United States Court of Appeals
for the
Third Circuit

No. 14-3969

UNITED STATES OF AMERICA,

– against –

MICHAEL CALABRETTA, a/k/a MICHAEL CALLABRETTA,

Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

SUPPLEMENTAL BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

DISCUSSION 2

I. *Johnson* Held that the Residual Clause Is Void for Vagueness. 2

II. *Johnson* Applies to the Sentencing Guidelines' Residual Clause. 3

A. The Government Concedes, and All Courts to Have Considered the Question, With the Exception of the Eleventh Circuit, Agree that *Johnson* Applies to and Invalidates the Guidelines' Residual Clause. 3

B. The Guidelines' Residual Clause Is Subject to a Vagueness Challenge 7

C. The Eleventh Circuit's Reasoning in *Matchett* Is Deeply Flawed and Should Be Rejected by This Court. 10

III. Under *Johnson*, Calabretta Is Not A Career Offender. 12

A. Calabretta Is Not A Career Offender. 12

B. This Court Should Decline the Government's Invitation to Hold that *Knight* Has Been Abrogated. 13

CONCLUSION 14

COMBINED CERTIFICATE 16

TABLE OF AUTHORITIES

Cases

Banks v. United States, No. 15-5722, __S.Ct.__, 2015 WL 4987655 (Oct. 19, 2015) 5

Beckles v. United States, 135 S. Ct. 2928 (2015) 5

Chambers v. United States, 555 U.S. 122 (2009)..5

Chapman v. United States, 500 U.S. 453 (1991)...9

Cooper v. United States, 135 S. Ct. 2938 (2015) 5

Denson v. United States, 135 S. Ct. 2931 (2015) 5

Gall v. United States, 552 U.S. 38 (2007) 8, 10, 11

Gonzales v. United States, No. 14-9996, __ S. Ct. __, 2015 WL 2473125 (Oct. 5, 2015) 5

Griffith v. Kentucky, 479 U.S. 314 (1987)..12

Henderson v. United States, __U.S. __, 133 S.Ct. 1121 (2013)..............................14

Hopkins v. United States, 555 U.S. 1132 (2009) (mem.) 5

*Hutto v. Da*vis, 454 U.S. 370 (1982) 12

In re Sealed Case, 548 F.3d 1085 (D.C. Cir. 2008) 6

Irizarry v. United States, 553 U.S. 708 (2008)...11

James v. United States, 550 U.S. 192 (2007) 9

Johnson v. United States, 135 S.Ct. 2551 (2015) .... passim

Jones v. United States, 135 S. Ct. 2944 (2015) 5

Jones v. United States, No. 15-5667, __ S. Ct. __, 2015 WL 4916474 (Oct. 13, 2015) 5

Kolender v. Lawson, 461 U.S. 352 (1983) 12

Maldonado v. United States, 135 S. Ct. 2929 (2015)..5

McCarthren v. United States, No. 15-5654, __ S. Ct. __, 2015 WL 4916396
(Oct. 13, 2015) 5

Mistretta v. United States, 488 U.S. 361 (1989) 8

Molina-Martinez v. United States, 14-8913 13

Peugh v. United States, 133 S. Ct. 2072 (2013)..9, 10, 11

Smith v. United States, 135 S. Ct. 2930 (2015) 5

Stinson v. United States, 508 U.S. 36 (1993) 8

Sykes v. United States, 131 S. Ct. 2267 (2011) 9

Talmore v. United States, 135 S. Ct. 2937 (2015)...5

United States v Booker, 543 U.S. 220 (2005)...11

United States v. Alexander, 609 F.3d 1250 (11th Cir. 2010) 10

United States v. Batchelder, 442 U.S. 114 (1979)...3

United States v. Boose, 739 F.3d 1185 (8th Cir. 2014) 6

United States v. Collins, 799 F.3d 554 (6th Cir. Aug. 24, 2015) 6

United States v. Coronado, 603 F.3d 706 (9th Cir. 2010)...6

United States v. Darden, 605 Fed. Appx. 545 (6th Cir. July 6, 2015) (unpub.)........6

United States v. Denson, 728 F.3d 603 (6th Cir. 2013)...6

United States v. Goodwin, __ Fed. Appx. __, 2015 WL 5167789
(10th Cir. Sept. 4, 2015)...6

United States v. Harbin, 610 Fed. Appx. 562 (6th Cir. July 6, 2015) (unpub.) 6

United States v. Hopkins, 577 F.3d 507 (3d Cir. 2009)..6

United States v. Hunter, 14-3188 (3d Cir. May 27, 2015) (not precedential).........14

United States v. Jarmon, 596 F.3d 228 (4th Cir. 2010)..6

United States v. Jones, 740 F.3d 127 (3d Cir. 2014)..6

United States v. Jones, 979 F.2d 317 (3d Cir. 1992)..8

United States v. Knight, 266 F.3d 203 (3d Cir. 2001)...2, 13

United States v. Lipscomb, 285 Fed. Appx. 877 (3d Cir. 2008)..........................1, 13

United States v. Litzy, __ F. Supp.2d __, 2015 WL 5895199
(S.D.W. Va. Oct. 8, 2015)..7

United States v. Marrero, 743 F.3d 389 (3d Cir. 2014) *cert. denied*,
135 S. Ct. 950, 190 L. Ed. 2d 843 (2015) 6

United States v. Matchett, __F.3d __, 2015 WL 5515439
(11th Cir. Sept. 21, 2015)... passim

United States v. Maurer, 639 F3d 72 (3d Cir. 2011)...7

United States v. Mead, 773 F.3d 429 (2d Cir. 2014)...6

United States v. Moore, 635 F.3d 774 (5th Cir. 2011) 6

United States v. Nerius, No. 14-4121 (3d Cir. Aug. 19, 2015) 6

United States v. Perez, 514 Fed. Appx. 263 (3d Cir. 2013) (not precedential).......14

United States v. Ramirez, __F.3d__, 2015 WL 5011965 (7th Cir. Aug. 25, 2015) ..6

United States v. Tann, 577 F.3d 533 (3d Cir. 2009)...14

United States v. Taylor, __F.3d __, 2015 WL 5918562 (8th Cir. Oct. 9, 2015).......6

United States v. Vann, 660 F.3d 771 (4th Cir. 2011) (en banc) 6

United States v. Willings, 588 F.3d 56 (1st Cir. 2009)...6

United States v. Womack, 610 F.3d 427 (7th Cir. 2010) 6

United States v. Wray, 776 F.3d 1182 (10th Cir. 2015) 6

Vinales v. United States, 135 S. Ct. 2928 (2015) 5

Wade v. United States, 504 U.S. 181 (1992) 8

Wynn v. United States, 135 S. Ct. 2945 (2015) 5

New Jersey Statutes

N.J. Stat. Ann. § 2C:29-2(b) (West 1995) 13

Other Authorities

Appellee's Supp. Br., *United States v. Madrid*, No. 14-2159, 2015 WL 4985890 (10th Cir. Aug. 20, 2015) 5

Appellee's Supp. Br., *United States v. Madrid*, No. 14-2159, 2015 WL 4985890 (10th Cir. Aug. 20, 2015) 4

Br. and Reply Br. for Appellant, *United States v. Hunter*, 14-3188 (3d Cir.).........14

Br. and Reply Br. for Appellant, *United States v. Moreno*, 14-1568 (3d Cir.) 14

Br. of Plaintiff-Appellee, *United States v. Gillespie*, No. 15-1686 (7th Cir. Sept. 14, 2015) 5

Br. of Plaintiff-Appellee, *United States v. Gillespie*, No. 15-1686 (7th Cir. Sept. 14, 2015) 4

Letter Br. for United States, *United States v. Zhang*, No. 13-3410 (2d Cir. Aug. 13, 2015) 4

Letter for United States, *United States v. Calabretta*, 14-3969 (Aug. 12, 2015)......4

Order, *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 24, 2015) 6

Supp. Br. for Plaintiff-Appellee United States, *United States v. Grayer*, No. 14-6294, 2015 WL 4999426 (6th Cir. Aug. 20, 2015)..4

Supp. Br. for United States, *United States v. Pagan-Soto*, No. 13-2243, 2015 WL 4872453 (1st Cir. Aug. 11, 2015) 4

Supp. Br. for United States, *United States v. Talmore*, No. 13-10650, 2015 WL 5076250 (9th Cir. Aug. 17, 2015) 4

Supp. Letter Br. for United States, *United States v. Lee*, No. 13-10507 (9th Cir. Aug. 17, 2015) 4

Supp. Letter Br. for United States, *United States v. Matchett*, No. 14-10396 (11th Cir. Aug. 27, 2015) 4

Supp. Letter Br. for United States, *United States v. Townsend*, No. 14-3652, 2015 WL 5112425 (3d Cir. Aug. 28, 2015) 4

U.S. Sent'g Comm'n, *News Release: U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence* (Aug. 7, 2015) 7

U.S. Sent'g Comm'n, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, Pt. C (Career Offenders) (2012) 4

United States Supp. 28(j) Auth., *United States v. Smith*, No. 14-2216 (10th Cir. Aug. 20, 2015) 4

United States Unopposed Motion to Remand in Light of *Johnson v. United* States, 135 S. Ct. 2551 (2015), *United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 8, 2015) 4

United States' Supp. Br., *United States v. Goodwin*, No. 13-1466, 2015 WL 4999435 (10th Cir. Aug. 21, 2015) 4

Rules

Fed.R.App.P 28(j) 2

Third Cir. I.O.P. 9.1 14

United States Sentencing Guidelines

USSG § 4B1.2 ....1, 2, 13

USSG § 4B1.2(a)(2) 2, 3, 5, 13

USSG App. C, Amend. 268 (1989) 4

STATEMENT OF FACTS

Appellant Michael Calabretta, faced a mandatory minimum sentence of 60 months under 21 U.S.C. § 841(b)(1)(B), and a guidelines range of 108-135 months (CHC III, level 29). However, the PSR found, and the district court agreed, that Calabretta's prior convictions—Death by Auto (1990) and Eluding in the Second Degree (1994), both under New Jersey law—were crimes of violence, making him a career offender under USSG § 4B1.2. As a career offender—level 31 in CHC VI— Calabretta's sentencing range was 188 to 235 months, a difference of 80 to 100 months from the guidelines range calculated without a career offender designation. *See* App. Br. at 6-7. The district court departed downward from the career offender guidelines range and sentenced Calabretta to 120 months of imprisonment. Calabretta argued both at sentencing and in his moving brief on appeal that he was not a career offender. A-120-23[1]; App. Br. at 13-34. But, based on this Circuit's precedent, Calabretta did not challenge that Eluding was a crime of violence under the residual clause of USSG § 4B1.2. *See United States v. Lipscomb*, 285 Fed. Appx. 877, 880 (3d Cir. 2008).

While Calabretta's direct appeal was pending, the Supreme Court ruled that the identically-worded residual clause in the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was void for vagueness. *Johnson v.*

[1] "A" citations refer to page numbers within Appellant's Appendix filed with his moving brief on appeal.

United States, 135 S.Ct. 2551 (2015). On June 26, 2015, Calabretta filed a letter pursuant to Fed.R.App.P 28(j) arguing that *Johnson* applied to his case. On August 12, 2015, the government conceded *Johnson*'s applicability but maintained that Calabretta was not entitled to re-sentencing because he could not demonstrate that he had been prejudiced by the district court's application of the incorrect guidelines range. At oral argument on September 15, 2015, the government argued that this Court should not presume prejudice despite this Court's prior holding in *United States v. Knight*, 266 F.3d 203 (3d Cir. 2001).

On September 21, 2015, the Eleventh Circuit held that *Johnson* does not apply to § 4B1.2. *United States v. Matchett*, __F.3d __, 2015 WL 5515439 (Sept. 21, 2015). On September 25, 2015, this Court invited the parties to submit supplemental briefing addressing whether, notwithstanding the government's concession, and considering *Matchett*, *Johnson* applies to § 4B1.2. This supplemental brief is respectfully submitted pursuant to that invitation.

DISCUSSION

I. *Johnson* Held that the Residual Clause Is Void for Vagueness.

The "residual clause" defines a "violent felony" or a "crime of violence" to include an offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii); USSG § 4B1.2(a)(2). In *Johnson*, the Supreme Court held that the residual clause is void for vagueness in

every application and, therefore, "[i]ncreasing a defendant's sentence under the clause denies due process of law." *Id*. at 2557.

The Court held that the government violates the Fifth Amendment's due process 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*, 135 S. Ct. at 2556. "The prohibition of vagueness in criminal statutes," the Court explained, "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 (internal quotation marks and citations omitted). "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Id*. at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

II. ***Johnson* Applies to the Sentencing Guidelines' Residual Clause.**

A. The Government Concedes, and All Courts to Have Considered the Question, With the Exception of the Eleventh Circuit, Agree that *Johnson* Applies to and Invalidates the Guidelines' Residual Clause.

Johnson applies to § 4B1.2(a)(2)'s residual clause. The career offender guideline's residual clause—"or otherwise involves conduct that presents a serious

potential risk of physical injury to another" —repeats the ACCA's residual clause verbatim.[2] That language is now void for vagueness.

As United States Attorneys' Offices around the country have conceded,[3] *Johnson*'s constitutional holding applies to the identical clause in the guidelines because the "guideline's residual clause uses the same language that *Johnson* held was impermissibly vague because it 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" Supp. Br. for United States at 6-7, *United States v. Pagan-Soto*, No. 13-2243, 2015 WL 4872453 (1st Cir. Aug. 11, 2015) (citing *Johnson*, 135 S. Ct. at 2558); *see also* Br. of Plaintiff-Appellee at

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[2] The Sentencing Commission copied the residual clause in the definition of "crime of violence" from 18 U.S.C. § 924(e). *See* USSG, App. C, USSG, App. C, Amend. 268 (1989); U.S. Sent'g Comm'n, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, Pt. C (Career Offenders), at 4 (2012).

[3] *See* Letter for United States, *United States v. Calabretta*, 14-3969 (Aug. 12, 2015); Letter Br. for United States, *United States v. Zhang*, No. 13-3410 (2d Cir. Aug. 13, 2015); Supp. Br. for United States, *United States v. Talmore*, No. 13-10650, 2015 WL 5076250 (9th Cir. Aug. 17, 2015); Supp. Letter Br. for United States at 2-4, *United States v. Lee*, No. 13-10507 (9th Cir. Aug. 17, 2015); United States Supp. 28(j) Auth., *United States v. Smith*, No. 14-2216 (10th Cir. Aug. 20, 2015); Appellee's Supp. Br. at 3-10, *United States v. Madrid*, No. 14-2159, 2015 WL 4985890 (10th Cir. Aug. 20, 2015); Supp. Br. for Plaintiff-Appellee United States at 4-8, *United States v. Grayer*, No. 14-6294, 2015 WL 4999426 (6th Cir. Aug. 20, 2015); United States' Supp. Br. at 7-9, *United States v. Goodwin*, No. 13-1466, 2015 WL 4999435 (10th Cir. Aug. 21, 2015); Supp. Letter Br. for United States, *United States v. Matchett*, No. 14-10396 (11th Cir. Aug. 27, 2015); Supp. Letter Br. for United States, *United States v. Townsend*, No. 14-3652, 2015 WL 5112425 (3d Cir. Aug. 28, 2015); Br. of Plaintiff-Appellee at 8-14, *United States v. Gillespie*, No. 15-1686 (7th Cir. Sept. 14, 2015); United States Unopposed Motion to Remand in Light of *Johnson v. United* States, 135 S. Ct. 2551 (2015) at 8, *United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 8, 2015).

7, 10, *United States v. Gillespie*, No. 15-1686 (7th Cir. Sept. 14, 2015) (same); Appellee's Supp. Br. at 3, *United States v. Madrid*, No. 14-2159, 2015 WL 4985890 (10th Cir. Aug. 20, 2015) (same).

Indeed, the Supreme Court relied on several decisions applying the clause as it appears in § 4B1.2(a)(2) to demonstrate that it "has proved nearly impossible" to "mak[e] sense of the residual clause." *See* 135 S. Ct. at 2559-60 (citations omitted). Furthermore, the Court has thus far vacated and remanded thirteen lower court decisions in which defendants had been sentenced under § 4B1.2(a)(2)'s residual clause in light of *Johnson*.[4]

Because § 4B1.2(a)(2)'s residual clause is identical to the ACCA's residual clause, the Third Circuit interprets the clauses identically.[5] *See United States v. Marrero*, 743 F.3d 389, 395 n.2 (3d Cir. 2014) *cert. denied*, 135 S. Ct. 950, 190 L.

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[4] The GVRs include eleven career offender cases, *see Banks v. United States*, No. 15-5722, __S.Ct.__, 2015 WL 4987655 (Oct. 19, 2015); *McCarthren v. United States*, No. 15-5654, __ S. Ct. __, 2015 WL 4916396 (Oct. 13, 2015); *Jones v. United States*, No. 15-5667, __ S. Ct. __, 2015 WL 4916474 (Oct. 13, 2015) (28 U.S.C. § 2255 motion); *Gonzales v. United States*, No. 14-9996, __ S. Ct. __, 2015 WL 2473125 (Oct. 5, 2015); *Vinales v. United States*, 135 S. Ct. 2928 (2015); *Denson v. United States*, 135 S. Ct. 2931 (2015) (28 U.S.C. § 2255 motion); *Beckles v. United States*, 135 S. Ct. 2928 (2015) (28 U.S.C. § 2255 motion); *Maldonado v. United States*, 135 S. Ct. 2929 (2015); *Smith v. United States*, 135 S. Ct. 2930 (2015); *Wynn v. United States*, 135 S. Ct. 2945 (2015) (28 U.S.C. § 2255 motion); *Jones v. United States*, 135 S. Ct. 2944 (2015) (28 U.S.C. § 2255 motion); one § 2K2.1 case, *Talmore v. United States*, 135 S. Ct. 2937 (2015); and one § 7B1.1 case, *Cooper v. United States*, 135 S. Ct. 2938 (2015).

[5] *Cf. Hopkins v. United States,* 555 U.S. 1132 (2009) (mem.) (remanding a career offender case for consideration after the Supreme Court's ACCA opinion in *Chambers v. United States,* 555 U.S. 122 (2009)).

Ed. 2d 843 (2015) ("'Precedent . . . requires the application of case law interpreting 'violent felony' in ACCA to 'crime of violence' in U.S.S.G. § 4B1.2[ ] because of the substantial similarity of the two sections.'") (citing *United States v. Herrick,* 545 F.3d 53, 58 (1st Cir. 2008)); *United States v. Jones*, 740 F.3d 127, 133 n.1 (3d Cir. 2014) ("authority interpreting one is generally applied to the other"); *United States v. Hopkins,* 577 F.3d 507, 511 (3d Cir. 2009) (same).[6]

The overwhelming majority of authority finds that *Johnson* applies to and invalidates § 4B1.2(a)(2).[7] Only the Eleventh Circuit has disagreed. *Matchett*, 2015 WL 5515439, at *8 (directing district courts to continue to apply the residual

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[6] The other Circuits do as well. *See*, *e.g.*, *United States v. Willings*, 588 F.3d 56, 58 n.2 (1st Cir. 2009); *United States v. Mead*, 773 F.3d 429, 432 (2d Cir. 2014); *United States v. Vann*, 660 F.3d 771, 773 n.2 (4th Cir. 2011) (en banc); *United States v. Jarmon*, 596 F.3d 228, 231 n.* (4th Cir. 2010); *United States v. Moore*, 635 F.3d 774 (5th Cir. 2011); *United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2013); *United States v. Womack*, 610 F.3d 427, 433 (7th Cir. 2010); *United States v. Boose*, 739 F.3d 1185, 1187 n.1 (8th Cir. 2014); *United States v. Coronado*, 603 F.3d 706, 709 (9th Cir. 2010); *United States v. Wray*, 776 F.3d 1182, 1184-85 (10th Cir. 2015); *United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010); *In re Sealed Case*, 548 F.3d 1085, 1089 (D.C. Cir. 2008).

[7] *See United States v. Taylor*, __F.3d __, 2015 WL 5918562 (8th Cir. Oct. 9, 2015) (vacating career offender sentence and remanding in light of *Johnson* but "leav[ing] for the district court on remand the question of whether the residual clause of the career offender guideline is unconstitutional"); *United States v. Harbin*, 610 Fed. Appx. 562, 563 (6th Cir. July 6, 2015) (unpub.); *United States v. Darden*, 605 Fed. Appx. 545, 546 (6th Cir. July 6, 2015) (unpub.); *United States v. Collins*, 799 F.3d 554, 596-97 (6th Cir. Aug. 24, 2015); *United States v. Ramirez*, __F.3d__, 2015 WL 5011965, at *9 (7th Cir. Aug. 25, 2015); *United States v. Goodwin*, __ Fed. Appx. __, 2015 WL 5167789, at *3 & n.3 (10th Cir. Sept. 4, 2015); Order, *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 24, 2015). Before *Matchett*, this Court did as well. *See United States v. Nerius*, No. 14-4121 (3d Cir. Aug. 19, 2015) (vacating sentence and remanding in light of *Johnson*).

clause and to rely on decisions overruled by the Supreme Court in *Johnson* when calculating the advisory guideline range). As discussed *infra* at 10-12, the Eleventh Circuit's reasoning is deeply flawed and should not persuade this Court.[8] Moreover, *Matchett* rests on uncertain ground. A petition for rehearing *en banc* was filed on October 13, 2015.

The Sentencing Commission also recognizes that *Johnson* has rendered § 4B1.2(a)(2)'s residual clause void. Because "the statutory language the Court found unconstitutionally vague" in *Johnson* is "identical" to the career offender guideline's residual clause, the Commission proposes to "delete the residual clause" in order "to make the guideline consistent with *Johnson*."[9]

B. The Guidelines' Residual Clause Is Subject to a Vagueness Challenge.

Johnson held, and this Circuit has recognized, that the Guidelines are susceptible to vagueness challenges. *Johnson*, 135 S. Ct. at 2557; *see also United States v. Maurer*, 639 F3d 72 (3d Cir. 2011) (presuming Guidelines are subject to vagueness challenges); *United States v. Jones*, 979 F.2d 317, 319 (3d Cir. 1992),

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[8] The only court of which the defense is aware that has considered whether to follow the Eleventh Circuit's approach declined to do so. *See United States v. Litzy*, __ F. Supp.2d __, 2015 WL 5895199 at **7-9 (S.D.W. Va. Oct. 8, 2015).
[9] U.S. Sent'g Comm'n, *News Release: U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence* (Aug. 7, 2015), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150807_Press_Release.pdf.

superseded by statute on other grounds as stated in *United States v. Done*, 589 Fed. Appx. 49 (Mem) (3d Cir. 2015)).

More generally, the Supreme Court has repeatedly resolved constitutional challenges to the Guidelines as a whole, and to individual guidelines, on the merits.[10] In *Stinson v. United States*, 508 U.S. 36 (1993), the Supreme Court considered the precise guideline here at issue–the career offender guideline–and held that Guideline commentary must yield if it "violates the Constitution." *Stinson*, 508 U.S. at 38, 45. And questions of Guidelines interpretation are subject to *de novo* review. *See*, *e.g*., *Marrero*, 743 F.3d at 393.

Following *Johnson*, district courts cannot rely on § 4B1.2(a)(2)'s residual clause to calculate the applicable guidelines range—an essential first step in sentencing. District courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). The sentencing court must "correctly calculat[e] the applicable Guidelines range," *id*. at 49, and "failing to calculate (or improperly calculating) the Guidelines range" is reversible error, *id*. at 51. The guideline range

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[10] *See, e.g.*, *Peugh*, 133 S. Ct. at 2085-86 (dismissing the government's argument that the guidelines lacked "the force and effect of laws" and holding that 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 (1992) (government's refusal to file substantial-assistance motion under Guidelines subject to constitutional review); *Mistretta v. United States*, 488 U.S. 361 (1989) (Guidelines as a whole did not violate Constitution's structural features).

thus serves as the "framework," "lodestar," "anchor" and "basis" for sentencing. *Peugh v. United States*, 133 S. Ct. 2072, 2083-84 (2013). The use of a vague "'formula'. . . to calculate the applicable sentencing range," *id*. at 2088, violates due process because it inevitably leads to unpredictable and arbitrary applications of the legal framework for sentencing. *See Johnson*, 135 S. Ct. at 2557.

Sentencing courts cannot continue to rely on a method of analysis that the Supreme Court has termed "guesswork." *Johnson*, 135 S. Ct. at 2560.[11] The Due Process Clause prohibits the imposition of a penalty "based on an arbitrary distinction." *Chapman v. United States*, 500 U.S. 453, 465 (1991). *Johnson*'s rationale reveals that § 4B1.2's residual clause amounts to just such a prohibited "arbitrary distinction" because the clause is so "vague" and "shapeless" that it "invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557, 2560. Experience left the Supreme Court with "no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause." *Id*. at 2562.

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[11] Even if they could continue to apply the residual clause, sentencing courts no longer have any body of law to apply in determining whether or not an offense not contained within the elements clause or the enumerated clause of § 4B1.2 constitutes a crime of violence. The ACCA cases on which courts have relied to decide whether offenses fall within the Guidelines' residual clause are now overruled. *See Johnson*, 135 S.Ct. at 2562-63 (overruling *James v. United States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 131 S. Ct. 2267 (2011)). Instead, after *Johnson*, judges attempting to determine whether a particular offense qualifies as a crime of violence under the residual clause would be forced to rely on "guesswork and intuition." *Johnson*, 135 S. Ct. at 2559.

Following *Johnson*, it is evident that the residual clause, which defies accurate and consistent application, violates due process and thwarts the Supreme Court's instruction in *Gall* and *Peugh* to calculate accurate guidelines sentencing ranges as the first, essential step in sentencing.

C. The Eleventh Circuit's Reasoning in *Matchett* Is Deeply Flawed and Should Be Rejected by This Court.

In *Matchett*, the Eleventh Circuit held that "[b]y its terms," *Johnson* does not apply to the Guidelines. *Matchett*, 2015 WL 5515439, at *6. But *Matchett*'s analysis is deeply flawed and contrary to the Eleventh Circuit's own precedent. *See United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010) ("[T]he residual clauses are identical[.] Accordingly, we look to the Supreme Court's opinions applying the ACCA . . . for guidance in considering whether an offense qualifies as a crime of violence under the Sentencing Guidelines.").

Johnson's focus was on the residual clause's language—the same language stated verbatim in the residual clause of § 4B1.2—not the location of that clause. *Johnson*, 135 S. Ct. at 2557 ("Increasing a defendant's sentence under the clause denies due process of law."). Indeed, *Johnson* relied on lower court decisions interpreting "[t]he clause" in § 4B1.2 to demonstrate that making sense of the clause in the ACCA "has proved nearly impossible." 135 S. Ct. at 2559-60.

Matchett's holding that *Johnson* doesn't apply to § 4B1.2 requires the district courts to continue the "guesswork" that the Supreme Court forbade by applying

case law that the Supreme Court has overruled. *See Matchett*, 2015 WL 5515439, at *8-9 (stating that "[a]lthough *Johnson* abrogated the previous decisions of the Supreme Court interpreting the residual clause of the Armed Career Criminal Act, sentencing courts interpreting the residual clause of the guidelines must still adhere to [their] reasoning," and relying on *James v. United States*, 550 U.S. 192 (2007)).

Matchett minimizes the conflict between *Johnson*'s holding and the district courts' role in performing the mandatory guidelines calculations by dismissing the guidelines as "merely 'the starting point and the initial benchmark'" of federal sentencing. 2015 WL 5515439, *6 (emphasis added). But the Guidelines occupy a uniquely important space in federal criminal law. *See supra* at 8 (discussing *Gall*); *United States v Booker*, 543 U.S. 220, 243 (2005) (The Sentencing Commission is "properly thought of as exercising some sort of legislative power."); *Peugh*, 133 S. Ct. at 2083, 2085 (advisory Guidelines have "legal force").[12]

The *Matchett* court cites *Irizarry v. United States*, 553 U.S. 708 (2008), for the proposition that a claim based on a lack of notice can't apply to advisory

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[12] Similarly, *Matchett* erroneously claims that application of the vagueness doctrine to the Guidelines would "upend our sentencing regime." *Matchett*, 2015 WL 5515439, *8 (discussing "sophisticated means" and "minor participant" provisions). But those provisions involve just the sort of assessments of "real world" conduct ("relevant conduct") that *Johnson* said aren't susceptible to a vagueness challenge. *See Matchett*, 2015 WL 5515439, at *8; *Johnson*, 135 S. Ct. at 2561. In contrast, the problem with the residual clause is that it ties risk to a judicially-imagined abstraction, an idealized "ordinary" commission of a crime, rather than "real world conduct." *Id.*

Guidelines. *Matchett*, 2015 WL 5515439, at *7. But the vagueness doctrine isn't only focused on notice—it's also concerned with "arbitrary enforcement," the real risk that district courts would face if ordered to continue applying § 4B1.2(a)(2)'s residual clause to calculate sentencing guidelines ranges. *Johnson*, 133 S. Ct. at 2557; *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (arbitrary enforcement is the "more important aspect of the vagueness doctrine").

In sum, the *Matchett* court "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. . . . [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Da*vis, 454 U.S. 370, 374-75 (1982). This Court should not join *Matchett*, direct the lower courts to apply decisions the Supreme Court has overruled, and allow anarchy to prevail. Rather, it should disregard *Matchett* and accept the government's concession that *Johnson* applies to § 4B1.2(a)(2).

III. Under *Johnson*, Calabretta Is Not A Career Offender.

A. Calabretta Is Not A Career Offender.

Johnson applies to Calabretta's case because it is pending on direct review. *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). Calabretta's case must be remanded for re-sentencing without application of the career offender guideline

because he does not have two qualifying prior convictions under § 4B1.2. This Circuit has held that Eluding is properly analyzed under the residual clause, which *Johnson* has voided,[13] and Calabretta now has only a single (arguable) conviction for a crime of violence.[14]

B. This Court Should Decline the Government's Invitation to Hold that *Knight* Has Been Abrogated.

Under this Circuit's settled law, the application of an incorrect Guidelines range is presumptively prejudicial on plain-error review, even when the sentence imposed falls within the correct range. *See Knight*, 266 F.3d at 207.[15] *See also*

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[13] Calabretta was convicted in New Jersey for second-degree eluding, which criminalizes knowing flight or the attempt thereof from law enforcement under certain circumstances, "if the flight or attempt to elude creates a risk of death or injury to any person." N.J. Stat. Ann. § 2C:29-2(b) (West 1995). The *Lipscomb* court rationalized that, by its definition, New Jersey's Eluding statute "involves conduct that presents a serious potential risk of physical injury to another" under § 4B1.2(a)(2). *Lipscomb*, 285 Fed. Appx. at 880. *Lipscomb* was decided before *Sykes*, which is now overruled. *Lipscomb*'s rationale, based on what the Supreme Court has termed "guesswork," cannot stand.

[14] If this Court declines to apply *Johnson* to USSG § 4B1.2(a)(2), the Court should reach the question of whether Death by Auto is a crime of violence, as argued in the parties' briefing. Calabretta argues that Death by Auto is not equivalent to generic manslaughter, and was (before *Johnson*) properly analyzed under the residual clause. App. Br. at 13-28. The Sentencing Commission's proposed amendment to the Guidelines, *see supra*, p. 7 n. 8, agrees with Calabretta's position by defining manslaughter for purposes of § 4B1.2's enumerated clause as voluntary manslaughter only.

[15] On October 1, 2015, the Supreme Court granted *certiorari* in *Molina-Martinez v. United States*, 14-8913, in which the Fifth Circuit declined to find a presumption of error, despite contrary Fifth Circuit precedent. This Court need not hold this case pending the Supreme Court's decision in *Molina-Martinez* because the Fifth Circuit's holding conflicts with the settled law of this Circuit which is neither

Henderson v. United States, __U.S. __, 133 S.Ct. 1121, 1124-25 (2013) (error is "plain" for Rule 52(b) purposes if it is plain by the time of appellate review, even if the substantive legal question was unsettled when trial court acted).[16] *Knight* controls the outcome here because the incorrect career offender guidelines range was an anchor for the district court's ultimate sentence.[17] A-130-32. This Circuit has recently declined the government's similar invitation to overrule *Knight* or to find it has been abrogated.[18] This Court should do the same.

CONCLUSION

Wherefore, Calabretta is not a career offender and this case should be remanded for resentencing because prejudice is presumed from the application of the incorrect Guidelines range under the settled law of this Circuit.

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superseded by intervening controlling authority nor contrary to Supreme Court precedent not brought to the attention of the previous panel. *See* Third Cir. I.O.P. 9.1; *United States v. Tann*, 577 F.3d 533, 540-42 (3d Cir. 2009).

[16] The government recognizes that the error here could be sufficiently plain to satisfy Rule 52(b). Gov't. Supp. Br. at 13. To hold otherwise would discount the fact that the Supreme Court treats the residual clauses in the ACCA and § 4B1.2 as interchangeable. *See supra*, p. 3-10. To the Supreme Court, the error here is plain.

[17] The Court is respectfully referred to Br. and Reply Br. for Appellant, *United States v. Moreno*, 14-1568 (3d Cir.); Br. and Reply Br. for Appellant, *United States v. Hunter*, 14-3188 (3d Cir.) for additional discussion of *Knight*'s continuing validity.

[18] *See United States v. Hunter*, 14-3188 (May 27, 2015) (not precedential) (considering the presumption of prejudice in the context of allocution). *See also United States v. Perez*, 514 Fed. Appx. 263 (3d Cir. 2013) (not precedential) (disregarding government's argument that Supreme Court precedent permitted panel overruling of *Knight*).

Dated: October 26, 2015
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COMBINED CERTIFICATE

I, John Meringolo, whose name appears on the foregoing brief for Appellant Michael Calabretta, certify as follows:

Certification of Admission-Bar Membership

I am admitted to practice before the United States Court of Appeals for the Third Circuit and am a member in good standing.

Certification of Compliance with Federal Rule of Appellate Procedure 32(a)

This brief complies with the type-volume limitation of this Court's Letter inviting supplemental briefing dated September 25, 2015, because this brief does not exceed 14 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14 point Times New Roman font.

Certification of Service upon the Court and Counsel

I have caused the Supplemental Brief for Defendant-Appellant Michael Calabretta to be electronically filed and served by CM/ECF upon:

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I have further caused seven hard copies of the Supplemental Brief for Defendant-Appellant Michael Calabretta to be sent by Federal Express/overnight mail to:

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Certification of Identical Compliance and Virus Check Pursuant to Rule 31.1

The text of the e-brief filed on October 26, 2015, and the text of the hard copies of the Supplemental Brief filed by Appellant are identical. A virus check using Virus Total was performed on the e-brief and no viruses were detected.

Dated: October 26, 2015
New York, NY

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