral attack waiver does not preclude the court from entertaining Bolton's Johnson claim and Ineffective Counsel Claim.

II. This court has held the residual clause "vague in all it's application [.]" Id. at 2561. The Supreme Court has since determined that Johnson established a new substantive rule of constitutional law that applies retroactively to cases on collateral review. Welch v. United States, 136 S.Ct. 1257,1265(2015). Mr. Bolton has timely filed as within one year from the date on which the right asserted was initially recognized by the Supreme Court (June 26, 2015), and it has been made retroactive to cases on collateral review. See 28 U.S.C. § 2255(f)(3).

III.In Johnson, Our Supreme Court held the residual Clause of the Armed Career Criminal Act(ACCA), which defined a crime of violence to include any conviction that "otherwise involved conduct that presents a serious potential risk of physical injury to another [,]" under 18 U.S.C. § 924(e)(2)(B)(ii), to be void for vagueness. 135 S.Ct. 2551, 2563(2015). The court held the residual clause "vague in all it's applications [.]" Id. at 2561. In our Supreme Court case in Johnson has nothing to do with the advisory Guidelines. Johnson held that the residual clause in the Armed Career Criminal Act(ACCA) is unconstitutionally vague. While the Supreme Court in Johnson invalidated the residual clause of the ACCA, the Supreme Courts holding should equally apply to the residual clause of the crime of violence definition located within U.S.S.G. § 4B1.2(a)(2). The advisory Guidelines are no longer good to a vagueness challenge challenge following the Supreme Court's holding in Johnson and Peugh v. United States, 133 S.Ct. 2072(2013) Id. at *1, 5-7,13. Johnson unconstitutionally vague sentence negates each of the government's proposed argument's against the application of Johnson to Career Offender cases.

IV. The trial court committed prejudicial error when it determined that the Defendant qualified as a career offender based on a conviction in States Court for facilitation of a felony-robbery. This conviction should not have qualified I the Defendant for career offender status, because facilitation of robbery under applicable Tennessee Statutes does not involve the requisite intent to commit the underlying felony-in this case, the intent to commit theft of property from the person of another by violence or the use of fear-and thus is not a predicate "crime of violence" contemplated by U.S. Sentencing Guideline §§ 4B1.1(a) and 4B1.2, and thus is not a predicate "crime of violence" that allows for enhancement to career offender status to be void for vagueness under the residual clause in light of Johnson v. United States, 135 S.Ct. 2551,2563(2015).

V. Counsel Mr. Greene was ineffective by failing to file requested Appeal of District Court's ruling in Defendant's Motion To Dismiss Indictment" on [Doc. 337] and [Doc. 358] along with filing requested Notice of Appeal by his client. Is a constitutionally ineffective error of counsel even if Defendant 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 been different. In the context of conviction by guilty plea for, errors, Bolton would have insisted on going to trial proceedings forth of his Motion to Dismiss Indictment [Doc. 337] and [Doc. 358]. Counsel is ineffective during these pretrial proceedings.

VI. Mr. Greene was ineffective where he did not have appropriate licenses needed to represent the Defendant. The lack of counsel not having Circuit Bar Membership was a Constitutional error of Defendant's pre-trial proceedings that violated his rights of Fifth, Sixth and Fourteenth Amendment of the United States Constitution depriving Mr. Bolton of "Life, Liberty, and Freedom since counsel never complied with all requirements to practice Federal law in the State of Tennessee failing to have Bar Membership commencing his duties as Attorney even when he knew that he was not licensed to practice during pretrial proceedings.

I. Mr. Bolton's § 2255 Waiver in his plea agreement is unenforceable because he raises a Johnson claim.

All of the government's arguments in favor of enforcing Mr. Bolton's waiver of rights to file post-conviction motions to bar Johnson relief have unequivocally been rejected by the Sixth Circuit Court of Appeals. See United States v. McBride, ____F.3d____, 2016 WL 3209496*1(6th cir. June 10, 2016)("a defendant can abandon only "Known right[s]"....McBride could not have intentionally relinquished a claim based on Johnson, which was decided after his sentencing.")(citing United States v. Olano, 507 U.S. 725,773(1993); United States v. Stines, 313 F.3d 912,917-18(6th cir. 2002); and United States v. Rodgers, 118 F.3d 466,471(6th cir. 1997))(emphasis in original). Thus the merits of Mr. Bolton's Johnson claim may be reached by this court, despite any waiver that was entered into. The waiver of Collateral Attack in Plea Agreement is not barred from bringing Mr. Bolton's motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C § 2255 because his plea agreement contained a waiver of collateral attack. This argument is unpersuasive. Although the plea agreement does contain a waiver, that waiver is unenforceable if, indeed, Bolton's sentence is unconstitutional. See Williams v. United States, 2016 U.S. Dist. LEXIS 125853, 2016 WL 4917017,*3(W.D.N.Y. Sept. 15, 2016)(citing United States v. Torres, 2016 U.S. App. LEXIS 12941, 2016 WL 3770517,*8(9th cor. July 14, 2016)); See also United States v. Rosa, 123 F.3d,101(2d cir. 1997). Therefore, the collateral attack waiver does not preclude the court from vacating, set aside, or correcting his unconstitutionally vague sentence that's invalid in light of Johnson.

II. & III. The government along with the Supreme Court's recent decision in Beckles v. United States, 137 S.Ct. 886,894(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 the 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 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 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 cases on collateral review... and "made no distinction between a Fifth Circuit ACCA Case and on 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)(same). This court should reconsider prior case law holding that the Guidelines could not be susceptible to a vagueness challenge are no longer good law following the Supreme Court's holdings in Johnson. This court is entitled to reconsider the Fourth Circuit's ruling in Hubbard as persuasive authority in the absence of a Sixth Circuit decision to the contrary.

Further, The Supreme Court granted a defendant's petition for certiorari recently and 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 was wrong in it's judgment and opinion reviewing the judgement of the United States Court of Appeals for the 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. Bolotns 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.

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1 The case cited from the Fifth and Eighth Circuits do little to support the Government's claim. Both Donnell v. United States, ____F.3d____, 2016 WL 3383831(8th Cir. June 20,2016) and In re Arnick,____F.3d____, 2016 WL 3383487(5th cir. June 17,2016), espouse 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 a 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 In re Hubbard,____F.3d____, 2016 WL 3181417(4th cir. June8,2016)("....the rule in Johnson is substantive with respect to it's

Bolton's sentence being enhanced to career offender status under the residual Clause that's unconstitutionally vague. This court is entitled to consider the Fourth Circuit's ruling in Hubbard as persuasive authority in the absence of a Sixth Circuit decision to the contrary. This court should revisit this issue of the Eleventh Circuit precedent 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, 1(See Doc. 789 at 6-7) 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). The Sixth Circuit's similar expansion 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 issue, 3 Save for granting leave to file second of successive petitions in guidline cases and rejecting the government's "procedural as applied" arguments in dicta. 4 Further Johnson should apply retroactively to guideline cases on collateral review with all respect to this court.

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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); United States v. Tomisser, No. 2:11-CR-2115, Slip op. at 7, n.1(E.D. Wash. July 11,2016); United States v. Beck, No. 8:13-CR-62,2016 WL 3676191(D. Neb. July 6, 2016); United States v. Hoopes,____F.3d____, 2016 WL 3638114(D.Or. July 5,2016); United States v. Stamps, 4.13-CR-238-CW (N.S. Cal. June 29,2016)(granting : 2255 relief, 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, (Doc. 789 at 6-7), only cites to six different courts that have substantively decided against the retroactivity 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).

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.

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. 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 later rejected in Pawlak that "the Guidelines merely guide the execution 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, 822 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 of it's arguments, (doc. 789 at-6-7), none of those 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 sentencing 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 that the rule extending Johnson to the career-offender Guidelines residual clause would announce a procedural rule [and would not apply 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 sentenced under the ACCA, and Johnson did not announce a new rule of constitutional law when applied to the guidelines. However, this court has previously interpreted both residual clauses identically.... Furthermore, 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 statute, or as here, a sentencing guideline"); Oliver v. United States, 90

Even if the 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 definitions the 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 reach" 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 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 on element the use, attempted use, or threatened 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. 2685, 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).

F.3d 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. 614,620-621(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 collateral 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 defendant's 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 Staes, 655 F.3d 1182,1189(9th cir. 2011)(holding that decision limiting the definition of burglary under the ACCA is substantive because "it altered the conduct that substantively qualifies as burglary," and this applies retroactively in Guideline cases); Rozier v. United States, 701 F.3d 681(11th cir. 2012)(taking it "as given, that the Supreme Court's" 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 eligibility 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 defendant's sentence are selected." (Doc. 789 at 13). Even before Welch, the Supreme Court rejected the government's argument that in order to be substantive, a rule must alter statutory limits. See Montgomery v. Louisiana, 136 S.Ct. 718,735(2016)(holding that it's 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 State's power to impose," explaining that, although Miller" did not bar a punishment for all juvenile offenders "it" did bar life without parole... for all but the rarest of juvenile offenders." Montgomery, 136 S.Ct. at 734. The government's argument here is even more untenable because Johnson has no procedural 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 Career Offender Guideline applies than it did 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 one disputes that the identical language of the Guideline's residual clause implicates the same constitutional concerns as the ACCA for guidance interpreting § 4B1.2, it stretches credulity to say that we could 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.

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DETERMINED THAT THE DEFENDANT QUALIFIED AS A CAREER OFFENDER BASED ON A CONVICTION IN STATE COURT FOR FACILITATION OF A FELONY-ROBBERY. THIS CONVICTION SHOULD NOT HAVE QUALIFIED I THE DEFENDANT FOR CAREER OFFENDER STATUS, BECAUSE FACILITATION OF ROBBERY UNDER APPLICABLE TENNESSEE STATUTES DOES NOT INVOLVE THE REQUISITE INTENT TO COMMIT THEFT OF PROPERTY FROM THE PERSON OF ANOTHER BY VIOLENCE OR THE USE OF FEAR-AND THUS IS NOT A PREDICATE "CRIME OF VIOLENCE" CONTEMPLATED BY U.S. SENTENCING GUIDELINE §§ 4B1.1.(a) and 4B1.2, and THUS IS NOT A PREDICATE "CRIME OF VIOLENCE" THAT ALLOWS FOR ENHANCEMENT TO CAREER OFFENDER STATUS TO BE VOID FOR FOR VAGUENESS UNDER THE RESIDUAL CLAUSE IN LIGHT OF JOHNSON V. UNITED STATES, 135 S.Ct. 2551,2563(2015).

A.Standard of Review

In determining whether an enhancement as a career offender is appropriate, an appellate court must "review de novo the district court's determination that a prior conviction is a "crime of violence" under U.S.S.G. § 4B1.1." Unites States v. Wynn, 579 F.3d 567,570(6th cir. 2009) citing United States v. Hargrove, 416 F.3d 486,494(6th cir. 2005)).

B. Law and Argument

The trial court below erroneously considered the Defendant's conviction for facilitation of robbery to be a second predicate "crime of violence" mandating the enhancement to career offender status pursuant to U.S. Sentencing Guidelines § 4B1.1(a). Facilitation of Robbery 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 remanded for resentencing.

2

a.

Robbery is defined under Tennessee law as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). Under Tennessee law, facilitation is a lesser included offense of the charged offenses. State v. Burns, 65. W.3d 453,466-67(Tenn. 1999)(applying part(c)(1) of the Burns test). Additionally, facilitation of a felony establishes criminal responsibility under Tennessee law in the following circumstance:

> A person is criminally responsible for the facilitation of a felony, if , knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony.

Tenn. Code Ann. § 39-11-403(a). The Tennessee Sentencing Commission comments for this section acknowledge that

> [this] section states a theory of vicarious responsibility because it applies to person who facilitates criminal conduct of another by knowingly furnishing substantial assistance to the perpetrator of a felony, but who lacks the intent to promote or assist in, or benefit from, the felony's commission.

As contemplated by the U.S. Sentencing Guidelines.

[the] term "crime of violence" means any offense under... states law, punishable by imprisonment for a term exceeding one year that-

> (1)has an element the use, attempted use, or threatened use of physical force against the person of another....

U.S.S.G. § 4B1.2(a).

<u>b.</u>

In construing the above definitions in pari materia, facilitation of "the intentional or knowing theft of property from the person of another by violence or putting the person in fear," means that the defendant was guilty by "substantially assisting" another commit theft of property from the person in fear. "Tenn. Code Ann. §§ 39-11-403(a),-13-401(a). By removing the element of intent to use violence ~~or~~ fear, a conviction for facilitation is effectively removed from the definition of "crime of violence" under U.S. Sentencing Guideline § 4B1.2(a). See United States v. Vanhook, 640 F.3d. 706,712-14(6th cir. 2011).

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. 122; 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 Someones 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 to 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 abstraction presents a serious potential risk of physical injury. James, supra, at 208. Pp. 3 5.

(b.)Two features of the residual Clause conspire to make it unconstitutionally vague. By trying judicial 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 tolerates. 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. CohenGrocery Co., 255 U.S. 81,89. Holding the residual Clause void for vagueness does not put other criminal laws that use terms such as "Substantial risk" in doubt, because those laws generally require gauging the riskiness 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 wideranging inquiry 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 year's 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 constitution's 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 predictability 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 the 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 (though 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; Sykes; 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 than 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 that the defendant has been convicted of 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 original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the 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).

<u>c.</u>

That brings us to stare decisis. This is the first case in which the court has received briefing and heard argument from the parties about whether the residual Clause is void for 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 210, N.6. In Sykes, the court again rejected a dissenting opinion's claim of vagueness. 564 U.S., at____-____(slip op., at 13-14).

The doctrine of stare decisis allows us to revisit an earlier decision where experience with its 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 about 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 frustrates any effort to impact, "some sense of order and direction." United States v. Vann. 660 F.3d 771,787(CA4 2011)(Agee,J.,Concurring).

This court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. 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," 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 riskiness 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 those 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 constitution's guarantee of due process. Our contrary holdings in James and Sykes are overruled. Today's decision 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.

We reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this 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 definition 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 against the application of Johnson to career offender cases.

Because of the constitutional magnitude of Johnson decision and it's equal application to the to the Guidelines, Johnson must necessarily also apply retroactively to guidelines cases on collateral review. See In re Hubbard, ____F.3d____, 2016 WL 3181417(4th cir. June 8, 2016)("....the rule in Johnson is substantive with respect to its application to the Sentencing Guidelines and therefore applies retroactively....").

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 cited as 576 U.S.____(2016), See(Page 15) of Johnson decision. Also see Appendices #I Where Soliciter General Counsel of Record Honorable Donald B. Verilli, Jr. On Petition for A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit No.15-5719 September 2015 stating 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 disposition is to grant certiorari, vacate the judgement of the court of appeals, and remand the case for further consideration in light of Johnson.

3

For these reasons, I the Defendant respectfully suggests that the trial court below committed prejudicial legal error of RESIDUAL CLAUSE in determining that the Defendant's prior conviction in state court for facilitation of robbery was a predicate crime of career Status, and thus an enhanced offense level under the U.S. Sentencing Guidelines. Consequently, this court must reverse and vacate the sentence imposed, and remand for resentencing to reflect a total offense level of 31 and a Criminal History category of VI, and an advisory guidelines range 188-235 months.

ARGUMENT FIVE

Counsel Mr. Greene was Ineffective by failing to file requested appeal of district court's ruling in Memorandum opinion order [Doc. 425] denying Defendants Motion to dismiss Indictment on [Doc. 337] and [Doc. 358] along with not filing a notice of appeal for his client. Is a constitutionally ineffective error of counsel even if Defendant 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 been different. In the context of conviction by guilty plea for, errors, Bolton would have insisted on going to trial proceeding forth of his "Motion To Dismiss Indictment" [Doc. 337] and [Doc. 358] pro se. Counsel is Ineffective during these pretrial proceedings.

Mr. Bolton received constitutionally deficient representation at pretrial motions when counsel refused to Appeal the District courts ruling on Defendant's Motion To Dismiss Indictment on [Doc. 337] and [Doc. 358] where counsel at the time Mr. Russell T. Greene was Ineffective for refusing to Appeal to the "MEMORANDUM OPINION AND ORDER" by CHIEF UNITED STATES JUDGE Thomas A. Varlan on [Doc. 425] concerning Motion to Dismiss Indictment on [Doc. 337] and [Doc. 358] filed by Defendant concerning Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, respectfully requesting that the court dismiss the pending indictment against Defendant on account of Due Process violations and police misconduct since his Due Process rights where violated by the outrageous conduct of Detective Jason Mynatt, Kris Mynatt, and any other Officer's who have not complied with the requirements pertaining to Oaths of Office.

Detective Jason Mynatt of Roane county Sheriff's Office was lead investigator in the case against the Defendant, and he directed a confidential source of record conversations with said Defendant and meet with him in an attempt to obtain evidence.

As a result of this evidence gathered at the direction of Detective Jason Mynatt, Defendant Bradley Bolton was indicted as a co-defendant for "aid[ing] and abet[ing] one another [to]... knowingly, intentionally, and without authority distribute a mixture and substance containing a detectable amount of cocaine base, also known as crack, a schedule II controlled substance in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(c) and Title 18, United States Code, Section 2.

Defendant Bradley Bolton was also indicted as a co-defendant in Count Twenty-Three for "knowingly, intentionally, and without authority combin[ing], Conspir[ing], confederate[ing], and agree[ing] with one another and other to commit certain offenses against the United States in violation of Title 17, United States Code, Section 1956... "These offenses Include" conduct[ing] financial transactions affecting interstate and foreign commerce "through" possession with intent to distribute two-hundred and eighty (280) grams or more of a mixture and substance containing a detectable amount of cocaine base, also known as "crack", and five (5) Kilograms or more of a mixture substance containing a detectable amount of cocaine, Schedule II controlled substance...

Tennessee state law requires that Oaths of sheriffs and their deputies be administered in a particular manner; they "may be administered by any officer authorized to administer" an Oath. "Tenn. Code Ann. § 8-18-107 Further, Oaths are required to" be written out and subscribed by the person taking them, and shall accompanied with the Certificate of the officer administering the oaths, specifying the day and year when taken." Id.

Any deputy serving a sheriff has additional Oath requirements that must be fulfilled "before [the deputy proceeds] to act' Tenn. Code Ann. § 8-18-112. The Tennessee Constitution requires that both sheriffs and deputy sheriffs perform a Constitutional Oath as well as an Oath for the office of sheriff prior to assuming their duties. Tenn. Const. Art. X, See. 1. All Oaths must also contain specific language. A Sheriff must take "the oaths prescribed for public officer's."

An Oath that the sheriff has not promised or given, nor will give, an fee, gift, gratuity, or reward for the office or for aid in procuring such office, that the sheriff will not take any fee, gift, or bribe, of gratuity for returning any person as a juror or for making any false return of any process, and that the sheriff will faithfully execute the office of sheriff to the best of such sheriff's knowledge and ability agreeable to law. Tenn. Code Ann. § 8-8-104.

The Tennessee sheriff's Department Handbook indicates that deputy sheriff oaths are incredibly similar in language to those of sheriffs. The Oath for deputy sheriffs provides as follows:

> I do solemnly swear that I will perform with fidelity the duties of the Office to which I have been appointed, and which I am about to assume. I do solemnly swear to support the Constitutions of Tennessee and the United States and to faithfully perform the duties of the office of deputy sheriff for ____________ County, Tennessee. I further swear that I have not promised or given, nor will I give any fee, gift, gratuity or reward for this office or for aid in procuring this office; that I will not take any fee, gift, or bribe, or gratuity for returning any person as a juror or for making any false return of any process and that I will faithfully execute the office of deputy sheriff to the best of my knowledge and ability, agreeably to law.

Tennessee Law also imposes filing requirements upon officers. Deputies are responsible for having Oaths "accompanied by the same certificate" [and having them] filed in the same office, and with the same endorsement, as the Oaths if such deputy's principal. Tenn. Code. Ann. § 8-18-112.

All deputies, with the exception of those "who may be employed in particular cases only." must fulfill all the above-mentioned statutory requirements.

The attached "Oath of Deputy Sheriff" shows that officer Jason Mynatt was involved in investigations of Mr. Bolton for over a year prior to taking his official Oath. See Exhibit 1.

In other words, it appears that Detective Jason Mynatt was acting without proper authority to act as a law enforcement officer since his Oath was not completed until June 1, 2012. The Tennessee Bureau of Investigation submitted an official Forensic Chemistry Report to Jason Mynatt on September 8, 2011-also prior to his June 2012 swearing-in date. See Exhibit 2.

Officer Kristopher Mynatt, who was involved in the case against Defendant Bolton, also appears to have an improperly administered Oath pursuant to the Tennessee Sheriff's Department Handbook and Tenn. Code Ann. § 8-8-104 since the Oath did not contain explicit language prohibiting him from accepting fees, gifts, bribes, or gratuities in the future. See Exhibit 3.

Defendant Bolton argues that the Indictment should be Dismissed since the underlying charges were wrongfully obtained by Police Misconduct. United States v. Huff, 2011 WL

2414553(E.D. Tenn. June 10, 2011)(citing Hamling v. United States, 418 U.S. 87,117(1974; United States v. Landham, 251 F.3d 1072,1079(6th cir. 2001)).

Bolton is entitled to dismissal of the Indictment since his due process rights were violated by the outrageous conduct of Defective Jason Mynatt and any other who have not complied with the requirements pertaining to Oaths previously referenced in His Motion To Dismiss Indictment in [Doc. 337] and [Doc. 358]. Due process constitutes grounds for dismissal of indictment when "the conduct of law enforcement from invoking judicial processes to obtain a conviction. Defendant asserts that in case at issue, alleged Sheriff's deputy Detective Jason Mynatt actions in the absence of the Mandatory Oath of office amounts to outrageous conduct under the totality of the circumstances, particularly since Jason Mynatt had acted in investigations of Bolton years prior and should have known he had no authority to do so.

The Due Process Clause of the Fourteenth Amendment effectively prevents state and local government Officials from depriving Defendant Bolton of "Life, Liberty, or property" without legislative authorization; accordingly, Petitioner Bolton could not be deprived of his liberty to communicate privately without the involvement of Detective Mynatt, who was merely a citizen since he did not take an officer Oath prior to commencing his duties. Detective Mynatt, who critical on establishing the prosecution's case against Defendant Bolton, took advantage of Defendant exercise of his right to privacy in communications by using a confidential source to intercept them without authority to do so. Since Detective Mynatt knew that he had not taken the officer Oath as required by State Statute, his actions were unreasonable and violated the rights of Defendant Bolton.

The performance of Mr. Greene was deficient by not filing a Anders brief and filing a notice of appeal. Mr. Bolton asserts that he was denied effective assistance of counsel due to appeal the denial of "MEMORANDUM OPINION AND ORDER" by CHIEF UNITED STATES THOMAS A. VARLAN on [Doc. 425] concerning Motion To Dismiss Indictment on [Doc. 337] and [Doc. 358]. For counsels unprofessional errors the result of the proceedings would have been different. In the context of conviction by guilty plea for errors, Defendant would have not have pleaded guilty and would have insisted on going to trial. This was a fundamental defect on the proceeding of Mr. Greene that results in a complete Miscarriage of Justice of egregious error violative of due process. See Gall v. United States, 21 F.3d. 107,109(6th cir. 1994) Citing United States v. Ferguson, 918 F.2d. 627,630(6th cir. 1990).

ARGUMENT SIX

Mr. Greene was ineffective where he did not have appropriate licenses needed to represent the Defendant. The lack of counsel not having Circuit Bar Membership was a Constitutional error of Defendants pre-trial proceedings that violated his rights of Fifth, Sixth, and Fourteenth Amendment of the United States Constitution depriving Mr. Bolton of "Life, Liberty, and Freedom since counsel never complied with all requirements to practice Federal law in the States of Tennessee failing to have Bar membership commencing his duties as Attorney even when he knew that he was not with federal law.

Defendant respectfully requested for the Government of District Court verify that Mr. Greene complied with all the requirements to practice Federal law in the State of Tennessee. Requesting this in Memorandum of Law In Support of Motion To Vacate, Set Aside and Correct a sentence under 28 U.S.C. § 2255, pro se Motion on [Doc. 779]. The government on [Doc. 789] and District Court Chief Judge Varlan on [Doc. 809] failed to respond to this argument or verify Counsel Mr. Greene to have proper requirements to Practice Federal Law in the State of Tennessee to be licensed with the Bar Association of Sixth Circuit at the time of representation of Mr. Bolton at pre-Trial proceedings.

This is ineffective assistance of counsel and is violating the rights of Defendant Bolton's Sixth Amendment and also of Fifth and Fourteenth Amendments of the Due Process Clause of the United States Constitution. Counsel's pre-Trial proceedings result's in a complete Miscarriage of Justice.

CONCLUSION

For the reasons set forth hereinabove, the Defendant, Brad 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 consideration 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 of 188-235 months; and/or

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

Respectfully submitted this 6th day of December, 2017.

Brad Bolton pro-se
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