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No. 15-8544

In The
Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court declared unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). The residual clause of the career offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2), contains identical language and is governed by the same analytical framework as the residual clause invalidated in *Johnson*.

The questions presented are:

1. Whether the residual clause in U.S.S.G. § 4B1.2(a)(2) is void for vagueness in light of *Johnson*, thereby rendering Petitioner's challenge to his career offender sentence cognizable under 28 U.S.C. § 2255(a).

2. Whether *Johnson* has retroactive effect in this collateral proceeding.

3. Whether Petitioner's conviction for unlawful possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, qualifies as a "crime of violence" after *Johnson*.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings below.

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OPINIONS BELOW

The unpublished opinion of the court of appeals issued prior to *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015) (JA 155-58) is reported at 579 F. App'x 833. The unpublished opinion of the court of appeals on remand from this Court for reconsideration in light of *Johnson* (JA 161-63) is reported at 616 F. App'x 415. The unpublished order of the court of appeals denying rehearing and rehearing en banc (JA 164-65) is unreported. The relevant orders of the district court (JA 127-54) are unreported, as is the report of the magistrate judge (JA 80-126). The opinion of the court of appeals on direct appeal (JA 15-40) is reported at 565 F.3d 832.

JURISDICTION

The decision of the court of appeals on remand from this Court was issued on September 29, 2015. The court of appeals denied a timely petition for rehearing and rehearing en banc on February 11, 2016. The petition for writ of certiorari was timely filed on March 9, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and United States Sentencing Guidelines provisions are reprinted in the appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court declared the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), void for vagueness in violation of the Due Process Clause. The following Term, the Court held that *Johnson* announced a "substantive" rule that has retroactive effect in cases on collateral review. *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016). Mr. Beckles's sentence was enhanced pursuant to the residual clause of the "career offender" provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2). The text of § 4B1.2(a)(2)'s residual clause is identical – word-for-word – to the residual clause invalidated in *Johnson*, and the same analytical framework governs the interpretation of both. This case requires the Court to confirm that *Johnson* renders the career offender guideline's indistinguishable residual clause void for vagueness, that *Johnson* has retroactive effect in this collateral case, and that applying *Johnson* to this case results in relief.

A. The Career Offender Guideline

In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1837, 2017-2026 (1984), Congress established the United States Sentencing Commission and charged it with, *inter alia*, "establish[ing] sentencing policies and practices for the Federal Criminal justice system." 28 U.S.C. § 991(b)(1). "The Commission, however, was not granted unbounded discretion. Instead, Congress articulated general goals for federal sentencing and imposed upon the Commission a variety of specific requirements." *United States v. LaBonte*, 520 U.S. 751, 753 (1997) (citing 28 U.S.C. §§ 994(b)-(n)).

Among those goals, Congress mandated that the Commission "assure" that a certain category of offenders receive a sentence of imprisonment "at or near the maximum term authorized." 28 U.S.C. § 994(h). United States Sentencing Guidelines § 4B1.1, known as the "career offender" guideline, implements that congressional mandate. U.S.S.G. § 4B1.1 cmt. background (2015). The career offender guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). It does this by generally prescribing enhanced offense levels and automatically placing career offenders in criminal history category VI, the highest category available under the Guidelines. *See* § 4B1.1(b); *LaBonte*, 520 U.S. at 753-54. Thus, no matter how short a sentence the Guidelines might otherwise call for, if a defendant is designated a career offender, he is placed in the worst class of offenders, facilitating a sentence

"at or near" the statutory maximum, as Congress required.

The career offender guideline applies to a defendant who is at least eighteen years of age, commits an offense that is a "crime of violence" or a controlled substance offense, and has at least two prior felony convictions for a "crime of violence" or a controlled substance offense. *See* § 4B1.1. The term "crime of violence" is defined in U.S.S.G. § 4B1.2(a). In 1989, the Sentencing Commission discarded § 4B1.2(a)'s prior definition of "crime of violence" and replaced it with one "derived from" the ACCA. *See* U.S.S.G. app. C, amend. 268 (Reason for Amendment) (1989). The definition of "crime of violence" the Commission adopted "closely track[ed] ACCA's definition of 'violent felony.'" *James v. United States*, 550 U.S. 192, 206 (2007), *overruled in other part by Johnson*, 135 S. Ct. at 2563. Indeed, the two provisions nearly mirrored each other. *Compare* § 924(e)(2)(B) (1989) *with* U.S.S.G. § 4B1.2(a) (1989).

That symmetry remained true when Mr. Beckles was sentenced in 2006. *Compare* § 924(e)(2)(B) (2006) *with* U.S.S.G. § 4B1.2(a) (2006). Section 4B1.2(a) then defined a "crime of violence" to include "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*." § 4B1.2(a) (2006) (emphasis added). These

latter fifteen words, known as the residual clause, are the very same fifteen words that this Court declared unconstitutionally vague in *Johnson*. *See Johnson*, 135 S. Ct. at 2555, 2563.[1]

In addition to the offenses enumerated as "crimes of violence" in the text of § 4B1.2(a), the guideline commentary lists other offenses which the Sentencing Commission has determined either do or do not qualify as a "crime of violence." § 4B1.2 cmt. n.1. The offenses defined as "crime[s] of violence" in the commentary have changed over time. *Compare, e.g.*, § 4B1.2 cmt. n.1 (1987) *with id*. (2015). At the time relevant here, the commentary specified that "unlawful possession of a firearm by a felon" was *not* a crime of violence "unless the possession was of a firearm described in 26 U.S.C. § 5845(a)," which includes sawed-off shotguns. § 4B1.2 cmt. n.1 (2006); *see id*. ("Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off

[1] These same fifteen words comprised § 4B1.2(a)(2)'s residual clause until August 1, 2016, when the Sentencing Commission deleted them. *See* U.S.S.G. § 4B1.2 (eff. Aug. 1, 2016). The Sentencing Commission explained that its amendment to § 4B1.2 was "informed by" *Johnson*. U.S.S.G. app. C, amend. 798 (Reason for Amendment) (Aug. 1, 2016). It declined to make the amendment retroactive. Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 4 (Jan. 8, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf. Unless otherwise indicated, all references hereafter are to the pre-amendment version of § 4B1.2.

shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'").[2]

B. Petitioner is Sentenced as a Career Offender

In 2007, Mr. Beckles was charged with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and the jury convicted him as charged. JA 129. Following trial, a presentence investigation report prepared for the district court relied on the commentary to § 4B1.2 to recommend that Mr. Beckles be sentenced as a career offender, because the firearm he possessed was a sawed-off shotgun. JA 130. Mr. Beckles's designation as a career offender meant that he was assigned an enhanced offense level of 37 and a criminal history category of VI,[3] which corresponded to a Sentencing Guidelines imprisonment range of 360 months to life. *See id*. Without the career offender enhancement, Mr. Beckles's criminal history category would have remained the same, but his offense level would have dropped to 34, resulting in an imprisonment range of 262 to 327 months. *See id.*

The district court declined to sentence Mr. Beckles outside the sentencing range established by the career offender guideline and imposed a 360-month term of imprisonment. JA 85, 132. At the sentencing hearing,

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[2] Section 5845(a) instructs that "[t]he term 'firearm'" includes "a shotgun having a barrel or barrels of less than 18 inches in length." 26 U.S.C. § 5845(a).

[3] Mr. Beckles had 12 criminal history points.

the district court explained to Mr. Beckles that it would not impose a lesser sentence, because it was swayed by the government's argument "referring the Court back to Congress's mandate as it pertains to career offenders such as yourself, and Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify a sentence to a term of imprisonment at or near the maximum term authorized." JA 131-32. The district court later stated that the record "reflects (and is consistent with undersigned's recollection) that but for the minimum offense levels assigned by the Sentencing Commission, the Court *would not have* imprisoned Beckles for 360 months, a term substantially greater than a sentence within the [non-enhanced] range of 262 to 327 months." JA 149 (emphasis in original).

The United States Court of Appeals for the Eleventh Circuit affirmed Mr. Beckles's conviction and sentence. JA 40. Pertinent here, it relied on the commentary to § 4B1.2 characterizing possession of a sawed-off shotgun as a "crime of violence" to reject Mr. Beckles's argument that he was wrongly sentenced as a career offender. JA 29-30 (citing § 4B1.2 cmt. n.1). This Court denied certiorari in October 2009. *Beckles v. United States*, 558 U.S. 906 (2009) (Mem.). The district court subsequently reduced Mr. Beckles's term of imprisonment to 216 months pursuant to Federal Rule of Criminal Procedure 35(b) for reasons not relevant here. JA 132-33.

C. Petitioner's 28 U.S.C. § 2255 Proceedings

1. The Proceedings Before the District Court

In 2010, Mr. Beckles timely filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence in which he alleged that he was wrongly sentenced as a career offender because possession of a sawed-off shotgun was not a "crime of violence" under § 4B1.2(a)(2)'s residual clause. JA 41-52. In support of this argument, Mr. Beckles relied on *Begay v. United States*, 553 U.S. 137 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), and the Due Process Clause. JA 45, 71. *McGill* applied *Begay* to hold that possession of a sawed-off shotgun was not a violent felony under the ACCA's residual clause. *McGill*, 618 F.3d at 1279. *Archer* held that the definition of "violent felony" in the ACCA is "virtually identical" to the definition of "crime of violence" in § 4B1.2(a)(2). 531 F.3d at 1352. The government opposed relief solely on the ground that Mr. Beckles's challenge to his career offender enhancement was not cognizable in a § 2255 proceeding. *See* JA 53-69, 133.[4]

The district court, however, held that the claim was cognizable, and concluded that Mr. Beckles had

[4] A federal prisoner may move to vacate, set aside, or correct a sentence only on the grounds "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

been wrongly sentenced as a career offender under *Begay* and *McGill*. JA 152. Noting that it "specifically remarked at Beckles's sentencing hearing that the sentence imposed was due to his career offender status," and noting further that it would have applied the same degree of reduction to Mr. Beckles's sentence pursuant to Rule 35(b) even if it had not sentenced him as a career offender, the district court granted the motion and ordered resentencing without the career offender enhancement. JA 144, 151-52.

After the time for appeal had passed, the government moved for reconsideration of the district court's order based on an intervening Eleventh Circuit decision, *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013). JA 153. *Hall* held that § 4B1.2's commentary defining "crime of violence" to include possession of a sawed-off shotgun was binding on the federal courts under *Stinson v. United States*, 508 U.S. 36 (1993), notwithstanding *Begay* and *McGill*:

> Although we would traditionally apply the categorical approach to determine whether an offense qualifies as a "crime of violence," we are bound by the explicit statement in the commentary that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n.1. Hall does not satisfy either of *Stinson*'s stringent exception requirements, as the commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent

> with, or a plainly erroneous reading of, the guideline text itself. Moreover, because the commentary to § [4B1.2] defines "crime of violence" very differently than the ACCA does, we cannot say that the definition of "crime of violence" provided in the commentary to § [4B1.2] is a plainly erroneous reading of the guideline.

Hall, 714 F.3d at 1274 (brackets in original; internal quotation marks and ellipsis omitted). The district court granted reconsideration in light of *Hall*, set aside its prior final judgment, and denied Mr. Beckles's § 2255 motion. JA 153-54.

2. The Eleventh Circuit's Decisions

On appeal, the Eleventh Circuit determined that it was bound by *Hall* to conclude that possession of a sawed-off shotgun was a "crime of violence" for purposes of § 4B1.2. JA 157-58 (citing *Hall*, 714 F.3d at 1273). Accordingly, it affirmed the district court's denial of Mr. Beckles's § 2255 motion. *Id*.

After this Court granted review in *Johnson* to consider whether possession of a sawed-off shotgun was a "violent felony" under the ACCA, Mr. Beckles petitioned for a writ of certiorari on the closely-related question of whether that same offense qualified as a "crime of violence" under U.S.S.G. § 4B1.2. *See* Petition for Writ of Certiorari at i, *Beckles v. United States*, ___ U.S. ___, 135 S. Ct. 2928 (2015) (No. 14-7390). Four days after it decided *Johnson*, the Court granted Mr.

Beckles's petition, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *Johnson*. JA 159; *Beckles v. United States*, ___ U.S. ___, 135 S. Ct. 2928 (2015).

Before Mr. Beckles's case was reconsidered on remand, however, another panel of the Eleventh Circuit held that the advisory Sentencing Guidelines were immune from vagueness challenges, and therefore *Johnson* did not invalidate the residual clause in § 4B1.2(a)(2). *United States v. Matchett*, 802 F.3d 1185, 1194-96 (11th Cir. 2015), *petition for rhg. en banc filed* (Oct. 13, 2015) (No. 14-10396). Eight days after *Matchett*, the Eleventh Circuit again rejected Mr. Beckles's challenge to his career offender sentence. JA 161-63. As it did pre-*Johnson*, the court of appeals cited *Hall* and the commentary to § 4B1.2 to support its conclusion that "Beckles's offense of conviction – unlawful possession of a sawed-off shotgun – constitutes a 'crime of violence' under [U.S.S.G. §] 4B1.1." JA 162 (citing § 4B1.2 cmt. n.1; *Hall*, 714 F.3d at 1274). Without mentioning *Matchett*, the Eleventh Circuit specifically determined that *Johnson* did not apply either to the career offender provision of the Sentencing Guidelines or its commentary, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") – does not control this appeal. Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express

> language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender. [¶] Our decision in *Hall* remains good law and continues to control this appeal.

JA 163 (emphasis in original).

The Eleventh Circuit denied Mr. Beckles's timely petition for rehearing and rehearing en banc. JA 164. This Court subsequently granted certiorari. *Beckles v. United States*, ___ S. Ct. ___, 2016 WL 1029080 (June 27, 2016) (Mem.) (No. 15-8544).

SUMMARY OF ARGUMENT

I. The residual clause in United States Sentencing Guideline § 4B1.2(a)(2) is void for vagueness under the Due Process Clause. In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court invalidated the residual clause in the Armed Career Criminal Act ("ACCA") as unconstitutionally vague. It did so because interpreting the ACCA's residual clause "requires a court to picture the kind of conduct that the crime involves in the 'ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id*. at 2557. The Due Process Clause, the Court explained, could not tolerate the unpredictability and arbitrariness generated by a legal

provision requiring such wide-ranging inquiry. *Id.* The residual clause in § 4B1.2(a)(2) contains the same fifteen words as the residual clause invalidated in *Johnson*, and it is interpreted using the same "ordinary case" analysis. As a result, lower courts and this Court have interpreted these two provisions interchangeably. Because these two residual clauses contain identical text and are analytically indistinguishable, *Johnson*'s holding compels the conclusion that § 4B1.2(a)(2)'s residual clause is similarly void for vagueness.

That § 4B1.2(a)(2) is a Guideline makes no difference. The Court has sustained constitutional challenges to the Sentencing Guidelines, and the Due Process Clause's prohibition on vagueness is not limited to statutes. For example, the Court has invalidated agency regulations as unconstitutionally vague. That precedent is particularly instructive here because the Guidelines are the "equivalent" of agency regulations. *Stinson v. United States*, 508 U.S. 36, 45 (1993). Also instructive is *Peugh v. United States*, 569 U.S. ___, 133 S. Ct. 2072 (2013), which held that the advisory Guidelines are subject to the Ex Post Facto Clause. Indeed, the ex post facto violation recognized there was premised on the Guidelines being intelligible. And, like the Ex Post Facto Clause, the Due Process Clause's prohibition on vagueness ensures fair notice and prevents arbitrary enforcement. Section 4B1.2(a)(2)'s residual clause flouts those dual objectives no less than the residual clause invalidated in *Johnson*. Furthermore, because the Guidelines serve as the very foundation of the federal sentencing regime, they cannot be immune

from the fundamental requirements of due process. Permitting vague guidelines to contaminate the sentencing matrix would infect all stages of the criminal justice process, guarantee unwarranted sentencing disparities, and prevent the Guidelines from fulfilling their role as the uniform baseline for sentencing. The federal sentencing regime would collapse on its foundation.

It is therefore unsurprising that the clear majority view is that *Johnson* invalidates § 4B1.2(a)(2)'s residual clause. The United States has even conceded that point in courts around the country and now in this Court. And, with the lone exception of the court below, the courts of appeals have either held or assumed that *Johnson* renders § 4B1.2(a)(2)'s residual clause invalid. The Court should declare the residual clause in § 4B1.2(a)(2) void for vagueness, thereby rendering Mr. Beckles's challenge to his career offender enhancement cognizable on collateral review.

II. *Johnson* has retroactive effect in this collateral proceeding. *Johnson* announced the following rule of constitutional law: a legal provision is void for vagueness under the Due Process Clause where it "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." 135 S. Ct. at 2557; *see Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1272 (2016) (Thomas, J., dissenting) (articulating rule of *Johnson*). Under *Teague v. Lane*, 489 U.S. 288 (1989)

and its progeny, this Court applies a three-step analysis for determining whether a rule announced in one of its decisions has retroactive effect. Each step is easily resolved here.

First, the Court asks when the petitioner's conviction became final. Here, Mr. Beckles's conviction became final in 2009 when this Court denied his petition for a writ of certiorari to review his conviction and sentence. Second, the Court asks whether the rule upon which the petitioner relies is "new." Here, *Johnson*'s rule is new as to Mr. Beckles because it was announced several years after his conviction became final, and it expressly overruled precedent foreclosing a vagueness challenge. Third, because the rule relied upon is new, the Court asks whether it meets one of the exceptions to nonretroactivity as either a "substantive" rule or a "watershed" rule of procedure. Here, this Court has already resolved that question, holding just last Term that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review. *Welch*, 136 S. Ct. at 1268. Accordingly, it has retroactive effect in this case.

That conclusion must be true because, under *Teague*, retroactivity is a "categorical" matter: new rules satisfying one of the two exceptions to nonretroactivity must "be applied to *all* defendants on collateral review." *Teague*, 489 U.S. at 316 (emphasis in original). Indeed, since *Teague*, this Court has never given a rule retroactive effect to some cases on collateral review, but not others. This is so because retroactivity is based on the rule itself, not the context in

which it is invoked. Thus, when this Court declares a new rule to be substantive, as it did in *Welch* vis-a-vis *Johnson*, that rule necessarily has retroactive effect in all collateral cases. Of course, that a substantive rule has retroactive effect "to all defendants on collateral review" hardly means that a particular defendant will obtain relief as a result of that rule. In this case, for example, Mr. Beckles must show that *Johnson* invalidates § 4B1.2(a)(2)'s residual clause and that he is no longer a career offender as a result. But those issues go to the cognizability and merits of his claim, not the retroactivity of the rule upon which he relies.

Johnson's retroactive application to this case is compelling for other reasons as well. As a matter of logic and symmetry, it cannot be that *Johnson* both invalidates the residual clause in § 4B1.2(a)(2) *and* announced a substantive rule, but does *not* have retroactive effect in Guidelines cases on collateral review. That type of incongruity must be rejected.

And that is all the more true given that the retroactivity analysis in *Welch* applies with full force here. The Court explained that *Johnson* had a substantive function because, by invalidating the residual clause, it "changed the substantive reach" of the ACCA, thereby "altering the range of conduct or the class of persons that the [Act] punishes." *Welch*, 136 S. Ct. at 1265 (internal quotation marks omitted). By contrast, the Court concluded that *Johnson* did not have a procedural function because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced

under the [ACCA]." *Id.* That exact same logic applies here: by invalidating the residual clause in § 4B1.2(a)(2), *Johnson* changed the substantive reach of the career offender guideline – its content – "rather than the judicial procedures by which [it] is applied." *Id*. After *Johnson*, a defendant, like Mr. Beckles, whose career offender sentence is based on the residual clause in § 4B1.2(a)(2) can no longer be sentenced as a career offender. That is a substantive change in the law.

III. After *Johnson*, Mr. Beckles's offense of conviction is not a "crime of violence." With the text of § 4B1.2 stripped of its residual clause, its commentary designating unlawful possession of a sawed-off shotgun as a "crime of violence" cannot survive. *Stinson* held that a guideline's commentary must yield where it "is inconsistent with, or a plainly erroneous reading," of the guideline it purports to interpret. 508 U.S. at 38. Here, with the residual clause excised from the text of § 4B1.2, the commentary's designation of Mr. Beckles's offense as a "crime of violence" becomes inconsistent with the text's remaining definitions of that term. Unlawful possession of a sawed-off shotgun is not one of the offenses enumerated in the text of § 4B1.2(a)(2). Nor does it have as an element the use, attempted use, or threatened use of physical force against the person of another under § 4B1.2(a)(1). Absent the residual clause, § 4B1.2's commentary identifying possession of a sawed-off shotgun as a "crime of violence" no longer explains or interprets that guideline's remaining text.

Therefore, the court below erred by relying on the commentary to § 4B1.2 to conclude that Mr. Beckles was properly sentenced as a career offender.

ARGUMENT

I. *JOHNSON* RENDERS THE RESIDUAL CLAUSE IN U.S.S.G. § 4B1.2(a)(2) VOID FOR VAGUENESS

The Due Process Clause of the Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. The government "violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 2556 (2015). This "prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Id.* at 2556-57 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

In *Johnson*, the Court held that the residual clause of the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally void for vagueness. 135 S. Ct. at 2563. The ACCA defines a "violent felony" to include any felony that "is

burglary, arson, or extortion, involves 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)(ii) (emphasis added). The latter half of § 924(e)(2)(B)(ii), italicized above, comprises the ACCA's residual clause. *Johnson*, 135 S. Ct. at 2556. The analytical framework employed to assess whether a conviction qualifies as a "violent felony" is known as the "categorical approach." *See id*. at 2557. In the context of the residual clause, the "categorical approach" requires courts to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id*. (quoting *James v. United States*, 550 U.S. 192, 208 (2007), *overruled in other part by Johnson*, 135 S. Ct. at 2563).

Johnson determined that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* First, the "ordinary-case" analysis creates "grave uncertainty about how to estimate the risk posed by a crime." *Id.* And, second, the residual clause creates "uncertainty about how much risk it takes for a crime to qualify as a violent felony" because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes" preceding it, and those enumerated crimes – burglary, arson, extortion, and crimes involving the use of explosives, *see* 18 U.S.C. § 924(e)(2)(B)(ii) – "are 'far from clear in respect to the degree of risk each poses.'" *Id*. at 2558 (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)). The combination of those uncertainties led the Court to conclude

that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," thereby "produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2557-58.

A. *Johnson* Applies Equally to the Identical and Interchangeable Residual Clause in § 4B1.2(a)(2)

The text of the residual clause in United States Sentencing Guideline § 4B1.2(a)(2) is identical to that of the residual clause invalidated in *Johnson*. Section 4B1.2(a)(2) defines a "crime of violence" to include an offense that "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*." § 4B1.2(a)(2) (emphasis added). Its residual clause, italicized here, is comprised of the exact same fifteen words as the residual clause in the ACCA that *Johnson* held void for vagueness. *Compare id. with* 18 U.S.C. § 924(e)(2)(B)(ii). And like the ACCA's residual clause, § 4B1.2(a)(2)'s residual clause "forces courts to interpret 'serious potential risk' in light of" four enumerated crimes, and the four crimes enumerated in § 4B1.2(a)(2) are virtually identical to those enumerated in the ACCA. *Compare* § 4B1.2(a)(2) ("burglary of a dwelling, arson, or extortion, involves use of explosives") *with* § 924(e)(2)(B)(ii) ("burglary, arson, or extortion, involves use of explosives").

But the text of the two residual clauses is not their only similarity. The same categorical approach and "ordinary case" analysis that rendered the ACCA's residual clause vague applies equally to § 4B1.2(a)(2)'s residual clause, and, as a result, the unanimous view of the courts of appeals is that the two residual clauses can be interchangeably interpreted, such that "decisions about one apply to the other." *Gilbert v. United States*, 640 F.3d 1293, 1309 n.16 (11th Cir. 2011) (en banc).[5] This Court shares that view. In *Johnson* itself, the Court relied on four circuit-court decisions interpreting § 4B1.2(a)(2)'s residual clause to support its conclusion that the ACCA's residual clause was unconstitutionally vague. 135 S. Ct. at 2559-60 (citing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013); *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010) (per curiam); *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010); *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

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[5] *See, e.g.*, *United States v. Velasquez*, 777 F.3d 91, 94-98 & n.1 (1st Cir. 2015); *United States v. Van Mead*, 773 F.3d 429, 432-33 (2d Cir. 2014); *United States v. Calabretta*, ___ F.3d ___, 2016 WL 3997215, at *4-5 (3d Cir. July 26, 2016); *United States v. Gomez*, 690 F.3d 194, 197 (4th Cir. 2012); *United States v. Mohr*, 554 F.3d 604, 609 & n.4 (5th Cir. 2009); *United States v. Ford*, 560 F.3d 420, 421-22 (6th Cir. 2009); *United States v. Griffin*, 652 F.3d 793, 802 (7th Cir. 2011); *United States v. Boose*, 739 F.3d 1185, 1187-88 & n.1 (8th Cir. 2014); *United States v. Park*, 649 F.3d 1175, 1177 (9th Cir. 2011); *United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015); *United States v. Hill*, 131 F.3d 1056, 1062 & n.6 (D.C. Cir. 1997).

Because the two residual clauses are identical and interchangeably interpreted, if one is void for vagueness, then so too is the other. The fifteen words comprising the residual clause do "not somehow magically become clearer or more meaningful because [they] appear in the guideline, rather than in the ACCA." *In re Clayton*, ___ F.3d ___, 2016 WL 3878156, at *12 (11th Cir. July 18, 2016) (No. 16-14556) (Rosenbaum, J., concurring). As this Court said in *Johnson*, the residual clause is "vague in all its applications." 135 S. Ct. at 2561. And interpretation of the residual clause in § 4B1.2(a)(2) is governed by the same indeterminate, wide-ranging "ordinary case" inquiry that *Johnson* concluded "denies fair notice to defendants and invites arbitrary enforcement by judges." *Id*. at 2557. In short, because the residual clauses in the ACCA and § 4B1.2(a)(2) are linguistically and analytically indistinguishable, *Johnson*'s rationale applies with equal force to § 4B1.2(a)(2)'s residual clause.

B. The Sentencing Guidelines Are Subject to the Due Process Clause's Prohibition on Vagueness

That this vagueness plagues a Sentencing Guideline rather than a statute is a distinction without a constitutional difference. The Guidelines are not uniquely immune from constitutional constraints. To the contrary, the Court has repeatedly addressed and even sustained constitutional challenges to them. *See, e.g.*, *Peugh v. United States*, 569 U.S. ___, 133 S. Ct.

2072 (2013) (application of advisory Guidelines violated Ex Post Facto Clause); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory Guidelines violated Sixth Amendment); *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (government's refusal to file substantial-assistance motion under Guidelines was "subject to constitutional limitations"); *Mistretta v. United States*, 488 U.S. 361 (1989) (Guidelines did not violate Constitution's structural features). And it has recognized – in the context of the career offender guideline in particular – that even the Guidelines's commentary must yield where it "violates the Constitution." *Stinson v. United States*, 508 U.S. 36, 38, 45 (1993).

Nor is there any question that the vagueness doctrine applies broadly. It is not limited to criminal statutes prohibiting conduct or prescribing penalties. *See, e.g.*, *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (declaring void for vagueness a statute permitting juries to impose court costs on acquitted defendants). In fact, it is not limited to statutes at all. *See, e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991) (judicial rule regulating the Bar); *Grayned v. City of Rockford*, 408 U.S. 104, 108-14 (1972) (local ordinance). For example, this Court has invalidated agency regulations on vagueness grounds. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. ___, 132 S. Ct. 2307, 2317-20 (2012) ("Th[e] requirement of clarity in regulation is essential to the protections provided by the Due Process Clause."). This latter precedent is particularly instructive here, because the "[G]uidelines are the equivalent of legislative rules adopted by federal

agencies." *Stinson*, 508 U.S. at 45. Because agency regulations can be unconstitutionally vague, the same must be true of the Guidelines, their "equivalent." *See id*. In sum, there is no legal basis to conclude that the Guidelines are somehow immune from vagueness challenges.

That the advisory Guidelines are subject to the Constitution is confirmed by *Peugh*'s holding that the retrospective use of a harsher version of the advisory Guidelines "create[d] a sufficient risk of a higher sentence to constitute an ex post facto violation." 133 S. Ct. at 2084. That holding rested on the fact that, although the Guidelines were rendered advisory in *Booker*, the federal system adopted certain measures "intended to make the Guidelines the lodestone of sentencing." *Id*. Those measures "aim[] to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Id.* at 2083.

As *Peugh* stated, those measures are so powerful that "*the Guidelines are in a real sense the basis for the sentence*," even when a court varies outside the prescribed sentencing range. *Id.* (emphasis in original; internal quotation marks omitted). As a result, *Booker* did "not deprive the Guidelines of force as the framework for sentencing." *Id.* The Court thus rejected the government's "principal argument" that there could be no constitutional violation because the advisory Guidelines were merely "guideposts" and "lack[ed] sufficient legal effect to attain the status of a 'law' within the

meaning of the Ex Post Facto Clause." *Id.* at 2085-87. *See also Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 1345-47, 1349 (2016) (reaffirming that the Guidelines serve as the "anchor," "focal point," and "lodestar" of sentencing, establish the "essential framework" of the proceeding, and have a "real and pervasive effect" on sentences).

Given the Guidelines's centrality to sentencing, they cannot be immune from the requirements of due process, "perhaps the most fundamental concept in our law." *Argersinger v. Hamlin*, 407 U.S. 25, 49 (1972). District courts are required to properly calculate the guideline range and "remain cognizant of [the Guidelines] throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007); *see* 18 U.S.C. § 3553(a)(4)(A). Requiring courts to use a vague residual clause necessarily violates due process "because no court could reliably ascertain the correct calculation of the Guidelines range." *Clayton*, ___ F.3d at ___, 2016 WL 3878156, at *12 (Rosenbaum, J., concurring). Indeed, the very ex post facto violation recognized in *Peugh* is premised on the Guidelines being intelligible. If the Guidelines could be vague consonant with the Constitution, then it simply would not matter which version of the Guidelines manual the sentencing court used. It would make scant sense to insulate the Guidelines from the Constitution's fundamental prohibition on vagueness, but not its prohibition on ex post facto laws.

That is particularly true given that this Court has repeatedly analyzed and cited these companion doctrines together.[6] The Court has recognized as "undoubtedly correct" that the Ex Post Facto and Due Process Clauses "safeguard common interests – in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001); *compare Johnson*, 135 S. Ct. at 2556 (vagueness doctrine designed to ensure "fair notice" and prevent "arbitrary enforcement"); *with Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (ex post facto doctrine designed to "give fair warning" of legislative acts and prevent "arbitrary and potentially vindictive legislation"). In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), for example, the Court explained that judicial construction of a vague statute violated

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[6] *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997) (referring to both vagueness and ex post facto doctrines as "related manifestations of the fair warning requirement"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 & n.22 (1996) (citing ex post facto and due process authorities to support proposition that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose"); *Gilmore v. Taylor*, 508 U.S. 333, 358 (1993) (citing both due process and ex post facto authorities to support proposition that "the Constitution requires a State to provide notice to its citizens of conduct will subject them to criminal penalties and what those penalties are"); *Marks v. United States*, 430 U.S. 188, 191-92 (1977) (fundamental "right to fair warning of that conduct which will give rise to criminal penalties" underlies both the Ex Post Facto and Due Process Clauses).

the Due Process Clause for the same reasons that retroactive legislation violated the Ex Post Facto Clause. *Id.* at 351-55, 362.

The dual concerns of fair notice and arbitrary enforcement underlying both Clauses apply here no less than they did in *Johnson*. Just like the ACCA's residual clause, § 4B1.2(a)(2)'s residual clause is a "judicial morass that defies systemic solution, a black hole of confusion and uncertainty that frustrates any effort to impart some sense of order and direction." *Johnson*, 135 S. Ct. at 2562 (internal quotation marks omitted). This "standardless" and "shapeless" provision of "hopeless indeterminacy" does not afford fair notice. *Id.* at 2556, 2558, 2560.

Section 4B1.2(a)(2)'s residual clause also "invites arbitrary enforcement." *Id.* at 2556. *Johnson* expressed concern that this Court's "[d]ecisions under the residual clause ha[d] proved to be anything but even-handed, predictable, or consistent." *Id.* at 2563. But it is those very same decisions that the lower courts have relied upon to interpret the residual clause in § 4B1.2(a)(2). Now that *Johnson* has abrogated those prior decisions, there is no longer any body of law for lower courts to consult when interpreting § 4B1.2(a)(2)'s residual clause. As a result, determining whether an offense constitutes a "crime of violence" under that clause could not be based on anything more than "guesswork and intuition." *Johnson*, 135 S. Ct. at 2560. The lower courts "will simply throw the [Court's residual-clause] opinions into the air in frustration,

and give free rein to their own feelings as to what offenses should be considered crimes of violence." *Derby v. United States*, 564 U.S. 1047, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of certiorari). The residual clause in § 4B1.2(a)(2) would take on whatever fickle meaning judges gave it. The Due Process Clause's prohibition on vagueness was designed to safeguard against such arbitrary "personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

C. The Clear Majority View Is That *Johnson* Invalidates § 4B1.2(a)(2)'s Residual Clause

In light of the foregoing arguments, it is unsurprising that the majority view is that § 4B1.2(a)(2)'s residual clause is void for vagueness. The government has unequivocally conceded that point in this Court, as it has in the courts of appeals. BIO 15-16. And, with the lone exception of the court below, all eleven of the other courts of appeals have, at some point, either held or assumed that *Johnson* makes the identical language in § 4B1.2(a)(2) unlawful.[7]

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[7] *See, e.g.*, *United States v. Soto-Rivera*, 811 F.3d 53, 59 (1st Cir. 2016); *United States v. Welch*, 641 F. App'x 37, 43 (2d Cir. 2016) (per curiam); *Calabretta*, ___ F.3d at ___, 2016 WL 3997215, at *4; *United States v. Frazier*, 621 F. App'x 166, 168 (4th Cir. 2015) (per curiam); *United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 27, 2015); *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016); *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015); *United States v. Taylor*, 803 F.3d 931, 932-33 (8th Cir. 2015) (per curiam); *United States v. Benavides*, 617 F. App'x 790, 790 (9th Cir. 2015)

The courts that have so held have arrived at this conclusion with little difficulty. For example, embracing many of the arguments made above, a unanimous panel of the Sixth Circuit found that this conclusion was so clear that it abrogated prior circuit precedent precluding vagueness challenges to the Guidelines. *See Pawlak*, 822 F.3d at 903, 911. That court found "no legal basis for concluding that the Guidelines are uniquely immune to vagueness challenges," *id.* at 907, and it considered undisputed "that the identical language of the Guidelines' residual clause implicates the same constitutional concerns as the ACCA's residual clause," *id.* at 911. It concluded that this Court's precedent "compels our holding that the rationale of *Johnson* applies equally to the residual clause of the Guidelines." *Id.* at 911.

A unanimous panel of the Tenth Circuit likewise found this conclusion so obvious that it satisfied plain error review. *Madrid*, 805 F.3d at 1210-13. It explained that, given its previous "reliance on the ACCA for guidance in interpreting § 4B1.2, it stretches credulity to say that we could apply the residual clause of the Guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA." *Id.* at 1211. The court emphasized that "[t]he concerns about judicial inconsistency that motivated the Court in *Johnson* lead us to conclude that the residual clause of the Guidelines is also unconstitutionally vague." *Id.* at

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(per curiam); *Madrid*, 805 F.3d at 1210; *In re Booker*, No. 16-3018 (D.C. Cir. June 10, 2016).

1210. A recent panel of the Third Circuit similarly concluded that *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause satisfied plain error review. *Calabretta*, ___ F.3d at ___, 2016 WL 3997215, at *7.

In its post-*Johnson* decision below, however, the Eleventh Circuit concluded, without elaboration, that "*Johnson* says and decides nothing about career-offender enhancements under the Sentencing Guidelines." JA 163. That erroneous statement follows directly from (and was issued only eight days after) the Eleventh Circuit's anomalous decision in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), which rejected the government's national concession and held that the vagueness doctrine does not apply to the advisory Guidelines. *Id.* at 1193-96.

Matchett was the first circuit court decision to address whether *Johnson* invalidated § 4B1.2(a)(2)'s residual clause. Revealingly, however, no other circuit has embraced that decision, and several have criticized it for, *inter alia*: relying exclusively on decisions predating *Johnson* and *Peugh*; disregarding entirely the prospect of arbitrary judicial enforcement with which *Johnson* was concerned; embracing reasoning that would permit the Commission to promulgate with constitutional impunity Guidelines that were facially discriminatory or irrational; and dismissing *Peugh* as irrelevant to its analysis. *See, e.g.*, *Calabretta*, ___ F.3d at ___, 2016 WL 3997215 at *6 & n.8; *Pawlak*, 822 F.3d at 908-11; *Madrid*, 805 F.3d at 1212 n.10. These persuasive criticisms have also come from within the Eleventh Circuit itself. *See, e.g.*, *Clayton*, ___ F.3d at

___, 2016 WL 3878156, at *3-7 (Martin, J., concurring in result); *id*., ___ F.3d at ___, 2016 WL 3878156, at *10-13 (Rosenbaum, J., concurring); *id*., ___ F.3d at ___, 2016 WL 3878156, at *16 (Jill Pryor, J., concurring in result); *In re Hunt*, ___ F.3d ___, 2016 WL 3895246, at *2-4 (11th Cir. July 18, 2016) (No. 16-14756) (Wilson, J., concurring).

In addition to its flawed legal analysis, the *Matchett* court also expressed concern that "holding the advisory guidelines can be unconstitutionally vague would invite more, not less, instability." 802 F.3d at 1196. But the court of appeals had it exactly backwards. Immunizing a vague guideline – particularly one as impactful as the career offender guideline – would infect every stage of the criminal-justice process. Uncertainty about its applicability would restrict defense counsel's ability to provide constitutionally adequate advice, paralyze the plea-bargaining process, confound probation officers and sentencing courts, and subject every career offender sentence to possible reversal for unreasonableness. The result would be chaos.

It would also guarantee unwarranted sentencing disparities, contrary to Congress's express intent. *See* 18 U.S.C. § 3553(a)(6). Indeed, because § 4B1.2(a)(2)'s residual clause would take on whatever meaning courts attributed to it on a given day, one defendant could be sentenced as a career offender, while another defendant with the exact same criminal history might not. In light of the inequities that would result from a vague career offender guideline, it is unsurprising that

the Sentencing Commission itself chose to delete § 4B1.2(a)(2)'s residual clause following *Johnson*. *See* U.S.S.G. § 4B1.2 (eff. Aug. 1, 2016). In short, the Sentencing Guidelines must be intelligible to fulfill their intended role as providing the uniform baseline for sentencing. If they are not, then calculating the guideline range would no longer be the linchpin of the federal sentencing regime; it would be a charade.

* * *

In sum, no basis in logic or law supports immunizing the Guidelines from the Constitution's fundamental prohibition on vagueness. Any legal provision "that flouts [this prohibition] 'violates the first essential of due process.'" *Johnson*, 135 S. Ct. at 2557 (quoting *Connally*, 269 U.S. at 391). In light of *Johnson*, this Court should declare the residual clause in § 4B1.2(a)(2) void for vagueness in violation of the Due Process Clause. And with that declaration, Mr. Beckles's challenge to his career offender sentence would sound in due process, rendering it cognizable on collateral review. *See* 28 U.S.C. § 2255(a); *Davis v. United States*, 417 U.S. 333, 342-43 (1974).

II. *JOHNSON* HAS RETROACTIVE EFFECT IN THIS CASE

In *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent cases, the Court has "laid out the framework to be used in determining whether a rule announced in one of [its] opinions should be applied retroactively to judgments in criminal cases that are already final on

direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). "The *Teague* inquiry is conducted in three steps." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is . . . 'new.' Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411 (2004) (internal quotation marks and citations omitted). The first exception to nonretroactivity is for "substantive" rules; the second for "watershed procedural" rules. *Welch v. United States*, 578 U.S. at ___, 136 S. Ct. 1257, 1264 (2016).[8]

Applying *Teague*'s three-step inquiry here is a straightforward task:

First, Mr. Beckles's conviction became final in 2009 when this Court denied his petition for a writ of certiorari seeking review of the Eleventh Circuit's affirmance of his conviction and sentence. *Beckles v.*

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[8] "Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules 'are more accurately characterized as . . . not subject to the bar.' " *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 728 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 352 n.4 (2004)).

United States, 558 U.S. 906 (2009) (Mem.); *see Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.").

Second, there can be no dispute, and Mr. Beckles concedes, that *Johnson* announced a "new" rule as to him. This is so because, at the time Mr. Beckles's conviction became final in 2009, this Court's precedent in *James* foreclosed a vagueness challenge to the residual clause. *See* 550 U.S. at 210 n.6. *Johnson* expressly overruled that precedent. 135 S. Ct. at 2563; *see Welch*, 136 S. Ct. at 1264 ("It is undisputed that *Johnson* announced a new rule."); *Saffle v. Parks*, 494 U.S. 484, 488 (1990) ("The explicit overruling of an earlier holding no doubt creates a new rule.").

Third, this Court squarely held last Term that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." *Welch*, 136 S. Ct. at 1268. That ends the retroactivity analysis here. *Johnson* has retroactive effect in this collateral case.

Any conclusion to the contrary would represent a radical departure from this Court's categorical approach to retroactivity. As the Court has explained, new substantive rules "must be applied in all future trials, all cases pending on direct review, and *all* federal habeas corpus proceedings." *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (emphasis added). Not

some proceedings; all proceedings. Since *Teague*, this Court has never given a new rule retroactive effect to only some cases on collateral review but not others.

A categorical approach to retroactivity accords with one of *Teague*'s main objectives: to eliminate the inequities that resulted from the previous retroactivity regime established in *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Linkletter*, the Court "adopt[ed] a practical approach" to retroactivity and held that "the retroactive effect of each new rule should be determined on a case-by-case basis by examining the purpose of the rule, the reliance . . . on the prior law, and the effect on the administration of justice of the retroactive application of the rule." *Danforth*, 552 U.S. at 273 (citing *Linkletter*, 381 U.S. at 629). That approach "produced strikingly divergent results." *Id.*

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court abandoned *Linkletter* as it applied to cases still on direct review as "unprincipled and inequitable." *Id.* at 274. *Griffith* held that a new rule of law "is to be applied retroactively to *all* cases, state or federal, pending on direct review or not yet final." 479 U.S. at 328 (emphasis added). The "integrity of judicial review" required that result for two reasons. *Id.* at 323. First, failing to do so would amount to a legislative activity "violat[ing] basic norms of constitutional adjudication." *Id.* at 322. Second, the "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323. Because the Court "cannot hear each case pending on direct review

and apply the new rule," it "fulfill[s] [its] judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* Thus, a rule announced in a decision of this Court may not be given retroactive effect only to some cases on direct review; rather, it must be given such effect to *all* cases at that stage of the criminal justice process. *Id*. at 328.

Two years later, *Teague* applied *Griffith*'s reasoning in the context of collateral review. *See Teague*, 489 U.S. at 303-10. That opinion observed that, not only had *Linkletter* "led to the disparate treatment of similarly situated defendants on direct review," *id.* at 303, but it "also led to unfortunate disparity in the treatment of similarly situated defendants on collateral review," *id.* at 305. As a result, *Teague* declined to recognize a new, nonretroactive rule in that particular collateral case, because doing so would "give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated." *Id.* at 315. The Court emphasized that "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." *Id.* (internal quotation marks omitted). *Teague* "therefore h[e]ld that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of

the two exceptions we have articulated." *Id.* at 316 (emphasis in original). Thus, just as *Griffith* held that new rules have retroactive effect in *all* cases on direct review, *Teague* held that new substantive rules have retroactive effect in *all* cases on collateral review.

The upshot is a categorical, rule-based approach to retroactivity. As the Court has explained, its post-*Teague* "retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available . . . as a *potential* ground for relief." *Davis v. United States*, 564 U.S. 229, 243 (2011) (emphasis in original). In other words, "[r]etroactive application . . . lifts what would otherwise be a categorical bar to obtaining redress for the . . . violation of a newly announced constitutional rule," such that a defendant "may invoke [the] newly announced rule . . . as a basis for seeking relief." *Id.* at 243-44. This categorical analysis therefore turns on the rule itself; it does not depend on the particular context in which the rule is invoked.

Accordingly, this Court has carefully kept the retroactivity of a rule analytically distinct from other issues that may affect a claim based on that rule. For example, the retroactivity of a rule is unaffected by whether: the petitioner's claim "falls within the scope" of the rule announced by the Court, *O'Dell*, 521 U.S. at 159; the rule "could support any claim for relief in petitioner's case," *Sawyer v. Smith*, 497 U.S. 227, 233-34 (1990); the petitioner's claim is procedurally barred, *Bousley v. United States*, 523 U.S. 614, 621 (1998); or the rule will ultimately afford the petitioner a remedy, *Davis*, 564 U.S. at 243-44; *Powell v. Nevada*, 511 U.S.

79, 84 (1994). In short, the retroactivity of the rule is distinct from whether a petitioner will ultimately benefit from it. While there are numerous reasons why a petitioner may not benefit from a newly-announced substantive rule, nonretroactivity is not one of them.

Given the clarity of this Court's categorical approach to retroactivity, it is unsurprising yet significant that Congress codified that approach in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. There, Congress instructed the courts of appeals to authorize a second or successive petition where, *inter alia*, "the claim relies on a new rule of constitutional law, made retroactive to *cases on collateral review* by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A) (emphasis added); *accord* 28 U.S.C. § 2255(h)(2). And it used the exact same categorical language in circumscribing the availability of evidentiary hearings. *See* 28 U.S.C. § 2254(e)(2)(A). This language reflects Congress's post-*Teague* understanding that, when this Court makes a new rule retroactive, it necessarily does so for *all* cases on collateral review. Were this Court to hold otherwise, these key statutory provisions would be rendered inoperable.

It is therefore also unsurprising that the government, in addition to Congress, once embraced this understanding of retroactivity. In the years before *Johnson*, the government advanced the very same position that Mr. Beckles advances here, and in this very same context. Following the Court's residual-clause-narrowing decisions in *Begay* and *Chambers v. United*

States, 555 U.S. 122 (2009), the government conceded in litigation around the country that those decisions had retroactive effect not only in ACCA cases, but in Guidelines cases as well. *See, e.g.*, *United States v. Doe*, 810 F.3d 132, 154 (3d Cir. 2015); *Narvaez v. United States*, 674 F.3d 621, 623, 625-26 (7th Cir. 2011).

The government did not merely concede that point but vigorously advanced it. Slightly over two years ago, the government's major argument heading in an en banc brief before the Eleventh Circuit was this: "*Begay* Applies Retroactively to ACCA Cases, Mandatory Guidelines Cases, and Advisory Guideline Cases Alike." Supplemental Brief for the United States on Rehearing En Banc at 48, *Spencer v. United States*, 773 F.3d 1132 (11th Cir. May 21, 2014) (No. 10-10676). There was no qualification. In a sub-heading, the government affirmatively argued: "*Begay*'s Status as a Substantive Rule Does Not Vary Based on the Nature of the Claim." *Id.* at 54. The government criticized as "questionable" the notion that "a rule's status as substantive or procedural varies based on the context in which the claim is asserted." *Id.* at 56. It specifically stated that it was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id*. Rather, it opined that "[t]he better view is that a rule either is or is not substantive, and that its status as such does not involve a context-dependent assessment into how the rule is being invoked." *Id.* Well said.

Rather than re-affirm that uncontroversial position after *Johnson* – a case that not only narrowed but

invalidated the ACCA's residual clause – the government curiously argued in *Welch* that *Johnson* was not retroactive in the context of the Guidelines. *See* Brief for the United States at 38 n.9, *Welch*, 136 S. Ct. 1257 (2016) (No. 15-6418), 2016 WL 537542; Reply Brief for the United States at 8-9 & n.3, *Welch*, 2016 WL 1165972. Yet, notwithstanding those arguments, the Court repeatedly held, without qualification, that *Johnson* "has retroactive effect in *cases on collateral review*." *Welch*, 136 S. Ct. at 1268 (emphasis added); *see id.* at 1265 (same); *id.* at 1268 (same, reiterating holding). The Court also repeatedly framed the question in that same categorical manner. *Id.* at 1261, 1263-64. At no time did *Welch* suggest that *Johnson* (or any other rule) could have retroactive effect only in some, but not all, cases on collateral review. To the contrary, the Court's language in *Welch* fully comports with, and is mandated by, its categorical approach to retroactivity after *Teague*.[9] Because the rule in *Johnson* has retroactive effect in *all* cases on collateral review, it clearly has retroactive effect in this one.

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[9] Several lower courts have recently been even more explicit about this. *See, e.g.*, *In re Sapp*, ___ F.3d ___, 2016 WL 3648334, at *5 (11th Cir. July 7, 2016) (No. 16-13338) (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring) ("For purposes of collateral review in criminal cases, constitutional retroactivity is an all-or-nothing proposition. A new substantive rule of constitutional law is either retroactive on collateral review or it is not.") (internal citations omitted); *In re Hubbard*, ___ F.3d ___, 2016 WL 3181417, at *6 (4th Cir. June 8, 2016) (No. 15-276) ("*Welch* declared unequivocally that *Johnson* was 'a substantive decision and so has retroactive effect under *Teague* in cases on collateral review,' and the government has cited no case to support the proposition that a

That conclusion is particularly compelling here because, as explained above in Part I, § 4B1.2(a)(2)'s residual clause suffers from the exact same constitutional infirmities that rendered the ACCA's residual clause void for vagueness. It would be highly incongruous for this Court to conclude that: (1) the ACCA's residual clause is unconstitutionally vague (*Johnson*); (2) *Johnson* renders § 4B1.2(a)(2)'s residual clause unconstitutionally vague for the same reasons (Part I, *supra*); (3) *Johnson* has retroactive effect in "cases on collateral review" (*Welch*); but (4) *Johnson* does *not* have retroactive effect in Guidelines cases on collateral review. If the first three propositions are true, then the fourth follows *a fortiori*. Indeed, it would be an anomaly to say that the rule in *Johnson* does not have retroactive effect in collateral Guidelines cases even though it both is substantive and invalidates § 4B1.2(a)(2)'s residual clause.

Although this Court's categorical approach to retroactivity requires it, that common-sense conclusion is bolstered by this Court's retroactivity analysis in *Welch*. There, the Court reaffirmed that "'[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law

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rule can be substantive in one context but procedural in another.") (internal citation omitted); *Doe*, 810 F.3d at 154 n.13 (3d Cir. 2015) ("Under *Teague*, either a rule is retroactive or it is not."); *Price v. United States*, 795 F.3d 731, 732, 734 (7th Cir. 2015) (stating that "*Teague* . . . recognized that new substantive rules are categorically retroactive" and holding, even before *Welch*, that *Johnson* was "categorically retroactive to cases on collateral review").

punishes.'" *Welch*, 136 S. Ct. at 1264-65 (quoting *Summerlin*, 542 U.S. at 353). Although the Court recognized other formulations, it referred to this one as the "normal criteria for a substantive rule," *id.* at 1267, invoking it six times in only four short pages, *see id.* at 1264-68. In so doing, the Court clarified that "whether a new rule is substantive or procedural" is determined "by considering the function of the rule." *Id.* at 1265. And a rule has a "substantive function" where it "alters . . . the range of conduct or class of persons that the law punishes." *Id.* at 1266. The Court concluded that, "[u]nder this framework, the rule announced in *Johnson* is substantive." *Id.* at 1265.

The Court explained: "By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering the range of conduct or the class of persons that the Act punishes." *Id.* (citation omitted). "Before *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause." *Id.* However, after *Johnson*, the very "same person engaged in the same conduct is no longer subject to the Act." *Id.*

"By the same logic," the Court continued, "*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 a defendant should be sentenced under the Armed Career Criminal Act." *Id.* It did not, for example, "allocate decisionmaking

authority between judge and jury, or regulate the evidence that the court could consider in making its decision." *Id.* (quotation marks and internal citation omitted). Rather, "*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id. Johnson* therefore had the substantive function of altering the range of conduct and class of persons that the legal provision punished. *See id*.

That exact same substantive function exists here. By invalidating § 4B1.2(a)(2)'s residual clause, "*Johnson* changed the substantive reach of the [career offender guideline], altering the range of conduct or the class of persons that the [guideline] punishes." *Welch*, 136 S. Ct. at 1265 (internal quotation marks omitted). Before *Johnson*, the career offender guideline applied to any person who was convicted of a crime of violence after two prior convictions for a crime of violence, "even if one or more of those convictions fell under only the residual clause." *Id.* But after *Johnson*, "some crimes will no longer fit the Sentencing Guidelines' definition of a crime of violence and will therefore be incapable of resulting in a career-offender sentencing enhancement." *Hubbard*, ___ F.3d at ___, 2016 WL 3181417 at *7. Thus, the very same person who qualified as a career offender based on § 4B1.2(a)(2)'s residual clause before *Johnson* "is no longer subject to" the career offender enhancement after *Johnson*. *Welch*, 136 S. Ct. at 1265.

And just as *Johnson*'s invalidation of the ACCA's residual clause is not procedural, neither is its invalidation of § 4B1.2(a)(2)'s residual clause. It does not "allocate decisionmaking authority" between judge and jury, "regulate the evidence that the court could consider," or "alter the permissible methods for determining whether a defendant's conduct is punishable." *Id.* (citations omitted). This Court's decisions in *Shepard v. United States*, 544 U.S. 13 (2005) (limiting prior-conviction documents that sentencing courts may consult), *Descamps v. United States*, 570 U.S. ___, 133 S. Ct. 2276 (2013) (prohibiting sentencing courts from consulting *Shepard* documents where statute of conviction is "indivisible"), and *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016) (holding that statute is indivisible where it contains alternative "means" of satisfying an element), are all examples of procedural rules in this context. They instruct courts how to apply the categorical approach – the methodology used to determine whether a prior conviction qualifies as a "violent felony" under the ACCA or "crime of violence" under § 4B1.2(a).

By contrast, *Johnson* "affected the reach of the [career offender guideline] rather than the judicial procedures by which [it] is applied." *Welch*, 136 S. Ct. at 1265. It narrowed the substantive definition of the term "crime of violence" and, in turn, the reach of the enhancement. Indeed, *Johnson* narrowed eligibility for the career offender enhancement just as much as it narrowed eligibility for the ACCA enhancement. And,

as was true in ACCA cases, no procedures can be afforded to render the career offender enhancement applicable if that enhancement is based on the residual clause. It is for precisely that reason that the government had previously conceded that this Court's ACCA-narrowing decisions had retroactive effect in Guidelines cases.[10] In short, *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause "'alters the range of conduct or the class of persons that the law punishes.'" *Welch*, 136 S. Ct. at 1264-65 (quoting *Summerlin*, 542 U.S. at 353). That is, it changed "the actual content" of § 4B1.2(a)(2). *Summerlin*, 542 U.S. at 355 n.5.

* * *

In sum, this Court's three-step analysis neatly resolves any retroactivity issue here. Mr. Beckles's conviction became final in 2009; this Court in *Johnson* announced a "new" rule in 2015; and *Welch* held that *Johnson* announced a "substantive" rule that has retroactive effect in "cases on collateral review." *Welch*, 136 S. Ct. at 1268. This Court's retroactivity precedents make clear that, like any other new substantive

[10] *See, e.g.*, Supplemental Brief for the United States on Rehearing En Banc at 53, *Spencer v. United States*, 773 F.3d 1132 (No. 10-10676) ("*Begay* narrowed the reach of the ACCA's residual clause – and by logical extension, the career-offender guideline's residual clause. . . . *Begay* thus narrowed the class of persons who are eligible to receive a recidivist sentencing enhancement, and no procedures permit a non-*Begay*-qualifying conviction from being treated as a [qualifying predicate]."); *id.* at 55 ("*Begay* narrows eligibility for the advisory career-offender enhancement just as much as it narrowed eligibility for the enhancements in [ACCA] cases. And, as was true in those cases, no procedures can be afforded to render that enhancement applicable.").

rule, *Johnson* must have retroactive effect in *all* cases on collateral review. That conclusion is particularly clear in this case, because *Johnson* renders § 4B1.2(a)(2)'s residual clause unconstitutionally vague for the same reasons as the ACCA's residual clause. And this Court's reasoning in *Welch* applies equally here. Accordingly, *Johnson* has retroactive effect in this collateral case.

III. AFTER *JOHNSON*, PETITIONER'S CONVICTION FOR UNLAWFUL POSSESSION OF A SAWED-OFF SHOTGUN IS NOT A "CRIME OF VIOLENCE"

At the time Mr. Beckles was sentenced, the commentary to U.S.S.G. § 4B1.2 specified that his offense – unlawful possession of a sawed-off shotgun – was a "crime of violence" for purposes of that guideline. § 4B1.2 cmt. n.1 (2006). As relevant here, the commentary provided: "[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.'" *Id*. The court below determined that *Johnson* had no effect on Mr. Beckles's career offender designation because this commentary provided an independent basis for justifying the career offender enhancement. *See* JA 163. It stated: "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 commentary underlying Beckles's status

as a career-offender." *Id*. (emphasis in original). But the Eleventh Circuit's conclusion collapses on its foundation once the residual clause is invalidated. Without the residual clause's definition of "crime of violence," the commentary on which the court of appeals relied becomes inconsistent with the text of § 4B1.2. The commentary therefore cannot be used to support Mr. Beckles's career offender enhancement.

Stinson sets forth the relationship between the Sentencing Guidelines and their commentary: "The functional purpose of commentary . . . is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce." *Stinson*, 508 U.S. at 45. Thus, *Stinson* explained, the Guidelines are "the equivalent of legislative rules adopted by federal agencies," and the commentary is "akin to an agency's interpretation of its own legislative rules." *Id*. at 45. Applying the analogous administrative-law standard, the Court held that commentary interpreting or explaining 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. If the "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. The text of the guideline must therefore "bear the construction" the commentary lends it. *Id.* at 46. In short, the commentary has

no freestanding definitional power; it may only interpret or explain a guideline's text.

Particularly instructive here is the First Circuit's recent decision in *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016). There, the defendant was convicted of possession of a machine gun, which, like a sawed-off shotgun, is a "firearm" described in 26 U.S.C. § 5845(a), and its possession is therefore listed as a "crime of violence" in the commentary to § 4B1.2. *See* § 4B1.2 cmt. n.1. The *Soto-Rivera* court proceeded on the government's concession that *Johnson* invalidated § 4B1.2(a)(2)'s residual clause. *Id.* at 58, 61 & nn.10, 12. The government also acknowledged, and the court agreed, that possession of a machine gun: (1) did not qualify under the "elements clause" of § 4B1.2(a)(1) because it did not have as an element the use, attempted use, or threatened use of force; and (2) was not one of the offenses enumerated in the text of § 4B1.2(a)(2). *Id.* at 58, 60. With those provisions and "the residual clause out of the picture," the government relied exclusively on the commentary to § 4B1.2 to support classifying possession of a machine gun as a "crime of violence." *Id.* at 59. The court rejected that reliance as "hopeless." *Id.* at 60. It held that, absent the residual clause, "[t]here 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" under *Stinson*. *Id.* Accordingly, the court vacated the sentence. *Id.* at 61-62.

The same straight-forward application of *Stinson* applies here. As demonstrated in Part I above, § 4B1.2(a)(2)'s residual clause is void for vagueness in light of *Johnson*. Thus, that clause has effectively been excised from the text of § 4B1.2. Without the residual clause's broad definition of a "crime of violence," the commentary enumerating unlawful possession of a sawed-off shotgun as a "crime of violence" becomes inconsistent with the remaining text of the guideline, since that offense clearly does not fall within either of the remaining definitions. It does not have as an element "the use, attempted use, or threatened use of physical force against another." § 4B1.2(a)(1). Nor is it one of the offenses that was enumerated as a "crime of violence" in the text of § 4B1.2(a)(2) at the time of Mr. Beckles's sentencing. *See* 4B1.2(a)(2) (2006) (defining "crime of violence" as "any offense . . . that – . . . is burglary of a dwelling, arson, or extortion, [or] involves use of explosives"). Relying on the commentary therefore impermissibly "violat[es] the dictates" of the text of § 4B1.2 once the residual clause has been invalidated. *Stinson*, 508 U.S. at 43. Accordingly, under *Stinson*, the commentary may not be used to support the enhancement. *See United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015) ("where commentary is inconsistent with [a guideline's] text, text controls"). And, without the commentary, Mr. Beckles's possession of a sawed-off shotgun no longer qualifies as a "crime of violence."

That conclusion is confirmed by the history of the commentary linking this particular offense to the residual clause. When the Sentencing Commission first

listed possession of a sawed-off shotgun as a "crime of violence" in the commentary, it explained that it did so in accordance with court decisions holding that the offense qualified as a "crime of violence" only under the residual clause. U.S.S.G. app. C, amend. 674 (Reason for Amendment) (2004) ("A number of courts have held that possession of certain of these firearms, such as a sawed-off shotgun, is a 'crime of violence' due to the serious potential risk of physical injury to another person."). At that time, "the Fourth, Seventh, Eighth, and Ninth Circuits each ha[d] found that, because it is primarily used for violent purposes, possession of a sawed-off shotgun presents a serious potential risk of physical injury and therefore constitutes a 'crime of violence.'" *United States v. Serna*, 309 F.3d 859, 863-64 (5th Cir. 2002) (collecting cases).

Pre-*Johnson* circuit court decisions also continued to link the commentary's designation of possession of a sawed-off shotgun as a "crime of violence" exclusively to § 4B1.2(a)(2)'s residual clause. *See United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010) ("Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the 'residual' or 'otherwise' clause in § 4B1.2(a)(2)."); *United States v. Lipscomb*, 619 F.3d 474, 477 (5th Cir. 2010) ("We think that the Sentencing Commission's commentary to § 4B1.2 answers" the question of whether possession of a sawed-off shotgun qualifies as a "crime of violence" under the residual clause); *United States v. Hawkins*,

554 F.3d 615, 617-18 (6th Cir. 2009) (holding that Commission's interpretation of the residual clause allowing possession of a sawed-off shotgun to qualify as a "crime of violence" was not clearly erroneous).

Finally, the Commission again recently confirmed that this aspect of the commentary was tethered exclusively to the residual clause. Upon deleting § 4B1.2(a)(2)'s residual clause for "many of the same concerns cited by the Supreme Court in *Johnson*," the Commission moved the unlawful possession of a sawed-off shotgun offense out of the commentary and into the text of the Guideline. *See* U.S.S.G. § 4B1.2 app. C, amend 798 (Reason for Amendment). In so doing, the Commission implicitly and correctly recognized that this "crime of violence" enumerated in the commentary depended entirely on the residual clause and could not stand on its own without it.

In conclusion, following *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause, the commentary to that guideline specifying unlawful possession of a sawed-off shotgun as a "crime of violence" is inconsistent with that guideline's text and is therefore invalid. *See Stinson*, 508 U.S. at 38, 44. Accordingly, the court below erred by relying on that commentary to uphold Mr. Beckles's career offender enhancement.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. V

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

FEDERAL STATUTES

18 U.S.C. § 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, ...

(2) As used in this subsection–

* * *

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

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

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise

involves conduct that presents a serious potential risk of physical injury to another; . . .

* * *

26 U.S.C. § 5845(a)

(a) Firearm. – The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; . . .

28 U.S.C. § 994(h)

(h) The [United States Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and–

(1) has been convicted of a felony that is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

28 U.S.C. § 2255(a)

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. § 4B1.1. Career Offender (2006)

(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) . . . [I]f 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.

* * *

Commentary

Application Notes:

1. "Crime of violence" . . . [is] defined in §4B1.2.

* * *

U.S.S.G. § 4B1.2. Definition of Terms Used in Section 4B1.1 (2006)

(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" does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, § 2K2.1 (Unlawful Receipt, Possession, or*

Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.

* * *

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

* * *
