

IN THE SUPREME COURT OF THE UNITED STATES

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ALFREDERICK JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. In Welch v. United States, 136 S. Ct. 1257, 1265 (2016), the Court held that Johnson announced a new “substantive” rule of constitutional law that applies retroactively in an initial collateral challenge under 28 U.S.C. 2255 to a sentence enhanced under the ACCA. The questions presented in this petition are:

1. Whether, in a vagueness challenge to the use of the residual clause in Sentencing Guidelines § 4B1.2(a)(2) to enhance an advisory guidelines range, Johnson’s constitutional rule applies retroactively in a motion under Section 2255.

2. Whether Johnson’s constitutional rule applies to the residual clause in Sentencing Guidelines § 4B1.2(a)(2).

3. Whether petitioner’s prior conviction for third-degree robbery under Pennsylvania law qualifies as a “crime of violence” under the commentary to Sentencing Guidelines § 4B1.2.

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No. 15-8629

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OPINIONS BELOW

The order of the court of appeals denying petitioner's application for a certificate of appealability (Pet. App. A1-A2) is unreported. A prior order of the court of appeals denying petitioner's application for a certificate of appealability (Pet. App. D1) is unreported. The order of the district court denying petitioner's motion under 28 U.S.C. 2255 and denying a certificate of appealability (Pet. App. E1-E7) is unreported but is available at 2014 WL 1386328. A prior opinion of the court of appeals affirming petitioner's conviction on direct appeal

(Pet. App. F1-F3) is not published in the Federal Reporter but is reprinted in 450 Fed. Appx. 183.

#### JURISDICTION

The judgment of the court of appeals was entered on November 9, 2015. A petition for rehearing was denied on January 22, 2016 (Pet. App. B1). The petition for a writ of certiorari was filed on March 18, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

In 2009, following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 262 months of imprisonment, to be followed by four years of supervised release. Pet. App. E1. The court of appeals affirmed. Id. at F1-F3. In 2012, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). D. Ct. Doc. 69. The district court denied the motion and denied a certificate of appealability (COA). Pet. App. E1-E7. The court of appeals also denied a COA. Id. at D1. Petitioner filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of Johnson v. United States, 135

S. Ct. 2551 (2015). 135 S. Ct. 2944; Pet. App. C1. On remand, the court of appeals again denied a COA. Pet. App. A1-A2.

1. a. On two occasions in 2007, petitioner sold cocaine to a government informant who was working with agents of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. The amount of cocaine involved in the two sales totaled 497 grams. Presentence Investigation Report (PSR) ¶¶ 8-14; 10-1185 Gov't C.A. Br. 5-9. A federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). After a jury trial, petitioner was convicted on both counts. No. 10-1185 Gov't C.A. Br. 4.

b. The PSR prepared by the Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1. PSR ¶¶ 27, 47. Under Section 4B1.1, a defendant is subject to an enhanced advisory sentencing range when (a) he was at least 18 years old at the time of the offense of conviction; (b) the offense of conviction is a felony that is a "crime of violence" or a "controlled substance offense"; and (c) he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a). The phrase "crime of violence" is defined in Guidelines Section 4B1.2(a) to include a felony offense 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."<sup>1</sup> Sentencing Guidelines § 4B1.1(a). The commentary to Section 4B1.2 further identifies other crimes of violence, including "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, \* \* \* [and] extortionate extension of credit." Sentencing Guidelines § 4B1.2, comment. (n.1). The PSR referred to two prior convictions for crimes of violence: a 1986 Pennsylvania conviction for robbery, PSR ¶ 39, and a 1990 Pennsylvania conviction for aggravated assault, PSR ¶ 43. As a career offender, petitioner's total offense level was 34 and his criminal history category was VI, resulting in an advisory Guidelines range of 262 to 327 months of imprisonment.<sup>2</sup> PSR ¶ 77.

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<sup>1</sup> The Guidelines' definition of a "crime of violence" closely tracks the ACCA's definition of a "violent felony," 18 U.S.C. 924(e)(2)(B). Both provisions include an identically worded elements clause, see 18 U.S.C. 924(e)(2)(B)(i) (offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"); Guidelines § 4B1.2(a)(1) (same), and an identically worded residual clause. See 18 U.S.C. 924(e)(2)(B)(ii) (offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another"); Sentencing Guidelines § 4B1.2(a)(2) (same).

<sup>2</sup> Absent the career offender classification, petitioner would have faced a Guidelines range of 77 to 96 months of

Petitioner objected to his classification as a career offender, claiming that his prior robbery conviction should not be treated as a crime of violence because, among other things, it was "nothing more than a purse snatching" that was classified as a third-degree felony under Pennsylvania law.<sup>3</sup> PSR Addendum 18. The district court overruled petitioner's objection and adopted the Guidelines calculation in the PSR. Sent. Tr. 8-9, 49 (Sent. Tr.); Judgment, Statement of Reasons 1. The court sentenced petitioner to 262 months of imprisonment. 8/31/10 Sent. Tr. 50. In explaining the sentence, the court noted that petitioner's prior aggravated assault conviction involved a shooting that left the victim "paralyzed for the rest of his life." Ibid. The court found petitioner's commission of "significant" drug crimes while he was on parole after spending "an awful lot of time in jail" for the aggravated assault to be "very, very, disturbing." Id. at 45-46. The court concluded that the 262-month sentence was justified by the need to "punish

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imprisonment based on an offense level of 24 and a criminal history category of IV. PSR ¶¶ 26, 47.

<sup>3</sup> At sentencing, the government introduced a certified copy of the judgment for petitioner's prior robbery conviction showing that petitioner pleaded guilty to "Robbery F-3." Sent. Tr. 7; Gov't Sent. Ex. A. Under Pennsylvania law, a defendant is guilty of third-degree robbery if, "in the course of committing a theft, he \* \* \* physically takes or removes property from the person of another by force however slight." 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(v) and (b)(1) (1986).

[petitioner]," "deter others from engaging in this kind of conduct," and "protect the public." Id. at 50.

c. Petitioner did not challenge his sentence on appeal, and the court of appeals affirmed his convictions. Pet. App. F1-F3.

2. a. In April 2012, petitioner filed a pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. D. Ct. Doc. 69. As relevant here, petitioner argued that his appellate counsel was ineffective in failing to challenge his career offender sentence on the ground that his robbery conviction did not qualify as a crime of violence because it did not have "[as] an element, the use, attempted use, or threatened use of physical force against the person of another." Id. at 27-29 (quoting Sentencing Guidelines § 4B1.2(a)(1)).

On April 8, 2014, the district court denied petitioner's Section 2255 motion and denied a COA. Pet. App. E1-E7. The court ruled that petitioner's robbery conviction qualified as a crime of violence, noting that Section 4B1.2(a) "is clear on this point, specifically citing robbery in the application notes," and that petitioner's counsel was not ineffective for failing to raise a "meritless" argument. Id. at E6-E7 & n.2.

b. In July 2014, petitioner filed an application for a COA in the court of appeals. In the application, he argued for the first time that under this Court's decision in Johnson v. United



States, 559 U.S. 133, 140 (2010) (Curtis Johnson), his third-degree robbery conviction did not qualify as a crime of violence under the Guidelines' elements clause because it did not require "violent force." C.A. App. for COA 6-7. Petitioner also argued that his robbery conviction did not qualify under the Guidelines' residual clause because commission of a robbery "by use of force however slight" did not necessarily present a serious risk of physical injury to another person. Id. at 7-9.

On February 24, 2015, the court of appeals, through a single judge, denied petitioner's request for a COA "[f]or substantially the reasons given by the District Court." Pet. App. D1. The court declined to consider petitioner's claim that his robbery conviction did not qualify as a crime of violence under the holding in Curtis Johnson, noting that "Johnson is not a new case," and petitioner could have raised his claim in the district court. Ibid.

c. On April 27, 2015, petitioner filed a petition for a writ of certiorari challenging his classification as a career offender based on his Pennsylvania robbery conviction and arguing that the career offender guideline's residual clause was unconstitutionally vague. See 14-9574 Pet. 10 n.4. On June 26, 2015, this Court held in Johnson that ACCA's residual clause is void for vagueness, and, therefore, imposing an increased sentence under ACCA's residual clause "violates the

Constitution's guarantee of due process." 135 S. Ct. at 2563. On June 30, 2015, this Court granted petitioner's petition for a writ of certiorari, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of Johnson. 135 S. Ct. at 2944; Pet. App. C1.

3. On remand, the court of appeals again denied petitioner's application for a COA in an unpublished single-judge order. Pet. App. A1-A2. The court ruled that "the 2015 Johnson decision" was "not relevant" because "whether or not Johnson invalidates the residual clause" in the career offender guideline, petitioner's "designation as a career offender did not rely on that clause." Id. at A2. Instead, the court stated, the district court relied on the Guidelines' commentary listing robbery as "an enumerated predicate offense." Ibid.

Petitioner filed a petition for rehearing en banc, arguing that Johnson invalidated the career offender guideline's residual clause and that, without the residual clause, the commentary's list of qualifying predicate offenses was inconsistent with the remaining clauses of the definition of "crime of violence." 14-2882 Pet. for Reh'g 6-15. The court of appeals denied the petition for rehearing without recorded dissent. Pet. App. B1.

## ARGUMENT

1. Petitioner first contends (Pet. 12-24; see Amicus Br. of Fed. Defenders 1-18) that this Court should grant review to decide whether, in a vagueness challenge to the use of the residual clause in Sentencing Guidelines § 4B1.2(a)(2) to enhance an advisory guidelines range, Johnson's constitutional rule applies retroactively in a motion under Section 2255. The court of appeals did not address that question, and resolution of the issue would not affect the outcome of this case. To obtain relief, petitioner would have to prevail on the threshold question whether Johnson applies to the residual clause in the career offender guideline. He would also have to establish that the court of appeals erred in concluding that, whatever effect Johnson had on the Guidelines' residual clause, the decision was "not relevant" here because petitioner's prior robbery conviction qualified as a crime of violence based on the commentary to the career offender guideline. Pet. App. A2. And that dispositive question -- which concerns the proper application of the commentary to the current career offender guideline -- is not a question of continuing importance because the Sentencing Commission has amended the guideline to move the

list of enumerated offenses from the commentary to the text of the guideline. Accordingly, this Court's review is unwarranted.<sup>4</sup>

a. After the petition for a writ of certiorari in this case was filed, this Court held in Welch v. United States, 136 S. Ct. 1257 (2016), that Johnson announced a new substantive rule of constitutional law that applies retroactively on collateral review in cases involving ACCA-enhanced sentences. Id. at 1264-1268. The Court explained that whether a new rule is substantive or procedural depends on the "function of the rule at issue." Id. at 1266. By striking the ACCA's residual clause as unconstitutionally vague, Johnson "changed the substantive reach of the Armed Career Criminal Act," so that a defendant who previously faced a minimum of 15 years in prison (and a maximum of life) under the ACCA would now face at most ten years in prison. Id. at 1265. Because Johnson "affected the reach of the underlying statute rather than the judicial procedures by

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<sup>4</sup> The questions presented in this case are also presented in the petition for a writ of certiorari in Beckles v. United States, No. 15-8544 (Mar. 9, 2016). The question whether Johnson is retroactive (or whether it has been "made" retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2)) in cases involving sentences imposed based on the Guidelines' residual clause is presented in the petition for an original writ of habeas corpus in In re Rivero, No. 15-7776 (Jan. 14, 2016). The government filed its brief in opposition to that petition on April 1, 2016.

which the statute is applied," the Court held, it is a "substantive decision" that "has retroactive effect." Ibid.

The Court's holding in Welch that Johnson applies retroactively in ACCA cases on collateral review does not govern the separate question whether Johnson applies retroactively to claims based on the Sentencing Guidelines. As the government explained in its merits briefing in Welch, the application of Johnson to the ACCA is a substantive change in the law because it necessarily alters the statutory range of permissible sentences, but the application of Johnson to the Guidelines' residual clause produces procedural changes in the sentencing process that are not retroactive on collateral review.<sup>5</sup> See U.S. Br. at 38 n.9, Welch, supra; U.S. Reply Br. at 8-10 & n.3, Welch, supra.

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<sup>5</sup> In Welch, the government described the test for retroactivity of a new rule as turning on the "effect" of applying the new rule. See, e.g., U.S. Reply Br. at 2-3. The Court's statement in Welch that retroactivity depends on the "function" of the rule appears to embody the same approach. Compare Welch, 136 S. Ct. at 1266 (characterizing a "substantive function" as one that "alters \* \* \* the range of conduct or class of persons that the law punishes"), with U.S. Reply Br. at 2, Welch, supra (characterizing a substantive "effect" in the same language) (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)). See also Welch, 136 S. Ct. at 1274 (Thomas, J., dissenting) (opining that the Court's reliance on the "function of the rule" to determine whether a rule is retroactive "apparently means that courts should divine the effect of a new rule").

i. The function of the Johnson rule is markedly different in the Guidelines context than in a case involving the erroneous imposition of a sentence under the ACCA. In the ACCA context, sentencing a defendant based on the residual clause functions to raise the statutory minimum and maximum terms of imprisonment so that the defendant is exposed to a wholly new and unauthorized range of sentencing options. Welch, 136 S. Ct. at 1265. That error directly implicates the separation of powers principle that federal courts may not impose sentences unauthorized by Congress. See id. at 1268 (“[A] court lacks the power to exact a penalty that has not been authorized by any valid criminal statute.”).

In the Guidelines context, in contrast, sentencing a defendant in light of an erroneous application of Section 4B1.2 does not alter the statutory boundaries for sentencing set by Congress for the crime. It results in incorrect advice to the sentencing court, but does not authorize an otherwise-inapplicable statutory mandatory minimum sentence or produce a higher-than-otherwise-applicable statutory maximum, as is true under the ACCA with respect to comparable error. See Mistretta v. United States, 488 U.S. 361, 396 (1989) (Sentencing Guidelines do not usurp “the legislative responsibility for establishing minimum and maximum penalties for every crime,” but instead operate “within the broad limits

established by Congress"). Because a Guidelines provision cannot "mandate or authorize any sentence," see Welch, 136 S. Ct. at 1265, an erroneous Guidelines calculation does not alter the range of sentencing options available to the court. The function of the guidelines range is to provide a framework for the exercise of discretion under 18 U.S.C. 3553(a). It therefore relates to the "manner of determining" the defendant's sentence, Welch, 136 S. Ct. at 1265, which is the function of a procedural rather than a substantive rule.

ii. Petitioner's amicus contends (Br. 5-6) that Welch rejected "the premise of the government's position" that Johnson applies retroactively in ACCA cases, but not in Guidelines cases. Amicus asserts (Br. 6) that the Court's references in Welch to the retroactivity of new "rules" means that the rule announced in Johnson must be "categorically retroactive" in both ACCA cases and Guidelines cases. Cf. Davis v. United States, 564 U.S. 229, 243 (2011) ("Our retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a potential ground for relief."). Amicus maintains that the same rule cannot function substantively in one context and procedurally in another. Amicus is incorrect.<sup>6</sup>

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<sup>6</sup> As petitioner (Pet. 13-14 & n.4) and Amicus (Br. 15) note, the government previously took the position that ACCA and Guidelines errors were to be treated the same for retroactivity

From the inception of this Court's modern retroactivity jurisprudence, it has been recognized that a rule can have a substantive function in one context and a procedural function in another. See U.S. Reply Br. at 10-12, Welch, supra. That is the case here: Johnson sets forth a substantive rule in ACCA cases, but not in Guidelines cases, because an ACCA error results in a sentence that is "not authorized by substantive law," Welch, 136 S. Ct. at 1266, while a Guidelines error does not. The ACCA requires an increased minimum and maximum statutory sentence, and after Johnson the residual clause "can no longer mandate or authorize any sentence." Id. at 1265. But the same range of sentences remains statutorily authorized even when a court makes a Johnson error in applying the Sentencing Guidelines. Because Johnson plays a different functional role in the Guidelines context than in the ACCA context, it is appropriate to reach a different retroactivity conclusion.

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purposes, and some courts of appeals adopted that view. The government has since reconsidered that position and believes that such an approach is inconsistent with this Court's precedents defining a substantive rule that is retroactive to cases on collateral review, which focus on the function of the new rule, not its legal source. See Welch, 136 S. Ct. at 1265-1266. Accordingly, and contrary to Amicus's suggestion (Br. 15-17), the government's position is that, regardless of whether an alteration of the Guidelines results from interpretation or invalidation, the change in law is not retroactive to cases on collateral review.



iii. Petitioner contends (Pet. 20-24) that Johnson announced a substantive rule in Guidelines cases because it “prohibit[s] a certain category of punishment for a class of defendants because of their status,” i.e., defendants whose career-offender classification depends on the residual clause. Pet. 20-24 (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016)). That argument misconceives the role of the Guidelines calculation in the district court’s discretionary sentencing determination. The Guidelines do not define a “category of punishment” as this Court’s retroactivity cases employ that phrase. In the retroactivity setting, the Court has used that phrase to describe a type of punishment, such as a capital sentence, a mandatory life-without-parole sentence, or an enhanced statutory range. The ACCA establishes such a category by requiring an enhanced statutory sentence. But unlike the ACCA, a Guidelines classification does not “prescribe[] punishment.” Welch, 136 S. Ct. at 1268. The Guidelines range is one factor the court is required to consider in imposing a sentence that is “sufficient, but not greater than necessary” to achieve the purposes of sentencing. 18 U.S.C. 3553(a). That latter standard remains the “overarching” instruction to the sentencing court, regardless of the calculated range. Kimbrough v. United States, 552 U.S. 85, 101 (2007) (noting that courts may vary from the advisory range

to "tailor the sentence in light of other statutory concerns" and to reflect "disagreements with the Guidelines") (citations omitted). In this case, for example, the district court considered the relevant factors under Section 3553(a) and concluded that a 262-month sentence satisfied the statutory purposes of sentencing. Sent. Tr. 50 (finding that sentence would appropriately "punish [petitioner]," "deter others," and "protect the public"). A career-offender classification did not mandate that sentence, and that sentence would not be prohibited absent a career offender classification.

Petitioner's amicus suggests (Br. 11-12) that the career offender guideline is "uniquely statutory" because it was adopted pursuant to 28 U.S.C. 994(h), which directs the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for career offenders. 28 U.S.C. 994(h). But Section 994(h) is "directed [at] the United States Sentencing Commission," not sentencing courts. United States v. LaBonte, 520 U.S. 751, 752, 761 n.5 (1997)). It does not bind courts to the resulting ranges any more than any other guideline. Rather, just as with all of the Guidelines, sentencing courts are free to vary from the range recommended by the career offender guideline based on a disagreement with the Commission's policy judgment or on the facts of a particular case. See, e.g.,

United States v. Corner, 598 F.3d 411, 416 (7th Cir. 2010) (en banc) ("That the floor in § 4B1.1 is linked to the statutory maximum sentence for the crime of conviction does not make § 4B1.1 itself a statute; it remains a Guideline" with which "judges are \* \* \* free to disagree").

Amicus also suggests (Br. 12) that Johnson should be considered substantive in the context of an erroneous career offender sentence because the career offender enhancement is "uniquely severe" and typically followed. But district courts often vary from the advisory Guidelines range when sentencing career offenders. See Spencer v. United States, 773 F.3d 1132, 1142 (11th Cir. 2014) (en banc) ("[S]entencing courts depart or vary from the guideline range more often when they sentence career offenders. Only 30 percent of career offenders were sentenced within the guideline range in 2013."), cert. denied, 135 S. Ct. 2836 (2015); see also Quick Facts, United States Sentencing Commission, FY2010 through FY2014 Datafiles, USSCFY10-USSCFY14 (Between fiscal years 2010 and 2014, the rate of sentences within the Guidelines range for career offenders decreased from 33.2% to 27.5%. The rate at which district judges sentenced career offenders below the Guidelines range -- without a request by the government -- was 25.9% in FY2014.).

In addition, the logic of petitioner's retroactivity argument would apply equally to other provisions of the

Guidelines that include or incorporate the language of the ACCA's residual clause. This would include provisions that have a less "severe" effect, e.g., Sentencing Guidelines § 2K2.1(a)(4)(A) and (5) (six-level increase for firearms possessor who has a prior crime-of-violence conviction, where "crime of violence" has the meaning given that term under the career offender guideline), and others that may have only a minor effect on the Guidelines range, e.g., Sentencing Guidelines § 4A1.1(e) (adding one point to defendant's criminal history score for "each prior sentence resulting from a conviction of a crime of violence" that did not otherwise incur points). See also Sentencing Guidelines § 7B1.1(a)(1) & comment. (n.2) (policy statement governing the "grade" of probation and supervised-release violations).

Because all Guidelines provisions are equally advisory, no justification exists to treat the career offender designation as a substantive error eligible for correction on collateral review any more than other errors in calculating the Guidelines range. And while an erroneous range may have influenced (although not authorized) the ultimate sentence, the consequences of opening up to collateral attack all Guidelines sentences based on application of the residual clause would be far more consequential, yet have far less justification, than permitting collateral attacks on unlawful ACCA sentences. Cf. Welch, 136

S. Ct. at 1266 (noting the finality-based justifications for withholding retroactive effect to new procedural rules, notwithstanding “[t]he chance of a more accurate outcome,” in contrast to the justifications for retroactivity “if a new rule changes the scope of the underlying criminal proscription”).<sup>7</sup>

iv. Petitioner’s reliance (Pet. 21-22) on Peugh v. United States, 133 S. Ct. 2072 (2013), is misplaced. In Peugh, the Court held that the Ex Post Facto Clause prohibits the retrospective use of an increased advisory Guidelines range, noting that the Clause “forbids the [government] to enhance the measure of punishment by altering the substantive ‘formula’ used to calculate the applicable sentencing range.” Id. at 2088. The Court’s use of the word “substantive” in that context has no implications for the retroactivity of Johnson in the advisory Guidelines context. See Mistretta, 488 U.S. at 392 (noting that the “distinction between substance and procedure depends on

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<sup>7</sup> Petitioner (Pet. 20) and Amicus (Am. Br. 18) suggest that it would not be burdensome to the federal criminal justice system to apply Johnson retroactively to Sentencing Guidelines errors in light of successful judicial experience with modification of sentences when the Sentencing Commission has made a guidelines amendment retroactive. That comparison is entirely unfounded. A sentencing modification proceeding under 18 U.S.C. 3582(c) involves a streamlined process that does not entail a full resentencing. See Dillon v. United States, 560 U.S. 817, 825-826 (2010). A full resentencing would impose far greater burdens on the judicial system, unraveling sentences imposed many years ago and requiring extensive new procedures for resentencing.

context"); see also Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn."). Indeed, the lower courts that have addressed the question have found Peugh itself to be nonretroactive in cases on collateral review -- even though a Peugh error necessarily entails the use of the wrong advisory guidelines range. See Conrad v. United States, 815 F.3d 324, 328 (7th Cir. 2016) (finding finality costs too high to correct a Guidelines range error); Herrera-Gomez v. United States, 755 F.3d 142, 146 (2d Cir. 2014) (per curiam) (finding Peugh neither substantive nor watershed).

In any event, Peugh arose on direct review and applied a distinct test derived from Ex Post Facto principles -- a test that is not applicable here. The Ex Post Facto test, Peugh explained, turns on "whether a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes." 133 S. Ct. at 2082 (emphasis added and internal quotation marks omitted). A "risk" of a different measure of punishment can arise even when the sentencing authority has "discretion" not to impose more severe punishment. Id. at 2086. The Ex Post Facto Clause thus protects against the possibility that a defendant would be disadvantaged by

application of a harsher set of guidelines, even if that possibility would not necessarily materialize in a given case.

In the retroactivity context, in contrast, a substantive sentencing rule is one that changes the lawful boundaries of punishment, not a rule that alters the factors that a sentencer may consider in imposing a discretionary sentence within an authorized range. This Court's capital cases reflect the distinction, treating as procedural -- and nonretroactive -- new constitutional rules that affect the weight or manner of considering factors bearing on whether to impose a death sentence without altering a defendant's eligibility for a capital sentence.<sup>8</sup> See Welch, 136 S. Ct. at 1266. Even if those errors may have affected the outcome, they remain procedural. If that is true in the capital context, the same must be true for comparable errors in the non-capital context.

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<sup>8</sup> See, e.g., Beard v. Banks, 542 U.S. 406, 408, 420 (2004) (new constitutional rule that juries may consider mitigating factors even if not found unanimously is not retroactive); O'Dell v. Netherland, 521 U.S. 151, 153, 167 (1997) (new constitutional rule that capital defendant may introduce evidence of his parole ineligibility to rebut argument about future dangerousness is not retroactive); Lambrix v. Singletary, 520 U.S. 518, 539 (1997) (new constitutional rule of Espinosa v. Florida, 505 U.S. 1079 (1992) (per curiam), that a sentencing court's consideration of an advisory jury's constitutionally flawed recommendation of a capital sentence violates the Eighth Amendment, was a non-retroactive procedural rule); Sawyer v. Smith, 497 U.S. 227, 229, 232, 244-245 (1990) (new constitutional rule that capital sentence may not be imposed when the jury is led to believe that responsibility for the death penalty lies elsewhere is not retroactive).

Changing the advisory Guidelines range to recommend a different sentence is of the same, procedural character. See Molina-Martinez v. United States, 136 S. Ct. 1338, 1345-1346 (2016) (improper Guidelines calculation is "significant procedural error") (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).<sup>9</sup> Like those other erroneously considered factors, the advisory range exerts an influence on the ultimate sentence, see Peugh, 133 S. Ct. at 2081-2084, but does not change the authorized range of punishment. See Molina-Martinez, 136 S. Ct. at 1346 (Guidelines "inform and instruct the district court's determination of an appropriate sentence"). Weighing an improper factor in reaching an authorized sentence within

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<sup>9</sup> In characterizing the role of the Guidelines in "this Court's now familiar words," Amicus substitutes "reversible" for "procedural" when referring to Gall's description of the nature of a Guidelines error. Br. 9-10. This Court, however, viewed the use of the incorrect range as a "procedural" error. Nothing in this Court's recent decision in Molina-Martinez suggests otherwise. Molina-Martinez held that on plain-error review on direct appeal, an error in sentencing a defendant under an incorrect range "can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 136 S. Ct. at 1345. A "reasonable probability" of a changed outcome is sufficient to show prejudice on direct appeal, but that prejudice holding does not imply that an error is "substantive" and so meets the higher hurdle necessary to justify post-conviction relief. Cf. Bousley v. United States, 523 U.S. 614, 621 (1998) ("Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.") (internal quotation marks omitted).



unchanged statutory boundaries is a procedural error that, accordingly, does not merit retroactive effect.<sup>10</sup>

b. No conflict in the circuits exists over whether Johnson is retroactive in an initial collateral motion under Section 2255 challenging application of the Guidelines' residual clause. Indeed, no court of appeals has yet resolved Johnson's retroactivity in the Guidelines context in an initial Section 2255 motion. The two published court of appeals decisions that have addressed the issue did so in the course of considering applications for authorization to file a second or successive Section 2255 motion. In In re Rivero, 797 F.3d 986 (2015), petition for habeas pending, No. 15-7776 (filed Jan. 14, 2016), the Eleventh Circuit denied authorization to file a successive Section 2255 motion and held only that this Court had not "made"

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<sup>10</sup> For similar reasons, petitioner also errs (Pet. 22-24) in suggesting that Montgomery v. Louisiana, 136 S. Ct. 718 (2016), provides support for his claim that an advisory Guidelines error is not procedural in the retroactivity context. Montgomery held that Miller v. Alabama, 132 S. Ct. 2455 (2012), is a substantive rule because it eliminated a particular sentence for non-incorrigible juveniles convicted of homicide by "render[ing] life without parole an unconstitutional penalty." 136 S. Ct. at 734. The Court further explained that the need for procedures to identify whether a juvenile was constitutionally ineligible for a life-without-parole sentence did not transform Miller into a procedural rule. Id. at 734-735. But changing a defendant's advisory guidelines range from a career-offender to a non-career-offender classification does not render any penalty unconstitutional or otherwise unauthorized. The consideration of the advisory Guidelines range is thus an essentially procedural step in sentencing.

Johnson retroactive for purposes of the gatekeeping provision in 28 U.S.C. 2255(h)(2). 797 F.3d at 989-991; see Mays v. United States, No. 14-13477, 2016 WL 1211420, at \*6 (11th Cir. Mar. 29, 2016) (explaining that Rivero resolved only the "narrow" question whether this "Court has explicitly, or by logical necessity, made [the] rule [in Johnson] retroactive"). In In re Encinias, No. 16-8038, 2016 WL 1719323, at \*1-\*2 (Apr. 29, 2016) (per curiam), the Tenth Circuit granted an application to file a second or successive Section 2255 motion challenging a career offender sentence based on Johnson. The court noted that the applicable "prima facie" standard required only a showing of "possible merit to warrant a further exploration \* \* \* by the district court," and it concluded that the applicant had made a sufficient prima facie showing. Ibid.

c. In any event, this case would not be an appropriate vehicle to decide the retroactivity question. The court of appeals' unpublished order did not address whether Johnson applies retroactively in Guidelines cases. See Pet. App. A1-A2. Recognizing that it is "a court of review, not of first view," this Court generally declines to reach issues not addressed below. Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005).

That practice is particularly appropriate here because resolution of the retroactivity question petitioner raises would have no effect on the outcome in this case. See Am. Br. 3 n.2

(acknowledging that a ruling on retroactivity would not "resolve the [dispositive] issue[s] in this case"). After this Court remanded the case for further consideration in light of Johnson, the court of appeals ruled that Johnson was "not relevant" because, even if Johnson's vagueness holding applied to the residual clause in Section 4B1.2(a)(2), petitioner's classification as a career offender "did not rely on that clause." Pet. App. A2. Accordingly, a ruling by this Court that Johnson applies retroactively in Guidelines cases would not assist petitioner, absent review of that additional Guidelines classification issue, which does not merit further review. See pp. 28-31, infra.

Petitioner contends (Pet. 6-7, 12, 15-16) that a "prompt" ruling from this Court clarifying whether Johnson applies retroactively in Guidelines cases would promote "judicial economy" because prisoners must file Section 2255 motions raising Johnson claims by June 26, 2016, to comply with the one-year statute of limitations set forth in 28 U.S.C. 2255(f). See Dodd v. United States, 545 U.S. 353, 357 (2005) (one-year statute of limitations applies to all Section 2255 motions, including successive motions, and it runs from the date of the decision announcing the new right, not a later decision making that right retroactive). Petitioner also notes (Pet. 15-16) that if the Court does not resolve the retroactivity question

this Term, prisoners who have previously filed a Section 2255 motion will be left with no avenue for relief other than filing an original habeas petition in this Court. But those considerations, without more, do not make it appropriate to grant review of a question that neither the court below nor any other court of appeals has resolved and that would not affect the judgment in this case.

2. Petitioner also urges (Pet. 24-29) the Court to grant review to decide whether Johnson's holding that the ACCA's residual clause is void for vagueness applies to the residual clause in the career offender guideline. The government agrees with petitioner that Johnson's holding invalidating the ACCA's residual clause invalidates the identically worded residual clause in the career offender guideline, and the government has advocated that position in post-Johnson Guidelines sentencing proceedings and in cases pending on direct review as of the date of Johnson's issuance. See, e.g., U.S. Supp. Br. at 3-10, United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) (No. 14-2159); cf. Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). Petitioner also correctly notes (Pet. 25) that a conflict exists among the circuits on the question whether

Johnson's holding applies to the Guidelines. Compare United States v. Pawlak, No. 15-3566 (6th Cir. May 13, 2016), slip op. at 5-13 (agreeing with the government that it does); Madrid, 805 F.3d at 1210-1211 (same), with United States v. Matchett, 802 F.3d 1185, 1193-1196 (11th Cir. 2015) (disagreeing with the government), petition for reh'g en banc pending, No. 14-10396 (11th Cir. filed Oct. 13, 2015). Cf. United States v. Lee, No. 13-10517, 2016 WL 2638364, \*2 & n.2 (9th Cir. May 6, 2016) (declining to reach the issue); id. at \*10 (Ikuta, J., dissenting) (opining that "the Guidelines residual clause is not void for vagueness" under Johnson, but that the district court committed procedural error in applying that clause).

Despite the disagreement among the courts of appeals, this Court's review is not warranted. Whether Johnson applies to the career offender guideline's residual clause is a question of limited and diminishing prospective importance. The Sentencing Commission has adopted an amendment that deletes the residual clause from the guideline in light of "many of the same concerns cited by [this] Court in Johnson." 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016). Absent congressional action, that amendment will take effect on August 1, 2016. The question of Johnson's application to the current career offender guideline is therefore likely to be of no continuing importance.

Furthermore, even if the question otherwise warranted review, this case would be a poor vehicle in which to consider it. The court of appeals did not resolve this case based upon an analysis of whether Johnson invalidated the career offender guideline's residual clause. Instead, the court held that Johnson did not affect petitioner's sentence, which was based on commentary that "lists robbery as an enumerated predicate offense." Pet. App. A2. The Third Circuit has since issued an unpublished decision accepting the government's concession that Johnson applies to the Guidelines' residual clause, see United States v. Townsend, No. 14-3652, 2015 WL 9311394, at \*4 & n.14 (3d Cir. Dec. 23, 2015), but that holding is not at issue here.

Finally, this case is an inappropriate vehicle for review because even if Johnson invalidated the career offender guideline's residual clause, petitioner would not be entitled to relief unless he also prevailed on his claim that his robbery conviction did not qualify as a crime of violence under the commentary to the guideline. As explained below, that claim lacks merit and in any event is of no prospective importance, given the proposed amendment to the career offender guideline.

3. Petitioner contends (Pet. 30-36) that this Court should grant certiorari to decide whether Pennsylvania third-degree robbery is a crime of violence under Section 4B1.2 because robbery is listed as a "crime of violence" in the commentary to

the guideline and, more broadly, whether the commentary has "freestanding definitional power" independent of the guideline's text. Those issues do not warrant review.

a. First, petitioner's claim involves interpretation of the Sentencing Guidelines and the accompanying commentary. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines because the Sentencing Commission can amend the Guidelines and commentary to eliminate a conflict or correct an error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Particularly because the Guidelines are now advisory, id. at 245, this Court's review of the court of appeals' decision applying the career-offender guideline and associated commentary is not warranted.

b. Second, as explained above, the question whether Pennsylvania third-degree robbery qualifies as a "crime of violence" under the current version of the career-offender

guideline and commentary has no prospective importance in light of the Sentencing Commission's amendment to the guideline. The amendment moves offenses currently enumerated in the commentary, including "robbery," to the text of Section 4B1.2. See 81 Fed. Reg. at 4743 (noting that "[f]or easier application, all enumerated offenses are now included in the guideline at § 4B1.2; prior to the amendment, the list was set forth in both § 4B1.2(a)(2) and the commentary at Application Note 1").

c. In any event, petitioner's contention lacks merit. Under this Court's decision in Stinson v. United States, 508 U.S. 36 (1993), Guidelines commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Id. at 38. Stinson held that the provision of the commentary to the career offender guideline that excludes ordinary felon-in-possession offenses from the definition of "crime of violence," while not "compelled by the guideline text," was "a binding interpretation of the phrase 'crime of violence.'" Id. at 47. Likewise, the Sentencing Commission's interpretation of "crime of violence" to include robbery offenses "does not run afoul of the Constitution or a federal statute" and "is not plainly erroneous or inconsistent with § 4B1.2." Ibid. (citation and internal quotation marks omitted). Stinson's conclusion that the



Commission's determination that certain offenses do not qualify as predicate crimes of violence is valid and "binding" makes clear that the Commission's authority is not limited to construing the specific provisions in the text of the guideline. Even assuming that the career offender guideline's residual clause is no longer viable, the Commission acted within its authority in defining robbery as a qualifying offense for sentencing enhancement under the guideline.<sup>11</sup>

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<sup>11</sup> As petitioner notes (Pet. 31-32), the First Circuit reached a contrary conclusion in United States v. Soto-Rivera, 811 F.3d 53 (2016). The court held that, accepting the government's concession that Johnson applied to the Guidelines, the defendant's conviction for possession of a machine gun did not qualify as a "crime of violence" under the career offender guideline. Id. at 60-62. The court reasoned that without the residual clause, there was no "textual hook in Guidelines § 4B1.2(a) to allow for the conclusion that his possession of a firearm constituted a crime of violence," and that the commentary's provision listing unlawful possession of a machine gun as a "crime of violence" was therefore "inconsistent with the remaining text of the Guideline." Id. at 61-62. Any conflict between the First Circuit's ruling and the court of appeals' unpublished decision in this case does not warrant review in light of the amendment to the career offender guideline.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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