No. 15-8629

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

ALFREDERICK JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson v. United States*, 135 S. Ct. 2551 (2015) is "a substantive rule that has retroactive effect in cases on collateral review," 136 S. Ct. at 1268. The holding and reasoning of *Welch* answer the first question presented: *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review challenging sentences imposed under the residual clause of U.S.S.G. § 4B1.2(a)(2). The parties agree on the answer to the second question presented: *Johnson*'s constitutional holding applies to U.S.S.G. § 4B1.2(a)(2)'s residual clause, thus rendering that provision void. The holding in *Stinson v. United States*, 508 U.S. 36 (1993) that commentary to a guideline is invalid if it "is inconsistent with, or a plainly erroneous reading of, that guideline," *id.* at 38, answers the third question: Petitioner's Pennsylvania robbery conviction is not a "crime of violence" simply because it is listed in the guideline's commentary, because it does not interpret and conflicts with the text of the guideline after *Johnson*.

Prompt resolution of these questions is needed for many of the same reasons the Court granted *certiorari* and expedited briefing in *Welch*, including a June 26, 2016, deadline for filing collateral challenges. The government contends that these questions are of no prospective importance, BIO at 28, 30; *see id.* at 9, 27, but under this logic, the Court should not have granted review in *Welch*. As in *Welch*, a ruling here is of continuing and vital importance to the thousands of prisoners whose sentences were enhanced under an unconstitutionally vague sentencing provision who, absent immediate guidance from this Court, will likely to lose the ability to

obtain relief. Petitioner therefore requests that the Court decide the questions presented in his favor in a *per curiam* decision. If, however, the Court believes that full briefing and argument is necessary on any of the questions presented, Petitioner asks the Court to grant *certiorari* and order full briefing and argument.

1. *Johnson* is retroactive to Guidelines cases on collateral review.

a. *Welch* held that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). The government misstates the holding, adding "in cases involving ACCA-enhanced sentences," Brief in Opposition ("BIO") at 10, and insists that whether *Johnson* applies retroactively to "claims based" on the Guidelines is a "separate question," *id.* at 11. A rule's retroactivity, however, is a "categorical matter," *Davis v. United States*, 564 U.S. 229, 243 (2011), and "[u]nder *Teague*, either a rule is retroactive or it is not," *United States v. Doe*, 810 F.3d 132, 154 & n.13 (3d Cir. 2015); *see also* FPD-NAFD Amici Br. 5-6 nn.5-6. The relevant "categories" for retroactivity purposes are "categories of decisions" that are "substantive rules" or "watershed rules of criminal procedure," *Welch*, 136 S. Ct. at 1264, and the cases to which those rules retroactively apply are "cases on collateral review." *Teague v. Lane,* 489 U.S. 288, 315-16 (1989); *see also* 28 U.S.C. §§ 2255(f)(3), 2255(h)(2).

Rather than respond to amici's argument that *Welch* rejected its position that *Johnson*'s retroactivity depends on the "category" of case in which it is invoked, FPD-NAFD Amici Br. 5-6, or the court of appeals decisions holding that rules interpreting

the ACCA are categorically retroactive in Guidelines cases,[1] the government points to two cases decided 45 years ago and 18 years before *Teague*. BIO at 14 (citing U.S. Reply Br. at 10-12, *Welch*, 136 S. Ct. 1257 (2016)). Those cases are inapposite. In one case, the defendant invoked a substantive rule that applied to his claim. *See United States v. United States Coin & Currency*, 401 U.S. 715, 723-24 (1971). In the other case, the defendant sought to rely on the same rule, but it did not apply to his claim. *See Mackey v. United States*, 401 U.S. 667, 700-01 (1971) (Harlan, J., concurring). Petitioner is invoking *Johnson*, a substantive rule, that all agree applies to his claim.

Even if the government's as-applied theory of retroactivity were correct, *Johnson* as-applied to the Guidelines is a substantive rule, not a procedural one, under the criteria stated in *Welch*. Whether a rule is substantive or procedural depends on the "function" of the "rule itself." *Id.* at 1265-66. If the rule changes the "substantive reach" of a sentencing provision, thus "altering 'the range of conduct or the class of persons that the [provision] punishes,'" its function is substantive. *Id.* at 1265 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). If the rule regulates the "permissible methods a court might use to determine whether" the provision applies, its function is procedural. *Id.* at 1265.

Johnson is substantive as-applied to the Career Offender Guideline because it changed the "substantive reach" of the guideline, thus "altering the range of conduct

[1] The government states that it no longer agrees with these decisions, but fails to meaningfully them. *See* BIO at 13-14 n.6.

[and] the class of persons that the [guideline] punishes." *Id.* *Johnson* "is not a procedural decision" because it "had nothing to do with the range of permissible methods a court might use to determine whether" any sentencing provision applies. *Id.* Because the residual clause is invalid, "even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* (internal citation and quotation marks omitted). When a court applies the Career Offender Guideline based on the residual clause, the sentence, whether inside or outside the guideline range, is "based on" that clause. *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) ("'[T]he Guidelines are in a real sense the basis for the sentence.'") (quoting *Freeman v. United States*, 564 U.S. 522-529 (2011) (plurality opinion)) (italics omitted). Because the residual clause is invalid under *Johnson*, "it can no longer mandate *or authorize* any sentence." *Welch*, 136 S. Ct. at 1265 (emphasis added). The residual clause "authorized" Petitioner's 262-month sentence; after *Johnson*, the residual clause can no longer authorize that or "any" other sentence.

Not satisfied with *Welch*, the government, citing only its brief in *Welch*, insists that for a rule to be substantive, it must "necessarily alter[] the statutory range of permissible sentences." BIO at 11; *see also id.* at 10, 12-14, 21-23. But the Court did not adopt that definition. Instead, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264-65 (internal citation and quotation marks omitted). The Court repeated this definition throughout its opinion, *id.* at 1265, 1266, 1268, as the "normal criteria for a substantive rule," *id.* at 1267. A rule's "function" is substantive when it

"change[s] the substantive reach" of a sentencing provision, thus "altering the range of conduct or the class of persons that the [provision] punishes." *Id.* at 1265.

The government asserts, however, that a "Guidelines provision cannot 'mandate or authorize any sentence,'" BIO at 13, and that "any sentence" means only a statutory mandatory minimum or maximum sentence, *id.* at 12; *see also id.* at 16, 18. Once again, the government is wrong. Before *Johnson*, the residual clause *authorized* courts to impose a sentence within the Career Offender Guideline range, and required them to "consider" that range, *see* 18 U.S.C. § 3553(a)(4), as the "basis for the sentence." *Peugh*, 133 S. Ct. at 2083. After *Johnson*, the residual clause "cannot authorize" a court to impose a sentence within, to consider, or to decide whether to vary from, any guideline range. *See* FPD-NAFD Amici Br. 9-11.

The government does not attempt to show that *Johnson* regulates any procedure for determining "whether a defendant should be sentenced under" the Career Offender Guideline, nor could it. *Welch,* 136 S. Ct. at 1265. As the Court made clear in *Welch*, such a rule would, for example, require a jury rather than a judge to find that the defendant had been convicted of a crime of violence, *cf. Almendarez-Torres v. United States*, 523 U.S. 224, 234-35 (1998), or limit the documents the court may consider in determining whether a prior conviction is a crime of violence, *see Shepard* v. *United States*, 544 U.S. 13, 16 (2005). *Johnson* "had nothing to do with" such procedures. *Welch*, 136 S. Ct. at 1265.

Instead, relying on its briefs in *Welch*, the government claims that *Johnson* is procedural because, when combined with 18 U.S.C. § 3553(a), it "produces procedural

changes in the sentencing process." BIO at 11; *see also id.* at 13, 15. These "procedural changes," according to the government, consist of courts now considering "incorrect advice" or an "improper factor," rather than changing "statutory boundaries."[2] *Id.* at 12, 22-23. In other words, the government's circular argument is that *Johnson* is procedural because it is not substantive under the definition the government sought but failed to obtain in *Welch.*

The Court had already rejected, before *Welch*, the argument that a rule must alter statutory limits in order to be substantive. *See Montgomery v. Louisiana,* 136 S. Ct. 718, 734 (2016). Contrary to the government's contention, BIO at 23 n.10, there is no principled distinction between *Miller v. Alabama,* 132 S. Ct. 2455 (2012), and *Johnson,* even accepting its position that whether *Johnson* is substantive or procedural depends not on the function of *Johnson* itself in changing the substantive reach of the Career Offender Guideline, but the possibility that a court might vary upward to the equivalent of a career offender sentence for a defendant who is not a career offender after *Johnson. See* BIO at 13, 15-16. *Miller* prohibits life without parole for juveniles *found by the court* to be transiently immature, but allows that sentence for juveniles *found by the court* to be permanently incorrigible. In making

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[2] The government also argues that *Johnson* is procedural because the Court has described use of an incorrect guideline range as "procedural" error. BIO 22 & n.9. The Court's characterization of errors as "substantive" or "procedural" to distinguish between two types of sentencing errors on direct review, *see Gall v. United States,* 552 U.S. 38, 51 (2008), was not derived from and had nothing to do with the definitions of "substantive" and "procedural" used to categorize rules for purposes of retroactivity on collateral review, which have now been clearly defined in *Welch.*

that finding, the court must "take into account how children are different" in light of the "penological justifications" for imposing life without parole, *i.e.*, retribution, deterrence, incapacitation and rehabilitation. *Montgomery*, 136 S. Ct. at 733. Under the government's own theory, *Johnson* prohibits the equivalent of a career offender sentence for the class of persons *found by the court* not to warrant an upward variance to such a sentence based on the penological justifications set forth in § 3553(a)(2). Thus, even if *Johnson* itself required courts to consider the factors and purposes set forth in § 3553(a), which it does not, it would "not, of course, transform" *Johnson*'s "substantive rule[] into [a] procedural one[]." *Montgomery*, 136 S. Ct. at 735.

The government does not dispute the fact that in only 0.57 percent of cases, drug offenders who were not classified as career offenders received sentences as high as the bottom of the guideline range for drug offenders who were classified as career offenders. *See* Pet. 22-24; FPD-NAFD Amici Br. 14-15; Appendix 1.[3] That the equivalent of a career offender sentence *could* be imposed on a rare defendant who is not a career offender after *Johnson* does not mean that all other defendants who are not career offenders after *Johnson* have not suffered the deprivation of a substantive right.[4] *See Montgomery*, 136 S. Ct. at 734.

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[3] The Data Analyses is attached as Appendix 1, and is posted at http://www.src-project.org/wp-content/uploads/2016/05/Appendix-1-Data-Analyses.pdf. The link to the Data Analyses in Mr. Jones petition for writ *certiorari*, *see* Pet. 16 n.5, 22 n.11, 24 n.13, has unfortunately been broken.

[4] In an attempt to show that the career offender enhancement does not result in a uniquely severe punishment, the government cites statistics showing that courts often sentence below the Career Offender range. BIO at 16-17. But the rate of below-range sentences does not refute the point: The average Career Offender Guideline

The government claims that the Court's decisions in capital cases support its position that *Johnson* is not substantive but procedural. BIO at 21 & n.8. These decisions did not alter the range of conduct or the class of persons that the states' capital punishment statutes punished, but changed the permissible kinds of evidence or methods the sentencer could use in determining whether to impose the death penalty.[5] These decisions are entirely inapposite. *Johnson* altered the "substantive reach" of the Career Offender Guideline, and said nothing about the kinds of evidence or methods of determining whether any sentence should be imposed. *See Welch*, 136 S. Ct. at 1265.

Finally, Petitioner relied on *Peugh* for the proposition that "[b]y voiding the residual clause, *Johnson* 'alter[s] the substantive 'formula' used to calculate the applicable sentencing range.'" Pet. 21-22 (quoting *Peugh*, 133 S. Ct. at 2088). It does

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minimum was 2.46 times the non-Career Offender Guideline minimum, and the average sentence imposed on career offenders was 2.35 times the average sentence imposed on non-career offenders. *See* Appendix 1. The Career Offender range *does* result in uniquely severe punishment because it *does* "exert controlling influence on the sentence" imposed. *Peugh*, 133 S. Ct. at 2085.

[5] *See Beard v. Banks*, 542 U.S. 406, 408, 416-17 (2004) (holding nonretroactive rule that forbids instructing jurors to disregard mitigating factors not found unanimously); *O'Dell v. Netherland*, 521 U.S. 151, 155, 167 (1997) (holding nonretroactive rule permitting defendant to inform jury that state law prohibits his release on parole when prosecutor argues future dangerousness); *Lambrix v. Singletary*, 520 U.S. 518, 528 n.3, 539 (1997) (holding nonretroactive rule holding that indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as direct weighing); *Sawyer v. Smith*, 497 U.S. 227, 233, 241-44 (1990) (holding nonretroactive rule that forbids leading jury to believe responsibility for death sentence lies elsewhere).

not matter here whether *Peugh* is retroactive to cases on collateral review.[6] *Cf.* BIO 19-21. Under *Peugh*, the elimination of the residual clause from the Career Offender Guideline alters the substantive basis for Petitioner's sentence. It did not simply alter the method to be followed in determining whether the substantive standard applies. *See Welch*, 136 S. Ct. at 1265; *Peugh*, 133 S. Ct. at 2088; *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505-08 (1995). While the meaning of the terms "substance" and "procedure" can depend on context, *Peugh* shows that the guidelines constitute a substantive, rather than procedural, aspect of federal sentencing.

b. The Court should grant review to decide the retroactivity question despite the current absence of appellate court rulings in initial § 2255 cases, BIO at 23-24, because the circuits are divided in cases involving second or successive motions about whether *Johnson* is a substantive rule, and a decision here will resolve the issue for both initial and successive motions. The Seventh Circuit has authorized successive motions because "*Johnson* announced a new substantive rule of constitutional law" that is "categorically retroactive"[7]; the Sixth Circuit has

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[6] In a recent case the government cites for the proposition that *Peugh* is not retroactive, however, the court found that "[t]o call an increase in sentence length, however effectuated, 'procedural' seems a misuse of the word" and that "the increase in the [advisory] guidelines range . . . seems substantive," then refused to give *Peugh* retroactive effect for reasons at odds with *Peugh*. *Conrad v. United States*, 815 F.3d 324 , 327-28 (7th Cir. 2016), *pet. for reh'g filed* (Apr. 18, 2016).

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

authorized successive motions because *Johnson* announced a "retroactively applicable rule of constitutional law"[8]; and the Tenth Circuit has authorized successive motions because the Court "made *Johnson*'s holding retroactive to cases on collateral review in *Welch*."[9] The Eighth Circuit denied a successive motion in a pre-*Welch* order based on the government's argument that an "extension of the rule in *Johnson* would not be a new substantive rule."[10] After *Welch* overruled its holding that this Court had not "made" *Johnson* retroactive, *In re Rivero*, 797 F.3d 986 (11th Cir. 2015), the Eleventh Circuit, over dissent, denied a second or successive motion because *Johnson* would be a "procedural" rule as-applied to the Guidelines.[11]

c. The government claims that if *Johnson* is retroactive as-applied to advisory Guidelines cases, all "other errors in calculating the Guidelines range" will be "eligible for correction on collateral review." BIO at 18. This is not correct. First, for a new rule to be applied retroactively on collateral review, it must be announced by this Court unless the motion is filed within one year from the date the conviction

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

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

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

[11] *In re Cantillo*, No. 16-11468, slip op. at 9-11 (11th Cir., May 2, 2016); *but see id.* at 19-21 (Martin, J., dissenting).

became final, *see* 28 U.S.C. § 2255(f)(3), and if the motion is second or successive, *see* § 2255(h)(2), but this Court does not decide cases involving ordinary guidelines errors. *See Braxton v. United States*, 500 U.S. 344, 348-49 (1991). Second, ordinary guideline errors generally are not cognizable on a § 2255 motion. *See, e.g., Coleman v. United States*, 763 F.3d 706, 708 (7th Cir. 2014).

The government agrees that retroactivity is justified if a new rule changes the scope of the underlying proscription, but nonetheless contends that it would be too burdensome to apply *Johnson* retroactively even though the courts have resolved nearly 40,000 motions under 18 U.S.C. § 3582(c)(2) in fifteen months. BIO at 19. It says those proceedings were "streamlined," while *Johnson* resentencings would require unspecified "extensive" procedures, *id.* at 19 n.7. But sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) are not necessarily streamlined,[12] and there is often no litigation at resentencings obtained under 28 U.S.C. § 2255. Moreover, the number of people in need of resentencing based on *Johnson* is a fraction of 40,000. *See* Pet. 16-18; Appendix 1.

What has created an enormous burden on the courts and litigants, as well as delay to the brink of the expiration of the statute of limitations, is litigation of the government's novel, complicated, and unsound position on retroactivity. The Court should therefore either rule in Petitioners' favor in this case and in *United States v.*

[12] Issues are litigated under the rules at U.S.S.G. § 1B1.10 that prohibit or limit reductions, govern the procedures used, or specify factors to be considered.

Travis Beckles, No. 15-8544 (filed March 9, 2016), or grant certiorari in one of these cases, as soon as possible.

2. Although the government agrees that *Johnson* invalidates the residual clause in the career offender guideline, and that there is a circuit conflict on that question, BIO at 26-27, it argues that uniform application of *Johnson* to the Guidelines is "likely to be of no continuing importance" because the Sentencing Commission has adopted an amendment that will delete the clause. *Id.* at 27; *see id.* at 31 n.11. The Commission's prospective amendment[13] provides no more reason to reject review than did this Court's prospective voiding of the ACCA's residual clause provide a reason to deny review in *Welch*. As there, the Commission's prospective amendment will not affect the thousands of prisoners whose sentences already were enhanced and for whom uniform application of *Johnson*'s holding is of continuing and vital importance.

3. The government does not dispute the longstanding split in the circuits as to whether the commentary to the career offender guideline has freestanding definitional power, or whether the offenses listed in the commentary must instead satisfy a definition of "crime of violence" in the guideline's text. *See* BIO, *passim*; Ptn.

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[13] 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 precluded a vote on making the amendment retroactive).

at 33-35. It also acknowledges the post-*Johnson* iteration of this divide. *See* BIO at 31 n.11 (citing *United States v. Soto-Rivera*, 811 F.3d 53 (2016)).

Again, the government turns to the Commission's proposed amendment and asserts that whether offenses listed in the commentary must satisfy a definition in the guideline's text "has no prospective importance." BIO at 30. The amendment does not resolve the disagreement in the circuits; nor does it eliminate the need for this Court's intervention. The inchoate offenses of attempt, aiding and abetting, and conspiracy will remain in the commentary 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 (Jan. 15, 2016). Because none of these offenses is enumerated or satisfies the elements clause, *see* Reply Brief for Petitioner, *Beckles v. United States*, No. 15-8544 (May 23, 2016), the question whether the Commission may use the guidelines commentary to add freestanding "crimes of violence" will have continuing importance after the amendment takes effect. Even if the proposed amendment resolved the issue prospectively, which it does not, it would not affect those, like Petitioner, whose sentences were enhanced based on the current commentary. For them, the question remains important.

Citing *Braxton v. United States*, 500 U.S. 344, 347-49 (1991), the government opposes review because, it says, "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 29. *Braxton* is

irrelevant here. There, the Court left to the Commission resolution of a circuit conflict over the meaning of a guideline's text. 500 U.S. at 348-49 (leaving to Commission task of resolving "conflict over the meaning of § 1B1.2"). Here, the conflict does not involve the meaning of the guideline's text; rather, the conflict is over compliance with 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 30-33. The Commission is not authorized to resolve, and never has resolved, a circuit split over whether or how to apply *Stinson*. *See* U.S.S.G., App. C, Vols. I, II, III & Supp. (collecting amendments and reasons therefor).

On the merits, the government contends that the Commission's interpretation of "crime of violence" in commentary to include robbery "'does not run afoul of the Constitution'" and "'is not plainly erroneous or inconsistent with 4B1.2.'" BIO at 30 (quoting *Stinson*, 508 U.S. at 47)). The government's unsupported assertion is wrong. Without the residual clause, the offenses in the commentary no longer interpret any portion of the guideline's text and are "freestanding." For example, Petitioner's conviction for robbery under 18 Pa. C.S. § 3701(a)(1)(v) contains no element of force as required under § 4B1.2(a)(1) and is not enumerated in § 4B1.2(a)(2). Reliance on the commentary to find Petitioner's conviction constitutes a crime of violence results in "flat inconsistency" with the text of § 4B1.2, thereby "violating the dictates" of the text. *Stinson*, 508 U.S. at 43.

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. Should the Court issue a writ, Petitioner also prays that the Court expeditiously issue a *per curiam* opinion resolving the questions presented.

Respectfully submitted,

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Western District of Pennsylvania
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Dated: May 23, 2016

Appendix 1

DATA ANALYSES

CAREER OFFENDER STATUS

Description of Data and Methodologies

In FY2014, the most recent year for which data are publicly available, 21,907 offenders were sentenced primarily under the drug guidelines.[1] The Commission obtained complete guideline application information on 21,257 of these offenders. Of these, 1,702 were classified as career offenders; for 1,552 of these, career offender status increased the guideline range.

Comparison of above-guideline rates, average sentences imposed, and guideline minimums for non-career offenders and career offenders

The average guideline minimum was 204 months for career offenders, and 83 months for non-career offenders.

The average sentence imposed was 138.6 months for career offenders, and 62 months for non-career offenders.

Sentences above the guideline range were imposed on 0.47 percent of career offenders, and on 0.98 percent of non-career offenders.

Percentage of non-career drug offenders who received sentences as high as the guideline minimum for comparable career offenders

Analyses were performed to determine how often non-career offenders received upward departures or variances that increased the sentence imposed to a level at least as high as the guideline minimum for comparable career offenders. The analyses were performed on the 192 non-career offenders who were sentenced above the guideline range, and the 1,552 career offenders whose career offender status increased their guideline range.

Offenders were divided into comparable groups based on the cells of the Sentencing Table they were in *prior to any upward departure or variance or adjustment for career offender status.* For example, non-career offenders with a guideline minimum of 57 months were compared to career offenders whose guideline minimum was also 57 months prior to the Chapter Four enhancement for career offender status. Final sentences for the non-career offenders were compared to the minimum of the guideline range applicable to the career offenders following the career offender enhancement.

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[1] Chapter Two, Part D (Drugs) §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). These are the offenders described further in the Commission's annual *Sourcebook of Federal Sentencing Statistics,* tbls. 33-45.

Sentences for non-career offenders were the same as or greater than career offenders' guideline minimum in 111 cases. This means that in just 0.57 percent of drug cases, offenders who did not receive career offender status received sentences at least as high as the guideline minimum for comparable drug offenders who did receive career offender status.

ARMED CAREER CRIMINAL STATUS

Data on all defendants who qualified for Armed Career Criminal status under 18 U.S.C. § 924(e) in FY 2014 was examined to determine how many received sentences of less than 15 years and how many received sentences of ten years or less. Of the 567 defendants for whom the Commission received full information, and who were classified as Armed Career Criminals, 21.2 percent (120) received sentences less than 180 months (ranging from 12 to 170 months), and 15.5 percent (88) received sentences of 120 months or less.

Of these 120 sentences below the mandatory minimum under 18 U.S.C. § 924(e), 100 were substantial assistance departures; 5 were government-sponsored below-range sentences; 5 were below-range *Booker* sentences; 1 was an early disposition departure; 1 was a downward departure; and 8 were within-range sentences, which likely means that the courts departed to a sentence within the non-ACCA range.

NUMBER OF DEFENDANTS CLASSIFIED AS CAREER OFFENDERS IN FY 2008-2014 AND LIKELY TO REMAIN IN PRISON

Data from FY2008 through FY2014 were used to estimate the numbers of offenders sentenced under the career offender guideline, and the number of those offenders likely to remain in prison. The estimate of the number likely to remain in prison is necessarily imprecise, because it is based only on information available at the time of sentencing, including estimates of the prison time likely to be served by offenders, assuming they receive full good time credits. Information on prison conduct that may affect good time credits, re-sentencings, or other possible post-sentencing reductions is not available. Publicly available data also do not indicate the precise date of sentencing, only the fiscal year. Offenders who would be more than 70 years old today are excluded from the estimate.

Based on this information, about 16,444 offenders were sentenced under the career offender guideline from FY2008 through FY2014, and about 14,928 of these offenders are likely still in prison.

A 2004 Sentencing Commission report noted that among offenders classified as career offenders, "Most of these offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guidelines." 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). There are no publicly available data with which to estimate how many offenders classified as career offenders based on "crimes of violence" were classified as such based on offenses that depended upon the "residual clause" at U.S.S.G. § 4B1.2(a)(2).

DATA SOURCE

The data used for these analyses were extracted from the U.S. Sentencing Commission's Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project, Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission. For a description of the Datafiles, see 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* app. D at 1 (2004). Although these particular analyses have not been performed or published by the Commission, the underlying data are the same as the data used in the Commission's annual *Sourcebook of Federal Sentencing Statistics*. The data are publicly available at the Commission's website: http://www.ussc.gov/research-and-publications/commission-datafiles. Using standard statistical software, such as SAS or SPSS, the Individual Offender Monitoring Datafiles can be used to generate a wide variety of tables and graphs beyond those published by the Commission.

CERTIFICATE OF SERVICE

I hereby certify that under penalty of perjury that a true and correct copy of the foregoing Reply Brief for Petitioner was sent in an envelope via email and first class mail this 23rd day of May, 2016, to the following:

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