No. ____

IN THE

Supreme Court of the United States

ALPHONSO CHURCHWELL, JR.,

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

PETITION FOR A WRIT OF CERTIORARI

DONNA LEE ELM
FEDERAL PUBLIC DEFENDER
MEGHAN ANN COLLINS
Counsel of Record
RESEARCH AND WRITING ATTORNEY
APPELLATE DIVISION
201 S. Orange Ave., Ste. 300
Orlando, Florida 32801
(407) 648-6338
Meghan_Boyle@fd.org

Counsel for Petitioner

OCTOBER 3, 2018

QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson)*, this Court declared the Armed Career Criminal Act's (ACCA) residual clause unconstitutionally vague. In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Samuel Johnson* announced a new, substantive rule of constitutional law that applied retroactively on collateral review.

In *Beckles v. United States*, 137 S. Ct. 886 (2017), this Court held that an identical residual clause in the Career Offender provision of the Sentencing Guidelines was not unconstitutionally vague. *See* U.S.S.G. § 4B1.2(a)(2). The Court reasoned that the advisory Guidelines were not subject to the constitutional vagueness prohibition because, unlike the ACCA, they do not "fix the permissible range of sentences." *Beckles*, 137 S. Ct. at 892.

However, the *Beckles* Court "le[ft] open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005)—that is, during the period in which the Guidelines did fix the permissible range of sentences—may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring in the judgment) (citations omitted).

Mr. Churchwell moved to vacate his sentence under 28 U.S.C. § 2255, arguing that after *Samuel Johnson* and *Beckles*, his career-offender sentence, which was imposed under the mandatory Guidelines, is unconstitutional. That district court denied the motion, holding that *Samuel Johnson* does not apply to the mandatory

Guidelines, and both the district court and the Eleventh Circuit denied Mr. Churchwell a certificate of appealability (COA).

The broad question presented by this petition is whether the Eleventh Circuit erroneously denied Mr. Churchwell COA on whether his sentence is unconstitutional after *Samuel Johnson*. More specifically, however, this petition presents the narrow questions of whether reasonable jurists can debate the following issues:

1. Whether U.S.S.G. § 4B1.2(a)(2)'s residual clause is void for vagueness with respect to defendants sentenced under the pre-*Booker* mandatory Guidelines.

2. Whether the invalidation of § 4B1.2(a)(2)'s mandatory residual clause applies retroactively on collateral review.

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Alphonso Churchwell respectfully petitions for a writ of certiorari to review the Eleventh Circuit's judgment.

OPINION BELOW

The Eleventh Circuit's denial of Mr. Churchwell's application for a COA in Appeal No. 18-10928 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Churchwell's case under 18 U.S.C. § 3231. The district court denied Mr. Churchwell's 28 U.S.C. § 2255 motion on January 11, 2018. Mr. Churchwell subsequently filed a notice of appeal and application for a COA in the Eleventh Circuit, which was denied on July 5, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

The ACCA defines a "violent felony" to include any felony "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii). The italicized language is the "residual clause."

At the time of Mr. Churchwell's sentencing, the Career Offender provision of the Sentencing Guidelines contained an identical residual clause, defining a "crime of violence" to include any felony "that is burglary of a dwelling, arson, or extortion,

involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2) (1998).

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

The ACCA transforms a ten-year statutory maximum penalty into a fifteen-year mandatory minimum for certain defendants convicted of federal firearms offenses. 18 U.S.C. §§ 924(a)(2), 924(e). The ACCA enhancement applies when the defendant has three "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). For purposes of the ACCA, "violent felony" is defined as, *among other things*, any felony "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The italicized language is known as the "residual clause."

In *Samuel Johnson*, this Court held that the ACCA's residual clause was unconstitutionally vague. 135 S. Ct. at 2557. The Court explained: "Two features of the residual clause conspire to make it unconstitutionally vague." *Id.* First, the "ordinary-case" analysis—requiring courts to "picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents a serious risk of physical injury"—created "grave uncertainty about how to estimate the risk posed by a crime." *Id.* (citation omitted). And, second, the residual clause created "uncertainty about how much risk it takes for a crime to qualify as a violent

felony," because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes" preceding it, and those crimes were "far from clear in respect to the degree of risk each poses." *Id.* at 2558 (citation omitted). Those uncertainties led the Court to conclude that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," "produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2557–58.

In *Welch*, this Court held that *Samuel Johnson* announced a new, substantive rule of constitutional law, and it therefore applied retroactively on collateral review. 136 S. Ct. at 1264–65. The Court reaffirmed that "a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes," and that determination is made "by considering the function of the rule." *Id.* (citation omitted). The Court concluded that, "[u]nder th[at] framework, the rule announced in [*Samuel*] *Johnson* is substantive," because it "changed the substantive reach" of the ACCA by "altering the range of conduct or the class of persons that the Act punishes." *Id.*

The Career Offender provision of the Sentencing Guidelines implements a congressional mandate to ensure that a certain category of offenders receive a sentence "at or near the maximum term authorized." 28 U.S.C. § 994(h); *see* U.S.S.G. § 4B1.1 cmt. backg'd (2015). The career offender provision creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). It does so by generally prescribing enhanced offense levels and

automatically placing career offenders in criminal history category VI, the highest category available under the Guidelines. *See* U.S.S.G. § 4B1.1(b).

A defendant is a career offender if he is at least eighteen years of age, commits an offense that is a "crime of violence" or "controlled substance offense," and has at least two prior felony convictions for a "crime of violence" or "controlled substance offense." U.S.S.G. § 4B1.1. At the time of Mr. Churchwell's sentencing in 2003, the term "crime of violence" was defined to include any felony "that is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." U.S.S.G. § 4B1.2(a)(2) (1998) (emphasis added).[1] The italicized language in the Career Offender Guideline was identical to the ACCA residual clause that *Samuel Johnson* invalidated.

Given the similarity between the two residual clauses, thousands of federal prisoners who had been sentenced as career offenders sought to collaterally challenge their sentences under § 2255 in light of *Samuel Johnson*. Some of those prisoners had been sentenced before this Court's decision in *Booker* rendered the Guidelines advisory. Because those prisoners had been sentenced over a decade earlier, many had previously filed § 2255 motions. Thus, they were legally required to obtain authorization from the court of appeals before filing a second or successive § 2255 motion based on *Johnson*. 28 U.S.C. § 2255(h).

[1] Shortly after *Samuel Johnson*, the Sentencing Commission amended § 4B1.2 and deleted its residual clause. U.S.S.G., app. C, amend. 798 (Aug. 1, 2016). All references here are to the pre-amendment version of § 4B1.2(a)(2).

Marvin Griffin was one such inmate, and he filed a *pro se* application for leave to file a successive § 2255 motion based on *Samuel Johnson*. *See* 11th Cir. No. 16-12012. Without appointing counsel or holding oral argument, the Eleventh Circuit published an order denying the application. *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016). In doing so, the Court issued two holdings. First, it held that "the Guidelines—whether mandatory or advisory—cannot be unconstitutionally vague." *Id.* at 1354. Second, the court alternatively held that any ruling invalidating § 4B1.2(a)(2)'s then-mandatory residual clause would not be retroactive. *Id.* at 1355. Because *In re Griffin* arose in the context of a successive application, Mr. Griffin was statutorily barred from seeking rehearing or certiorari review. 28 U.S.C. § 2244(b)(3)(E).[2]

After *In re Griffin*, this Court granted certiorari in *Beckles* to decide, among other things, whether *Samuel Johnson* rendered § 4B1.2(a)(2)'s residual clause void for vagueness, and, if so, whether that holding would apply retroactively on collateral review. The Court ultimately did not reach the retroactivity question because it held that the advisory Guidelines were not subject to the constitutional prohibition on

[2] Mr. Griffin nonetheless re-filed two subsequent *Samuel Johnson* applications with the court of appeals—one with counseled briefing, urging reconsideration of *In re Griffin*; and one after this Court's decision *Beckles*. *See* 11th Cir. Nos. 16-13752 & 17-11663. In the interim period, however, the Eleventh Circuit held that inmates were legally barred from re-filing a *Samuel Johnson*-based application after a previous application had been denied on the merits. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). Accordingly, Mr. Griffin's later applications were denied on that basis.

vagueness at all, and therefore § 4B1.2(a)(2)'s residual clause could not be unconstitutionally vague.

Critically, however, the Court's holding was expressly limited to the *advisory* Guidelines. *Id.* at 890, 895–96. Moreover, throughout the opinion, the Court contrasted the post-*Booker* advisory Guidelines with the pre-*Booker* mandatory Guidelines. As a result, Justice Sotomayor's separate opinion made explicit what was implicit in the majority opinion—that it did not address defendants sentenced under the pre-*Booker* mandatory Guidelines:

> The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005)—that is, during the period in which the Guidelines did "fix the permissible range of sentences," *ante*, at 892—may mount vagueness attacks on their sentences. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.

Id. at 903 n.4 (Sotomayor, J., concurring in the judgment) (internal citations omitted). This case presents the question left open in *Beckles*.

B. Procedural Background

In 2003, Mr. Churchwell pled guilty to one count of possession with intent to distribute 5 grams or more of cocaine base. Cr. Doc. 15.[3] At sentencing he was found to be a career offender based on the following prior felony offenses:

> Sell or Deliver a Controlled Substance within 1000 Feet of a School, Lee County Circuit Court, Fort Myers, Florida; Case No. 93-2880CF,

[3] References to 2:03-cr-118-FtM are cited as "Cr. Doc." References to 2:16-cv-512-FtM are cited as "Cv. Doc."

> Resisting Officer With Violence, Lee County Circuit Court, Fort Myers, Florida; Case No. 96-3001CF, and
>
> Aggravated Fleeing or Attempting to Elude Causing Injury and Aggravated Assault on an Officer, Charlotte County Circuit Court, Punta Gorda, Florida, Case No. 02-80F.
>
> PSR ¶ 34.

The career offender enhancement increased his total offense level to 31, which combined with a criminal history category of VI, resulted in a mandatory sentencing range of 188 to 235 months. Id. ¶¶ 37, 53, 78. Had he not been a career offender, then Mr. Churchwell's offense level would have been only 29, and his sentencing range would have been 151 to 188 months. Id. ¶¶ 33, 52; U.S.S.G. ch.5, pt. A. On March 1, 2003, Mr. Churchwell was sentenced to 188 months. Cr. Doc. 15. He did not appeal his conviction or sentence.

On June 27, 2016, Mr. Churchwell moved to vacate his sentence under 28 U.S.C. § 2255, arguing that based on *Samuel Johnson* and *Welch v. United States*, 136 S. Ct. 1257 (2016), his career offender sentence is unconstitutional. Cv. Doc. 1. Specifically, Mr. Churchwell challenged the career offender guideline enhancement under USSG § 4B1.2 that was applied at his sentencing. *Id.* On September 1, 2016, the district court stayed this case pending a decision in *Beckles v. United States*, 136 S. Ct. 2510 (2016), as that case was to decide whether *Johnson* was retroactively applicable to the federal sentencing guidelines. Cv. Doc. 10.

On March 6, 2017, this Court decided *Beckles*, holding that *Samuel Johnson* does not apply to the *advisory* guidelines, but left open whether it applies to the mandatory Guidelines. 137 S. Ct. 886; *see id.* at 903 n.4 (Sotomayor, J., concurring).

On March 6, 2017, the Supreme Court decided *Beckles*, holding that *Samuel Johnson* does not apply to the advisory guidelines, but left open the issue of whether it applies to the mandatory guidelines. 137 S. Ct. 886; see id. at 903 n.4 (Sotomayor, J., dissenting). On March 20, 2017, the district court issued an order lifting the stay and directing Mr. Churchwell to notify the Court within 14 days if the motion to vacate sentence under 28 U.S.C. § 2255 is due to be dismissed. Cv. Doc. 11. Mr. Churchwell responded that he did not seek dismissal. Cv. Doc. 12. The government then filed a motion to dismiss, arguing that Mr. Churchwell's claim was untimely because Samuel Johnson does not apply to the sentencing guidelines, not cognizable, procedurally defaulted, and without merit. Cv. Doc.14.

In his response to the motion to dismiss, Mr. Churchwell argued that in *Beckles*, the Supreme Court confirmed that *Samuel Johnson* applies to the mandatory guidelines, and that this Court's decision in *In re Griffin*, holding that *Samuel Johnson* does not apply to the mandatory guidelines, is no longer good law. Civ. Doc. 15 at 5-9. Mr. Churchwell also argued that he had not procedurally defaulted on his claim because he could show cause and prejudice. *Id*. at 9-10. Mr. Churchwell then argued that without the guidelines' residual clause, he could not be deemed a career offender based upon his Florida convictions and asked that the district court deny the motion to dismiss and allow him to brief the merits of his issue. *Id*. at 10-11.

On January 12, 2018, the district court denied Mr. Churchwell's § 2255 motion, finding that Mr. Churchwell's motion is untimely since *Samuel Johnson* does not

apply to the mandatory guidelines. Civ. Doc. 16 at 14. The district court also dismissed the motion on the grounds that it was not cognizable and procedurally barred. *Id*. at 3. The district court further ruled, in the alternative, that the motion was denied the on the merits. *Id*. at 3. The district court also denied Mr. Churchwell a COA. *Id*. The district court also denied Mr. Churchwell a COA.

Mr. Churchwell moved for a COA in the Eleventh Circuit, and on July 5, 2018, the court denied the motion. Appendix A. The Eleventh Circuit held that Mr. Churchwell's claim was meritless, because, as a threshold matter, *Samuel Johnson* did not apply to the mandatory guidelines, citing *In re Griffin,* 823 F.3d 1350, 1354 (11th Cir. 2016). Appendix A at 2. The Eleventh Circuit further stated that, even if *Samuel Johnson* was applicable to the mandatory guidelines, Mr. Churchwell would still not receive relief as his prior convictions would still qualify as crimes of violence. *Id*. at 3.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON THE QUESTIONS PRESENTED

The circuits are divided on whether *Samuel Johnson* invalidates the mandatory, pre-*Booker* residual clause of the Guidelines, and, if so, whether that invalidation would apply retroactively on collateral review. The Seventh Circuit has answered both questions affirmatively. The Eleventh Circuit has answered both negatively.

A. The Seventh Circuit Has Declared the Guidelines' Mandatory Residual Clause Retroactively Void for Vagueness

In *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), the Seventh Circuit held that "the residual clause of the [mandatory] guidelines suffers from the same indeterminacy" as the ACCA's residual clause struck down in *Johnson*. *Id.* at 299. The court explained that the "ordinary case" approach and "serious potential risk" standard that had plagued the ACCA's residual clause applied equally to the Guidelines' residual clause. *Id.* at 299–300. "It hardly could be otherwise because the two clauses are materially identical." *Id.* That the Guidelines referred to burglary "of a dwelling," while the ACCA referred only to "burglary," made no difference, particularly given *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)—declaring 18 U.S.C. § 16(b) void for vagueness in light of *Samuel Johnson*—because "the textual differences between the ACCA and guidelines pale in comparison to the differences between the ACCA and section 16." *Id.* at 302. And concerns about the categorical approach in *Dimaya* were expressed by only a minority of the Court and were limited to § 16(b). *Id.* at 302–303.

Because the mandatory Guidelines' residual clause suffered from the same indeterminacy as the ACCA's residual clause, the *Cross* court went on to determine whether "the constitutional requirement of clarity applies to the mandatory guidelines." *Id.* at 299. The court concluded that *Beckles*' "logic for declining to apply the vagueness doctrine" to the advisory Guidelines resulted in the opposite outcome for the mandatory Guidelines. *Id.* at 304. It reasoned that, unlike the advisory Guidelines, "[t]he *mandatory* guidelines did . . . implicate the concerns of the vagueness doctrine" because, as described by *Booker*, they fixed the permissible

sentences for criminal offenses. *Id.* at 305. "In sum, as the Supreme Court understood in *Booker*, the residual clause of the mandatory guidelines did not merely guide judges' discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases." *Id.* at 306. Thus, the Seventh Circuit "conclude[d] that the mandatory guidelines' incorporation of the vague residual clause impeded a person's efforts to 'regulate his conduct so as to avoid particular penalties' and left it to the judge to 'prescribe the sentencing range available.'" *Id.* (quoting *Beckles*, 137 S. Ct. at 894–95 (ellipsis omitted)). "The mandatory guidelines are thus subject to attack on vagueness grounds." *Id.*

The Seventh Circuit then addressed "whether *Johnson* applies retroactively to the residual clause of the career-offender guideline." *Id.* Relying heavily on this Court's decision in *Welch*, the court of appeals answered that question affirmatively. *Id.* at 306–07. It reasoned: "The same logic justifies treating *Johnson* as substantive, and therefore retroactive, when applied to the mandatory guidelines." *Id.* "Just as excising the residual clause from the ACCA changed the punishment associated with illegally carrying a firearm, striking down the residual clause in the mandatory guidelines changes the sentencing range associated with Cross's and Davis's bank robberies. At the same time, it narrows the set of defendants punishable as career offenders for the commission of any number of crimes." *Id.* "Elimination of the residual clause of section 4B1.2(a)(2) (in its mandatory guise) thus alters the range of conduct or the class of persons that the law punishes and qualifies as a retroactive, substantive rule." *Id.* (citations omitted).

Having declared the mandatory residual clause retroactively void for vagueness, the Seventh Circuit held that movants "are entitled to relief from their career-offender classifications, based on the Supreme Court's decision in [*Samuel*[*Johnson*. We thus REVERSE the district court and REMAND these cases with instructions to grant [the] section 2255 motions and to resentence them" without the enhancement. *Id.*

B. The Eleventh Circuit Has Held That the Guidelines' Mandatory Residual Clause Is Not Void for Vagueness and That Any Such Ruling Would Not Have Retroactive Effect

In *In re Griffin*, a pre-*Beckles* decision issued on a *pro se* application to file a successive § 2255 motion, the Eleventh Circuit held that "the Guidelines—whether mandatory or advisory—cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." 823 F.3d at 1354. It reasoned that "[t]he Guidelines do not define illegal conduct: they are directives to judges for their guidance in sentencing convicted criminals, not to citizens at large." *Id.* And, the Eleventh Circuit emphasized, "[d]ue process does not mandate notice of where, within the statutory range, the guidelines sentence will fall." *Id.* "Indeed, a defendant's due process rights are unimpaired by the complete absence of sentencing guidelines." *Id.* at 1355. Thus, the Eleventh Circuit opined, "[t]he limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague." *Id.* at 1354. It further noted the PSI afforded adequate notice of the career-offender enhancement. *Id.* at 1355.

The Eleventh Circuit alternatively held that even if the mandatory residual clause were void for vagueness, "that does not mean that the ruling in *Welch* makes *Johnson* retroactive." *Id.* The court reasoned that "[t]he application of *Johnson* to the ACCA was a substantive change in the law because it altered the statutory range of permissible sentences." *Id.* "By contrast, a rule extending *Johnson* and concluding that it invalidates the crime-of-violence residual clause in the Guidelines would establish only that the defendant's guidelines range had been incorrectly calculated, but it would not alter the statutory boundaries for sentencing set by Congress for the crime." *Id.* Because that invalidation would not "produce a sentence that exceeds the statutory maximum," and instead would "produce changes in how the sentencing procedural process is to be conducted," the court characterized it as a procedural rather than a substantive rule. *Id.* And, unlike in the ACCA context, the retroactive invalidation of the mandatory residual clause of the Guidelines would not preclude the district court from re-imposing the same sentence under the now-advisory Guidelines. *Id.* The court concluded: "A rule that the Guidelines must satisfy due process vagueness standards therefore differs fundamentally and qualitatively from a holding that a particular criminal statute or the ACCA sentencing statute—that increases the statutory maximum penalty for the underlying new crime—is substantively vague." *Id.* at 1356.

In sum, geography alone will now determine whether career offenders sentenced before *Booker* will be eligible for relief. Those from Chicago may walk free; those from Miami will not. Only this Court can resolve that disparity.

II. THE ELEVENTH CIRCUIT'S DECISION IN *IN RE GRIFFIN* CONTRAVENES THIS COURT'S PRECEDENTS

Here, the district court relied on *In re Griffin*. *See* Appendices A & B. That decision's holdings—that the mandatory Guidelines cannot be unconstitutionally vague, and that the invalidation of § 4B1.2(a)(2)'s mandatory residual clause would not have retroactive effect—contravene this Court's decisions in *Beckles* and *Welch*. At a minimum, reasonable jurists can debate these issues.

A. *In re Griffin*'s Vagueness Holding Contravenes *Beckles*

In *Beckles*, this Court explained, to determine whether a legal provision is subject to the constitutional prohibition on vague laws, the key "inquiry" is "whether a law regulating private conduct by fixing permissible sentences provides notices and avoids arbitrary enforcement by clearly specifying the range of penalties available." 137 S. Ct. at 895. The Court concluded that the advisory Guidelines do not fit that description, because they do not "fix the permissible range of sentences," but merely guide the exercise of sentencing discretion under 18 U.S.C. § 3553(a). *Id.* at 892, 894.

Because of their advisory nature, the Court found that the advisory guidelines do "not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894. It reasoned that "even perfectly clear Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid particular penalties within the statutory range," since the sentencing court retained discretion to vary outside the advisory guideline range. *Id.* And vague advisory Guidelines do not implicate the concern of arbitrary judicial enforcement

because, rather than "prescribe the sentences or sentencing range available," they merely "advise sentencing courts how to exercise their discretion within the bounds established by Congress." *Id.* at 894–95.

Beckles' reasoning compels the opposite outcome for the pre-*Booker* mandatory Guidelines. While the advisory Guidelines do not "fix the permissible range of sentences," *id.* at 892, the mandatory Guidelines did precisely that, *id.* at 903 n.4 (Sotomayor, J., concurring in the judgment). Indeed, *Beckles* itself distinguished the mandatory Guidelines from the advisory Guidelines, recognizing that the former were "binding on district courts" and "constrain[ed] [their] discretion." *Id.* at 894. The landmark decision in *Booker* made that clear.

In *Booker*, this Court confronted a Sixth Amendment challenge to the mandatory Guidelines precisely because they could not "be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences." 543 U.S. at 233. The Court explained:

> The Guidelines as written . . . are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. (Emphasis added.) Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.

Id. at 233–34 (footnotes and parallel citations omitted); *see Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (reiterating that Guidelines are

"binding on federal courts"). As a result, the *Booker* Court repeatedly recognized that the Guidelines effectively prescribed the range of permissible sentences. *See* 543 U.S. at 226 ("binding rules in the Guidelines limited the severity of the sentence that the judge could lawfully impose on the defendant"); *id.* at 227 (Guidelines "mandated that the judge select a sentence" in the range); *id.* at 236 (guideline range established "the maximum sentence" and "upper limits of sentencing"). Thus, it equated the guideline maximum with the statutory maximum. *Id.* at 238.

Booker further explained that the mandatory Guidelines had the "force and effect of laws" despite "[t]he availability of a departure in specified circumstances." *Id.* at 234. Departures were determined by considering "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission," 18 U.S.C. § 3553(b) (emphasis added); *see Burns v. United States*, 501 U.S. 129, 133 (1991), which were themselves "binding," *Stinson*, 508 U.S. at 42–43. Courts were not permitted "to decide for themselves, by reference to the" goals of § 3553(a), "whether a given factor ever [could] be an appropriate sentencing consideration." *Koon v. United States*, 518 U.S. 81, 108 (1996). Thus, "the guidelines were no different from statutes, which often specify exceptions." *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013); *see, e.g.*, 18 U.S.C. § 3553(e) (substantial-assistance exception to statutory minimum); 18 U.S.C. § 3553(f) (safety-valve exception to statutory minimum).

Indeed, *Booker* expressly rejected the notion that "the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory" range.

543 U.S. at 234. The Court emphasized that "departures are not available in every case, and in fact are unavailable in most," where, "as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guideline range." *Id.* Departing from that mandatory guideline range was reversible error. *Id.* at 234–35. And nowhere was that true more than in the career-offender context, where Congress uniquely directed the Commission to promulgate that particular Guideline. 28 U.S.C. § 994(h).

Because the mandatory Guidelines prescribed the permissible range of sentences, any lack of clarity therein would squarely implicate the twin concerns of the vagueness doctrine. While "even perfectly clear [advisory] Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid particular penalties," *Beckles*, 137 S. Ct. at 894, the same was not true for the mandatory Guidelines. Because the mandatory Guidelines constrained the court's sentencing discretion, they provided concrete notice to a defendant of the particular penalties available. Indeed, *Beckles* expressly reiterated that "due process concerns . . . require[d] notice in a world of mandatory Guidelines." *Id.* (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)); *see also Burns*, 501 U.S. at 138.

Applying a vague Guideline in the pre-*Booker* era would also invite arbitrary judicial enforcement. Because the mandatory Guidelines provided the sentencing court with more than advice, instead mandating a specific range of permissible sentences, a vague Guideline would permit the court, "without any legally fixed

standards," to arbitrarily "prescribe the sentences or sentencing range available." *Beckles*, 137 S. Ct. at 894–95 (citation omitted). That is precisely the sort of arbitrary judicial enforcement that motivated *Samuel Johnson*. Permitting judges to set that range with no intelligible legal standard directly implicates the vagueness doctrine's concern with arbitrary enforcement.

In short, the pre-*Booker* Guidelines were called "mandatory" for a reason: they bound the sentencing judge. Carrying the force and effect of law, they prescribed the sentences that a court could impose and that a defendant was eligible to receive. In stark contrast to the advisory Guidelines, they "fixed the range of permissible sentences." *Beckles*, 137 S. Ct. at 892. Thus, *Beckles* compels the conclusion that the mandatory Guidelines under which Mr. Churchwell was sentenced are subject to the constitutional prohibition on vagueness. And because the mandatory residual clause in § 4B1.2(a)(2) is identical to the residual clause invalidated in *Samuel Johnson*, it too must be declared void for vagueness.

The contrary reasoning and conclusion of *In re Griffin* cannot be reconciled with *Beckles*. To begin with, at no time did *In re Griffin* conduct the key "inquiry" that *Beckles* now requires—whether the mandatory Guidelines fixed or prescribed the range of permissible sentences. *Id.* at 892, 894–95. Instead, *In re Griffin* adopted an incompatibly narrow understanding of the vagueness doctrine, concluding that the mandatory Guidelines cannot be unconstitutionally vague because "they do not establish the illegality of any conduct." 823 F.3d at 1354; *see id.* (repeating same). But *Beckles* reaffirmed what *Samuel Johnson* had already clarified: the vagueness

doctrine applies not only to "laws that define criminal offenses," but to "laws that fix the permissible sentences for criminal offenses." *Beckles*, 137 S. Ct. at 892 (emphasis omitted); *see Samuel Johnson*, 135 S. Ct. at 2557.

The Eleventh Circuit also failed to ask, as *Beckles* now requires, whether the mandatory Guidelines "implicate[d] the twin concerns" of notice and arbitrary enforcement underlying the vagueness doctrine. *Beckles*, 137 S. Ct. at 894. As for the latter, *In re Griffin* said nothing at all, a glaring analytical omission. As for the former, it reasoned that "[d]ue process does not mandate notice of where, within the statutory range, the guidelines sentence will fall." 823 F.3d at 1354. That may be so, but *Beckles* made clear that due process *does* mandate notice of the permissible "range" of sentences. And while that does not include the range established by advisory Guidelines (since they merely guide the exercise of discretion), it does include the range established by mandatory Guidelines (since they fixed the range of permissible sentences). By fixing the range of permissible sentences, the mandatory Guidelines communicated the available sentences to a defendant. *See Beckles*, 137 S. Ct. 894. Indeed, *Beckles* specifically contrasted the mandatory Guidelines from the advisory Guidelines with regard to due process notice principles. *See id.* ("the due process concerns that . . . require notice in a world of mandatory Guidelines no longer apply'" post-*Booker*) (citations omitted)).

In re Griffin also reasoned that due process is satisfied whenever the PSI notifies the defendant of the career-offender enhancement. 823 F.3d at 1355. But *Beckles* clarified that the relevant notice question is not whether the defendant

receives notice of a potential sentence after having already committed the offense and been convicted. Instead, it is whether the Guidelines supply notice *ex ante* to a "person who seeks to regulate his conduct so as to avoid particular penalties." *Beckles*, 137 S. Ct. at 894. In that regard, *In re Griffin*'s reasoning is also irreconcilable with *Samuel Johnson*: in the ACCA context, probation officers routinely notified defendants, after conviction but before sentencing, that they might receive an enhanced sentence based on the residual clause. But that notice did not cure the constitutional infirmity of the ACCA's residual clause.

The remainder of *In re Griffin*'s analysis continues to overlook the key distinction between advisory and mandatory Guidelines. For example, in concluding that the Guidelines, "whether mandatory or advisory," cannot be unconstitutionally vague, it reasoned that they were "designed to *assist and limit* the discretion of the sentencing judge." 823 F.3d at 1354 (emphasis added). That conflates the key distinction—emphasized in *Beckles*—between advisory Guidelines that "assist" (*i.e.*, guide) sentencing discretion and mandatory Guidelines that "limit" (*i.e.*, constrain) such discretion. *Beckles*, 137 S. Ct. at 892, 894.

Continuing to treat the advisory and mandatory Guidelines as one and the same, *In re Griffin* also reasoned that the Guidelines could not be vague because the Constitution permitted completely indeterminate sentencing. 823 F.3d at 1355. While *Beckle*s did embrace that point, its reasoning applies only to the advisory Guidelines. Specifically, *Beckles* reasoned that, because a purely discretionary sentencing regime was constitutional, there could be no vagueness problem with

Guidelines that sought only to guide that discretion. 137 S. Ct. at 892–94. At the same time, however, *Beckles* made clear that the vagueness doctrine *does* apply to laws prescribing the range of authorized penalties. *See id.* at 892 (laws "must specify the range of available sentences with sufficient clarity") (citation omitted); *id.* at 893 (reaffirming that sentencing laws must "specif[y] the 'penalties available' and define[ ] the 'punishment authorized'") (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). Again, the mandatory Guidelines did just that.

In sum, at no time did *In re Griffin* acknowledge the binding nature of the mandatory Guidelines, let alone ask whether they fixed the range of permissible sentences, the key "inquiry" under *Beckles*. Instead, it focused on the fact that the Guidelines did not define illegal conduct, which is not relevant under *Beckles*. It repeatedly overlooked or conflated the key distinction between advisory and mandatory Guidelines, a distinction that *Beckles* reaffirmed and emphasized. And it did not properly analyze whether the mandatory Guidelines implicated the notice and arbitrary enforcement concerns underlying the vagueness doctrine. Had it done so, it would have reached the same conclusion as the Seventh Circuit in *Cross*.

B. *In re Griffin*'s Retroactivity Holding Contravenes *Welch*

In re Griffin's retroactivity holding fares no better. In *Welch*, this Court explained: "By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering the range of conduct or the class of persons that the Act punishes." 136 S. Ct. at 1265 (citation omitted). "Before [*Samuel*] *Johnson*, the Act applied to any person who possessed a

firearm after three violent felony convictions, even if one or more of those convictions fell only under the residual clause." *Id.* However, after [*Samuel*] *Johnson*, the "same person engaged in the same conduct is no longer subject" to the enhancement. *Id.* Thus, it announced a "substantive" rule with retroactive effect.

"By the same logic," the Court added, "[*Samuel*] *Johnson* is not a procedural decision," because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act." *Id.* It did not, for example, "allocate decision-making authority between judge and jury, or regulate the evidence that the court could consider in making its decision." *Id.* (citation omitted). Instead, "[*Samuel*] *Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id.* Its function was therefore substantive, not procedural.

Welch's reasoning applies with full force here. Just as with *Samuel Johnson*, any decision invalidating § 4B1.2(a)(2)'s mandatory residual clause would "change[ ] the substantive reach of the [Career Offender Guideline], altering the range of conduct or the class of persons that the [Guideline] punishes." *Id.* (internal quotation marks omitted). Before that invalidation, the Career Offender Guideline applied to any person who, *among other things*, was convicted of a "crime of violence" after two prior convictions for a "crime of violence," "even if one or more of those convictions fell under only the residual clause." *Id.* But after the invalidation, "some crimes will no longer fit the Sentencing Guidelines' definition of a crime of violence and will therefore be incapable of resulting in a career-offender sentencing enhancement." *In*

re Hubbard, 825 F.3d 225, 234 (4th Cir. 2016). Thus, the very same person who qualified as a career offender based on § 4B1.2(a)(2)'s mandatory residual clause before its invalidation would no longer be subject to the enhancement after the invalidation. It therefore affects the substantive reach of the Career Offender Guideline and, in turn, the class of persons eligible for its enhanced penalty.

Ignoring *Welch*'s core reasoning, *In re Griffin* held that the invalidation of § 4B1.2(a)(2)'s mandatory residual clause would be procedural rather than substantive. Attempting to distinguish *Welch*, it reasoned that any such ruling would not be substantive because it "would not alter the statutory boundaries for sentencing," and thus would not "produce a sentence that exceeds the statutory maximum." 823 F.3d at 1355. Rather, it reasoned, that ruling would be procedural because it "would establish only that the defendant's guidelines range had been incorrectly calculated," which "would produce changes in how the sentencing procedural process is to be conducted." *Id.*

That attempt to distinguish *Welch* is unpersuasive because it neglects that the mandatory Guidelines had "the force and effect of laws." *Booker*, 543 U.S. at 234. As explained above, under the pre-*Booker* regime, the sentencing court was legally bound to sentence defendants in accordance with the Guidelines. The Guidelines were thus the functional equivalent of what the statutory range is today. As a result, the career-offender enhancement, just like the ACCA enhancement, subjected defendants to increased sentences that they could not otherwise lawfully receive. Whether the sentence exceeded the correct statutory maximum or the correctly-

calculated high-end of the mandatory guideline range, the result is the same: the defendant's sentence was not "authorized by law." *Welch*, 136 S. Ct. at 1266. Therefore, invalidating § 4B1.2(a)(2)'s mandatory residual clause would not "produce changes in the sentencing procedural process" any more than *Johnson* did. *In re Griffin*, 823 F.3d at 1355.

That conclusion is not affected by the limited availability of departures from mandatory guideline range. Again, there are exceptions to the ACCA's statutory range, yet they did not render *Samuel Johnson* any less substantive. *See, e.g.*, 18 U.S.C. § 3553(e). Moreover, this Court has already determined, in a related context, that changing a "presumptive" guideline range—one more liberally permitting departures based on any clear and convincing reason—was substantive, not procedural, in nature. *Miller v. Florida*, 482 U.S. 423 (1987). Surely then, narrowing the reach of a mandatory guideline range, subject to only limited departures in exceptional cases, must be substantive as well. Again, had the Eleventh Circuit in *In re Griffin* properly applied *Welch*, it would have reached the same conclusion as the Seventh Circuit in *Cross*. In short, there is no sound basis to distinguish *Welch*'s retroactivity holding.

III. THE QUESTIONS PRESENTED ARE OF GREAT PUBLIC IMPORTANCE REQUIRING URGENT RESOLUTION BY THIS COURT

In light of the above arguments, many federal prisoners are currently serving unlawful sentences. According to one recent estimate, there are about five thousand federal prisoners who were sentenced as career offenders pre-*Booker* and who remain in prison. *See Raybon v. United States*, 867 F.3d 625, Amicus Br. of Sixth Circuit

Fed. & Cmty. Def., App. 2a (6th Cir. No. 16-2522) (Oct. 18, 2017). That high number reflects the severe operation of the enhancement. *See, e.g.*, *Beckles*, 137 S. Ct. 886, Am. Br. of Fed. Pub. & Cmty. Def. & NAFD 6, App. 2a (U.S. No. 15-8544) (Aug. 18, 2016) (observing that, in on year, "[t]he average sentence imposed on career offenders was 2.3 times that imposed on non-career offenders convicted of the same offense types") (emphasis omitted).

Moreover, it is estimated that over 1,100 of those 5,000 prisoners were sentenced in the Eleventh Circuit. That is more than any other circuit. Indeed, only the Fourth Circuit comes close to the thousand mark; no other circuit surpasses 500 prisoners. *See Raybon*, FPD Amicus Br. App. 3a–6a. Yet, as explained above, binding Eleventh Circuit precedent precludes any of those prisoners from obtaining relief under *Johnson*, *Welch*, and *Beckles*. To be sure, some will ultimately not be entitled to relief; some will have drug offenses as predicates, and others will have crimes of violence that remain so even without the residual clause. Nonetheless, some, like Mr. Churchwell, will have meritorious claims. Yet *In re Griffin* categorically bars such claims from even being evaluated by a court.

The same dynamic is now also true in the Fourth, Sixth, and Tenth Circuits, which have dismissed similar mandatory Guidelines claims based on *Samuel Johnson* as untimely. *See United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *Brown v. United States*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867

F.3d 625 (6th Cir. 2017), *cert. denied* 2018 WL 2184984 (2018).[4] In those circuits, there are another estimated 1,600 pre-*Booker* career offenders who remain in prison, and they too cannot obtain relief. Adding that figure to the 1,100 career offenders in the Eleventh Circuit means that, just in those four circuits alone, there are about 2,700 federal prisoners who, under this Court's precedents, may be serving unlawful sentences.

This situation requires prompt resolution. Indeed, because all of these prisoners were sentenced before *Booker*, they have already been serving their potentially-unlawful sentences for more than a *dozen* years. Confronted with a similar dire situation, the federal courts—including this Court in *Welch*—have moved expeditiously after *Samuel Johnson* to remedy illegal ACCA sentences. The same haste is required here, lest this significant swath of illegal sentences go un-remedied. Federal prisoners should not be required to serve an illegal sentence for a single day, let alone years. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) (observing that even "a minimal amount of additional time in prison" is prejudicial). Without prompt intervention by this Court, however, numerous prisoners will continue serving illegal sentences without recourse. This Court should not permit these potential miscarriages of justice to persist.

---

[4] Petitions for a writ of certiorari remain pending in *Greer*, No. 17-8775 (filed May 1, 2018) and *Brown*, No. 17-9276 (filed May 29, 2018). Another petition out of the Fourth Circuit is pending in *Smith v. United States*, No. 17-9400 (filed June 13, 2018). And two petitions out of the Eleventh Circuit—presenting the same questions as this one—are pending in *Wilson v. United States*, No. 17-8746 (filed May 1, 2018), and *Lewis v. United States*, No. 17-9490 (filed June 20, 2018).

IV. THIS CASE SQUARELY PRESENTS BOTH QUESTIONS FOR REVIEW

This case affords the Court an opportunity to intervene. The vagueness question presented here was fully litigated below. In the district court, Mr. Churchwell repeatedly pressed his contention that the mandatory Guidelines were subject to the vagueness prohibition, and therefore § 4B1.2(a)(2)'s then-mandatory residual clause was unconstitutionally vague. The government argued the opposite, relying on *In re Griffin*'s holding to the contrary. And the district court expressly agreed with the government, concluding that *In re Griffin* foreclosed Mr. Churchwell's claim. *See* Appendix B. Mr. Churchwell reiterated his contentions on appeal when requesting a COA from the Eleventh Circuit. The Eleventh Circuit denied Mr. Churchwell a COA, finding that reasonable jurists could not debate the issue.

The retroactivity question is also presented for decision here. In *In re Griffin*, the Eleventh Circuit held not only that the mandatory Guidelines were immune from vagueness, but also that the invalidation of § 4B1.2(a)(2)'s mandatory residual clause would not retroactively affect cases on collateral review. 823 F.3d at 1355–56. That decision considered, yet sought to distinguish, this Court's decision in *Welch*. And while the Eleventh Circuit did not expressly reiterate that retroactivity holding here, it has previously clarified that *In re Griffin* constitutes binding circuit precedent. *See Wilson v. United States,* 710 F. App'x 435, 436 *(11th Cir. 2018)*.

Given *In re Griffin*'s precedential status, remanding for resolution of the retroactivity question here would be futile. And resolving that question is needed not

only to resolve this case, but to provide critical guidance to the lower courts about whether a ruling invalidating the mandatory residual clause would create a "new" rule of constitutional law distinct from the substantive rule announced in *Samuel Johnson*; and, if so, whether that new rule would also be entitled to retroactive effect, thereby triggering a new statute of limitations under § 2255(f)(3), and satisfying the gatekeeping requirements for successive motions in § 2255(h)(2).

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DONNA LEE ELM
FEDERAL PUBLIC DEFENDER

/s/Meghan Ann Collins
MEGHAN ANN COLLINS
Counsel of Record
RESEARCH AND WRITING ATTORNEY
201 S. Orange Ave., Ste. 300
Orlando, Florida 32801
(407) 648-6338
Meghan_Boyle@fd.org
Counsel for Petitioner