No. 15-8544

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

REPLY BRIEF FOR PETITIONER

MICHAEL CARUSO
Federal Public Defender

Janice L. Bergmann*
Assistant Federal Public Defender
* *Counsel of Record*

One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND SENTENCING GUIDELINES:

OTHER AUTHORITIES:

REPLY BRIEF FOR PETITIONER

The application of *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), to both the residual clause of the career offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2), and its commentary are questions of immense importance to the myriad prisoners, like Mr. Beckles, whose sentences were enhanced under those provisions. The government acknowledges that the one-year statute of limitations governing collateral *Johnson* claims will expire on June 26, 2016. *See* BIO at 15; *Dodd v. United States*, 545 U.S. 353, 357 (2005). And it does not dispute that, as a result of the looming end of the limitations period, if the Court fails to resolve the questions presented herein this Term, prisoners "who have previously filed a Section 2255 motion will be left with no avenue for relief other than filing an original habeas petition in this Court." BIO at 15. The government also does not dispute Petitioner's showing, Pet. at 17-18, that thousands of federal prisoners have had their sentences enhanced under § 4B1.2(a)(2)'s residual clause, *see* BIO, *passim*.

The Court's conference for this case is set for June 2, 2016, a mere 24 days before the limitations period expires. The government has been unwilling to extend that date, despite its power to do so. *See Wood v. Milyard*, 132 S. Ct. 1826 (2012). Petitioner and others sentenced in the Eleventh Circuit under the Guidelines and seeking relief under *Johnson* have no recourse except to this Court. The petition should be granted.

ARGUMENT

1. In *Welch v. United States*, the Court's holding was clear and concise. "*Johnson* [*v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015)], is retroactive to cases on collateral review." 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016). *Welch* did not limit its holding to collateral cases involving the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). It simply held that *Johnson* is retroactive to collateral cases. That simple holding makes resolution of the first question presented equally simple. Petitioner's case, in which he seeks to vacate his sentence under 28 U.S.C. § 2255, is on collateral review. *Welch* therefore requires that *Johnson* applies retroactively to Petitioner's case.

Not only does *Welch* refute the government's retroactivity argument, the context in which the Court decided to grant review in that case also refutes the government's arguments as to why the Court should not grant review here. The government first asserts that review is unwarranted here because there is no conflict in the circuits "over whether *Johnson* is retroactive in an initial collateral motion under Section 2255 challenging application of the Guidelines' residual clause." BIO at 12. However, as is true of Petitioner here, Mr. Welch sought the Court's review of the Eleventh Circuit's denial of his *first* section 2255 motion. Nonetheless, what compelled the Court's decision to grant *certiorari* in *Welch* was a split in the circuits as to whether *Johnson* was a new rule of law that this Court had "made" retroactive to collateral cases so as to allow leave to file second or successive section 2255 motions under 28 U.S.C.

§ 2255(h)(2). And once the Court granted Mr. Welch's petition for writ of *certiorari* to consider the issue, its decision resolved the issue for initial and successive motions alike.

At present, a similar split in the circuits exists with respect to whether the Court has "made" *Johnson* retroactively applicable so as to authorize second or successive section 2255 motions seeking relief from sentences enhanced under the Guidelines. The Sixth, Seventh, and Tenth Circuits have all authorized second or successive section 2255 motions in cases where the applicant sought *Johnson* relief from a Guidelines sentence enhanced under the residual clause. The Seventh Circuit has done so because, in its estimation, "*Johnson* announced a new substantive rule of constitutional law" that is "categorically retroactive."[1] The Sixth Circuit has authorized successive motions because *Johnson* announced a "retroactively applicable rule of constitutional law."[2] And the Tenth Circuit has authorized successive motions

---

[1] Order, *Stork v. United States*, No. 15-2687, at 1 (7th Cir. Aug. 13, 2015); *see also, e.g.,* Order, *Best v. United States*, No. 15-2417 (7th Cir. Aug. 5, 2015); Order, *Swanson v. United States*, No. 15-2776 (7th Cir. Sept. 4, 2015); Order, *Zollicoffer v. United States*, No. 15-3125 (7th Cir. Oct. 20, 2015); Order, *Spells v. United States*, No. 15-3252 (7th Cir. Oct. 22, 2015).

[2] Order, *In re Swain*, No. 15-2040 (6th Cir. Feb. 22, 2016); *see also, e.g.*, Order*, In re Grant*, No. 15-5795 (6th Cir., March 7, 2016); Order, *United States v. Ruvalcaba*, No. 15-3913 (6th Cir. March 24, 2016); Order, *In re Homrich*, No. 15-1999 (6th Cir. March 28, 2016).

because the Court "made *Johnson*'s holding retroactive to cases on collateral review in *Welch*."[3]

In sharp contrast, the Eighth[4] and Eleventh Circuits have denied applicants challenging sentences enhanced under the Guidelines's residual clause leave to file second or successive section 2255 motions, with the Eleventh Circuit doing so both before and after *Welch*.[5]

Accordingly, there is a 3-2 split in the circuit courts on whether *Johnson* has been "made" retroactively applicable to collateral cases in which the applicant is seeking relief from a sentence enhanced under the Guidelines's residual clause. It is a split that presages a split in the circuits with respect to initial motions, that will, at some point, require this Court's attention.

In *Welch*, the Court expedited consideration of the circuit split presented there because it understood that the one-year statute of limitations compelled a speedy resolution of the retroactivity issue, and the issue had the potential to provide sentencing relief to hundreds, if not thousands, of federal prisoners seeking

---

[3] *In re Encinias*, __ F.3d __, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (No. 16-8038); *see also* Order, *In re Daniels*, No. 16-3093 (10th Cir. May 6, 2016); Order, *In re Bloomgren*, No. 16-8039 (10th Cir. May 9, 2016).

[4] *Richardson v. United States*, 623 F. App'x 841 (8th Cir. Dec. 16, 2015); *see also*, Order, *Sturdy v. United States*, No. 15-3639 (8th Cir. March 24, 2016) (unexplained denial).

[5] *In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015); Order, *In re Vasallo*, No. 16-11551 (11th Cir. April 28, 2016). Rivero has filed a petition for writ of habeas corpus in this Court seeking review of the Eleventh Circuit's decision in his case. *In re Gilberto Rivero*, No. 15-7776.

Johnson relief in both initial and successive section 2255 motions. The same is true here, except that here the urgent need for a speedy resolution is even greater.

The government next argues that Petitioner's case is not "an appropriate vehicle to decide the retroactivity questions" because Mr. Beckles did not raise, and the Eleventh Circuit did not decide, *Johnson*'s retroactivity below. BIO at 13-14. Again, in a different context – without the urgency or potential impact requiring resolution here – that might be a compelling argument. But desperate times require desperate measures. In *Welch*, the Court granted review the issue of *Johnson*'s retroactivity even though the court below had denied a certificate of appealability *before* this Court had even decided *Johnson*. *See* Order, *Welch v. United States*, No. 14-15733 (11th Cir. June 9, 2015). Accordingly, the question of *Johnson* and its retroactivity played no part in Mr. Welch's case below. Yet the Court nonetheless granted review of the retroactivity question because of the potential impact of the issue and the urgency created by the interaction of *Dodd* and the statute of limitations.

Moreover, even though the retroactivity issue was not ruled on below, its resolution is necessary for Mr. Beckles to obtain relief. Even if this Court answered the second and third questions presented in the affirmative, Mr. Beckles could not also obtain relief from his sentence under the Guidelines's residual clause unless the Court also answered the first question in the affirmative. This issue is squarely presented by this case, and the Court may therefore answer it.

2. The government agrees with Petitioner that *Johnson*'s holding invalidating the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), invalidates the identically-worded and analytically-indistinct residual clause in the career offender guideline, U.S.S.G. § 4B1.2(a)(2). BIO at 15. The government also agrees that a circuit conflict exists as to whether *Johnson*'s holding applies to sentences imposed under the advisory Sentencing Guidelines. *Id*. at 16. At present, ten of the eleven courts of appeal have either decided that *Johnson* applies to the Guidelines, accepted the government's concession that it does, or assumed that it does.[6] The Eleventh Circuit stands alone in its holding that *Johnson* never applies to sentences imposed under the

[6] The Second, Third, Sixth, and Tenth Circuits have held that *Johnson* invalidates the identical language in the Guidelines's residual clause. *United States v. Pawlak*, ___ F.3d ___ (6th Cir. May 13, 2016) (No. 15-3566); *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015); *United States v. Welch*, ___ F. App'x ___, 2016 WL 536656 (2d Cir. Feb. 11, 2016) *United States v. Townsend*, ___ F. App'x ___, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015). The First, Fifth, and Ninth Circuits have applied *Johnson* to the Guidelines's residual clause based on the government's concession and remanded for resentencing absent the unconstitutional residual clause. *United States v. Soto-Rivero*, 811 F.3d 53, 59 (1st Cir. 2016); Order, *United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 27, 2015); *United States v. Benavides*, 617 F. App'x 790, 790 (9th Cir. 2015). The Fourth Circuit has assumed that *Johnson* invalidates the Guidelines residual clause. *United States v. Frazier*, 621 F. App'x 166, 168 (4th Cir. 2015) (assuming without deciding that possession of a sawed-off shotgun no longer qualifies as a crime of violence after *Johnson*). And although the Seventh and Eighth Circuits held, prior to *Johnson* that the Guidelines were not susceptible to vagueness challenges, both have assumed without deciding that those decisions are no longer good law in light of *Johnson*. *United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015) (prior circuit precedent "reasoning . .. that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after *Johnson*"); *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015).

Guidelines's residual clause. *See United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), *ptn. for rhg. en banc filed* (Oct. 13, 2015).[7]

The government additionally acknowledges the split in the lower courts as to whether, post-*Johnson*, possession of a sawed-off shotgun remains a qualifying offense for purposes of the career offender guideline. It concedes that the First Circuit has expressly rejected the reasoning of the Eleventh Circuit's decision below to hold that possession of a sawed-off shotgun is cannot qualify as a "crime of violence" under the career offender guideline post-*Johnson*. *See* BIO at 21 n.4 (citing *Soto-Rivero*, 811 F.3d at 61-62). Finally, the government does not dispute that there is a deep, longstanding split in the circuits as to whether the commentary to the career offender guideline has freestanding definitional power, or the offenses listed in the commentary must satisfy one of the definitions in the guideline's text. *See* BIO, *passim*.

Despite these concessions, the government argues that the Court's review is nonetheless unwarranted because questions two and three in the Petition are "of limited and diminishing prospective importance" given that the Sentencing

---

[7] During more than seven months that the petition for rehearing *en banc* has been pending, the Eleventh Circuit has followed *Matchett* to hold that *Johnson* does not apply in cases where the defendant was sentenced under the advisory Sentencing Guidelines. *See, e.g., United States v. Ford*, ___ F. App'x ___, 2016 WL 2342756, *4 (11th Cir. May 4, 2016); *Jones v. United States*, ___ F. App'x ___, 2016 WL 1320800, *1 (11th Cir. April 5, 2016); *United States v. Jackson*, ___ F. App'x ___, 2016 WL 1253841, *6 (11th Cir. Mar. 31, 2016); *United States v. Casamayor*, ___ F. App'x ___, 2016 WL 722892, *5 (11th Cir. Feb. 24, 2016). This includes denying authorization for leave to file successive Section 2255 motions in cases where the movant was sentenced under the advisory Guidelines. *See*, *e.g.*, *In re Dougan*, 16-11718 (April 29, 2016); *In re Vasallo*, No. 16-11551 (11th Cir. April 28, 2016); *In Re Carlos Cuchet*, No. 16-11489 (11th Cir. April 26, 2016).

Commission has adopted an amendment, effective August 1, 2016, that deletes the residual clause from the career offender guideline. BIO at 17; *see id*. at 21 n.4. The government is wrong.

First, the Commission's prospective deletion of the residual clause provides no more reason to reject review of these issues than did this Court's prospective voiding of the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) ("ACCA") in *Johnson*. Under the government's logic, there was no reason for the Court to grant review in *Welch v. United States*, 136 S. Ct. 1257 (2016), because *Johnson*'s deletion of the residual clause from the ACCA rendered the question of its retroactive application of "limited and diminishing prospective importance." Yet the Court not only granted review in *Welch*, it expedited consideration.

Second, unlike *Welch*, which dealt only with *Johnson*'s application to initial and successive collateral cases, *Matchett* not only precludes *Johnson* relief in *all* Eleventh Circuit collateral proceedings, but also precludes *Johnson* relief in all Guidelines cases that are currently on direct appeal, and before the district courts for sentencing, as well as for any defendant who commits a federal offense prior to August 1, 2016. This is because the Commission deleted the residual clause and modified the commentary in the career offender guideline only prospectively; it did not make the amendment retroactive.[8] The amendment therefore affects only those cases where the defendant

[8] U.S. Sent'g Comm'n, Public Meeting Minutes at 6-7 (Jan. 8, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/meeting_minutes.pdf (summarizing statements by Chair Patti B. Saris explaining that it would be too difficult to conduct impact analysis, which

committed his federal offense *after* August 1, 2016. Accordingly, the cognizability issues presented herein will linger much longer than the retroactivity issue resolved in *Welch*, but the same factors that warranted the Court's expedited consideration in *Welch* are found here.

Third, the inter-circuit sentencing disparities that *Matchett* creates will also linger. In the many circuits granting *Johnson* relief to defendants whose sentences were enhanced using the Guidelines's residual clause, ex post facto principles require those defendants to be resentenced using the current career offender guideline *absent* the residual clause. *See Peugh v. United States*, 133 S. Ct. 2072 (2013). In the Eleventh Circuit, all defendants who committed their instant offense before August 1, 2016 will be sentenced under the current career offender guideline *with* the residual clause intact. *See Matchett*, 802 F.3d at 1197 (concluding Florida burglary falls within residual clause and is therefore a "crime of violence" under U.S.S.G. § 4B1.2). Thus, *Johnson*'s application to the Guidelines and commentary – and the inter-circuit sentencing disparities that *Matchett* and the decision below create – will likely remain ongoing issues for years to come.

Fourth, the Commission's deletion of the residual clause in the career offender guideline does not resolve the longstanding division in the circuits as to whether the commentary to that guideline has freestanding definitional power, or whether offenses listed in the commentary must instead satisfy one of the definitions in the guidelines

---

precluded a vote on making the amendment retroactive).

text. *See* Pet. at 32-34. The inchoate offenses of attempt, aiding and abetting, and conspiracy will continue to be listed in the commentary to the career offender guideline after August 1, 2016. *See* U.S.S.G. § 4B1.2, Application Note 1 ("For purposes of this guideline – 'Crime of violence' . . . include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."); 81 Fed. Reg. 4741-45 (2016). Inchoate offenses generally qualify as crimes of violence only under the residual clause because they do not have "as an element the use, attempted use, or threatened use of physical force against the person of another," and therefore are outside the reach of the so-called "elements clause."[9] Because inchoate offenses will remain in the guideline commentary notwithstanding the residual clause's deletion, are not enumerated and do not fall within the elements clause, those offenses will be unmoored from the definitions in the text of the guideline. Thus, whether the Commission may use the guidelines commentary to enumerate freestanding "crimes of violence" remains an ongoing issue even after the amendment takes effect.

---

[9] *See, e.g., James v. United States*, 550 U.S. 192, 197 (2007) (attempted burglary not a "violent felony" under ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), but qualifies under residual clause); *United States v. Gloss*, 661 F.3d 317, 319 (6th Cir. 2011) ("conspiracy or facilitation tends to be outside the reach of the [elements] clause . . . and generally will be deemed a violent felony only if it qualifies under the residual clause"); *United States v. Gore*, 636 F.3d 728, 731-32 (5th Cir. 2011) (conspiracy to commit aggravated robbery does not come within ACCA's elements clause, but qualifies under residual clause); *United States v. White*, 571 F.3d 365, 369-72 (4th Cir.2009) (same); *United States v. Whitson*, 597 F.3d 1218, 1223 (11th Cir. 2010) (*per curiam*) ("non-overt act conspiracy is *not* a section 4B1.1 'crime of violence'" under either elements clause or residual clause).

Finally, citing *Braxton v. United States*, 500 U.S. 344, 347-49 (1991), the government argues that Petitioner's third question does not warrant review because "this claim involves interpretation of the Sentencing Guidelines and the accompanying commentary" and the Court generally leaves questions of interpretation to the Sentencing Commission. BIO at 19. *Braxton* is irrelevant to the question presented. There, the Court left to the Commission the resolution of a circuit conflict over the meaning of guideline's text. 500 U.S. at 348. Here, the conflict in the lower courts is not over what the words "crime of violence" mean in the career offender guideline. It is about how to implement this Court's directive in *Stinson v. United States*, 508 U.S. 36, 38 (1993), that commentary "interpret[ing] or explain[ing] a guideline is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline." *See* Ptn. at 28-34. The Commission is not authorized to resolve, and never has resolved, a circuit split over whether and how to apply *Stinson*. *See* U.S.S.G., App. C, Vols. I, II, III & Supp. (collecting every amendment and reason therefore). *Braxton* is inapposite.

3. On the merits, the government contends that the Commission's interpretation of "crime of violence" in the commentary to U.S.S.G. § 4B1.2 to include possession of a sawed-off-shotgun "'does not run afoul of the Constitution' and 'is not plainly erroneous or inconsistent with § 4B1.2.'" BIO at 20 (quoting *Stinson*, 508 U.S. at 38). The government is wrong. The Commission expressly included "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)" as an interpretation of the residual clause. U.S.S.G. App. C, amend. 674 (Nov. 1, 2004). With the residual clause eliminated from § 4B1.2 as void for vagueness, that commentary no longer interprets any portion of the guideline's text. Possession of a sawed-off shotgun contains no element of force, and is not an enumerated offense. With the residual clause deleted, the commentary results in "flat inconsistency" with § 4B1.2, because following the commentary "will result in violating the dictates" of the text. *Stinson*, 508 U.S. at 43.

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 that the Court expeditiously issue a *per curiam* opinion resolving the questions presented herein.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By:_____
JANICE L. BERGMANN
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
May 20, 2016

No. 15-8544

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 20th day of May, 2016, in accordance with SUP. CT. R. 29, copies of the Reply Brief for Petitioner 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
May 20, 2016

By:_____

Janice L. Bergmann
Assistant Federal Public Defender
One East Broward Blvd. Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org