No. 15-8544

In The
Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF AMICUS CURIAE OF SCHOLARS OF CRIMINAL LAW, FEDERAL COURTS, AND SENTENCING IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2).

2. Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review.

3. Whether mere 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, remains a "crime of violence" after *Johnson*.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF AMICI CURIAE[1]

Amici are scholars of criminal law, federal courts, and sentencing. They take a professional interest in the application of the vagueness doctrine and retroactivity principles to decisions regarding criminal punishment. Amici have an important interest in this case because they are concerned that the court of appeals' decision misconstrues this Court's precedent and results in federal defendants serving unlawful sentences. More information about the specific interest of each scholar is provided below.

Douglas A. Berman is the Robert J. Watkins/ Procter & Gamble Professor of Law at The Ohio State University Moritz College of Law. He teaches and writes about criminal law and sentencing.

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[1] In accordance with Rule 37.6, Amici certify that no counsel for either party authored this brief in whole or in part, and no person or entity other than named amici made a monetary contribution for the preparation or submission of this brief. The parties have consented to the filing of this brief.

Amici appear in their individual capacities; institutional affiliations are provided here for identification purposes only.

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SUMMARY OF ARGUMENT

The Due Process Clause's prohibition on vague criminal laws extends to the Federal Sentencing Guidelines. The Guidelines play an important, and often dispositive, role in federal sentencing. Judges must begin every sentencing by calculating the applicable Guidelines range; judges must consider that range when imposing sentence; any major deviations from that range must be supported by a compelling justification; and, on appeal, the reasonableness of the sentence imposed is judged in relation to the Guidelines range.

Vague Guidelines may result in arbitrary or discriminatory enforcement, and they fail to give the public sufficient notice regarding the grounds for sentencing enhancements. This Court has repeatedly applied the vagueness doctrine to laws that allow for the exercise of discretion; it is of no moment that judges currently have discretion to impose non-Guidelines sentences. Moreover, because both prosecutors and defendants have authority (and often a significant incentive) to appeal any perceived misapplication of § 4B1.2(a), the constitutional problems posed by vague Guidelines are implicated not only during district court sentencing proceedings, but also during

appellate proceedings that review a district court's efforts to properly apply the Guidelines.

A ruling that the residual clause of § 4B1.2(a) is unconstitutionally vague should be applied retroactively. New constitutional rules apply retroactively when they are substantive. A rule invalidating § 4B1.2(a)'s residual clause is substantive because it "alters the range of conduct or the class of persons that the law punishes." *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). A rule invalidating § 4B1.2(a)'s residual clause alters the class of persons who receive sentencing enhancements based on their criminal history.

Holding that a rule invalidating § 4B1.2(a)'s residual clause is retroactive also comports with this Court's recent decisions on retroactivity, as well as decisions that address the continued significance of the Guidelines. Finality interests do not counsel against making a ruling invalidating § 4B1.2(a)'s residual clause retroactive. The federal criminal justice system's recent experience with sentence reductions under amendments to drug-related Guidelines confirms that the system has the capacity to conduct resentencings in cases similar to Petitioner's.

At a minimum, this Court's ruling about the vagueness of § 4B1.2(a)'s residual clause should be made retroactive to defendants whose sentences were imposed when the Guidelines were not advisory. This includes not only defendants who were sentenced before the decision in *United States v. Booker*, 543 U.S.

220 (2005), but also defendants such as Petitioner, who were sentenced when district court judges were not permitted to disagree with § 4B1.2(a) on policy grounds.

Finally, in order to enhance nationwide consistency in processing similar cases and to enhance judicial efficiency and orderly administration, this Court should clarify that motions asserting the right recognized in this case are not time barred.

ARGUMENT

Petitioner was sentenced to 360 months of imprisonment, rather than 180 months, based on the residual clause of § 4B1.2(a) of the Federal Sentencing Guidelines. After Petitioner's conviction became final, this Court held that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court subsequently held that the rule invalidating ACCA's residual clause applied retroactively. *Welch v. United States*, 136 S. Ct. 1257 (2016). The language from the ACCA that this Court held unconstitutionally vague is identical to the language in § 4B1.2(a)'s residual clause. Therefore, it should also be invalidated under the vagueness doctrine, and that ruling should be applied retroactively.

I. The Vagueness Doctrine Applies To The Federal Sentencing Guidelines

The Due Process Clause prohibits the enforcement of vague criminal laws. A criminal law is unconstitutionally vague "if 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*, 135 S. Ct. 2551, 2556 (2015). The vagueness doctrine applies "not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Id.* at 2557.

This Court has made clear that the vagueness doctrine applies not only to statutes, but also to regulations promulgated by agencies and other non-legislative bodies. *See, e.g.*, *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2319 (2012) (finding unconstitutionally vague federal regulations); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (finding Nevada Supreme Court Rule void for vagueness); *Boyce Motor Lines v. United States*, 342 U.S. 337, 338-40 (1952) (evaluating Interstate Commerce Commission regulation under the vagueness doctrine). Because the Guidelines "are the equivalent of legislative rules adopted by federal agencies," *Stinson v. United States*, 508 U.S. 36, 45 (1993), the vagueness doctrine applies to those rules. The Guidelines instruct judges regarding the amount of punishment to impose on a particular defendant. *See Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013) ("The Sentencing Guidelines represent the Federal Government's authoritative view of the appropriate sentences for specific crime.").

That judges may, under certain circumstances, exercise discretion not to follow those rules is immaterial.[2] This Court has repeatedly applied the vagueness doctrine to rules that allow for the exercise of discretion. In *Coates v. City of Cincinnati*, 402 U.S. 611, 611 (1971), this Court struck down an ordinance making it a crime for persons to gather on the sidewalk and "conduct themselves in a manner annoying to persons passing by," even though police officers retained discretion not to arrest individuals whom they found annoying. And in *Kolender v. Lawson*, 461 U.S. 352, 353-54 (1983), this Court applied the vagueness doctrine to a

[2] The precise scope of this discretion is unsettled. District courts doubtlessly possess discretion to sentence outside of the Guidelines range when a defendant differs from the defendant in a mine-run case or when the U.S. Sentencing Commission has itself indicated that certain Guidelines often produce sentences "greater than necessary" in light of the purposes of sentencing set forth in 18 U.S.C. § 3553(a). *See Kimbrough v. United States*, 552 U.S. 85, 109-110 (2007). Whether, and how much, discretion judges have to sentence outside of the Guidelines range based only on their policy views remains unclear. *See Peugh v. United States*, 133 S. Ct. 2072, 2080 n.2 (2013). The circuits have reached different conclusions on this issue. *Compare United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) (permitting policy disagreement with child pornography Guideline) *with United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012) (suggesting policy disagreement with child pornography Guideline is inappropriate).

But this Court need not resolve the scope of district courts' sentencing discretion in order to conclude that the vagueness doctrine applies to the Guidelines. The existence of discretion is immaterial to whether a legal rule is unconstitutionally vague. The relevant question is whether the rule sets either criminal liability or punishment.

statute despite evidence that prosecutors regularly exercised their discretion not to bring charges under the statute.[3] This Court applied the vagueness doctrine in order to protect the due process rights of individuals who were arrested and charged under those laws, even though some other individuals benefited from exercises of discretion which enabled them to avoid the formal legal consequences of being directly subject to unconstitutionally vague provisions.

The application of the vagueness doctrine to the Guidelines similarly protects due process rights – the rights of those individuals whose sentences were increased under § 4B1.2(a)(2)'s residual clause. It is immaterial that some judges in some cases may exercise their discretion to impose sentences that do not fall within the range specified by § 4B1.2(a)(2).

The rationales underlying the vagueness doctrine – preventing arbitrary and discriminatory enforcement and providing adequate notice – squarely apply to the Guidelines. Vague Guidelines present a risk of arbitrary and discriminatory enforcement. Like a vague statute, a vague Guideline "delegates basic policy matters" regarding how a defendant should be punished to "judges . . . for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

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[3] The appellee was detained or arrested fifteen times under the vague statute, but he was prosecuted only twice. 461 U.S. at 354.

Section 4B1.2(a)(2) uses language that is identical to the language from the Armed Career Criminal Act that this Court declared unconstitutionally vague in *Johnson*. *See Johnson*, 135 S. Ct. at 2557 ("[T]he indeterminacy of the wide-ranging inquiry required by the residual clause . . . invites arbitrary enforcement by judges."). The Guidelines' language accordingly presents comparable threats of arbitrary enforcement. Consider a judge who (perhaps unconsciously) dislikes a particular defendant because he opted to exercise his right to a trial despite having no viable defense and a significant criminal history. Instead of exercising her discretion to vary from the Sentencing Guidelines and impose an above-Guidelines sentence, the judge could instead apply § 4B1.2(a)(2)'s residual clause in order to ensure that the sentencing range specified by the Guidelines is much higher. A sentence that is consistent with the Sentencing Guidelines is more likely to be upheld on appeal than a sentence that is outside of the Guidelines range. *Rita v. United States*, 551 U.S. 338, 347 (2007). Indeed, several circuits have adopted a presumption of reasonableness for within-Guidelines sentences. But even in circuits without such a presumption, a within-Guidelines sentence is more likely to be affirmed because it complies with the procedural requirements of *United States v. Booker*, 543 U.S. 220 (2005), *see Gall v. United States*, 552 U.S. 38, 49-51 (2007), and because the Guidelines range shapes substantive reasonableness review on appeal, *see Peugh*, 133 S. Ct. at 2083 (noting that the Guidelines "remain a meaningful benchmark through the process of appellate review"). As a result, the vagueness of

§ 4B1.2(a)(2)'s residual clause makes a higher sentence based on arbitrary or discriminatory criteria more likely to be upheld on appeal.

Nor is the potential for abuse limited to sentencing judges. Probation officers prepare presentence reports that recommend an applicable Guidelines range. Probation officers, like judges, could opt to increase sentences of disfavored defendants. For example, if a defendant behaved rudely toward a probation officer during the presentence interview, the probation officer could seek to retaliate against the defendant by recommending that § 4B1.2(a)(2) apply. Even if the sentencing judge exercised her discretion to impose a below-Guidelines sentence, that would not cure the harm resulting from the discriminatory enforcement at the probation officer's hands (especially if a prosecutor thereafter sought to appeal the sentence as unreasonable because it fell significantly below the sentencing range dictated by § 4B1.2(a)(2)). This Court has never indicated that the subsequent discretion of *another* criminal justice actor is sufficient to counteract the danger of arbitrary and discriminatory enforcement created by vague laws. Nor, given the "indeterminacy of the wide-ranging inquiry required by the residual clause," *Johnson*, 135 S. Ct. at 2557, does it matter that the sentencing judge might disregard the probation officer's recommendation when taking a fresh look at § 4B1.2(a)(2)'s applicability.

The rationale underlying the notice component of the vagueness doctrine also extends to the Guidelines. The reason for the notice requirement is to let ordinary

people know what they may do without risking punishment, *Grayned*, 408 U.S. at 108-09, as well as the consequences of engaging in prohibited conduct, *Batchelder v. United States*, 442 U.S. 114, 123 (1979). The Guidelines play a central role in establishing reasons for increasing a person's sentence. They currently operate as the "essential framework" for sentencing. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

Although the Guidelines are no longer mandatory, they have considerable influence on sentencing determinations because of the procedures courts must follow in imposing sentence. *Peugh*, 133 S. Ct. at 2083. District courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* Incorrectly calculating the Guidelines range "constitutes procedural error" that generally requires resentencing, and if a district court imposes a non-Guidelines sentence it must provide a justification "sufficiently compelling to support the degree of the variance." *Id.* Moreover, appellate courts assess the reasonableness of sentences by reference to the Guidelines. *Id.* Because of their significant effect on sentences, the Due Process Clause demands that the Guidelines, just like statutory sentencing enhancement provisions, provide adequate notice to defendants of the conduct that will result in an enhancement.

The Eleventh Circuit's contrary conclusion in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), was based on a misunderstanding of this Court's

vagueness decisions. *Matchett* claimed that a Guideline does not unconstitutionally deprive defendants of notice because "'defendants cannot rely on [the Sentencing Guidelines] to communicate the sentence that the district court will impose.'" *Matchett*, 802 F.3d at 1194 (quoting *United States v. Tichenor*, 683 F.3d 358, 365 (7th Cir. 2012)). But statutes establishing mandatory minimum sentences also do not "communicate the sentence that the district court will impose" because a judge may impose a sentence above the mandatory minimum. Yet *Johnson* invalidated a statute setting a mandatory minimum sentence on vagueness grounds. Requiring specificity for statutes setting mandatory minimum sentences merely allows a defendant to better predict her punishment. *See Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013). The same is true for the advisory Sentencing Guidelines.

Nor, contrary to the Eleventh Circuit's conclusion, does this Court's decision in *Irizarry v. United States*, 553 U.S. 708 (2008), establish that the Due Process Clause permits vague Sentencing Guidelines that do not provide notice of the grounds for enhancements. *Irizarry* resolved a notice question that is irrelevant to the notice inquiry under the vagueness doctrine.

The Due Process Clause imposes two separate notice requirements. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 210 (2014) (discussing the two types of notice). First, due process requires that the law inform the public, *ex ante*, of what conduct is prohibited and the consequences for engaging in that

conduct. *See, e.g.*, *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). Second, even if the law clearly notifies the public about prohibited conduct and penalties, due process requires certain procedural protections during adjudication. This "adversarial notice" requires the government to provide a defendant with notice of the allegations against her and an opportunity to respond to those allegations. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (noting that "at a minimum" the Due Process Clause "require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

The vagueness doctrine derives from the first kind of notice required by the Due Process Clause. It requires laws to notify the *public at large* of what conduct is prohibited and the penalties for engaging in that conduct. *Irizarry* involved the second kind of notice – the sort of notice that is required during particular adjudications. There, this Court held that, after *Booker*, a sentencing court is not required to notify *a particular defendant in a particular case* that it is contemplating imposing a sentence above the Guidelines range. *See, e.g.*, *Irizarry*, 553 U.S. at 715. *Irizarry* did not address the first type of notice – what degree of notice a Guideline must provide *ex ante* to the public at large to comply with the Due Process Clause. *Matchett* was

therefore incorrect to conclude that *Irizarry* settles the notice question at issue in vagueness cases. *See United States v. Pawlak*, 822 F.3d 902, 909-10 (6th Cir. 2016).

II. Any Ruling That § 4B1.2(A)(2) Is Unconstitutionally Vague Applies Retroactively

Under *Teague v. Lane*, 489 U.S. 288 (1989), "courts must give retroactive effect to new substantive rules of constitutional law," while new rules of criminal procedure generally do not apply on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). "'A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.'" *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 347, 353 (2004)).

A determination that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague is a substantive ruling. That rule alters the class of persons who receive additional punishment under the Sentencing Guidelines. That rule would hold that the Constitution does not permit a court to sentence a defendant based on whether the defendant engaged in "conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2) (2014). Before the determination that the Guideline is unconstitutional, a defendant whose career offender designation depended on § 4B1.2(a)(2)'s residual clause would receive a significant sentencing enhancement under that

Guideline. After the determination, the defendant could not receive that enhancement.

Furthermore, a determination that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague is a substantive ruling because it creates a "significant risk" that a defendant "faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). An otherwise permissible punishment is unlawful if it was based on an unconstitutional consideration, including an unconstitutionally vague Guideline. Because the Guidelines serve as the lodestar and the essential framework for federal sentencing, there is a significant risk that defendants who were sentenced under § 4B1.2(a)(2)'s residual clause received additional prison time as a direct result of that Guideline.[4]

[4] The now-advisory Guidelines are a recent development which resulted from a Court-ordered remedy in *United States v. Booker*, 543 U.S. 220 (2005). Because the advisory Guidelines are of recent vintage, there is no perfectly analogous rule that both invalidated a similarly advisory – but forceful and often controlling – sentencing regime, and that was available on collateral review. But that should not obscure the key questions for retroactivity, which include whether the Guideline imposes punishment or creates a significant risk of additional punishment. How the advisory Guidelines actually function and the effects of invalidating § 4B1.2(a)(2)'s residual clause are the kinds of "prudential considerations" that inform retroactivity analysis. *Danforth v. Minnesota*, 552 U.S. 264, 278 & n.15 (2008). These same considerations also mean that making a rule invalidating § 4B1.2(a)(2)

A. Invalidating A Guideline As Unconstitutionally Vague Is A Substantive Rule Because It Alters The Class Of Persons That The Law Punishes

Welch v. United States established that a rule holding that a defendant cannot receive an increased punishment based on a provision that is unconstitutionally vague is a substantive rule. In *Welch*, this Court made retroactive *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* invalidated the so-called residual clause of the ACCA, which subjected certain federal firearm defendants to a fifteen-year mandatory minimum sentence. *Welch* found that "*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." *Welch*, 136 S. Ct. at 1265 (internal quotation marks and alterations omitted).

Welch further explained that a rule may be substantive because of the *effects* of that rule. *See, e.g.*, 136 S. Ct. at 1265 ("*Johnson affected* the reach of the underlying statute.") (emphasis added); *id.* ("[T]his Court has determined whether a new rule is substantive or procedural by considering the *function* of the rule, not its underlying constitutional source.").

The effect of invalidating § 4B1.2(a)(2)'s residual clause is clear – it alters the class of persons who are

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retroactive comports with "the purposes for which the writ of habeas corpus is made available." *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring).

subject to heightened punishment under § 4B1.2(a)(2). Applying § 4B1.2(a)(2) increases defendants' criminal history score, and consequently imposes additional punishment on defendants under the Guidelines. The effect of invalidating § 4B1.2(a)(2)'s residual clause would be to limit the class of persons who are subject to additional punishment under § 4B1.2(a)(2). Invalidating § 4B1.2(a)(2)'s residual clause is a substantive rule because "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264-65 (internal quotation marks omitted).

Like other Guidelines that increase a defendant's Guideline sentencing range, § 4B1.2(a)(2)'s residual clause imposes punishment. The higher sentencing range imposed by § 4B1.2(a)(2)'s residual clause is the starting point for sentencing, and district courts must remain cognizant of the range throughout sentencing. The higher sentencing range is also the benchmark according to which a defendant's sentence is judged on appeal. *See supra* Part I. That is why this Court held that the Guidelines are subject to the prohibition on *ex post facto* laws in *Peugh v. United States*, 133 S. Ct. 2072 (2013). The decision in *Peugh* determined that the Guidelines fell within a well-established "category of *ex post facto* laws, those that 'chang[e] the punishment, and inflic[t] a greater punishment, than the law annexed to the crime, when committed.'" 133 S. Ct. at 2081 (quoting *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1789)). And in rejecting the United States' argument that the Guidelines "do not have adequate legal force

to constitute an *ex post facto* violation" this Court "detailed all of the ways in which the federal sentencing regime after *Booker*" has "achieve[d] its 'binding legal effect.'" *Id.* at 2086, 2087 (quoting Brief for United States 22).

B. Invalidating A Guideline As Unconstitutionally Vague Is A Substantive Rule Because It Creates A Significant Risk That a Defendant Faces Unlawful Punishment

A rule is substantive if that rule creates a "'*significant risk* that a defendant . . . ' faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620) (emphasis added). There is little doubt that § 4B1.2(a)(2)'s residual clause created a significant risk of unlawful punishment for defendants. Indeed, there is no doubt that Petitioner would have received significantly less punishment if not for the unconstitutionally vague language of § 4B1.2(a)(2); the district court judge in this case explicitly said so. JA 149 (noting 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").

First, all sentences that depended on § 4B1.2(a)(2)'s residual clause constitute unlawful sentences, and

thus punishment that the law cannot impose. Punishment is unlawful if it is imposed in violation of the Due Process Clause's prohibition on vague laws. *Welch*, 136 S. Ct. at 1266-67; *Johnson* 135 S. Ct. at 2556-57. Thus, a ruling that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague would mean that defendants whose career offender designations depended on that clause received unlawful sentences – sentences that were imposed in violation of the Due Process Clause. Those defendants' sentences were based on a Guideline provision "so shapeless" its application amounted to "only guesswork."[5] *Johnson*, 135 S. Ct. at 2560.

A sentence based on an unconstitutional consideration is unlawful even if it falls within an otherwise lawful statutory sentencing range. *See generally* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 54-56 (2011) (collecting "substantive limitations on what courts may consider in imposing sentence"). A judge may not impose a sentence based on an unconstitutional consideration even if the same sentence could have been imposed without the unlawful consideration. *Compare* Reply Br. of United States,

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[5] Indeed, one of Justice Scalia's opinions calling for this Court to invalidate the ACCA residual clause as "unconstitutionally vague" recognized as much: The opinion named a case involving the interpretation of the *Guideline*'s residual clause and criticized the court of appeals for "its apparent view that Oliver Twist was a violent felon." *Derby v. United States*, 564 U.S. 1047, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of cert.) (criticizing *United States v. Jarmon*, 596 F.3d 228 (4th Cir. 2010)).

Welch v. United States, No. 15-6418, at 9 (2016) ("*Johnson* is not retroactive in guidelines cases. The invalidation of the residual clause in [the] Guidelines . . . would not (and could not) alter the statutory boundaries for sentencing set by Congress."). Sentences that fall within the permissible sentencing range have been reversed when they were based on materially untrue information, *United States v. Tucker*, 404 U.S. 443, 447-48 (1972), when imposed because a defendant exercised her right to appeal, *North Carolina v. Pearce*, 395 U.S. 711, 723-25 (1969), or when based on a defendant's race or nationality, *United States v. Kaba*, 480 F.3d 152, 156 (2d Cir. 2007). It is immaterial that judges in those cases could have imposed the same sentences for different reasons. A sentence is unlawful if it was based on an unconstitutional consideration, including an unconstitutionally vague Guideline. Accordingly, career offenders who were sentenced based on an unlawful consideration – the invalid residual clause – do not have "lawful" sentences merely because they could have received their same sentences *without* the unlawful consideration.

Therefore, invalidating § 4B1.2(a)(2)'s residual clause would create a class of prisoners who received unlawful sentences – sentences that included punishment that was imposed in violation of the Due Process Clause's vagueness doctrine. Because judges have discretion to impose sentences outside the Guidelines range, *see United States v. Booker*, 543 U.S. 220 (2005), a defendant sentenced after a determination that § 4B1.2(a)(2)'s residual clause is unconstitutionally

vague could, in theory, receive the same sentence as a defendant sentenced before that determination.[6] But the mere possibility that *some* judges *might* impose the same sentence on *some* defendants does not mean that a rule invalidating § 4B1.2(a)(2)'s residual clause is not a substantive rule.

A sentence is not lawful merely because that same sentence could have been imposed in a constitutional manner. That is why this Court held that the ruling in *Johnson* was retroactive even though Congress could have prescribed the same punishment had it written a more precise statute. *Welch*, 136 S. Ct. at 1267 (rejecting the argument "that *Johnson* is not substantive because it does not limit Congress' power: Congress is free to enact a new version of the residual clause that imposes the same punishment on the same persons for the same conduct, provided the new statute is precise enough to satisfy due process").

Second, there is a "significant risk" that many defendants sentenced under § 4B1.2(a)(2)'s residual clause received additional prison time because of that clause, and this too constitutes punishment that the law cannot impose. *Montgomery v. Louisiana*, 136

[6] This makes a finding that § 4B1.2(a)(2) is impermissibly vague different than the finding that ACCA is impermissibly vague. Defendants whose sentences depended on ACCA's residual clause could not have received the sentence imposed on them in the absence of ACCA's residual clause because ACCA increased these defendants' mandatory minimum sentence above the statutory maximum sentence they otherwise could have received.

S. Ct. 718 (2016), illustrates why a rule invalidating § 4B1.2(a)(2)'s residual clause would be substantive.

Montgomery made the ruling in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), retroactive. *Miller* held that the Eighth Amendment forbids the mandatory imposition of life without parole sentences on juveniles. *Miller*, however, explicitly left open the possibility that a judge could, in some cases, impose a life without parole sentence on a juvenile defendant. *See* 132 S. Ct. at 2471 ("Our decision does not categorically bar a penalty for a class of offenders. . . . [It] mandates only that a sentencer follow a certain process . . . before imposing a particular penalty."). *Montgomery* nonetheless made *Miller* retroactive, recognizing that *Miller* barred life without parole for all "but the rarest of juvenile offenders." 136 S. Ct. at 734. Making *Miller* retroactive was necessary to vindicate the Eighth Amendment rights of those juvenile defendants who would receive shorter sentences under *Miller*.

The same logic applies to the Guidelines. Given the role that the Guidelines play in federal sentencing, there is a "significant risk" that a defendant who was sentenced under § 4B1.2(a)(2)'s residual clause is now "fac[ing] a punishment that the law cannot impose on him." *Schriro*, 542 U.S. at 352. Any ruling that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague must be applied retroactively to vindicate the due process rights of those defendants who will receive shorter sentences when § 4B1.2(a)(2) is not applied to them.

Although district court judges are permitted to sentence outside of the Guidelines range, the Guidelines "range is intended to, and usually does, exert controlling influence on the sentence that the court will impose." *Peugh*, 133 S. Ct. at 2085; *see also Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016) ("The Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing.").[7] The Guidelines "anchor both the district court's discretion and the appellate review process." *Id.* at 2087. District court judges must begin the sentencing process by calculating the applicable Guideline range, and that range serves as the starting point both for the district court to explain any deviation from the range

[7] There is some evidence that judges vary more from the career offender Guideline than other Guidelines. *See* Statement of Molly Roth On Behalf of the Federal Community and Public Defenders, U.S. Sentencing Comm'n Public Hearing on Proposed Amendments to Definitions of Crimes of Violence (Nov. 5, 2015) at 13, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/FPD.pdf (estimating that only 27.5% of career offenders sentenced within the Guidelines range). However, the rate of within-Guideline sentences for career offenders roughly tracks the general rate of within-Guideline sentences overall in the cases where the government recommended a below-Guideline sentence are excluded (25.9% versus 20%).

In any event, the prevalence of within-Guidelines sentences need not dictate the result in this case. Regardless whether this Guideline was followed in 95% of cases or in only 5% of cases, the ruling should be made retroactive because even when a defendant receives a sentence outside of the Guidelines range, "*the Guidelines are in a real sense the basis for the sentence*.'" *Peugh*, 133 S. Ct. at 2083 (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion)).

and for the appellate court to review the appropriateness of that deviation. *Gall v. United States*, 552 U.S. 38, 49-51 (2007). That is why this Court has said that, even when a defendant receives a sentence outside of the Guidelines range, "'*the Guidelines are in a real sense the basis for the sentence*.'" *Peugh*, 133 S. Ct. at 2083 (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion)) (emphasis in original).

Given that the Guidelines are the basis for all federal sentencing – even for sentences that vary from the Guidelines' range – it would be a "rare[]" case indeed where the application of § 4B1.2(a)(2)'s residual clause had *no* effect on a defendant's sentence.[8] And making the rule invalidating the Guideline retroactive is necessary to ensure that those defendants whose sentences were increased by § 4B1.2(a)(2)'s residual clause "have not suffered the deprivation of a substantive right." *Montgomery*, 136 S. Ct. at 734. "*Any* amount of additional jail time has . . . significance," not merely that amount which exceeds the statutory maximum. *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001) (emphasis added)). Whether meted out by statute or by a Guideline, additional jail time constitutes punishment, and additional jail time that results from

[8] Indeed, if the Guidelines range had *no* effect on a defendant's sentence, then the sentencing judge would have failed to impose an appropriate sentence under 18 U.S.C. § 3553(a), which requires judges to consider the Guidelines range when determining the particular sentence to be imposed. *See* 18 U.S.C. § 3553(a)(4).

an unconstitutional law is punishment that the law cannot impose.

C. Invalidating A Guideline As Unconstitutionally Vague Is Not A Procedural Rule

Unlike substantive rules, "[p]rocedural rules . . . 'regulate only the *manner of determining* the defendant's culpability.'" *Welch*, 136 S. Ct. at 1265 (quoting *Schriro*, 542 U.S. at 353). *Schriro v. Summerlin*, for example, declined to make the ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) – that a jury, rather than a judge must find facts necessary to impose a capital sentence – retroactive. But *Ring* involved only the allocation of power between judge and jury; it "did not alter the range of conduct Arizona law subjected to the death penalty." *Schriro*, 542 U.S. at 353.

A ruling that § 4B1.2(a)(2)'s residual clause is vague is not procedural. Invalidating § 4B1.2(a)(2) would "affect[] the reach" of the Guidelines "rather than the judicial procedures by which" the Guidelines are applied. *Welch*, 136 S. Ct. at 1265. A determination that § 4B1.2(a)(2)'s residual clause is vague prohibits courts from applying that Guideline at all; "'even the use of impeccable factfinding procedures could not legitimate' a sentence based on that clause." *Welch*, 136 S. Ct. at 1265 (2016) (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)).

The government attempts to paint the Guidelines as merely procedural, arguing that 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." Br. in Opp., *Jones v. United States*, No. 15-8629, at 21 (2016). That argument, however, mischaracterizes the Guidelines. The Guidelines are not mere "factors" that a sentencer "may" consider; they *must* be considered by judges when imposing sentences. *See Gall*, 552 U.S. at 49-50; *see also* 18 U.S.C. § 3553(a). Any sentence imposed on a defendant designated as a career offender is based on, and imposed under, § 4B1.2(a)(2). *Peugh*, 133 S. Ct. at 2083.

This Court's prior retroactivity decisions are not to the contrary. *Lambrix v. Singletary*, 520 U.S. 518 (1997), declined to make the rule announced in *Espinosa v. Florida*, 505 U.S. 1079 (1992), retroactive. *Espinosa* invalidated a capital sentence that was imposed after a jury did not receive an appropriately limited construction of an aggravating factor it considered when formulating an advisory sentence recommendation to the judge. *See Lambrix*, 520 U.S. at 525-26. But *Espinosa* did not invalidate the aggravating factor that went into the jury's sentencing recommendation. In *Espinosa*, while the *jury* did not receive an appropriately limited construction, the *trial judge* did,[9] and the

[9] This is another difference between *Espinosa* and the question in the case at bar: If § 4B1.2(a)(2)'s residual clause is invalid

trial judge, who imposed the ultimate sentence, did so based on an appropriately narrowed construction of the aggravating factor. *Espinosa* therefore concerned only the *processes* for reaching the court's ultimate sentence; the judge in that case did not impose a sentence pursuant to an invalid provision of law that established the defendant's eligibility for additional punishment. In any case, *Lambrix* predates this Court's more recent decisions in *Schriro*, *Montgomery*, and *Welch*, which have further clarified when a rule is substantive.[10]

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under the vagueness doctrine, then there is no possible narrowing construction that could potentially cure its application.

[10] Other early retroactivity cases are similarly inapposite. *Graham v. Collins*, 506 U.S. 461 (1993), held that the rule petitioner sought – that the State violated the Eighth and Fourteenth Amendments by not permitting the jury to consider evidence of his youthfulness, among other factors – was a new, procedural rule. *Graham* found that the jury *could* have considered the mitigating evidence in petitioner's case. *See* 506 U.S. at 475 ("Graham's mitigating evidence was not placed beyond the jury's effective reach."). The rule petitioner sought in *Graham* was also not *facial invalidation* of Texas's capital sentencing scheme, and it therefore would not result in a "void" law. Here, by contrast, finding § 4B1.2(a)(2) invalid would result in a void law, meaning any sentence imposed under that Guideline is unlawful.

Beard v. Banks, 542 U.S. 406 (2004), held that a rule about *how* a jury could find capital mitigating factors – not unanimously – did not apply retroactively. That rule did not find any particular factor invalid. *Saffle v. Parks*, 494 U.S. 484 (1990), addressed a rule that purportedly "limited *the manner in which* . . . mitigating evidence may be considered," *id.* at 491, not whether a factor was invalid.

Some lower courts have concluded that a ruling invalidating a Guideline is a procedural ruling because a district court's calculation of the appropriate Guidelines range is reviewed on appeal for procedural reasonableness under *Gall v. United States*. *See, e.g.*, *Hallman v. United States*, No. 3:15-CV-00468, 2016 WL 593817, at *5 (W.D.N.C. Feb. 12, 2016); *United States v. Stork*, No. 15-389, 2015 WL 8056023, at *6 (N.D. Ind. Dec. 4, 2015). This wordplay elevates form – the description of one facet of *Gall*'s reasonableness review as procedural – over substance – how the Guidelines actually work to affect the sentences that are imposed. *See supra* Part II.B. It also ignores that Guidelines also play a role in *substantive* reasonableness review, as courts of appeals are required to consider "the extent of any variance from the Guidelines." *Gall*, 552 U.S. at 51.

D. The Mechanics of Resentencing Prisoners Would Not Unduly Burden The Federal Courts

The federal criminal justice system has the capacity to conduct resentencings in cases similar to Petitioner's. The precise number of individuals sentenced under § 4B1.2(a)(2)'s residual clause in federal prison is difficult to estimate, but there may be (very roughly) 24,000 prisoners sentenced as career offenders in

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Finally, *O'Dell v. Netherland*, 521 U.S. 151 (1997), did not address whether the "narrow right of rebuttal" in *Simmons* was a substantive rule. 521 U.S. 151, 167 (1997).

prison.[11] That number pales in comparison to the number of prisoners (38,242) who requested sentence reductions under recent retroactive amendments to drug-related Guidelines.[12]

Moreover, not every prisoner sentenced as a career offender must be resentenced. The rule petitioner seeks in this case leaves intact the portion of § 4B1.2(a) that increases punishment based on controlled substance offenses. It also leaves intact two provisions that define what kinds of violent felonies provide a

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[11] The Sentencing Resource Counsel estimated that approximately 14,928 of the 16,444 prisoners sentenced as career offenders from 2008 through 2014 remain in prison. Sentencing Resource Counsel, Federal Public & Cmt'y Defenders, Data Analyses-Career Offenders, http://www.src-project.org/wp-content/uploads/2016/03/Effect-of-Career-Offender-Status-and-Number-Sentenced-2008-through-2014-Likely-Still-in-Prison.pdf. The average sentence for career offenders – at least after *Booker* – is approximately 147 months' (just over 12 years') imprisonment. U.S. Sentencing Comm'n, Quick Facts: Career Offender, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf.

This average means that the typical prisoner sentenced under the career-offender Guideline will be in prison if he or she was sentenced during or after 2004. Extending the Sentencing Counsel's estimates back several years, there may be (very roughly) 24,000 prisoners sentenced as career offenders in prison. (15,000 + 2250x4 is 24,000.)

[12] U.S. Sentencing Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report tbl. 1 (Apr. 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20160407-Drug-Retro-Analysis.pdf.

basis for a career-offender designation – the enumerated-offense clause, which identifies specific crimes as violent crimes, and the element-of-force clause, which defines a violent crime as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1), (a)(2) (2014). The Sentencing Commission has reported that "most" prisoners were designated career offenders "because of drug trafficking crimes."[13] The Commission's own calculation therefore means that fewer than 12,000 of the 24,000 career offenders would be eligible for resentencing, and some of those career offenders would not be eligible for resentencing because their designations depended on the enumerated-offense or the element-of-force clauses, not § 4B1.2(a)(2)'s residual clause.

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[13] *E.g.*, U.S. Sentencing Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; *cf.* U.S. Sentencing Comm'n, Quick Facts: Career Offenders (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf ("74.1%" of career offenders "were sentenced for a drug trafficking offense"); U.S. Sentencing Comm'n, Report to the Congress: Career Offender Sentencing Enhancements 28 (Aug. 2016), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (26.7 percent of prisoners sentenced in 2014 "had only drug trafficking convictions among their instant and prior offenses" and 60.6% "had a combination of drug trafficking and violent offenses").

Finally, the process for determining which prisoners should be resentenced would not unduly burden the federal courts. By all accounts, the workload from the retroactive drug Guideline amendments was managed well.[14] There is every reason to think the same would be true here. Many of the same procedures used to manage the workload from the drug Guideline amendments – such as expanding prisoner access to legal materials and presentence reports – could be employed in resentencing defendants who were sentenced under § 4B1.2(a)(2)'s residual clause.

The resentencings that would result from this case would also operate similarly to the sentence reductions under the retroactive drug Guideline amendments. After those amendments, courts imposed new sentences in light of the amended Guidelines ranges. Invaliding § 4B1.2(a)(2)'s residual clause would reduce some offenders' criminal history points, thereby yielding a new

[14] Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011) at 3, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Reggie_Walton.pdf; *see also* Testimony of James E. Felman on behalf of the Am. Bar Ass'n before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010, U.S. Sentencing Comm'n (June 1, 2011) at 4, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_ABA_James_Felman.pdf.

Guidelines range, and courts could likewise simply impose new sentences utilizing the new Guidelines range.

III. At A Minimum, Any Rule That § 4B1.2(A)(2) Is Unconstitutionally Vague Must Apply Retroactively To Those Defendants Who Were Sentenced Under Mandatory Guidelines

At a minimum, any rule that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague must apply retroactively to defendants whose sentences were imposed when the Guidelines were not advisory. Prior to *United States v. Booker*, 543 U.S. 220 (2005), district courts were required to impose sentences under the Guidelines. Because the Guidelines effectively operated as mandatory statutes, *id.* at 233-34, there is no plausible argument to treat § 4B1.2(a)(2)'s residual clause any differently than the ACCA language that this Court invalidated in *Johnson*. *See, e.g.*, *In re Patrick*, ___ F.3d ___, 2016 WL 4254929, at *4 (6th Cir. Aug. 12, 2016).

Importantly, at the time Petitioner was sentenced, § 4B1.2(a)(2) was not treated as advisory in the Eleventh Circuit. Even after this Court decided *Kimbrough v. United States*, 552 U.S. 85 (2007), the Eleventh Circuit did not permit district court judges to sentence outside of the Guidelines range based on policy disagreements with § 4B1.2(a)(2). *See United States v.*

Vazquez, 558 F.3d 1224, 1227-29 (11th Cir. 2009).[15] Thus, in deciding whether a vagueness rule must apply retroactively to Mr. Beckles, this Court should not credit the government's arguments that § 4B1.2(a)(2) represented only "incorrect advice to the sentencing court" nor that "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." Br. in Opp., *Jones v. United States*, No. 15-8629, at 12, 16. That simply was not true in Mr. Beckles' case. Nor was it true in many cases from the First, Seventh, and Fourth Circuits, which "initially held that sentencing judges had no authority to reject" § 4B1.2(a)(2). Hon. Thomas M. Hardiman & Richard L. Heppner Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 16 (2012).

IV. How The Court Decides This Case Affects The Timeliness Of Prisoners' § 2255 Motions

This Court should clarify that motions asserting a right recognized in this case are not time barred.

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[15] This Court vacated the judgment in *Vazquez* after the government confessed error. 558 U.S. 1144 (2010). The Eleventh Circuit has not yet decided whether district court judges are now authorized to disregard § 4B1.2(a)(2) based on a policy disagreement. *See United States v. Bradley*, 409 F. App'x 308, 312 (11th Cir. 2011) (stating "we need not address the implications of our vacated decision in *Vazquez*").

The applicability of several Anti-terrorism and Effective Death Penalty Act (AEDPA) restrictions turns on what "right" is "asserted" by a prisoner. AEDPA's statute of limitations, for example, runs from "the date on which *the right asserted* was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3) (emphasis added).

What this Court identifies as the "right" in this case therefore affects when the statute of limitations expires for cases similar to Petitioner's. For example, if this Court accepts Petitioner's argument that the right at issue in this case is *Johnson* – and nothing more – then the statute of limitations has already expired. *Johnson* was decided June 26, 2015, so the statute of limitations expired June 26, 2016.[16] If this Court does not explicitly clarify that it is recognizing a new right in this case – one that restarts the statute of limitations – there is a risk that some courts will conclude that claims similar to Petitioner's are time barred because the right this Court recognized was based, in part, on *Johnson*.

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[16] The statute of limitations is subject to equitable tolling, *Holland v. Florida*, 560 U.S. 631 (2010), including for actual innocence, *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). A favorable decision in Petitioner's case *could* mean that prisoners sentenced under the career-offender Guideline are actually innocent of their sentences. *See, e.g.*, Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson's *Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 65-73 (2015) (showing linkage between substantive rules and actual innocence).

But if this Court instead clarifies that it is recognizing a new right in this case, the statute of limitations will restart on the date on which that right is announced. One recent concurrence highlighted this possibility:

> [T]he statute of limitations for § 2255 motions based on *Johnson may* expire in the next few days. Of course, if the Supreme Court overrules *Matchett*, that new case *could* start a new one-year clock. If that happens, the dates of the one-year statute of limitations will turn in part on whether *Johnson*'s voiding of the identical § 4B1.2(a)(2) language was "apparent to all reasonable jurists."

In re McCall, ___ F.3d ___, 2016 WL 3382006, at *2 (11th Cir. June 17, 2016) (Martin, J., concurring) (citation omitted) (emphasis added).

Despite the public defenders' Herculean efforts, many prisoners did not file § 2255 motions prior to June 26. Precedent in some circuits squarely foreclosed successive motions, even by prisoners sentenced under ACCA; in these circuits, prisoners could not file before April 18 when *Welch* was announced. The Eleventh Circuit's precedent *still* forecloses successive and initial § 2255 motions by prisoners sentenced under the Guidelines, and that court has continued to deny authorization to file successive § 2255 motions after certiorari was granted in this case. *See, e.g.*, *In re Anderson*, ___ F.3d ___, 2016 WL 3947746 (11th Cir. July 22, 2016). Some prisoners may have elected not to file based on these cases, and these prisoners, as well

as those whose successive motion applications were recently denied, would need to file requests for authorization after June 26.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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