NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Johnson v. United States, 135 S. Ct. 2551 (2015), deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony"). The residual clause invalidated in *Johnson* is identical to the residual clause in the career-offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2) (defining "crime of violence").

The questions presented are:

1. Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)?

2. Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

3. Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Travis Beckles respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion reaffirming its denial of Mr. Beckles's 28 U.S.C. § 2255 motion to vacate judgment notwithstanding *Johnson v. United States*, 135 S. Ct. 2551 (2015), is reported at 616 Fed. Appx 415 (11th Cir. 2015), and included in the Appendix at A-1. The Eleventh Circuit's unreported order denying Mr. Beckles's petition for rehearing en banc is included in the Appendix at A-2.

This Court's decision granting Mr. Beckles's petition for writ of certiorari, vacating the Eleventh Circuit's prior decision denying his § 2255 motion, and remanding for reconsideration in light of *Johnson* is reported at 135 S. Ct. 2928 (2015), and included in the Appendix at A-3. The Eleventh Circuit's unpublished pre-*Johnson* opinion affirming the denial of Mr. Beckles's § 2255 motion is reported at 579 Fed. Appx. 833 (11th Cir. 2014), and included in the Appendix at A-4.

The District Court's unpublished order granting the government's motion for reconsideration and denying Mr. Beckles's § 2255 motion is included in the Appendix at A-5. The District Court's unpublished order granting Mr. Beckles's § 2255 motion and ordering resentencing is included in the Appendix at A-6. The magistrate judge's unpublished report recommending denial of Mr. Beckles's § 2255 motion is included in the Appendix at A-7.

The Eleventh Circuit's published opinion affirming Mr. Beckles's conviction and sentence on direct appeal is reported at 565 F.3d 832 (11th Cir. 2009), and included in the Appendix at A-8.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the district court's denial of Mr. Beckles's 28 U.S.C. § 2255 motion was entered on September 29, 2015. The court of appeals denied Petitioner's timely petition for rehearing *en banc* on February 11, 2016. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Section 924(e)(2)(B) of Title 18 states, in pertinent part:

§ 924. Penalties

* * *

(e)(2) As used in this subsection –

* * *

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . , that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; ...

18 U.S.C. § 924(e)(2)(B).

United States Sentencing Guideline 4B1.1(a) states, in pertinent part:

§ 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37

(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than one year, but less than 5 years	12.

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.1(a).

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(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 an 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.

* * *

Commentary

Application Notes:

1. For purposes of this guideline –

* * *

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a "crime of violence."

* * *

U.S.S.G. § 4B1.2.

INTRODUCTION

Johnson v. United States, 135 S. Ct. 2551 (2015), held unconstitutionally vague the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States*, No. 15-6418 (U.S. cert. granted Jan. 8, 2016), this Court will decide whether *Johnson* announced a new "substantive" rule of constitutional law retroactively applicable to cases on collateral review. *Welch*, however, will consider that issue in the context of a 28 U.S.C. § 2255 motion brought by a federal prisoner challenging an ACCA-enhanced sentence. This petition presents the closely-related question whether *Johnson* applies retroactively to collateral cases brought by federal prisoners, like Petitioner, who challenge federal sentences enhanced under the identically-worded and analytically-indistinct residual clause contained in the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2).

Specifically, this petition presents three critical questions requiring the Court's prompt resolution: (1) whether *Johnson* applies retroactively in the context of the Guidelines's residual clause; (2) whether *Johnson* renders the Guidelines's residual clause void for vagueness, such that *Johnson*-based challenges in that context are cognizable in § 2255 proceedings; and (3) whether, post-*Johnson*, a federal sentence may nonetheless be enhanced for mere possession of a sawed-off shotgun because that offense is listed as a crime of violence in the Guidelines commentary.

Prompt resolution of these issues is required because the one-year statute of limitations governing collateral *Johnson* claims will expire on June 26, 2016. Given

the looming statute of limitations, the Court should resolve these issues this Term for many of the same reasons it granted *certiorari* and expedited briefing in *Welch*. Indeed, depending on the Court's decision in *Welch*, a *per curiam* opinion on these issues without full briefing or oral argument may be appropriate. Regardless, this petition affords the Court an opportunity to decide all three of these important questions this Term, and thereby provide critical guidance to lower courts likely to be confronted between now and June 26, 2016 with thousands of § 2255 motions filed by federal prisoners whose sentences were enhanced using the Guidelines's residual clause.

STATEMENT OF THE CASE

1. In 2007, after a Miami detective placed Mr. Beckles in a police car outside his girlfriend's apartment, the girlfriend asked the detective to remove a gun from the bedroom. The detective searched the bedroom but was unable to find a gun. After questioning Mr. Beckles, the detective again searched the bedroom but was still unable to find a gun. Finally, the detective took Mr. Beckles into the apartment, and Mr. Beckles helped the officer recover a shotgun from under a mattress. A jury later convicted Mr. Beckles of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

2. The Presentence Investigation Report concluded that the unlawful possession of a sawed-off shotgun qualified as a "crime of violence," under U.S.S.G. § 4B1.2(a), and because Mr. Beckles had two prior felony convictions (for controlled

substance offenses that are not at issue in the instant petition), his sentence should be enhanced under the career offender provision found in U.S.S.G. § 4B1.1.

Possession of a sawed-off shotgun is listed as a "crime of violence" not in the text of the guideline itself, but in the commentary found in Application Note 1 to § 4B1.2. That commentary states, in pertinent part, that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence'." U.S.S.G. § 4B1.2 cmt. n.1. That offense was included as a "crime of violence" in the commentary to § 4B1.2 in 2004 by the United States Sentencing Commission because, at that time,"[a] number of courts ha[d] held that possession of certain . . . firearms, such as a sawed-off shotgun, is a 'crime of violence' due to the serious potential risk of physical injury to another person." U.S.S.G. App. C, amend. 674 (Nov. 1, 2004).

When Congress established the Sentencing Guidelines and the United States Sentencing Commission, it directed the Commission to "assure that the guidelines" for prisoners who qualify as career offenders "specify a sentence to a term of imprisonment at or near the [statutory] maximum authorized." 28 U.S.C. § 994(h). Section 4B1.1 of the Sentencing Guidelines implements this directive. *See* U.S.S.G. § 4B1.1 & cmt. n.3. As a result, the career offender enhancement dramatically escalates federal sentencing ranges under the Sentencing Guidelines. Here, Mr. Beckles's guideline imprisonment range without the career offender enhancement was 180 months.[1] As a career offender,

[1] Mr. Beckles's guideline sentencing range was 180 months because the PSI also concluded that he had three prior drug offenses that required imposition of a

his guideline imprisonment range increased to 360 months to life, and the district court sentenced him to a 360-month term of imprisonment.[2]

3. On direct appeal, the United States Court of Appeals for the Eleventh Circuit rejected Mr. Beckles's argument that his sentence was wrongly enhanced under the career offender provision in § 4B1.1 because possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a). *United States v. Beckles*, 565 F.3d 832, 842-44 (11th Cir. 2009). In reaching this conclusion, the court of appeals relied upon the commentary found in Application Note 1 to § 4B1.2. *See id*. at 842. This Court denied Mr. Beckles's petition for writ of certiorari. *Beckles v. United States*, 130 S. Ct. 272 (2009).

4. Mr. Beckles timely filed a 28 U.S.C. § 2255 motion to vacate sentence in which he argued that possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a) and he was therefore wrongly sentenced as a career offender. The motion was referred to a magistrate judge who issued a report recommending that the motion be denied because Mr. Beckles's challenge to his career offender enhancement was not cognizable in a § 2255 motion. App. A-7 at 13-34. In March 2013, however, the district court sustained Mr. Beckles's objections to the magistrate judge's report, and determined that Mr. Beckles's challenge was cognizable. App. A-3, *passim*.

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mandatory-minimum 15-year sentence as an armed career criminal under 18 U.S.C. § 924(e). Mr. Beckles's ACCA enhancement is not at issue in this petition.

[2] The district court later reduced Mr. Beckles's term of imprisonment to 216 months for reasons not relevant here.

Because the government had not contested Mr. Beckles's argument that possession of a sawed-off shotgun did not qualify as a crime of violence under U.S.S.G. § 4B1.2(a), *id*. at 11, the district court concluded that Mr. Beckles's sentence was wrongly enhanced under the career offender provision, granted the motion, *id*. at 18, and ordered that Mr. Beckles be resentenced without the career offender enhancement.

While Mr. Beckles awaited resentencing by the district court, however, the Eleventh Circuit decided *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013). *Hall* held U.S.S.G. § 4B1.2's commentary stating that possession of a sawed-off shotgun qualifies as a "crime of violence" is binding on the federal courts under *Stinson v. United States*, 508 U.S. 36 (1993):

> Although we would traditionally apply the categorical approach to determine whether an offense qualifies as a "crime of violence," we are bound by the explicit statement in the commentary that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun . . .) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n.1. Hall does not satisfy either of *Stinson*'s stringent exception requirements, as the commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent with, or a plainly erroneous reading of, the guideline text itself. Moreover, because the commentary to § [4B1.2] defines "crime of violence" very differently than the ACCA does, . . . we cannot say that the definition of 'crime of violence' provided in the commentary to § [4B1.2] is a plainly erroneous reading of the guideline.

Id. at 1274 (first ellipsis added; internal quotation marks omitted).

The government moved the district court to reconsider its decision granting Mr. Beckles's § 2255 motion in light of *Hall*. On June 14, 2013, the district court granted

reconsideration, set aside its prior final judgment in Mr. Beckles's § 2255 proceeding, and denied his § 2255 motion. App. A-5.

5. Mr. Beckles appealed the denial of his § 2255 motion to the Eleventh Circuit, and argued that possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a). He acknowledged, however, the prior contrary ruling in *Hall*. On September 5, 2014, the Eleventh Circuit issued a *per curiam* opinion affirming the district court's denial of Mr. Beckles's § 2255 motion, noting that it had already ruled on the issue in *Hall*:

> In *Hall*, we decided that possession of an unregistered sawed-off shotgun, as defined by 26 U.S.C. § 5861(d), qualifies as a 'crime of violence' under § 4B1.2(a), based on the commentary to that guideline provision. *Hall*, 714 F.3d at 1273. We explained that the commentary was controlling . . . because the commentary did not violate the Constitution or federal statute, and was not inconsistent with, or a plainly erroneous readying of, the guideline text. *Id*. at 1273-74.
>
> Here, Beckles's claim fails on the merits under *Hall*, and we are bound by that decision.

App. A-4 at 4.

6. After this Court granted review in *Johnson* on the question of whether possession of a sawed-off shotgun was a "violent felony" under the ACCA, Mr. Beckles petitioned for writ of certiorari on the closely-related question of whether that same offense qualified as a crime of violence under § 4B1.2(a)(2). *See Travis Beckles v. United States*, No. 14-7390, Cert. Ptn. at i (U.S. filed Dec. 2, 2014). After this Court decided *Johnson*, it granted the writ, vacated the Eleventh Circuit's judgment, and

remanded Mr. Beckles's case to the court of appeals for further consideration in light of that decision. *Beckles v. United States*, 135 S. Ct. 2928 (2015); App. A-3.

7. Post-*Johnson*, but before it considered Mr. Beckles's case on remand, the Eleventh Circuit effectively limited the scope of collateral relief available to federal prisoners under that decision by holding that the Sentencing Guidelines cannot be unconstitutionally vague, and thus rejected a *Johnson*-based challenge to the residual clause in U.S.S.G. § 4B1.2(a)(2). *See United States v. Matchett*, 802 F.3d 1185, 1194-96 (11th Cir. 2015), *ptn. for rhg. en banc filed* (October 13, 2015).

8. Eight days after it decided *Matchett*, the Eleventh Circuit again rejected Mr. Beckles's challenge to his career offender sentence. *See Beckles v. United States*, 616 Fed. Appx. 415 (11th Cir. 2015) (*per curiam*); App. A-1. As it did pre-*Johnson*, the court of appeals cited to *Hall* and Application Note 1 in the commentary to § 4B1.2 to support its conclusion that "Beckles's offense of conviction – unlawful possession of a sawed-off shotgun – constitutes a 'crime of violence' under [U.S.S.G. §] 4B1.1." App. A-1 at 2. Without citing *Matchett*, the Eleventh Circuit specifically determined that *Johnson* was inapposite, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") – does not control this appeal. Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a 'crime of violence.' *Johnson* says and decides nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

> Our decision in *Hall* remains good law and continues to control this appeal.

App. A-1 at 3.

9. On January 8, 2016, this Court granted the petition for writ of certiorari in *Welch v. United States*, No. 15-6418. *Welch* presents the question whether *Johnson* applies retroactively for purposes of an initial § 2255 motion challenging an ACCA-enhanced sentence.

10. On the same day that this Court granted the petition in *Welch*, the United States Sentencing Commission voted to amend the Sentencing Guidelines by deleting the residual clause from § 4B1.2(a)(2). However, the Commission voted *not* to make that forthcoming amendment retroactively applicable. *See* U.S. Sentencing Comm'n, *Proposed Amendment: "Crime of Violence" and Related Issues* (Jan. 8, 2016), available at www.ussc.gov.

11. On February 11, 2016, the Eleventh Circuit denied Mr. Beckles's timely petition for rehearing *en banc*, and on February 19, 2016, issued its mandate.

REASONS FOR GRANTING THE WRIT

I. Whether *Johnson* applies retroactively in the context of the Guidelines's residual clause presents an important question warranting this Court's prompt consideration.

A. Prompt resolution of the retroactivity question will help avoid confusion in the lower courts and the needless expenditure of scarce judicial resources.

The Court should decide *Johnson*'s retroactivity in the Guidelines context this Term for the same pressing reason it was urged to do so in the ACCA context. Specifically, there is an ever-shortening one-year statute of limitations, requiring federal prisoners to file any *Johnson*-based § 2255 motion by June 26, 2016 – one year from the date *Johnson* was decided. Critically, that deadline remains fixed even if the Court were to hold in a later case that *Johnson* did indeed apply retroactively in the Guidelines context. *See* 28 U.S.C. § 2255(f)(3); *Dodd v. United States*, 545 U.S. 353, 357 (2005). Due to the statute of limitations, it is likely that thousands of federal prisoners whose sentences were enhanced under § 4B1.2(a)(2)'s residual clause will be forced to file § 2255 motions between now and June 26, 2016, in order to preserve their potential right to relief under *Johnson*. Those filings, the vast majority of which would be *pro se*, will place a great strain on the federal judiciary. *See infra*, § I.B. (discussing data).

The retroactivity question takes on added significance in light of the United States Sentencing Commission's proposed amendment to § 4B1.2, which, absent action by Congress, will take effect August 1, 2016. That amendment will delete the residual clause from § 4Bl.2(a)(2), but the Commission voted not apply the amendment retroactively. It therefore provides federal prisoners no avenue for relief from their potentially unconstitutional Guidelines sentences.

Welch is unlikely to decide the retroactivity question for those federal prisoners who were sentenced under the Guidelines's residual clause because Welch's *Johnson* claim arises in the ACCA context. Although in *Welch* the government agrees that *Johnson* applies retroactively to ACCA cases on collateral review, it specifically argues that *Welch* "does not present any issue" concerning *Johnson*'s retroactive application to Guidelines cases on collateral review. *Welch v. United States*, No. 15-6418, U.S. Brief at 38 n.9 (U.S. Feb. 9, 2016). And, in its *Welch* brief, the government notes that it has argued to lower courts "that *Johnson* is not entitled to retroactive effect" in Guidelines cases on collateral review because, in its estimation, "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing." *Id*. This position, however, is directly contrary to lower court decisions, which have consistently held that new rules narrowing the ACCA's residual clause apply retroactively in Guidelines cases.[3]

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[3] *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); *Narvaez v. United States*, 674 F.3d 621, 625-26 (7th Cir. 2011) (holding that because *Begay* and *Chambers v. United States*, 555 U.S. 122 (2009), announced

It is also directly contrary to the government's own, pre-*Johnson* position in litigation across the country regarding the retroactive application of this Court's ACCA residual clause decisions to Guidelines cases. For example, according to the Appellate Section of the Department of Justice just two years ago, this Court's decision in *Begay* "applies retroactively to ACCA cases, mandatory guidelines cases, and advisory guidelines 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). Then, the government emphasized that "*Begay*'s status as a substantive rule is fixed," and "does not fluctuate based on whether the prisoner is challenging an ACCA enhancement, a mandatory guidelines enhancement, or, as here, an advisory guidelines enhancement." *Id*. at 15. At that time, the government was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id*. at 15. Rather, in the government's pre-*Johnson* estimation, "a rule either is or is not substantive." *Id*.

As a result of the government's newfound position on retroactivity, even if the Court holds in *Welch* that *Johnson* applies retroactively in ACCA cases, there will likely be divergent lower court decisions as to *Welch*'s implications in Guidelines cases.

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substantive rules, those rules apply retroactively in Guidelines cases); *Brown v. Caraway*, 719 F.3d 583, 594–95 (7th Cir. 2013) (same); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189 (9th Cir. 2011) (holding that because its decision limiting the definition of burglary under the ACCA was substantive, it applies retroactively in Guidelines cases); *Rozier v. United States*, 701 F.3d 681 (11th Cir. 2012) ("The government concedes, and we take it as a given, that the Supreme Court's" decision interpreting the ACCA's elements clause "is retroactively applicable" in Guidelines cases.).

In the ACCA context, the courts of appeals divided on whether *Johnson* applied retroactively to both initial and successive § 2255 motions, notwithstanding the government's concession that it did. There is little reason to anticipate greater uniformity in the Guidelines context, where the government opposes retroactivity. And once those the likely divisions among the lower courts occur, the retroactivity question will eventually make its way to this Court. But – absent prompt intervention – it will not arrive until after the statute of limitations has run on June 26, 2016. In the meantime, that issue would be litigated in thousands of cases, likely resulting in confusion in the lower courts, and thousands of federal prisoners left in legal limbo.

Delaying a decision on this critical issue would be particularly troubling given the heightened stakes. If those sentenced under the Guidelines's residual clause are eligible for *Johnson* relief, then many would be entitled to significant relief, including potential release. Those prisoners should not be forced to sit idle through another round of protracted litigation merely to learn whether their *Johnson* claim will be considered on the merits. And federal courts should not be burdened with litigation of the retroactivity question in thousands of cases where this Court could resolve that question once and for all prior to the June 26th deadline, obviating the need to tax the judiciary's scarce resources.

Of course, the one-year statute of limitations does not create an insurmountable obstacle for those federal prisoners who have never filed a § 2255 motion. Those prisoners may file an initial § 2255 motion raising a *Johnson*-based claim before June 26, 2016 and benefit from any subsequent ruling by this Court on retroactivity.

However, those federal prisoners who have filed a previous § 2255 motion may well be precluded from obtaining *Johnson* relief absent a prompt retroactivity decision from this Court. Those in a successive posture must first obtain authorization from the court of appeals before filing a § 2255 motion in the district court, and yet they cannot receive such authorization in the absence of a holding by this Court on the retroactivity question. *See* 28 U.S.C. § 2255(h)(2); *Tyler v. Cain*, 533 U.S. 656 (2001).

Accordingly, if the Court in *Welch* rules that *Johnson* applies retroactively in Guidelines cases, but does so *after* the limitations period elapses on June 26, 2016, any authorization from the court of appeals to file a successive § 2255 motion based on that decision will likely be for naught, because the motion will be deemed untimely. This quandary creates a substantial risk that, unless the Court decides this Term whether *Johnson* applies retroactively not only in the ACCA context, but also in the context of the Sentencing Guidelines, countless federal prisoners in the successive posture who seek to challenge the enhancement of their sentence under the Guidelines's residual clause may be left with no recourse except an original habeas petition filed in this Court. That would place a substantial burden on this Court's limited resources.

B. Whether *Johnson* applies retroactively to Guidelines cases is a question of great public importance.

The judicial efficiency concerns discussed above are particularly acute given the number of prisoners sentenced under § 4B1.2(a)(2)'s residual clause, which dwarfs the total number of prisoners sentenced under the ACCA. It is estimated that only 6,000

prisoners in total have been sentenced under the ACCA. *See* Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. Sidebar 55, 56 (2015). However, for each year from 1996 to 2011, the number of federal prisoners sentenced as career offenders under § 4B.l.1 ranged from a low of 909 to a high of 2,294, with that number exceeding 2,000 every year since 2006. U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, pt. C: Career Offenders, at 9 (Dec. 2012). Importantly, these figures do not include the many other federal prisoners who, while not career offenders, were nonetheless sentenced under § 4Bl.2(a)(2)'s residual clause, since that clause is incorporated throughout the Guidelines. *See, e.g.*, U.S.S.G. §§ 2Kl.3 & cmt. n.2 (explosive materials); 2K2.l & cmt. n.1 (firearms); 2Sl.1 & cmt. n.1 (money laundering); 4Al.l(e) & 4Al.2(p) (criminal history); 5K2.17 & cmt. n.1 (departure for semi-automatic firearms); 7Bl.l(a)(l) & cmt. n.2 (probation and supervised release). Thus, the question of whether *Johnson* applies retroactively in Guidelines cases has the potential to affect thousands of federal prisoners who were sentenced under § 4Bl.2(a)(2)'s residual clause.

Finally, persons sentenced as career offenders under the Guidelines's residual clause are serving lengthy sentences. *See* 28 U.S.C. § 994(h) (directing the Commission to "assure that the guidelines" for career offenders "specify a sentence to a term of imprisonment at or near the maximum authorized"); U.S.S.G. § 4B1.1 & cmt. n.3 (noting that career offender guideline implements Congress's directive set forth in

§ 994(h)). Mr. Beckles's career-offender designation increased his guideline range by 15 years to life. If *Johnson* applies retroactively to those, like Mr. Beckles, who are sentenced under § 4Bl.2(a)(2)'s residual clause, thousands of federal prisoners may be entitled to significant relief.

C. This petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases.

Travis Beckles's petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases. As *Welch* will do for federal prisoners sentenced under the ACCA, this Court's resolution of the retroactivity question in the context of Mr. Beckles's first § 2255 motion will also "make" *Johnson* retroactive (or not) under § 2255(h)(2), and thus also conclusively resolve the retroactivity issue for those federal prisoners raising *Johnson*-based challenges to Guidelines sentences who are litigating second or successive motions.

Moreover, other petitions presenting the question of whether *Johnson* applies retroactively to Guidelines cases are unlikely to be filed this Term because the lower courts are staying both ACCA and Guidelines cases pending the decision in *Welch*. Petitioner is aware of only two other cases, one pending in this Court and one forthcoming, that also present the issue of *Johnson*'s retroactive application in Guidelines cases: *In re Gilberto Rivero*, No. 15-7776 (U.S. filed January 14, 2016), an original habeas matter in which the Court has ordered a response from the United

States that is currently due on April 1, 2016; and *United States v. Alfrederick Jones*, No. 14-2882 (3d Cir. reh'g denied Jan. 22, 2016), a forthcoming petition for writ of certiorari from the Third Circuit's denial of a certificate of appealability. Mr. Beckles urges the Court to accept review in *Rivero* or *Jones* and decide this important issue this Term if it does not do so here.

II. Whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4B1.2(a)(2)'s residual clause – that is, whether *Johnson* claims are cognizable in Guidelines cases – presents an important question warranting this Court's prompt intervention.

A. The reasons compelling resolution of the retroactivity question this Term equally compel resolution of the cognizability question this Term.

To be eligible for collateral relief, prisoners whose sentences were enhanced under § 4Bl.2(a)(2)'s residual clause not only need *Johnson* to apply retroactively, but also need their *Johnson*-based challenge to be "cognizable" in a collateral proceeding. The question of cognizability in the Guidelines context ultimately turns on whether *Johnson*'s constitutional holding applies to § 4Bl.2(a)(2)'s residual clause. If so, the prisoners would have a constitutional, and thus cognizable, claim under § 2255(a). *See Hill v. United States*, 368 U.S. 424, 426-28 (1962). But if not, then not. *See Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (*en banc*) (holding that nonconstitutional Guideline errors are not cognizable on collateral review because they

do not amount to a miscarriage of justice). Because retroactivity and cognizability both serve as independent prerequisites to collateral relief, this Court should consider both questions together.

Moreover, all of the considerations above explaining why resolution of the retroactivity question is necessary this Term also apply to the cognizability question. If the Court affirmatively resolves the cognizability question in a subsequent Term, then those prisoners in the successive posture will be forced to file original habeas petitions in order to benefit from that ruling given the statute of limitations. And if the Court negatively resolves that question in a subsequent Term, then lower courts would needlessly be inundated with an avalanche of pro se litigation in the interim.

B. The circuits are divided on whether *Johnson* applies to the Guidelines's residual clause.

Whether *Johnson* applies to the Guidelines's residual clause has already generated a split in the circuit courts. In *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), the Eleventh Circuit rejected the government's concession that *Johnson* applied to the residual clause in § 4Bl.2(a)(2), holding instead that the advisory Guidelines were not susceptible to a vagueness challenge. That ruling stands alone among the circuits.

The Tenth Circuit has rejected *Matchett* as unpersuasive and squarely held that, in light of *Johnson*, "the residual clause of § 4Bl.2(a)(2) is void for vagueness." *United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015). The Third Circuit has done

the same. *United States v. Townsend*, ___ Fed. Appx. ___, 2015 WL 9311394, at *4 & n.14 (3d Cir. Dec. 23, 2015). In addition, the First, Second, Sixth, and Eighth Circuits have all either concluded that *Johnson* applies to the Guidelines, or vacated and remanded for resentencing in light of the government's concession that it does. *See, e.g., United States v. Soto-Rivera*, 811 F.3d 53, 58 (1st Cir. 2016); *United States v. Maldonado*, ___ Fed. Appx. ___, 2016 WL 229833 (2d Cir. 2016); *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015); *United States v. Grayer*, 625 Fed. Appx. 313, 315 (6th Cir. 2015).

Although *Matchett* and the cases that stand in conflict with it were all decided on direct appeal, they bear directly on the cognizability question at issue here. If *Matchett* is left undisturbed, then hundreds if not thousands of federal prisoners in the Eleventh Circuit will be categorically barred from seeking relief based on *Johnson*, whether on direct appeal or in collateral proceedings.

In light of the circuit split, geography alone determines a prisoner's ability to seek relief under *Johnson*. For example, had Mr. *Beckles* been sentenced in the Tenth Circuit, his *Johnson* claim would be cognizable on collateral review. In the Eleventh Circuit, however, it is not. This Court's immediate intervention is necessary to ensure uniformity on this important question of law.

C. The Eleventh Circuit's anomalous decision is clearly wrong.

Further compelling review is that *Matchett* was wrongly decided. In appellate courts around the country, the government has affirmatively set forth its well-

considered national position "that *Johnson*'s constitutional holding regarding the ACCA's residual clause applies to the identically worded clause of the career offender guideline." *United States v. Madrid*, U.S. Brief, 2015 WL 4985890, *3 (10th Cir. August 2015) (No. 14-2159). After all, the two residual clauses are not only identically worded, but have always been interchangeably interpreted. *Id*. at *3-4 (citing cases). This Court itself did so in *Johnson*, relying on Guidelines cases to illustrate the vagueness of the ACCA's residual clause. *See* 135 S. Ct. at 2560 (citing Guidelines decisions in *United States v. Whitson*, 587 F.3d 1218 (11th Cir. 2010) (*per curiam*); *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009); *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013); and *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010)).

Any doubt that *Johnson*'s constitutional holding applies to the Guidelines is eliminated by *Peugh v. United States*, 133 S. Ct. 2072 (2013), which held that the retrospective application of the advisory Guidelines violated the Ex Post Facto Clause. *Id*. at 2078. The Court emphasized that the Guidelines, while advisory, nonetheless remained the "lodestone" and "anchor" of the sentencing regime, and are subject to constitutional constraints. *Id*. at 2083-87. When read together, *Johnson* and *Peugh* compel the conclusion that *Johnson* applies to the Guidelines.

In reaching the contrary conclusion, the Eleventh Circuit in *Matchett* inexplicably relied entirely on decisions from other circuits that pre-dated both *Peugh* and *Johnson*. *See Matchett*, 802 F.3d at 1194-96 (citing, *e.g.*, *United States v. Tichenor*,

683 F.3d 358 (7th Cir. 2012), *United States v. Smith*, 73 F.3d 1414 (6th Cir. 1996); and *United States v. Wivell*, 893 F.3d 156 (8th Cir. 1990)). Those decisions adopted a cramped view of the vagueness doctrine, limiting it to laws proscribing conduct. *See, e.g., Wivell*, 893 F.2d at 159-60. But *Johnson* made clear that the doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." 135 S. Ct. at 2557. *Matchett* also adopted those circuits' pre-*Peugh* reasoning that the Guidelines were not susceptible to vagueness challenges because they were "merely" the starting point, and that a "'sentencing judge's authority to exercise discretion distinguishes the Guidelines from criminal statutes in a significant and undeniable manner.'" *Matchett*, 802 F.3d at 1194 (quoting *Tichenor*, 683 F.3d at 365). That reasoning is fundamentally irreconcilable with *Peugh*.

Not only did *Matchett* embrace abrogated reasoning, but it did not even attempt to follow *Peugh* and *Johnson*. *Matchett* cited *Peugh* only once and stated that it "in no way inform[ed]" its analysis. *Id*. at 1195. And, as the Tenth Circuit noted when it declined to follow *Matchett*, the Eleventh Circuit mischaracterized *Johnson* as being grounded exclusively in notice concerns, thereby failing to "address the 'arbitrary enforcement by judges' with which *Johnson* was concerned." *Madrid*, 805 F.3d at 1212 n.10.

Tellingly, the very courts that issued the pre-*Peugh* decisions on which *Matchett* relied are not following those decisions. The Sixth and Eighth Circuits have granted relief post-*Johnson* to those sentenced under § 4Bl.2(a)(2)'s residual clause,

notwithstanding their prior precedents holding that the Guidelines are not susceptible to a vagueness challenge. *See, e.g., Taylor*, 803 F.3d at 933-34 (Colloton, J., dissenting) (criticizing majority for declining to follow circuit precedent without convening *en banc* to overrule it); *United States v. Grayer*, 625 Fed. Appx. at 315. Indeed, since *Johnson*, the Eighth Circuit has stated that "[t]he reasoning in *Wivell* that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful." *Taylor*, 803 F.3d at 933. In short, *Matchett* flouts this Court's decisions in both *Johnson* and *Peugh*, and relies on out-of-circuit precedent that is no longer followed by those circuits post-*Johnson*. It is unpersuasive on its face, and this Court should not permit it to stand.

Moreover, this split is intractable. A petition for rehearing *en banc* was filed in *Matchett* on October 13, 2015, but has languished before the Eleventh Circuit. Nonetheless, that court has treated it as a final decision, issuing at least six decisions relying on or applying *Matchett* after the rehearing petition was filed, strongly indicating that rehearing will be denied.[4]

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[4] *United States v. Casamayor*, ___ Fed. Appx. ___, 2016 WL 722892 (11th Cir. Feb. 24, 2016); *United States v. Kirk*, ___ Fed. Appx. ___, 2016 335937 at *1 (11th Cir. Jan. 28, 2016); *United States v. Brown*, ___ Fed. Appx. ___, 2015 WL 9301410 (11th Cir. Dec. 22, 2015); *United States v. Collins*, 624 Fed. Appx. 725, 726 (11th Cir. 2015); *United States v. Dixon*, 622 Fed. Appx. 892 (11th Cir. 2015); *United States v. Walker*, ___ Fed. Appx. ___, 2015 WL 7074646, at *2-3 (11th Cir. 2015); *Denson v. United States*, 804 F.3d 1339, 1343 (11th Cir. 2015), *cert. denied*, ___ S. Ct. ___, 2016 WL 763612 (Feb. 26, 2016).

D. This petition squarely presents the cognizability issue.

Not only does this petition squarely present the retroactivity question; it also squarely presents the cognizability question. Mr. Beckles's eligibility for relief hinges on his challenge to his career offender enhancement being cognizable on collateral review.

Although the Eleventh Circuit did not mention *Matchett* in its decision on remand from this Court for reconsideration in light of *Johnson*, it nonetheless concluded that *Johnson* had no impact on Guidelines sentences, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") does not control this appeal. Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

Beckles v. United States, 616 Fed. Appx. 415, 416 (11th Cir. 2015); A-1 at 3. Thus, the court below expressly limited *Johnson* to sentences imposed under the ACCA.

Moreover, the decision below is grounded in U.S.S.G. § 4B1.2(a)(2)'s residual clause. In rejecting Mr. Beckles's claim for relief under *Johnson*, the Eleventh Circuit explicitly relied on U.S.S.G. § 4B1.2's Application Note 1 to conclude that possession of a sawed-off shotgun constitutes a "crime of violence." Specifically, the Eleventh Circuit cited its earlier decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), to state "the Guidelines commentary in U.S.S.G. § 4B1.2 is binding and, thus,

. . . possession of a sawed-off shotgun qualifies as a 'crime of violence.'" *Beckles*, 616 Fed. Appx. at 416 (citing *Hall*, 714 F.3d at 1274).

In its pre-*Johnson Hall* decision, the Eleventh Circuit stated the question before it was "whether an offense [i.e., possession of a sawed-off shotgun] qualifies as a 'crime of violence' *under the* [*Guidelines's*] *residual clause*," and held that it did. *Hall*, 714 F.3d at 1273 (emphasis added). Thus, on remand post-*Johnson* below, when the Eleventh Circuit rejected the notion that *Johnson* is controlling, it did no more than reaffirm *Hall*. *Beckles*, 616 Fed. Appx. at 416 ("Our decision in *Hall* remains good law and continues to control this appeal."); A-1 at 3. Accordingly, the Eleventh Circuit's decision here is grounded in the residual clause in § 4B1.2(a)(2), and expressly rejects *Johnson*'s application to the Guidelines's residual clause. *See id*.

This holding, along with the continuing viability of *Matchett* in the Eleventh Circuit, precludes Mr. Beckles from obtaining § 2255 relief on his *Johnson* claim even if the Court were to independently resolve the retroactivity question in his favor. Thus, this petition presents the cognizability question, and this Court should decide that question, along with the question of *Johnson*'s retroactive application to the Guidelines's residual clause, this Term in this case.

III. Whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson* because it is listed in the commentary to U.S.S.G. § 4B1.2 is an important question warranting this Court's resolution.

Not only are the circuits divided as to whether *Johnson*'s constitutional holding applies to the Guidelines; they also are divided as to whether the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)," which is listed as a "crime of violence" in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*. This division is the latest iteration of an longstanding split in the circuits as to whether the commentary to § 4B1.2, standing alone, has its own definitional power, or whether it is only valid and authoritative if it interprets and is not inconsistent with a guideline's text. The Court's intervention is therefore required.

A. The circuits are divided as to whether, post-*Johnson*, the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)" is a "crime of violence" for purposes of § 4B1.2 because it is expressly listed as such in the commentary to that Guideline.

Application Note 1 to § 4B.12 states that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun)." U.S.S.G. § 4B1.2 cmt. n.1. The referenced statute, § 5845(a), provides various definitions of the term "firearm," and, as the parenthetical

in Application Note 1 indicates, explicitly includes sawed-off shotguns and machine guns. *See* 26 U.S.C. § 5845(a).

The Eleventh Circuit determined below post-*Johnson* that because Mr. Beckles was convicted of possession of a sawed-off shotgun, Application Note 1 to § 4B1.2 provided an independent basis for applying the career offender enhancement. *See Beckles*, 616 Fed. Appx. at 416; A-1 at 3 ("Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing . . . about the Guidelines commentary underlying Beckles's status as a career-offender."). The First Circuit, however, has expressly disagreed, holding that post-*Johnson*, the commentary in Application Note 1 provides no basis for concluding that possession of a firearm falls within § 4B1.2's definition of "crime of violence." *United States v. Soto-Rivera*, 811 F.3d 53, 61 (1st Cir. 2016).

In *Soto-Rivera*, the defendant was convicted of possession of a machine gun, which, like a sawed-off shotgun, is a "firearm" described in 26 U.S.C. § 5845(a), and therefore listed as a "crime of violence" in Application Note 1 to § 4B1.2. *Id*. at 59. The First Circuit – unlike the Eleventh Circuit in *Matchett* – accepted the government's "concession that *Johnson*'s reasoning applies just as well to the Guidelines as to the ACCA" and, with the understanding that "Soto-Rivera's Career Offender status may not be predicated upon the Guidelines's residual clause," determined that "in the absence of the residual clause, there is no textual hook in Guidelines § 4B1.2 to allow

for the conclusion that [Soto-Rivera's] possession of a firearm constituted a crime of violence." *Id.* at 59, 61.

In reaching its conclusion, the First Circuit noted that, under *Stinson v. United States*, 508 U.S. 36 (1993), "commentary 'interpret[ing] or explain[ing] a [G]uideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline.'" *Soto-Rivera*, 811 F.3d at 59 (quoting *Stinson*, 508 U.S. at 38) (brackets added in *Soto-Rivera*). That court therefore looked at the text § 4B1.2(a) stripped of its residual clause, and concluded that Application Note 1 was inconsistent with the guideline's remaining text. *Id.* at 60. First, the First Circuit determined, passive possession of a firearm – even a potentially dangerous one like a machine gun – did not qualify as a crime of violence under § 4B1.2(a)(1), because it did not have as an element the use, attempted use, or threatened use of physical force against the person of another. *See id.* (citing § 4B1.2(a)(1)). Next, it noted that "such possession is clearly not one of those specifically-enumerated crimes listed in U.S.S.G. § 4B1.2(a)(2)," *id.* – that is, it is not "burglary of a dwelling, arson, extortion, [or] involve[] use of explosives," § 4B1.2(a)(2).

Finally, the First Circuit rejected the argument that Application Note 1 was an independent basis for finding career offender status, noting that:

> doing so would be inconsistent with the post-*Johnson* text of the Guideline itself. By its clear language, once shorn of the residual clause, § 4B1.2(A) sets forth a limited universe of specific offenses that qualify as a "crime of violence." There is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of "crime of violence." With no such

> path available to us, doing so would be inconsistent with the text of the Guideline. Accordingly, we . . . reject the government's attempt to make use of § 4B.12(a)'s Application Note 1 to expand upon the list of offenses that qualify for Career Offender status.

Id.

No other circuit has considered whether possession of a firearm continues to qualify as a "crime of violence" due to Application Note 1 after *Johnson*. However, pre-*Johnson* decisions in the Fourth, Fifth, and Sixth Circuits expressly linked the question of whether possession of a sawed-off shotgun constituted a "crime of violence" to the residual clause. *See United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010) ("Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the 'residual' or 'otherwise' clause in § 4B1.2(a)(2)."); *United States v. Lipscomb*, 619 F.3d 474, 477 & n.3 (5th Cir. 2010) (holding possession of a sawed-off shotgun qualifies as a "crime of violence" only if it satisfies the residual clause); *United States v. Hawkins*, 554 F.3d 615, 618 (6th Cir. 2009) (holding Sentencing Commission's interpretation of the residual clause allowing possession of a sawed-off shotgun to qualify as a "crime of violence" was not clearly erroneous).

Therefore if, as the government concedes and the majority of circuits have concluded, *Johnson* applies to the Guidelines and excises the residual clause from § 4B1.2(a)(2), the only conclusion the Fourth, Fifth, and Sixth Circuits could reach is that possession of a sawed-off shotgun no longer qualifies as a "crime of violence" post-*Johnson*. They would therefore join the First Circuit in rejecting the Eleventh Circuit's

decision below that possession of a sawed-off shotgun remains a "crime of violence" after *Johnson*.

B. There is a longstanding division in the circuits as to whether the commentary to U.S.S.G. § 4B1.2 has freestanding definitional power, or whether offenses listed as "crimes of violence" in the commentary must instead satisfy one of the definitions in the guideline's text.

The post-*Johnson* split in the circuits as to whether possession of certain firearms constitutes a "crime of violence" under the commentary in Application Note 1 to § 4B1.2 is part of a larger, long-standing split in the circuit courts regarding the analysis to be used when relying on the Guidelines commentary to determine whether an offense is a "crime of violence."

Like the Eleventh Circuit below and in *Hall*, the Third and Seventh Circuits have found the Guidelines commentary to have freestanding definitional power; that is, the power to define "crimes of violence" regardless of whether those offenses satisfy the definitions found in the text of § 4B1.2(a)(1) or (a)(2). *See, e.g., United States v. Marrero*, 743 F.3d 389 (3d Cir. 2014) (holding Pennsylvania third-degree murder is a "crime of violence" under § 4B1.2 because "murder" is listed in the commentary and thus "enumerated" equally with those offenses listed in the text of the guideline; court never examines whether the offense satisfies either the force clause in § 4B1.2(a)(1) or the residual clause in § 4B1.2(a)(2), and distinguishes residual clause cases from

commentary cases); *United States v. Raupp*, 617 F.3d 756, 759-60 (7th Cir. 2012) (holding application notes are authoritative where they address a question uncontradicted by the text); *id.* at 762 (Wood, J., dissenting) (noting the conspiracy offense at issue does not satisfy § 4B1.2(a)(1)'s force clause and is not enumerated in § 4B1.2(a)(2) and therefore cannot be a "crime of violence" unless it satisfies the residual clause in § 4B1.2(a)(2), but majority "has concluded that it does not need to address" whether the offense qualifies under the residual clause because "it plays the trump card" of the commentary).

In sharp contrast, the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, have instead concluded that offenses listed in Application Note 1 qualify as a "crime of violence" only if they satisfy one of the definitions in § 4B1.2's text. *See, e.g., Soto-Rivera*, 811 F.3d at 59-61; *United States v. Armijo*, 651 F.3d 1226, 1235 (10th Cir. 2011) (rejecting government's argument that inclusion in the commentary was sufficient to qualify manslaughter offense as a "crime of violence" where the offense failed to satisfy either the force clause in § 4B1.2(a)(1) or residual clause in § 4B1.2(a)(2)); *Hood*, 628 F.3d at 671; *Lipscomb*, 619 F.3d at 477 & n.3; *Hawkins*, 554 F.3d at 618; *United States v. Williams*, 110 F.3d 50, 52 (9th Cir. 1997) (finding kidnapping offense did not satisfy force clause in § 4B1.2(a)(1) and court "must therefore determine whether" it satisfied residual clause).

After this Court's decision in *Johnson*, and the government's concession that *Johnson* applies to the Guidelines's residual clause, this underlying split as to whether

the Guidelines commentary has freestanding definitional power is thrown into sharp relief, and requires this Court's intervention.

C. This case squarely presents whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson*.

Mr. Beckles's petition provides an ideal vehicle for the Court to determine whether possession of a sawed-off shotgun qualifies as a "crime of violence" under U.S.S.G. § 4B1.2(a)(2) after *Johnson*. First, the issue is squarely presented. Possession of a sawed-off shotgun was Mr. Beckles's instant offense of conviction. If, as the Eleventh Circuit concluded, possession of a sawed-off shotgun is a "crime of violence" under the Guidelines, his career offender enhancement remains. *See* § 4B1.1(a). If, on the other hand, this Court agrees with the First Circuit in *Soto-Rivera* that it is not a "crime of violence," Mr. Beckles was improperly sentenced as a career offender. By accepting review of Mr. Beckles's case, this Court can definitively answer whether possession of a sawed-off shotgun is a "crime of violence," and, at the same time, provide guidance to the lower courts considering other offenses listed as a "crime of violence" in the Guidelines commentary by addressing the larger split in the circuits as to whether the commentary has freestanding definitional power.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit. Should the Court issue a writ, Petitioner also prays for expedited briefing and argument in this matter this Term; or, in the alternative, that the Court expeditiously issue a *per curiam* opinion resolving the questions presented herein after the Court decides *Welch v. United States*, No. 15-6418.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By:_____
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
March 9, 2016

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A P P E N D I X

APPENDIX

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Travis Beckles, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis.*

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

Fort Lauderdale, Florida
March 9, 2016

By:_____

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No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I certify that on this 9th day of March, 2016, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by third party commercial carrier for delivery within three days upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

Fort Lauderdale, Florida
March 9, 2016

By:_____

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No:

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UNITED STATES OF AMERICA,

Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, Travis Beckles, through undersigned counsel and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was sent in an envelope via third party commercial carrier for delivery within three days, addressed to the Clerk of the Supreme Court of the United States, on the 9th day of March, 2016, which is timely pursuant to the rules of this Court.

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

Fort Lauderdale, Florida
March 9, 2016

By:_____

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