No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

ALFREDERICK JONES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Alfrederick Jones, pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Petitioner in the United States District Court for the Western District of Pennsylvania and in the United States Court of Appeals for the Third Circuit.

DATED: March 18, 2016

Respectfully submitted,

_____

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the language of the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague and therefore void. The language invalidated in *Johnson* is identical to that of the residual clause found in the United States Sentencing Guidelines' career offender provision, U.S.S.G. § 4Bl.2(a)(2). Petitioner Alfrederick Jones, along with thousands of federal prisoners, is serving a sentence that was enhanced under the guideline's residual clause – based on language this Court held "both denies fair notice to defendants and invites arbitrary enforcement by judges," such that "[i]ncreasing a defendant's sentence under the clause denies due process of law," 135 S. Ct. at 2557.

The questions presented are:

I. Whether *Johnson* announced a new substantive rule of constitutional law that applies retroactively on collateral review to challenges of sentences imposed under the residual clause in U.S.S.G. § 4Bl.2(a)(2)?

II. Whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4Bl.2(a)(2)'s identical residual clause, thus rendering that provision void?

III. Whether Petitioner's Pennsylvania conviction for robbery by force however slight is a "crime of violence" because it is listed in the commentary to U.S.S.G. § 4B1.2, even though it does not interpret and conflicts with the text of the guideline, after *Johnson*?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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On Petition for Writ of Certiorari to the
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for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Alfrederick Jones respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The court of appeals' order denying a certificate of appealability following remand and notwithstanding *Johnson v. United States*, 135 S. Ct. 2551 (2015), is included in the Appendix at A1-A-2. Its order denying a petition for rehearing *en banc* is included in the Appendix at B1-B-2. The opinion of this Court, granting certiorari, vacating the original judgment of the court of appeals is reported at 135

S. Ct. 2944 (2015), and included in the Appendix at C1. The court of appeals' pre-*Johnson* order denying a certificate of appealability is included in the Appendix at D1.

The district court's memorandum opinion denying Mr. Jones' § 2255 motion is reported at 2014 WL 1386328 (E.D. Pa. April 8, 2014), and included in the Appendix at E1-E-7.

The court of appeals' non-precedential opinion affirming Mr. Jones' conviction and sentence on direct appeal is reported at 450 Fed. Appx 183 (3d Cir. 2011) and included in the Appendix at F1-F-3.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' post-remand denial of Mr. Jones' application for a certificate of appealability was entered on November 9, 2015. The court of appeals denied a timely petition for rehearing *en banc* on January 22, 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--

> **(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 –

* * *

"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

* * *

U.S.S.G. § 4B1.2.

INTRODUCTION

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the definition of "violent felony" found in the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), *i.e.*, "otherwise involves conduct that presents a serious potential risk of physical injury to another[,]" unconstitutionally vague and therefore void. In *Welch v. United States*, No. 15-6418, the Court will decide whether *Johnson* announced a new substantive rule of constitutional law retroactively applicable to cases on collateral review. *Welch* involves a collateral challenge to a sentence enhanced under the residual clause in the ACCA. 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* announced a new substantive rule of constitutional law that applies retroactively on collateral review to challenges of sentences imposed under the residual clause in U.S.S.G. § 4Bl.2(a)(2)?; (2) whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4Bl.2(a)(2)'s identical residual clause, thus rendering that provision void?; and (3) whether Petitioner's Pennsylvania conviction for robbery by force however slight is a "crime of violence" because it is listed in the commentary to U.S.S.G. § 4B1.2, even though after

Johnson, it does not interpret any text of the guideline and is inconsistent with the text?

Prompt resolution of the issues presented here is needed for many of the same reasons the Court granted *certiorari* and expedited briefing in *Welch*, including the fast-approaching expiration of the one-year statute of limitations (June 26, 2016) for filing collateral challenges based on *Johnson*. Depending on the decision in *Welch*, the Court might consider resolving the issues presented here in a *per curiam* opinion without full briefing or oral argument. Alternatively, the Court should grant *certiorari* in a case this Term for argument and decision next Term, which would provide a basis for the lower courts to hold the motions in abeyance pending a decision from this Court. This case provides one of only a few opportunities for the Court to promptly resolve all three of these important questions, 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 guideline's residual clause.

STATEMENT OF THE CASE

1. Following a jury trial at which Alfrederick Jones was convicted of two counts of cocaine distribution, the district court sentenced him under the career offender guideline to 262 months' imprisonment.

2. The PSR indicated that the total offense level based on 497 grams of cocaine was 24, and that Mr. Jones had nine (9) criminal history points, which placed him in criminal history category four and yielded an advisory Guidelines range of 77-96 months' imprisonment. However, because Mr. Jones was deemed to be a career offender based, in part, on a finding that his prior Pennsylvania conviction for robbery by force however slight was a crime of violence, his total offense level was increased to 34 and his criminal history category raised to level VI, which produced an advisory Guidelines range of 262-327 months' imprisonment.

The PSR did not indicate which definition of crime of violence the prior conviction satisfied. Defense counsel objected, arguing that Mr. Jones' prior conviction for robbery did not qualify because it was "'nothing more than a purse snatching,' and is a felony 3 in Pennsylvania state court."[1]

3. The district court sentenced Mr. Jones as a career offender to 262 months' imprisonment. The court did not indicate which of U.S.S.G.'s § 4B1.2's definitions of "crime of violence" applied.

4. Robbery is not enumerated as a "crime of violence" in the text of the guideline itself, but is listed in the commentary to the guideline. That commentary

[1] A certified copy of the state court record, appended to the government's sentencing memorandum, confirmed that the robbery conviction was a third degree felony under 18 Pa.C.S. § 3701. Pursuant to § 3701(b), " . . . [r]obbery under subsection (a)(1)(iv) is a felony of the second degree; robbery under subsection (a)(1)(v) is a felony of the third degree; otherwise, it is a felony of the first degree." In other words, Mr. Jones' robbery conviction was for a violation of § 3701(a)(1)(v), which involves physically taking or removing property from the person of another by force however slight.

states, in pertinent part, that "[f]or purposes of this guideline . . . '[c]rime of violence' includes . . . robbery . . . ." U.S.S.G. § 4B1.2 cmt. n.1.[2]

5. Mr. Jones appealed his conviction and sentence and the court of appeals affirmed on November 7, 2011.

6. On April 13, 2012, Mr. Jones filed a *pro se* motion to vacate pursuant to 28 U.S.C. § 2255. Mr. Jones claimed that his prior robbery should not have been deemed a crime of violence under U.S.S.G. § 4B1.2(a)(1)'s "elements clause" because it did not involve the requisite physical force against another person. Although Mr. Jones did not cite *Johnson v. United States*, 559 U.S 133 (2010), in support of his argument, the district court understood him to be challenging whether the prior robbery offense involved violent force.

The district court disposed of Mr. Jones' argument by stating: "U.S.S.G. § 4B1.2 (a) is clear on this point, specifically citing robbery in the application notes." Appendix E-7 at n.2 (citing U.S.S.G. § 4B1.2 cmt. n.1). By Memorandum and Order

[2] On August 7, 2015, the Sentencing Commission announced that because "the statutory language the Court found unconstitutionally vague" in Johnson is "identical" to the career offender guideline's residual clause, it proposed to "delete the residual clause" and "move[ ] all enumerated offenses to the guideline," in order "to make the guideline consistent with Johnson." U.S. Sent'g Comm'n, News Release: U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence (Aug. 7, 2015), http://www.ussc.gov/news/press-releases-and-news-advisories/august-7-2015. On January 21, 2016, the Commission adopted an amendment (effective Aug. 1, 2016 absent congressional disapproval) deleting the residual clause and moving the offenses listed in the commentary, including robbery, to the text at § 4B1.2(a)(2). U.S. Sent'g Comm'n, Amendment to the Sentencing Guidelines (Jan. 21, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf.

dated April 8, 2014, the court denied Mr. Jones' § 2255 motion as well as a certificate of appealability.

7. Mr. Jones filed a timely notice of appeal and a *pro se* application for a certificate of appealability, which the court of appeals denied on February 24, 2015.

8. Mr. Jones filed a petition for writ of certiorari, again arguing that his prior robbery conviction was not a crime of violence. On June 30, 2015, this Court entered an Order granting certiorari, vacating the court of appeals' judgment, and remanding for further consideration in light of *Johnson.*

9. Following remand, undersigned counsel moved to be appointed as counsel and, on August 5, 2015, the court of appeals granted the motion. Thereafter, on August 20, 2015, the court directed the parties to file letter memoranda addressing the applicability of *Johnson* and whether a certificate of appealabilty should be issued. The government filed a memorandum on September 15, 2015, and several days later, undersigned counsel sought and received an additional 30 days within which to file her response. In the interim, counsel learned that two cases were pending before the court of appeals, *United States v. Townsend*, Appeal No. 14-3652, and *United States v. Calabretta*, Appeal No. 14-3969, that raised the issue of whether *Johnson*'s constitutional holding applied to the residual clause in the career offender guideline. Counsel therefore moved to stay the proceedings pending a decision by the court of appeals on *Johnson*'s applicability to

the Guidelines.[3] On November 9, 2015, the court of appeals denied a certificate of appealability, finding that *Johnson* "is not relevant in the appellant's case" because Mr. Jones' "career offender designation did not rely on [the residual] clause," but rather "relied on the part of Application Note 1 which lists robbery as an enumerated predicate offense." *See* Appendix A-2. The court of appeals also concluded that there was no reason to stay the proceedings or await a memorandum on behalf of Mr. Jones, and held the motion to stay moot.

10. Mr. Jones filed a timely petition for rehearing en banc, arguing that the court wrongly assumed that the commentary to U.S.S.G. § 4B1.2 had freestanding definitional power and was not impacted by the invalidation, by *Johnson*, of the text it was intended to interpret. Mr. Jones asserted that the court of appeals' denial of a certificate of appealability thus conflicted with this Court's decision in *Stinson v. United States*, 508 U.S. 36 (1993), as well as authoritative decisions of other courts of appeals which have been faithful to *Stinson*. Mr. Jones also argued that *Johnson*'s constitutional holding applies equally to the career offender guideline's residual clause and that, as a result, his claim for relief under *Johnson* was not only cognizable, but that he had made the requisite substantial showing of the denial of a constitutional right to be entitled to a certificate of appealability under *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

[3] The court of appeals ultimately found U.S.S.G. § 4B1.2's residual clause invalid under *Johnson* in *United States v. Townsend*, __ Fed. Appx __, 2015 WL 9311394 (3d. Cir. Dec. 23, 2015).

11. On January 8, 2016, this Court granted a petition for writ of certiorari in *Welch v. United States*, No. 15-6418. *Welch* presents the question whether *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. The Petitioner in *Welch* was sentenced under the ACCA.

12. On January 22, 2016, the court of appeals denied Mr. Jones' petition for rehearing *en banc* and thereafter issued its mandate.

REASONS FOR GRANTING THE WRIT

I. Whether *Johnson* applies retroactively to Guidelines cases on collateral review 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 judicial resources.

The Court should decide *Johnson*'s retroactivity to cases involving U.S.S.G. § 4B1.2's identically-worded residual clause this Term for the same pressing reason it was urged to do so in *Welch*: the expiration of the one-year statute of limitations – June 26, 2016 – is fast approaching. As a result, it is likely that thousands of federal prisoners whose sentences were enhanced under § 4B1.2's residual clause will file § 2255 motions between now and June 26, 2016, in order to preserve their right to relief under *Johnson*. Those filings, the majority of which may be *pro se*, will place a much greater strain on the judiciary if the retroactivity question is not promptly addressed. *See infra* § I.B. (discussing data).

It is unlikely that this Court's decision in *Welch* will specifically address retroactivity in the Guidelines' context because Welch's *Johnson* claim arises under the ACCA, and the government's brief argues that *Welch* "does not present any issue" concerning *Johnson*'s retroactive application to Guidelines cases on collateral review. Brief of the United States at 38 n.9, *Welch v. United States*, No. 15-6418 (S. Ct. Feb. 9, 2016). Although the government agrees that *Johnson* applies retroactively to ACCA cases on collateral review, it notes in its brief in *Welch* that it has argued to lower courts "that *Johnson* is not entitled to retroactive effect" in Guidelines cases on collateral review because, in its view, "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.*

The government's stated position is contrary to lower court decisions, which have consistently held that new rules narrowing the ACCA's residual clause apply retroactively in Guidelines cases.[4] It is also contrary to the government's own, pre-*Johnson* position in litigation across the country regarding the retroactive

[4] *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 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); *spencv. 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.).

application of this Court's ACCA residual clause decisions to Guidelines cases. As stated by the Appellate Section of the Department of Justice less than 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*, No. 10-10676 (11th Cir. May 21, 2014). 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. The government asserted that there were no "chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id.* at 15. Rather, "a rule either is or is not substantive." *Id.*

Given the government's newfound position on retroactivity, even if the Court holds in *Welch* that *Johnson* constitutes a new substantive rule that applies retroactively, there will likely be divergent lower court decisions as to *Welch*'s implications 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 courts of appeals have consistently held that ACCA decisions are retroactive to Guidelines cases, but the government now opposes retroactivity. Although the Guidelines retroactivity question will eventually make its way to this Court, absent

prompt intervention, it will not reach the Court until after the statute of limitations has run.

Delaying a decision on this critical issue would be particularly troubling given the heightened stakes for those sentenced under the guideline's residual clause who are eligible for relief under *Johnson*. Many would be entitled to significant sentence reductions, including potential release. Those prisoners, among them Mr. Jones, should not be forced to endure protracted litigation merely to learn whether their *Johnson* claims will be heard on the merits – nor should the federal courts be burdened with that litigation – when this Court could either decide the retroactivity question before the June 26th deadline or accept a case this Term for briefing and decision next Term.

The need for a decision this Term is particularly acute for those who have filed previous § 2255 motions because they must first obtain authorization from the court of appeals before filing a second or successive § 2255 motion in the district court, see 28 U.S.C. § 2255(h)(2), and a court of appeals' denial of authorization under 28 U.S.C. § 2255(h)(2) is unreviewable by this Court. A decision from this Court on retroactivity would resolve any doubt raised by the government's newfound position. *See Tyler v. Cain*, 533 U.S. 656 (2001). Short of deciding the issue this Term, the Court could accept a case now for argument and decision next Term, which would provide a basis for the courts of appeals to hold the motions in abeyance pending a decision from this Court. Unless the Court decides the issue this Term or accepts a case now for argument and decision next Term, there will be

numerous federal prisoners whose only recourse to challenge the increase in their sentences under the guideline's residual clause is an original habeas petition filed in this Court. That, in turn, 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 economy concerns discussed above are particularly acute given the number of prisoners sentenced under § 4B1.2(a)(2)'s residual clause. Approximately 14,928 of the 16,444 defendants sentenced as career offenders from fiscal year 2008 through fiscal year 2014 likely remain in prison.[5] This does not account for any re-sentencings or other post-sentencing reductions, nor does it include other federal prisoners who, while not career offenders, were sentenced under § 4Bl.2(a)(2)'s residual clause, which is incorporated in other Guidelines. *See, e.g.*, 2K2.l & cmt. n.1 (firearms). 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, individuals sentenced as career offenders under the guideline'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

[5] Sentencing Resource Counsel, Federal Public & Cmt'y Defenders, Data Analyses - Career Offenders (FY 2014, FY 2008-2014), http://www.src-project.org/wp-content/uploads/2016/03/Effect-of-Career-Offender-Status-and-Number-Sentenced-2008-through-2014-Likely-Still-in-Prison.pdf.

to a term of imprisonment at or near the maximum authorized"); U.S.S.G. § 4B1.1 & cmt. n.3 (noting that the career offender guideline implements Congress's directive set forth in § 994(h)). Mr. Jones' career-offender designation increased his Guidelines range from 6 ½ to 8 years to 21-27 years, and he was sentenced to 21 years. If *Johnson* applies retroactively to those, like Mr. Jones, who were sentenced under the guideline's residual clause, several thousand federal prisoners may be entitled to significant relief and, in many cases, will be serving unconstitutional sentences of imprisonment with every passing day.

At the same time, it is important to note that resentencings in light of *Johnson* would not be unduly burdensome on the courts. *See* Brief of Scholars of Federal Courts & Sentencing as Amici Curiae in Support of Petitioner at 28-31, *Welch v. United States*, No. 15-6418 (S. Ct. Feb. 16, 2016) (demonstrating that the resentencing of even tens of thousands of prisoners under retroactive Guidelines amendments was efficiently managed and did not overburden the courts). According to the Sentencing Commission, most career offenders were classified as such based on prior drug trafficking crimes. U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 133 (2004). That is, less than half of career offenders were so classified based on prior convictions deemed "crimes of violence," and a smaller subset of those qualified as such under the residual clause.

As the Chair of the Criminal Law Committee of the Judicial Conference recently noted, the courts have "effectively managed several rounds of retroactivity stemming from guideline amendments to the Drug Quantity Table."[6] Consistent with that experience, on October 28, 2015, the Director of the Administrative Office of the United States Courts and the Chairs of the Criminal Law and Defender Services Committees of the Judicial Conference encouraged the courts to obtain from the Sentencing Commission lists of individuals who are potentially eligible for relief under *Johnson*, to share the list with local stakeholders, and to appoint counsel to review the cases and to represent individuals with cognizable *Johnson* claims. As with the much larger numbers under retroactive Guidelines amendments, this system, now well underway, will "prevent . . . overburdening the courts" and "assist the courts in efficiently processing *Johnson* claims."[7]

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

Alfrederick Jones' petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases. As *Welch* will do for

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[6] Transcript of Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines, at 30 (Nov. 5, 2015) (Testimony of Hon. Irene M. Keeley, Chair, Committee on Criminal Law of the Judicial Conference of the United States), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/transcript.pdf.

[7] Memorandum from James C. Duff, Judge Catherine C. Blake, and Judge Irene M. Keeley, Appointment of Counsel under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A in light of *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015) (Oct. 28, 2015).

collateral challenges under the ACCA, this Court's favorable resolution of the retroactivity question here would also "make" *Johnson* retroactive under § 2255(h)(2), and thus conclusively resolve the retroactivity issue for all federal prisoners raising *Johnson*-based challenges to Guidelines sentences, including those litigating second or successive motions.

Other petitions presenting the question of whether *Johnson* applies retroactively to Guidelines cases are unlikely to be filed this Term because, at the government's request, the lower courts are staying nearly all ACCA and Guidelines cases pending the decision in *Welch*. Petitioner is aware of only two other cases 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. Travis Beckles*, No. 15-8544 (U.S. filed March 9, 2016), a petition for writ of certiorari from the Eleventh Circuit's denial of Beckles' § 2255 motion, in which a response is due April 13, 2016. Mr. Jones urges the Court to accept review in one of these cases and decide this important issue without delay if it does not do so here.

D. *Johnson* announced a new substantive rule of constitutional law that applies retroactively on collateral review to challenges of sentences imposed under the residual clause in U.S.S.G. § 4B1.2(a)(2).

This Court held in *Johnson* that "the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," such that "[i]ncreasing

a defendant's sentence under the clause denies due process of law," *Johnson*, 135 S. Ct. at 2557. As the government has correctly conceded in cases across the country, *Johnson*'s constitutional holding applies with equal force to the identical clause in the career offender guideline.[8] As discussed above, *see* Part I.A, *supra*, the government's proposed retroactivity analysis, in which the status of a substantive rule could fluctuate depending on whether the petitioner is challenging an ACCA or a career offender classification, is in conflict with the decisions of every court of appeals to decide the issue, and the government's own pre-*Johnson* position. Even if the government's proposed analysis were sound, and it is not, *Johnson* is a substantive rule as applied to the Guidelines and applies retroactively to this case.

Substantive rules include those that "prohibit a certain category of punishment for a class of defendants because of their status or offense," or that "alter[ ] . . . the class of persons that the law punishes." *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (internal citations and quotation marks omitted). *Johnson* narrows the class of persons who qualify for punishment as a "career offender," a "category of offender subject to particularly severe punishment." *Burford v. United States*, 532 U.S. 59, 60 (2001). Courts are required to calculate and consider "the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines," 18

[8] *See* Brief of Federal Public & Community Defenders & National Ass'n of Federal Defenders as Amici Curiae in Support of Petitioner, at 4-11, *Welch v. United States*, No. 15-6418 (S. Ct. Feb. 16, 2016).

U.S.C. § 3553(a)(4), and they have no discretion to determine that range using an improper legal interpretation, *see* 18 U.S.C. § 3742(e)(2). Accordingly, after *Johnson*, courts may not use the career offender guideline to calculate the sentencing range under § 3553(a)(4) unless the defendant has two or more predicate offenses that qualify absent the residual clause, and no procedure can be afforded to render the career offender enhancement applicable when that enhancement depends on the residual clause.[9] Indeed, to impose the equivalent of a career offender sentence in such a case, a court must make independent and legally sufficient findings under one or more statutory paragraphs *other than* paragraph (4) of § 3553(a). By voiding the residual clause, *Johnson* "alter[s] the substantive 'formula' used to calculate the applicable sentencing range." *Peugh v. United States*, 133 S. Ct. 2072, 2088 (2013) (internal quotation marks omitted). That range has

[9] *Cf.* Supp. Brief for the U.S. on Reh'g En Banc at 55, *Spencer v. United States*, No. 10-10676 (11th Cir. May 21, 2014) (arguing that "*Begay* narrows eligibility for the advisory career-offender enhancement just as much as it narrowed eligibility for the enhancements in [ACCA] cases," and "no procedures can be afforded to render that enhancement applicable").

"legal force,"[10] and significantly increases sentences in fact.[11] Thus, as applied to the Guidelines, *Johnson* "prohibit[s] a certain category of punishment for a class of defendants because of their status," *i.e.*, those whose status as a career offender depends upon the residual clause. *Montgomery*, 136 S. Ct. at 732.

The government's suggestion in *Welch* "that *Johnson* is not entitled to retroactive effect" in Guidelines cases on collateral review because "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing[,]" Brief of the United States at 38 n.9, *Welch v. United States*, No. 15-6418 (S. Ct. Feb. 9, 2016), echoes the State of

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[10] In *Peugh*, the Court dismissed the government's argument that the Guidelines lacked "'the force and effect of laws,'" *id.* at 2085-2086, and identified numerous attributes of the post-*Booker* sentencing system that ensure that the guidelines continue to have "legal force," *id.* at 2083-84, 2087, and serve as the "anchor," "framework," "basis," "benchmark," and "lodestone" for sentencing, *id.* at 2083-2084. Moreover, the Guidelines are enacted by Congress through its power to modify or disapprove them before they go into effect, *see* 28 U.S.C. § 994(p), and the Commission itself exercises "quasi-legislative power," and is "fully accountable to Congress," *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989). Further, the term "crime of violence" is defined by 18 U.S.C. § 924(e)(2)(B), a statute enacted by Congress, *see* USSG App. C, amend. 268 (Nov. 1, 1989), and Congress required the Commission to promulgate a career offender guideline "specify[ing] a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" defined by Congress in 28 U.S.C. § 994(h), a directive with which the Commission must comply, *United States v. LaBonte*, 520 U.S. 751, 757, 759-61 (1997) (quoting 28 U.S.C. § 994(h)).

[11] "[W]hen a Guidelines range moves up or down, offenders' sentences move with it." *Peugh*, 133 S. Ct. at 2084. The average sentence imposed on non-career offenders in drug cases in FY 2014 was 62 months, compared to 138.6 months for career offenders. Sentencing Resource Counsel, Federal Public & Cmt'y Defenders, Data Analyses - Career Offenders (FY 2014, FY 2008-2014), http://www.src-project.org/wp-content/uploads/2016/03/Effect-of-Career-Offender-Status-and-Number-Sentenced-2008-through-2014-Likely-Still-in-Prison.pdf.

Louisiana's efforts in *Montgomery* to recast a substantive rule as a procedural one.[12] The Court squarely rejected the State's argument that "*Miller [v. Alabama*, 132 S. Ct. 2455 (2012)] is procedural because it did not place any punishment beyond the State's power to impose," *Montgomery*, 136 S. Ct. at 734, 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, those whose crimes reflect permanent incorrigibility." *Id.* The same is true here. Only the rarest of defendants who no longer qualify as career offenders after *Johnson* would nonetheless be deemed to warrant the equivalent of a career offender sentence under the purposes and factors set forth in § 3553(a). Only a fraction of one percent (0.57%) of drug offenders sentenced in fiscal year 2014 who were not classified as career offenders received an upward departure or variance to a sentence as high as

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[12] The government acknowledges in *Welch* that *Johnson* is not a rule of criminal procedure because it does not regulate the manner of determining the defendant's culpability, but rather "strike[s] the residual clause entirely as 'void for vagueness.'" Brief of the United States at 27-28, *Welch v. United States*, No. 15-6418 (S. Ct. Feb. 9, 2016). According to the government, however, *Johnson* is transformed into a "rule of criminal procedure" in Guidelines cases because "the Guidelines are part of the process for imposing sentence." *Id.* at 38 n.9. But the question is not whether the Guidelines or the ACCA are "part of the sentencing process" (both are), but whether the *rule* is substantive or procedural. *Johnson* says nothing about procedure. Although the rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) had a "procedural component" in expressly requiring consideration of youth and its attendant characteristics, "those procedural requirements do not, of course, transform substantive rules into procedural ones." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016). Unlike *Miller*, *Johnson* has no procedural component.

the bottom of the Guidelines range for drug offenders who were classified as career offenders.[13]

II. Whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4Bl.2(a)(2)'s residual clause presents an important question warranting this Court's prompt intervention.

A. The reasons compelling prompt resolution of the retroactivity question also compel resolution of the question whether *Johnson*'s constitutional holding applies to the Guidelines.

A determination of whether federal prisoners whose sentences were enhanced under § 4Bl.2(a)(2)'s residual clause may rely on *Johnson* in collateral review proceedings involves not only the question whether *Johnson* applies retroactively in Guidelines cases, but also the question whether *Johnson*'s constitutional holding applies to § 4Bl.2(a)(2)'s residual clause. If it does, prisoners have constitutional, and thus cognizable, claims under § 2255(a). *See Hill v. United States*, 368 U.S. 424, 426-28 (1962). Because retroactivity and cognizability serve as independent prerequisites to collateral relief, the Court should consider both questions together.

Just as a prompt resolution of the retroactivity question is needed to avoid confusion in the lower courts, the needless expenditure of judicial resources, and the over-incarceration of those entitled to relief, the same is true of the cognizability question.

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

[13] Sentencing Resource Counsel, Federal Public & Cmt'y Defenders, Data Analyses - Career Offenders (FY 2014, FY 2008-2014), http://www.src-project.org/wp-content/uploads/2016/03/Effect-of-Career-Offender-Status-and-Number-Sentenced-2008-through-2014-Likely-Still-in-Prison.pdf.

Whether *Johnson* applies to the residual clause in § 4B1.2(a)(2) has 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 guideline's residual clause, holding instead that the advisory Guidelines were not susceptible to a vagueness challenge. That ruling stands alone among the circuits.

The Tenth Circuit expressly 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 did the same, *United States v. Townsend*, ___ Fed. Appx ___, 2015 WL 9311394, at *4 & n.14 (3d Cir. Dec. 23, 2015), as did the Second Circuit, *United States v. Welch*, __ Fed. Appx __, 2016 WL 536656, at *4 (2d Cir. Feb. 11, 2016). In addition, the First, Fifth, Sixth, Eighth and Ninth 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. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015); *United States v. Grayer*, 625 Fed. Appx 313, 315 (6th Cir. 2015); Order, *United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 27, 2015); *United States v. Benavides*, 617 Fed. Appx 790 (9th 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. As long as there is division among the circuits about whether *Johnson*'s constitutional holding applies equally to the guideline's residual clause, geography alone determines a prisoner's ability to seek and obtain relief under *Johnson*. Indeed, 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. This Court's immediate intervention is necessary to ensure uniformity on this important question of law.

C. The Eleventh Circuit's anomalous decision in *Matchett* 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." Supplemental Brief of United States, *United States v. Madrid*, 2015 WL 4985890, at *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*, 597 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. *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.2d 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. Darden*, 605 Fed. Appx 545, 546 (6th Cir. 2015). 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 after *Johnson*." *Taylor*, 803 F.3d at 933. And the Seventh Circuit has assumed "that the Supreme Court's reasoning [in *Johnson*] applies to section 4B1.2." *Ramirez v. United States*, 799 F.3d 845, 856

(7th Cir. 2015).[14] 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*.[15] 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.[16]

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[14] The Seventh Circuit heard oral argument on December 2, 2015 in three cases in which the parties agree that *United States v. Tichenor*, 683 F.3d 358 (7th Cir. 2012), which held that the Guidelines cannot be unconstitutionally vague, is no longer good law in light of *Johnson*. *United States v. Gillespie*, No. 15-1686; *United States v. Hurlburt*, No. 14-3611; *United States v. Rollins*, No. 13-1731.

[15] *Matchett's* assertion that application of the vagueness doctrine to the Guidelines would "upend our sentencing regime," 602 F.3d 1196, is also wrong. The residual clause is unconstitutionally vague because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts," *Johnson*, 135 S. Ct. at 2257, but this Court "[did] not doubt" the constitutionality of laws requiring application of a standard to the "actual . . . facts" of "real-world conduct," *id.* at 2561 (internal citation and quotation marks omitted). Nearly every Guidelines provision is determined on the basis of the "facts" of "real-world conduct." *See* U.S.S.G. § 1B1.3(a) (requiring base offense levels, specific offense characteristics, cross references, and adjustments to be determined based on "relevant conduct").

[16] *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*, 627 Fed. Appx 912 (11th Cir. 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. 29, 2016).

III. Whether Alfrederick Jones' prior Pennsylvania conviction for robbery by force however slight remains a "crime of violence" after *Johnson* because robbery 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 offenses listed as "crimes of violence" in the commentary to U.S.S.G. § 4B1.2 remain "crimes of violence" after *Johnson*. This division is the latest iteration of a longstanding split in the circuits as to whether the commentary to § 4B1.2 has freestanding definitional power, or whether it is only valid and authoritative if it interprets and is not inconsistent with a guideline's text, as this Court held in *Stinson v. United States*, 508 U.S. 36 (1993).[17] The Court's intervention is therefore required.

A. The circuits are divided as to whether offenses listed in the commentary to U.S.S.G. § 4B1.2 remain "crimes of violence" after *Johnson*.

[17] The Sentencing Reform Act requires the Sentencing Commission to "submit to Congress amendments to the guidelines" at least six months before their effective date, and provides that Congress may modify or disapprove such amendments before their effective date. 28 U.S.C. § 994(p). In upholding the Commission against a separation-of-powers challenge, this Court emphasized that this requirement makes the Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989). But the Sentencing Reform Act says nothing about submitting commentary to Congress, *see* 28 U.S.C. § 994(p), and did not expressly authorize the issuance of commentary at all, *see Stinson v. United States,* 508 U.S. 36, 40-41 (1993). Thus, commentary is valid and authoritative only if it interprets a guideline, is not inconsistent with or a plainly erroneous reading of that guideline, and does not violate the Constitution or a federal statute. *Id.* at 38, 44-45. Where "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43.

Application Note 1 to § 4B1.2 states that "'[c]rime of violence' includes . . . robbery . . . ." In denying Mr. Jones a certificate of appealability, the court of appeals found robbery's inclusion among the offenses listed in the application note provided an independent basis for applying the career offender enhancement. *See* Appendix A-2 (*Johnson* "is not relevant in the appellant's case" because Mr. Jones' "career offender designation did not rely on [the residual] clause. Rather, "the District Court relied on the part of Application Note 1 which lists robbery as an enumerated predicate offense.")

The First Circuit, however, has expressly disagreed, holding that post-*Johnson*, the commentary in Application Note 1 provides no independent basis for concluding that offenses listed therein fall 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 robbery, is listed as a "crime of violence" in Application Note 1 to § 4B1.2. *Id.* at 59. Understanding that, post-*Johnson*, "Soto-Rivera's Career Offender status may not be predicated upon the Guidelines's residual clause," the court determined that "in the absence of the residual clause, there is no textual hook in Guidelines § 4B1.2(a) 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 explained 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*). It therefore looked at the text of § 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 court determined that 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 U.S.S.G. § 4B1.2(a)'s Application Note 1 to expand upon the list of offenses that qualify for Career Offender status.

Soto-Rivera, 811 F.3d at 60.

The decision of the court of appeals in this case and in *United States v. Marrero*, 743 F.3d 389, 397-401 (3d Cir. 2014) (holding Pennsylvania third-degree murder was a "crime of violence" because "murder" was listed in the commentary without analysis of whether offense satisfied any definition in the text), and the Eleventh Circuit's decision in *United States v. Beckles*, 616 Fed. Appx 415 (11th Cir. 2015), directly conflict with the First Circuit's decision in *Soto-Rivera*. Addressing Beckles' claim that his prior conviction for possession of a sawed-off shotgun no longer qualified as a "crime of violence" after *Johnson*, the Eleventh Circuit concluded that "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." *Beckles*, 606 Fed. Appx at 416.

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 about whether Application Note 1 to § 4B1.2 provides an independent basis to conclude that offenses listed therein constitute "crimes of violence" is part of a larger, long-standing division among the circuits regarding whether the commentary has freestanding definitional power, or whether offenses listed in the commentary must satisfy one of the definitions of "crime of violence" in the guideline's text.

Like the court of appeals below, the Eleventh and Seventh Circuits have found the Guidelines' commentary has freestanding definitional power; that is, the power to define "crime of violence" irrespective of whether the listed offenses satisfy the definitions found in the text of § 4B1.2(a)(1) or (a)(2). *See, e.g., United States v. Hall*, 714 F.3d 1270, 1272-74 (11th Cir. 2013) ("[W]e 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 or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'"); *United States v. Raupp*, 677 F.3d 756, 759-60 (7th Cir. 2012) (holding application notes are "free to go [their] own way" as long as they do not "contradict the text"); *id.* at 762 (Wood, J., dissenting) (conspiracy offense at issue does not satisfy § 4B1.2(a)(1)'s elements 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).[18]

In sharp contrast, the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, have concluded that offenses listed in Application Note 1 qualify as "crimes 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.

[18] The Seventh Circuit granted rehearing on October 6, 2015, in *United States v. Rollins*, 800 F.3d 859 (7th Cir. 2015), to reconsider *United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012).

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 elements clause in § 4B1.2(a)(1) or the residual clause in § 4B1.2(a)(2)); *United States v. Leshen*, 453 Fed. Appx 408, 415 (4th Cir. 2011) ("[F]orcible sex offenses' does not have freestanding definitional power."); *United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015) ("[T]he government skips past the text of § 4B1.2 to focus on its commentary," but "it is the text, of course, that takes precedence."); *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). Thus, to qualify, it must 'otherwise involve[] conduct that presents a serious potential risk of physical injury to another.'"); *United States v. Lipscomb*, 619 F.3d 474, 477 & n.3 (5th Cir. 2010) (possession of a sawed-off shotgun must satisfy the residual clause in the text); *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 the guideline's residual clause is void after *Johnson*, the division among the circuits 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 offenses listed in the commentary to § 4B1.2 remain "crimes of violence" after *Johnson*.

Mr. Jones' petition provides an ideal vehicle for the Court to determine whether robbery and the other offenses listed in Application Note 1 to U.S.S.G. § 4B1.2 remain "crimes of violence" after *Johnson* simply because they are listed in the commentary. If, as the Third Circuit concluded, robbery is a "crime of violence" under the Guidelines simply by virtue of its inclusion in Application Note 1, Mr. Jones' career offender enhancement remains. If, on the other hand, this Court agrees that robbery only qualifies as a "crime of violence" if the statutory definition satisfies one of the remaining definitions in § 4B1.2(a), Mr. Jones was improperly sentenced as a career offender. By accepting review of Mr. Jones' case, this Court can address the division among the circuits and definitively answer whether offenses listed as "crimes of violence" in the guideline's commentary have freestanding definitional power or whether they must instead satisfy one of the definitions in the guideline's text.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari will issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Dated: March 18, 2016

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CERTIFICATE OF MEMBERSHIP IN BAR

I, Lisa B. Freeland, Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

_____

LISA B. FREELAND
Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that under penalty of perjury that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit sent in an envelope via third party commercial carrier for next day delivery this 18th day of March, 2016, to the following:

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_____

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Counsel for Petitioner

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2015 TERM

ALFREDERICK JONES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari on behalf of Alfrederick Jones was sent in an envelope via third party commercial carrier for next day delivery to the Clerk of the United States Supreme Court in Washington, D.C., postage and fees paid via Federal Express.

DATE: March 18, 2016

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LISA B. FREELAND
Federal Public Defender
Counsel for Petitioner