No. 17-9490

IN THE

Supreme Court of the United States

PAUL LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. In its brief in opposition, the government acknowledges that "a circuit disagreement exists on the viability of a claim like petitioner's." BIO 3. The government nonetheless argues that this admitted circuit conflict "may soon resolve itself without the need for this Court's intervention," because the government filed a petition for rehearing en banc in *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018). BIO 3. But that argument has been proven wrong: the Seventh Circuit has since denied the government's petition (without noted dissent or even a poll). Case No. 17-2282, DE 44 (7th Cir. Aug. 31, 2018). Accordingly, the circuit conflict is now intractable. Geography alone will determine whether federal prisoners may obtain relief from their career-offender sentences imposed before *United States v. Booker*, 543 U.S. 220 (2005). Only this Court can resolve that untenable disparity.

2. Seeking to shield that conflict from review, the government argues that the questions presented are of "limited importance" because they affect only a "closed-set of cases." *Gipson* BIO 16. But, as Petitioner explained, there are literally *thousands* of pre-*Booker* career offenders who remain incarcerated, many of whom are in the Eleventh Circuit. Pet. 25–27. The government does not dispute the numerical estimates supplied in petition. And the multiple pending petitions presenting related questions confirm that those questions do indeed affect numerous federal prisoners. The government fails to explain why this Court's review is not warranted to resolve a circuit conflict that will determine whether numerous federal prisoners are serving illegal sentences.

3. While an immutable circuit conflict on an important federal question alone compels reviews, *see* Sup. Ct. R. 10(a), (c), the government's argument on the merits is particularly weak. Indeed, it wholly fails to dispute Petitioner's main assertion: that the then-mandatory residual clause in U.S.S.G. § 4B1.2(a)(2) is void for vagueness in light of *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015) and *Beckles v. United States*, 580 U.S. __, 137 S. Ct. 886 (2017). *See* Pet. 14–21. Thus, the government has no answer for the Seventh Circuit's thorough decision in *Cross*, confirming Petitioner's argument on that point. 892 F.3d at 299–306. And the government does not defend the Eleventh Circuit's contrary decision in *In re Griffin*, 823 F.3d 1350, 1354–55 (11th Cir. 2016), upon which the decision below exclusively relied, Pet. App. 2a–4a. That silence is deafening.

Resorting instead to procedure, the government argues that the invalidation of the mandatory Guidelines' residual clause would not have retroactive effect in collateral cases. *Gipson* BIO 12–14. But, as the petition explained, this Court's decision in *Welch v. United States*, 578 U.S. __, 136 S. Ct. 1257 (2016) refutes that argument. *See* Pet. 22–24. *Welch* held that *Johnson*'s invalidation of the ACCA's residual clause was a "substantive rule" with retroactive effect because it narrowed the class of persons subject to the enhancement. The same logic applies here. Devoting only a sentence to *Welch*, the government suggests that it is distinguishable because, unlike those who are erroneously subject to the ACCA enhancement, those who were erroneously subject to a mandatory career-offender enhancement are still sentenced within the statutory range. That is unpersuasive.

The government's argument fails to recognize that, before *Booker*, the guideline range was the functional equivalent of what the statutory range is today: sentencing judges were bound by it. *Booker*, 543 U.S. at 233–35. The government emphasizes that departures were permitted in appropriate circumstances. But statutory ranges have exceptions too. *See Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013). The government does not argue that an upward departure would have been available here. And, most importantly, *Booker* already explained that the limited availability of departures did not render the Guidelines any less mandatory. 543 U.S. at 233–34. Thus, the government is wrong to suggest that a sentence exceeding the mandatory guideline range was something judges could lawfully impose; rather, doing so would have guaranteed reversal. *Id.* at 234–35. Lastly, the government makes no mention of this Court's precedent in *Miller v. Florida*, 482 U.S. 423 (1987), characterizing as "substantive" a change to a guideline range that was merely presumptive rather than mandatory. Pet. 24.

4. Because the government cannot get around this Court's precedents in *Beckles* and *Welch*, it argues that Petitioner's 28 U.S.C. § 2255 motion was not timely under § 2255(f)(3), reasoning that *Johnson* did not recognize the "new right" that Petitioner now seeks. BIO 2–3; *Gipson* BIO 9–12. In other words, the government asserts that, until this Court applies *Johnson* to the Guidelines, any § 2255 motion challenging a pre-*Booker* career-offender enhancement would be premature and thus untimely. But that begs the question: how could this Court ever decide whether to apply *Johnson* to that context unless career offenders are

permitted to challenge their sentences in court? The government's position would essentially require career offenders to file untimely § 2255 motions just to get the issue before this Court. And now that issue has arrived at the Court, the government opposes review by arguing that the motion is untimely. The government's Kafkaesque position would prevent this class of prisoners from *ever* challenging their illegal sentences in court.

Although the government's position cannot possibly be correct, this Court need not decide that issue at all. Determining whether the mandatory residual clause is retroactively void for vagueness would obviate any issue about timeliness. If the Court ultimately concludes either that § 4B1.2(a)(2)'s mandatory residual clause is *not* void for vagueness, or that its invalidation would *not* have retroactive effect, then § 2255 motions would fail for those reasons, regardless of timeliness. By contrast, if the Court concludes that § 4B1.2(a)(2)'s mandatory residual clause is retroactively void for vagueness, then the Court's retroactivity holding will require it to identify the "rule" underlying its decision. If the rule is the same substantive rule recognized in *Johnson*, then § 2255 motions filed within one year of *Johnson* will be timely. Or, if applying the rule in *Johnson* to the Guidelines creates a "new" substantive rule, then all previously-filed § 2255 motions will become timely once this Court recognizes that new rule. Either way, resolving the two questions presented here would effectively obviate any issue about timeliness.

5. That dynamic reinforces why this case is an ideal vehicle. The Eleventh Circuit's decision below rested exclusively on its circuit precedent in *In re*

Griffin, which held that: 1) the mandatory residual clause is not void for vagueness; and 2) its invalidation would not have retroactive effect. As a result, the petition here presented only those two questions for review, and the government does not dispute that they are squarely presented. *See* Pet. 27–28. And because the Eleventh Circuit did not make—and has not since made—any ruling about the timeliness of § 2255 motions challenging pre-*Booker* career offender sentences, Petitioner has not raised that question in his petition and would not need to brief it on the merits. Thus, this case neatly presents only two questions—not three—and their resolution would resolve the viability of all mandatory Guidelines cases.

The government nonetheless argues that this case is an unsuitable vehicle because, under current circuit precedent, Petitioner's predicate convictions satisfy the elements clause in § 4B1.2(a). BIO 4–5. But the government acknowledges that, whether his Florida robbery conviction satisfies the elements clause is now directly before this Court in *Stokeling v. United States*, No. 17-554 (argument set for Oct. 9, 2018), which could abrogate current Eleventh Circuit precedent. BIO 5 n.3. The government also argues that the residual clause was not vague "as applied" to Petitioner because two of his predicate convictions were listed in the commentary. BIO 3–4. But *Johnson* itself foreclosed such as-applied vagueness challenges. *See* 135 S. Ct. at 2560–61; *id.* at 2580–82 (Alito, J., dissenting). And several circuits have since held that, where an offense listed in the commentary does not satisfy a definition in the text of the Guideline, then the commentary is invalid under *Stinson v. United States*, 508 U.S. 36 (1993). *See United States v. Soto-Rivera*, 811

F.3d 53, 59–61 (1st Cir. 2016); *United States v. Rollins*, 846 F.3d 737, 742–43 (7th Cir. 2016) (en banc); *United States v. Bell*, 840 F.3d 963, 967–69 (8th Cir. 2016).

In any event, none of those issues were decided below, and this Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Again, the Eleventh Circuit affirmed the denial of Petitioner's § 2255 motion exclusively under its binding precedent in *In re Griffin*, which held that the mandatory residual clause is not void for vagueness and that its invalidation would not have retroactive effect. Were Petitioner to prevail on those two questions presented here, the Eleventh Circuit could address any remaining issues on remand, per this Court's customary procedure. So those issues pose no obstacle to review here.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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