No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID UPSHAW,
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 WRIT OF CERTIORARI

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November 16, 2018

QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), 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 *Johnson* announced a new substantive rule of constitutional law that applied retroactively on collateral review.

In *Beeman v. United States,* 871 F.3d 1215 (11th Cir. 2017), the Eleventh Circuit considered how a defendant could meet his burden to prove his ACCA-enhanced sentence was based upon the now unconstitutional residual clause. The court concluded the defendant could rely only on the "historical record," that is, the long-ago sentencing transcript and a snapshot of the then-current case law. Since then, a number of other circuits have diverged, holding instead that a court may consider the historical record, but when that record is silent, it may also rule out the alternative non-residual clauses by looking to more recent Supreme Court cases clarifying the law.

In *Beckles v. United States*, 137 S. Ct. 886 (2017), this Court held an identical residual clause in the Career Offender provision of the Sentencing Guidelines was not unconstitutionally vague. *See* USSG § 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. The *Beckles* Court, however, "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).

The questions presented here are:

1. May a defendant, faced with a silent record below, prove that his ACCA-enhanced sentence was indeed based upon the residual clause through a process of elimination? And in doing so, can he rely on post-sentencing case law, including this Court's decisions clarifying the other ACCA clauses?[1]

2. Is USSG § 4B1.2(a)(2)'s residual clause void for vagueness with respect to defendants sentenced under the pre-*Booker* mandatory Guidelines?[2]

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[1] A collection of petitions pending before this Court present variations on this question. *See, e.g., Beeman v. United States,* No. 18-6385 (pending); *Harper v. United States,* No. 18-339 (pending); *Prutting v. United States,* No. 18-5398 (pending); *Curry v. United States*, No. 18-229 (pending); *George v. United States*, No. 18-5475 (pending); and *Washington v. United States*, No. 18-5594 (pending). The Court has also denied petitions on this topic. *See, e.g., Casey v. United States*, No. 17-1251 (cert. denied June 25, 2018); *Coachman v. United States*, No 17-8480 (cert. denied Oct. 1, 2018); *King v. United States*, No. 17-8280 (cert. denied Oct. 1, 2018); *Perez v. United States*, No. 18-5217 (cert. denied Oct. 9, 2018).

[2] Mr. Upshaw is aware of at least four other cases pending before this Court that present a similar issue. *See Cottman v. United States,* No. 17-7563 (pending); *Garrett v. United States,* No. 18-5422 (pending); and *Allen v. United States,* No. 18-5939 (pending).

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

In this post-conviction proceeding under 28 U.S.C. § 2255, Petitioner David Upshaw respectfully prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit Court of Appeals panel opinion in *Upshaw v. United States,* 739 F. App'x 538 (11th Cir. 2018), is reproduced here as Appendix A-2. The denial of his petition for rehearing en banc is reproduced as Appendix A-1.

STATEMENT OF JURISDICTION

The Eleventh Circuit filed its opinion on June 22, 2018, affirming the district court's denial of Mr. Upshaw's § 2255 motion. On August 20, 2018, the court entered an order denying Mr. Upshaw's petition for rehearing en banc. This Court has jurisdiction under 29 U.S.C. § 1254(1), which permits the review of civil cases in the court of appeals.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1), known as the Armed Career Criminal Act, states in part:

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

18 U.S.C. § 924(e)(2)(B), also part of the ACCA, provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year … that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

28 U.S.C. § 2255(a) provides in part:

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

At the time of Mr. Upshaw's sentencing, the Career Offender provision of the Sentencing Guidelines defined 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." USSG § 4B1.2(a)(2) (2001).

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. 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 prior convictions for "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 *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 *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 *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*.

2. A person may challenge his sentence under 28 U.S.C. § 2255(a) on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States … or that the sentence was in excess of the maximum authorized by law." The federal courts, including the Eleventh Circuit, uniformly hold that a § 2255 defendant bears the burden of proving a *Johnson* claim. *See Beeman*, 871 F.3d at 1222. It is unclear, however, what a defendant can rely upon to meet that burden.

The Eleventh Circuit was the first to craft the "historical record" rule in *Beeman v. United States,* 871 F.3d 1215 (2017). There the court held that a defendant can meet his § 2255 burden of proving that an ACCA enhancement was based upon the residual clause only by way of what it referred to as the "historical" record. *Id.* at

1224 n.5. A defendant must show the sentencing record or clear precedent *from the time of sentencing* shows that a predicate offense fit within the residual clause, and only the residual clause. *Id.* The panel's opinion included a dissent. 871 F.3d at 1225.

The 2-1 majority opinion derided Beeman's attempt to prove his residual-clause claim by disproving the remaining ACCA alternatives through a review of post-sentencing case law:

> But even if such precedent had been announced since Beeman's sentencing hearing (in 2009), it would not answer the question before us. What we must determine is a historical fact: was Beeman in 2009 sentenced solely per the residual clause? … Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that Georgia aggravated assault no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact: whether in 2009 Beeman was, in fact, sentenced under the residual clause only.

871 F.3d at 1224 n.5. In the end, under the panel's standard, a silent record must be construed against the defendant, and he may not rely upon current law to disprove the ACCA's alternative clauses in order prove that he was sentenced via the unlawful residual clause.

The dissent agreed that a defendant must prove his ACCA sentence was based upon the residual clause, but it objected to the majority's effort to tie the defendant's hands with the twine of its "historical" record. Wrote the dissent: "I do not believe that the merits of Beeman's timely *Johnson* claim can be properly assessed without reaching the question of whether his [prior] conviction … qualifies as a proper predicate offense under the *elements* clause of the ACCA." *Id* at 1225 (Williams, D.J.,

dissenting) (emphasis added). A defendant's showing, via recent Supreme Court cases, "that he could not have been convicted under the elements clause of the ACCA is therefore proof of both requirements for success on the merits of a *Johnson* claim: first, that he was sentenced under the residual clause, and, second, that his predicate offenses could not qualify under the ACCA absent that provision." *Id* at 1230.[3] This case first addresses how a defendant can prove his sentence was based on the residual clause of the ACCA when the sentencing record is silent.

3. Turning to the second issue here, similar to the ACCA, 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* USSG § 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* USSG § 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." USSG § 4B1.1. At the time of Mr. Upshaw's sentencing in 2002, the term

[3] The debate continued to blossom in the Eleventh Circuit's later order denying a petition for rehearing en banc, *Beeman v. United Stats,* 899 F.3d 1218, 1224 (11th Cir. 2018), where judges on both sides of the question offered pointed, thoughtful expositions on the question presented here.

"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*." USSG § 4B1.2(a)(2) (2001) (emphasis added).[4] The italicized language in the Career Offender Guideline was identical to the ACCA residual clause that *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 *Johnson*. Some of those prisoners had been sentenced before the 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).

Marvin Griffin was one such inmate, and he filed a *pro se* application for leave to file a successive § 2255 motion. *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 "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

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

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).[5]

After *In re Griffin*, the Court granted certiorari in *Beckles* to decide, among other things, whether *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 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. *Beckles,* 137 S. Ct. 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

[5] Mr. Griffin nonetheless re-filed two subsequent *Johnson* applications with the court of appeals – one with counseled briefing, urging reconsideration of *In re Griffin*; and one after the Court's decision in *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 *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.

> 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 September of 2002, Mr. Upshaw pled guilty to conspiracy to possess with intent to distribute 500 grams or more of crack cocaine (count I), possession of a firearm in furtherance of a drug trafficking crime (count IV), and possession of a firearm by a convicted felon (count V). At sentencing, the district court concluded Mr. Upshaw qualified for an enhanced punishment based on both the ACCA and USSG § 4B1.1, the career offender guideline. He was sentenced to 300 months imprisonment on counts I and V, to run concurrently, and 60 months on count IV, to run consecutively to the other sentences. (The court later reduced the sentence to a total of 329 months in prison for reasons unrelated to this petition). In applying both the ACCA and the career offender enhancements, the district court relied upon two prior Florida convictions for burglary of a dwelling. During the sentencing hearing the district court was silent as to which clause – elements, enumerated offenses, or residual – the Florida burglary offenses fit into. The court simply counted the offenses without announcing why.

In 2016, after receiving permission from the Eleventh Circuit, Mr. Upshaw filed a successive § 2255 motion. He argued his ACCA and career offender sentences were unconstitutional in light of *Johnson,* 135 S. Ct. 2551 (2015). Mr. Upshaw claimed that because after *Johnson,* the ACCA residual clause was void for

vagueness, and his Florida burglary convictions were no longer violent felonies. Similarly, the same offense was no longer a crime of violence under the virtually identical residual clause of the career offender guideline. The district court denied the § 2255, but granted him a certificate of appealability on two issues:

> 1) whether Petitioner must affirmatively show that the sentencing court relied on the ACCA residual clause; and 2) whether *Johnson* applies to the career offender provision of the pre-*Booker* Guidelines.

See App. A-3.

The Eleventh Circuit affirmed the district court's order denying the § 2255 motion. The court indicated it was bound by its previous decision in *Beeman,* 871 F.3d 1215. Therefore Mr. Upshaw was required to show it was more likely than not that his original sentence was predicated on the ACCA's residual clause. And, "if it was just as likely that the sentencing court relied on the elements or enumerated offenses clause," then he could not meet his burden. *Upshaw,* 739 F. App'x at 540 (quoting *Beeman,* 871 F.3d at 1222).

With regard to his mandatory career offender sentence the court also indicated it was bound by its precedent in *In Re Griffin,* 823 F.2d 1350 (11th Cir. 2016). The court was not persuaded by Mr. Upshaw's argument that this Court's decision in *Beckles,* 137 S. Ct. 886 (2017), abrogated that precedent. Mr. Upshaw's appeal was therefore denied.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

1) THE CIRCUITS ARE DIVIDED ON WHETHER A DEFENDANT, FACED WITH A SILENT RECORD BELOW, CAN PROVE HIS ACCA-ENHANCED SENTENCE WAS INDEED BASED UPON THE RESIDUAL CLAUSE THROUGH A PROCESS OF ELIMINATION.

The federal circuits grow more fractured by the day. A current reading of the relevant decisions reveals two separate schools of thought, with at least four circuits on each side of the issue. Meanwhile, a least thirteen (and counting) certiorari petitions have brought the question to this Court's attention, and several remain pending.[6]

a) The Third, Fourth, and Ninth Circuits require a defendant to prove that the sentencing court "may have" relied on the residual clause when imposing the enhanced sentence, and permit him to meet that burden by citing post-sentencing precedents of this Court

Three circuit courts mirror the dissenting opinions in *Beeman.* Indeed the Fourth Circuit was the first appeals court to declare that a silent record is a path toward, not an obstacle to, relief. In *United States v. Winston,* the court addressed a second or successive § 2255 motion denied by the district court. 850 F.3d 677 (4th Cir. 2017). The sentencing record, like Mr. Upshaw's, was silent as to whether the sentencing judge had relied on the residual clause in counting Winston's convictions under the ACCA. The government argued that with a silent record the defendant failed to overcome a procedural hurdle unique to successive petitioners (the

[6] *See* footnote 1, *supra.*

gatekeeping function of 28 U.S.C. § 2255(h)) to prove that his claim "relie[d] on" *Johnson*. The Fourth Circuit disagreed because "[n]othing in the law requires a [court] to specify which clause … it relied upon in imposing a sentence." *Id.* at 682. It held: "[W]hen an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in [*Johnson,* the inmate has shown that he 'relied on' a new rule of constitutional law." *Id.*

Once it determined Winston had satisfied the procedural hurdle imposed upon successive petitioners, the Fourth Circuit "consider[ed] the merits of Winston's appeal." *Id.* at 683. The court measured Winston's prior convictions against the ACCA's alternative clauses. *Id.* at 685. Significantly here, it applied post-sentencing case law to conclude the robbery statute did not fit within the ACCA's elements, or any other, clause. *Id.* The court rejected the government's view that the court was bound to apply only pre-sentencing case law, even if that law was "no longer binding because it ha[d] been undermined by later Supreme Court precedent." *Id* at 683.

The Ninth Circuit chose the same path in *United States v. Geozos*. 870 F.3d 890 (9th Cir. 2017). There the defendant also brought a successive motion seeking *Johnson* relief. The court cited *Winston* and held that the defendant had satisfied § 2255(h)'s threshold requirement: "We therefore hold that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in [*Johnson*]." *Id.* at 896 & n.6 (noting

that the ACCA provenance is "unclear" when the sentencing record is silent and there is no binding circuit precedent at the time of sentencing). The Ninth Circuit then addressed the merits of the *Johnson* claim by "look[ing] to the substantive law concerning the [alternative ACCA clauses] as it *currently* stands, not the law as it was at the time of sentencing." *Id.* at 898 (emphasis in original). The court studied and applied post-sentencing decisions, including this Court's interpretation of the ACCA's non-residual clauses. *Id.* at 897 & 898 n.7 (citing *Mathis v. United States,* 136 S. Ct. 2243 (2016)).

The Third Circuit is the most recent appeals court to announce a position in this burden-of-proof debate. *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). And, like the Fourth and Ninth Circuits before it, the court held that a defendant successfully crosses through the § 2255(h) gate when he proves with a silent sentencing record that he "*might have* been sentenced under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced under that clause." *Id.* at 216 (emphasis added). The court rejected the government's view that a defendant can only pass through the gate by producing evidence that his sentence was based "solely" on the residual clause. *Id.* at 221-22.

Once a defendant passes through the gate and on to the merits, the Third Circuit held, he may "rely on post-sentencing cases (i.e., the current state of the law) to support his *Johnson* claim." *Id.* at 216. The court remarked upon the widening circuit split—"[l]ower federal courts are decidedly split on whether current law,

including *Mathis*, *Descamps*,[7] and *Johnson 2010*[8] may be used"—but sided with the *Beeman* dissenters. *Id.* at 228. A defendant "may use post-sentencing cases … to support his *Johnson* claim because they … ensure we correctly apply the ACCA's provisions." *Id.* at 230. "It makes perfect sense to allow a defendant to rely upon post-sentencing Supreme Court case law that explains the pre-sentencing law." *Id.* at 229-30.

Decisions like *Mathis*, *Descamps*, and *Curtis Johnson* "instruct courts on what has always been the proper interpretation of the ACCA's provisions. That is because when the Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 230 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). And this: "[T]hose decisions interpreting the ACCA are not new law at all … [They] are authoritative statement[s] of what the [ACCA] meant before as well as after [those] decision[s]." *Id.* (citing *Rivers*, 511 U.S. at 312-13). The Third Circuit ended with this: "[A] rule that requires judges to take a research trip back in time and recreate the then-existing state of the law—particularly in an area of law as muddy as this one — creates its own problems in fairness and justiciability." *Id.* at 231.

b) The First, Fifth, Eighth, and Tenth Circuits are aligned with the Eleventh.

The First Circuit, by a narrow 2-1 margin, joined the *Beeman* majority. In *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018), the court rejected the argument

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[7] *Descamps v. United States*, 133 S. Ct. 2276 (2013).

[8] *Curtis Johnson v. United States*, 559 U.S. 133 (2010).

that a defendant may rely upon post-sentencing case law to show his ACCA predicate offense never properly qualified under the elements or enumerated crimes clauses. 881 F.3d 232, 230, 243 (1st Cir.), *cert denied sub sum*, *Casey v. United States*, 138 S. Ct. 2678 (2018). The *Dimott* panel rejected the view that a defendant may prove through a process of elimination that the sentencing court could only have relied upon the then-valid, but now invalid under *Johnson*, residual clause. *Id.* at 243. The dissenting judge, however, endorsed the contrary view. Like the *Beeman* dissents and the Third, Fourth, and Ninth Circuits, the dissent argued that with a silent sentencing record, post-sentencing precedents could prove that the defendant was wrongly sentenced based upon the forbidden ACCA residual clause. *Id.* at 246 (Torruella, J., dissenting in part).

The Tenth Circuit crafted a rule similar to the Eleventh Circuit's in *Beeman*. In *United States v. Snyder*, it held that faced with a silent record, a district court may consider only the "relevant background legal environment" at the time of sentencing to ask whether a non-residual clause led to the ACCA enhancement. 871 F.3d 1122, 1129 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018). A "relevant background legal environment" is a "snapshot of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions."*Id.*at 1129.[9]

[9] In *Snyder,* the defendant's *Johnson* motion was his first § 2255 motion. The Tenth Circuit later extended the *Snyder* holding to second-or-successive § 2255 motions. *United States v. Washington,* 890 F.3d 891, 896-97 (10th Cir. 2018).

The Fifth Circuit, too, joined the *Beeman* cohort, at least for second-or-successive § 2255 motions. *United States v. Weise*, 896 F.3d 720, 724 (5th Cir. 2018). The court concluded that "we must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause, [the elements clause,] or the residual clause." *Id.* The panel explicitly rejected Weise's effort to prove that his ACCA sentence stemmed from the residual clause by using *Mathis* to disprove the enumerated crimes clause. *Id.*at 725-26.

The Eighth Circuit most recently joined this majority view. *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018). The court echoed, and quoted, the *Beeman* rule: "Where the record or an evidentiary hearing is inconclusive, the district court may consider 'the relevant background legal environment at the time of … sentencing' to ascertain whether the movant was sentenced under the residual clause." *Id.* at 1015. By drawing the borders around the snapshot of case law current at the long-ago sentencing hearing, of course, the Eighth Circuit too turns a blind eye to this Court's more recent opinions interpreting the scope of the ACCA's several provisions. But the view is not unanimous, even within the *Walker* panel. *Id.* at 1016-17 (Kelly, J, concurring in part and dissenting in part) ("I would hold that a claim for collateral relief under *Johnson* should be granted so long as the movant has shown that his sentence may have relied upon the residual clause, and the government is unable to demonstrate to the contrary.").

c) The Sixth Circuit straddles both sides of the debate by approving the use of post-sentencing case law to prove the merits of a first § 2255 motion, but not to support a second or successive § 2255 motion.

The Sixth Circuit has crafted a hybrid answer to the question presented here. Where a defendant raises a *Johnson* claim in a second-or-successive § 2255 motion, a silent historical record means he must lose and may not salvage the claim by citing post-sentencing case law. *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) (explicitly adopting views of the First and Eleventh Circuits). But later opinions of the Sixth Circuit have limited *Potter's* reach.

When it comes to a defendant's *first* § 2255 motion, the Sixth Circuit agrees with the Third, Fourth, and Ninth Circuits, and the dissenters in the Eleventh Circuit: With a silent sentencing record, a defendant may prove his *Johnson* claim by citing post-sentencing case law, including decisions of this Court. *Raines v. United State*s, 898 F.3d 680, 688-89 (6th Cir. 2018). The court explicitly limited the *Potter* rule to second or successive § 2255 *Johnson* motions by running his predicate offense through the filter of this Court's *Mathis* decision, a decision which arrived long after the original sentencing hearing. *Id.* at 688-89.

2) THE CIRCUITS ARE DIVIDED ON THE WHETHER THIS COURT'S DECISION IN JOHNSON APPLY RETROACTIVELY TO THE MANDATORY GUIDELINES ON COLLATERAL REVIEW

The circuits are divided on whether *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

1. 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 the "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 *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 consider 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*.

2. The Seventh Circuit next 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' and Davis' 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 *Johnson*." *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

1. In *In re Griffin*, a pre-*Beckles* decision issued on a pro se application to file a successive § 2255 motion, the Eleventh Circuit held "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.

2. 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 "[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.

c) The Eleventh Circuit's continued reliance on *In Re Griffin* is misguided in light of Beckles.

In *Beckles*, this Court explained that in order 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 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 determined 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. 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).

The Court 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 *Johnson*. Here, for example, the sentencing court had no intelligible standard by which to determine whether Mr. Upshaw's prior offense constituted a "crime of violence" under the residual clause. Rather than guide the sentencing court's discretion, that standard-less determination established the

fixed range of permissible sentences. Permitting judges to set that range with no intelligible legal standard directly implicates the vagueness doctrine's concern with arbitrary enforcement.

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. Upshaw 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 *Johnson*, it too must be declared void for vagueness.

The contrary reasoning and conclusion of *In re Griffin* cannot be reconciled with *Beckles*. For starters, 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 *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 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 *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.

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 *Beckles* 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*.

II. BOTH QUESTIONS ARE RECURRING AND IMPORTANT

a) The Eleventh Circuit's historical record rule misapplies, or fails to apply at all, this Court's many recent ACCA precedents. In the Eleventh Circuit, a lower court must travel back in time in search of (1) factual findings that generally don't exist because they did not matter, and (2) outdated case law. All while turning a blind eye to this Court's decisions clarifying and correcting that very case law. Thus, in the Eleventh Circuits and those circuits which have adopted *Beeman*, this Court's decisions carry no influence at all. But at least three circuit courts take the opposite view. These courts permit a judge to inform his understanding of a silent historical record through the later clarifications by this very Court. So as things now stand, a defendant's ACCA sentence depends not on the facts of his own case, but on the fluke of geography.

As this Court well knows, many thousands of defendants sentenced under the ACCA have filed *Johnson*-based § 2255 motions in district courts throughout the country. In the Eleventh Circuit alone, more than 2,000 defendants filed *Johnson*-based applications for permission to pursue a second or successive § 2255 motion. *In*

re Williams, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring). The ACCA is everywhere. Just last month, the Court heard arguments in two more ACCA-related cases.[10] This sentencing statute is as close to a national crisis as one might find in the federal criminal code.

That is not all. There is much at stake for each defendant in these *Johnson*-related ACCA cases. An ACCA sentence carries a breathtakingly harsh prison sentence. And many of these harsh sentences, we now know, are unlawful. Wrote Judge Martin in dissent from the *Beeman* en banc denial: "[T]he *Beeman* panel … imposed administrative impediments, such that [a *Johnson* litigant] can get no review of his sentence. Those impediments are not derived from the statute or Eleventh Circuit or Supreme Court precedent, and they bar relief for prisoners serving sentences that could not properly be imposed under current law." 899 F.3d at 1224 (Martin, J., dissenting from denial of rehearing en banc). Without a prompt intervention by this Court, the divided paths of the circuit courts will create inconsistent and unfair sentences for countless similarly-situated defendants across the country.

b) 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

[10] *Stokeling v. United States,* No. 17-5554 (argued on Oct. 9, 2018); *United States v. Stitt,* No. 17-765 (same).

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 one 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. Upshaw, 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 *Johnson* as untimely. *See United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), *cert denied,* 2018 WL 2087987 (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). 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 *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.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE BOTH QUESTIONS

a) Mr. Upshaw's ACCA sentence depends entirely upon the fate of the Eleventh Circuit's invented rule. If this Court rejects the Eleventh Circuit's path here, then Mr. Upshaw will gain *Johnson* relief from his harsh sentence because two

of his predicate offenses do not qualify under the elements or enumerated offense clauses.[11]

b) This case also ideally presents the mandatory guidelines question to the Court. All federal prisoners subject to the mandatory Guidelines were sentenced over a decade ago. In the interim, most have filed a § 2255 motion. That places them in a successive posture, obligating them to obtain authorization from the court of appeals before filing a second or successive motion. 28 U.S.C. § 2255(h). Mr. Upshaw was fortunate enough that his petition to do so was granted, and his successive § 2255 motion fully litigated. But others have not been so fortunate. And, of course, there are no longer any mandatory Guidelines cases still on direct appeal. Thus, this Court may not have many opportunities to address the questions left open in *Beckles*. That question is perfectly preserved and squarely presented here.

[11] Mr. Upshaw's ACCA sentence depends upon his Florida burglary convictions. The Eleventh Circuit has specifically held that a Florida burglary does not qualify under either clause. *United States v. Esprit,* 841 F.3d 1235, 1241 (11th Cir. 2016).

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner David Upshaw, prays that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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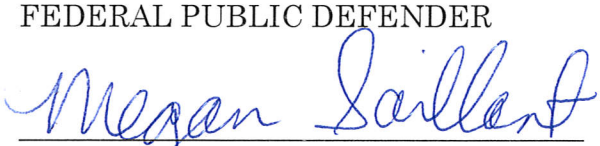

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