NO.

IN THE
SUPREME COURT OF THE UNITED STATES

TORRENCE ALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively to a 28 U.S.C. § 2255 motion attacking a sentence imposed under **mandatory** Sentencing Guidelines so that such a 28 U.S.C. § 2255 motion filed within a year of the *Johnson* decision is timely?

II. Whether the residual clause of U.S.S.G. § 4B1.2, the Career Offender Provision, is unconstitutionally vague pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and thus, whether appellant, Mr. Torrence Allen, is actually innocent of being a career offender, and thus, whether his sentence imposed pursuant to § 4B1.2 under the mandatory Sentencing Guidelines must be vacated?

III. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the panel issuing the binding precedent subsequently states the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Mr. Torrence Allen respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-13465, in that court on October 15, 2018, *Allen v. United States,* which denied a certificate of appealability necessary to appeal the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the order of the United States Court of Appeals for the Eleventh Circuit, which denied a certificate of appealability to appeal the judgment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

The United States District Court had jurisdiction over this case under 28 U.S.C. § 2255. The United States Court of Appeals had jurisdiction under 28 U.S.C § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on January 3, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. amend. V.:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 2244(b)(3):

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive

application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

U.S.S.G. § 4B1.1:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of convictions; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and 3) the defendant has at least two prior felony convictions of either a crime of violence or controlled substance offense.

U.S.S.G. § 4B1.2:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) Has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) 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

STATEMENT OF THE CASE

On February 9, 1995, Mr. Torrence Allen entered a plea of guilty to a one-count information charging him with conspiracy to possess with intent to distribute crack cocaine. PSI¶1. On June 6, 1995, the district court, applying the 1994 Sentencing Guidelines manual, sentenced him to a 480-month term of imprisonment. DE#28. Mr. Allen subsequently filed a motion for sentence reduction based on a retroactive amendment to the Sentencing guidelines. DE#30. The district court denied the motion holding that Mr. Allen's status as a career offender under the mandatory Sentencing Guidelines made him ineligible for relief. DE#43.

Following this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Allen filed a 28 U.S.C. § 2255 motion in the district court arguing that, pursuant to *Johnson*, the residual clause of the career offender enhancement was void for vagueness and thus, that he was not guilty of being a career offender and thus eligible for a sentence reduction. Although the § 2255 motion was filed within a year of the *Johnson* decision, the district court applied Eleventh Circuit precedent

and held that *Johnson* did not apply to a sentence imposed under the mandatory Sentencing Guidelines, and denied the motion as untimely. The district court denied a request for a certificate of appealability. The Eleventh Circuit also denied a request for a certificate of appealability.

Mr. Torrence Allen is a fifty-six year-old native of Miami. Mr. Allen never knew his father and he was raised by his maternal grandmother. Mr. Allen's run-ins with the law began at the age of fourteen when he was placed on probation on a burglary charge. In fact, Mr. Allen did not finish high school because he was incarcerated.

In the underlying case, Mr. Allen and an under-aged woman attempted to travel from South Florida to Jacksonville carrying crack cocaine. As a result, Mr. Allen entered a plea of guilty to a one-count information charging him with conspiracy to possess with intent to distribute a detectable amount of crack cocaine.

Mr. Allen was held accountable for 848 grams of crack cocaine. At the time of his sentencing, the Sentencing Guidelines, 1994 manual to be precise, were mandatory. Under the Sentencing Guidelines in effect at the time, the base offense level for Mr. Allen was a level 38 consisting of a level 36 based on the amount of crack and two levels for the involvement of a minor. At the time of his sentencing, federal law and the guidelines punished crack cocaine defendants on a 100:1 ration compared to powder cocaine defendants. The probation office noted that Mr. Allen might be eligible for an enhancement under chapter four as a career offender, but that his offense level under chapter two, level 38, would be higher than the offense

level as a career offender, level 37, and thus, his offense level would remain at a level 38 based on the chapter two calculations.

Mr. Allen's lengthy criminal history resulted in 17 criminal history points. That corresponded to a criminal history category of VI. Coupled with an offense level of 38, that resulted in a mandatory sentencing range of 360 to life. The district court imposed a 480-month term of imprisonment.

Effective November 2007, the Sentencing Guidelines covering crack cocaine offenses were amended. The amendments were later made retroactive.

Mr. Allen filed a pro se motion requesting a sentence reduction based on the retroactive amendments. DE#30. The government filed a response arguing that Mr. Allen was not eligible for relief because he had been sentenced as a career offender. DE#33. Mr. Allen filed a reply noting, *inter alia*, that he had been sentenced based on the chapter two calculations, which had now been amended, and not under the career offender provision. DE#39.

The district court referred the matter to the magistrate judge for an evidentiary hearing at which Mr. Allen was present. Transcript of Hearing of April 29, 2008 ("TR"). At the hearing held before the Magistrate Judge on April 29, 2008, the parties agreed on several factual points from Mr. Allen's initial sentencing. First, the parties agreed that Mr. Allen was held accountable for 848 grams of crack cocaine. Under the Sentencing Guidelines in effect at the time, that resulted in a base offense level of **36**. U.S.S.G. § 2D1.1 (1994). That base offense level was increased by two levels to a level **38** based on the involvement of an under-aged co-

defendant. Mr. Allen's criminal history category was calculated at VI based solely on his criminal past. The parties also agreed that Mr. Allen was sentenced to a final sentencing range based on the offense level of 38 and criminal history VI without any other enhancements.

The parties agreed that Mr. Allen's offense level based solely on the amount of drugs involved and the enhancement for the minor, was greater than any offense level enhancement under chapter four and his criminal history category would not be increased by any chapter four enhancement.

As counsel for the government suggested at the hearing, the issue of career offender enhancements under chapter four was likely not even raised at the sentencing hearing since that point was moot based on the higher un-enhanced offense level. TR at 19. Counsel for Mr. Allen concurred.

The Magistrate Judge issued a report and recommendation finding that Mr. Allen did not qualify for a sentence reduction because he had been sentenced as a career offender. DE#41. Essentially the Magistrate Judge reasoned that even if Mr. Allen received a two-level reduction to a level 36, the career offender provision would kick in and leave him at a level 37 or the same range of 360 to life. *Id.* at 9.

The Magistrate Judge stated that the district court at the initial sentencing "clearly adopted the factual findings and guideline application of the Presentence Investigation Report" including the section on chapter four enhancements. *Id.* at 8. Mr. Allen filed timely objections to the report and recommendation. DE#42. Mr. Allen argued that he was not determined to be a career offender at his initial

sentencing, that the district court had the authority to act on his motion for sentence reduction and that the specific facts of his case required the granting of a sentence reduction. *Id.*

Nevertheless, the district court adopted the report and recommendation of the Magistrate Judge and denied Mr. Allen's motion. DE#43. Mr. Allen timely appealed. On appeal, the Eleventh Circuit affirmed the denial holding that Mr. Allen's eligibility under the career offender provision made him ineligible for relief. In 2010, Congress passed the Fair Sentencing Act reducing the ratio disparity of crack cocaine to powder cocaine punishments from 100:1 to 18:1. In December 2018, Congress passed the First Step Act making the changes in the Fair Sentencing Act retroactively applicable to defendant's sentence prior to the enactment of the Fair Sentencing Act.

Following this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Allen filed a 28 U.S.C. § 2255 motion in the district court arguing that, pursuant to *Johnson*, the residual clause of the career offender enhancement was void for vagueness and thus, that he was not guilty of being a career offender and thus eligible for a sentence reduction. Although the § 2255 motion was filed within a year of the *Johnson* decision, the district court applied Eleventh Circuit precedent and held that *Johnson* did not apply to a sentence imposed under the mandatory Sentencing Guidelines, and denied the motion as untimely. The district court denied a request for a certificate of appealability. The Eleventh Circuit also denied a request for a certificate of appealability.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's holding that this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), applies with equal force to a sentence imposed under a *mandatory* Sentencing Guidelines scheme creates an inter-circuit split and violates the reasoning of the *Beckles* opinion. Reasonable jurists differ as to whether *Beckles* bars a claim that the residual clause of the career offender enhancement, the basis of a sentence imposed under a mandatory sentencing guidelines scheme, is unconstitutionally vague pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Reasonable jurists actually do differ as to whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies to a sentence imposed under mandatory Sentencing Guidelines. Specifically, there is a conflict between the Eleventh Circuit and at least one other Circuit Court of Appeals on that specific legal issue. That clear conflict is more than enough to show that reasonable jurists differ on that legal point and thus, it is more than sufficient to grant a certificate of appealability. Despite the clear inter-circuit conflict, the Eleventh Circuit erroneously denied Mr. Allen a certificate of appealability on that specific legal issue.

In *Beckles v. United States*, 137 S. Ct. 886 (2017), this Court held that *Johnson* did not apply to a defendant who was sentenced under an ***advisory*** Sentencing Guidelines scheme. However, Mr. Allen was sentenced at a time when the Sentencing Guidelines were **mandatory** and thus, *Beckles* is inapplicable to Mr. Allen's case. The Eleventh Circuit has previously 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." *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016). However, this Court's subsequent decision in *Beckles* undermines *In re Griffin* to the point of abrogation.

Although Mr. Allen filed his motion within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), a new rule of law made retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Magistrate Judge concluded, and the District Judge agreed, that this proceeding is untimely under 28 U.S.C. § 2255(f)(3). They reasoned that *Johnson* did not apply to this case because "*Beckles* determined that the United States Sentencing Guidelines were not subject to a void for vagueness challenge." Mr. Allen objected to that conclusion because Mr. Allen was sentenced as a career offender *before* the Sentencing Guidelines were rendered advisory in *United States v. Booker*, 543 U.S. 220 (2005). And *Beckles* is limited only to advisory Guidelines.

As this Court recognized in the very first line of its decision in *Beckles*, the Guidelines were "advisory" "[a]t the time of petitioner's sentencing." *Beckles*, 137 S. Ct. at 890. As a result, the Court repeatedly framed and analyzed the issue in those terms, using the word "advisory" a dozen times in its relatively short opinion. And, most importantly, the Court repeatedly expressed its holding accordingly. *See id.* at *3 ("Because we hold that the *advisory* Guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.") (emphasis added); *id.* at 895 ("Accordingly, we hold that the *advisory* Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause

and that § 4B1.2(a)'s residual clause is not void for vagueness.") (emphasis added); *id.* at 896 ("We hold only that the *advisory* Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine.") (emphasis added); *id.* at 897 ("Because the *advisory* Sentencing Guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)'s residual clause is not void for vagueness."). In holding "only" that the *advisory* Guidelines were immune from a vagueness challenge, *id.* at 896, *Beckles* did not address whether the vagueness holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applied to the pre-*Booker* **mandatory** Guidelines. Justice Sotomayor's concurring opinion made that point clear:

> 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 —— —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).

Although *Beckles* did not decide whether *Johnson*'s holding applies to the mandatory Guidelines, its reasoning compels the conclusion that it does. The Court emphasized that the key "inquiry" under the vagueness doctrine is "whether a law regulating private conduct by fixing permissible sentences provides notice and avoids arbitrary enforcement by clearly specifying the range of penalties available." *Id.* at 895. The Court explained that the advisory Guidelines do not fit that

description, and thus are immune from the vagueness doctrine, because they "do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* at 894. As a result, the advisory Guidelines do not "implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* Because sentencing courts retain discretion post-*Booker* to impose a sentence anywhere within the statutory range, "even perfectly clear Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid particular penalties." *Id.* Nor do advisory Guidelines implicate arbitrary enforcement, the Court reasoned, because they do "not regulate the public by prohibiting any conduct or by establishing minimum and maximum penalties for any crime." *Id.* (citation and brackets omitted).

By contrast, the mandatory Guidelines did "fix the permissible range of sentences." *Id.* at 892. The Court in *Beckles* itself recalled that, before *Booker*, the Guidelines were "binding on district courts." *Id.* at 894. Indeed, this Court in *Booker* was forced to reach the constitutional question and declare the mandatory Guidelines a Sixth Amendment violation precisely because they "impose[d] binding requirements on all sentencing judges" and "ha[d] the force and effect of laws." *Booker*, 543 U.S. at 233–34. With the force and effect of laws, the mandatory Guidelines were the functional equivalent of what the statutory range is today. Rather than guide the sentencing court's discretion within a fixed range, the mandatory Guidelines established that fixed range. Thus, unlike the advisory

Guidelines, mandatory Guidelines squarely implicate the twin concerns of the vagueness doctrine. They provided notice of the permissible range of sentences, as the Court in *Beckles* itself recognized. *See Beckles*, 137 S. Ct. at 894 ("As we held in *Irizarry v. United States*, 553 U.S. 708, 'the due process concerns that . . . require notice in a world of mandatory Guidelines no longer' apply.") (citation and brackets omitted). And because they "establish[ed] minimum and maximum penalties," they could produce arbitrary enforcement. *Id.* (citation omitted). Thus, the reasoning of *Beckles* compels the conclusion that the mandatory Guidelines under which Movant was sentenced are subject to the vagueness doctrine.

Inter-Circuit Conflict

At least one federal circuit court of appeals has expressly held that "*Beckles* applies only to advisory guidelines, not to mandatory sentencing rules." *Cross v. United States*, 892 F.3d 288, 291 (7th Cir. 2018). In so holding, the Seventh Circuit further ruled that under *Johnson*, the residual clause of the career offender guideline "is unconstitutionally vague insofar as it determined mandatory sentencing ranges for pre-*Booker* defendants." *Id.*

The Seventh Circuit's decision in *Cross* makes it abundantly clear that reasonable jurists can and actually do differ as to whether *Beckles* is applicable to sentences imposed under a mandatory Sentencing Guidelines scheme. The inter-circuit conflict on that precise legal point goes far beyond the "debatable" standard required for a certificate of appealability. *See Slack*, 529 U.S. at 484. Even if the Eleventh Circuit had any doubt that there is a direct circuit conflict on the precise

legal issue raised here, any doubt about whether to grant a COA should have been resolved in favor of Mr. Allen. *See Barefoot*, 463 U.S. at 893; *Miniel*, 339 F.3d at 336; *Mayfield*, 270 F.3d at 922.

II. The Eleventh Circuit's rule that a certificate of appealability may not be granted where binding circuit precedent forecloses a claim misapplies the standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a certificate of appealability ("COA"), a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit's rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton v. Sec'y Dep't of Corr.*,

796 F.3d 1261 (11th Cir. 2015) ("[R]easonable jurists will follow controlling law."); *see also Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). The Eleventh Circuit's rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage. Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled

to relief, Mr. Allen respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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January 8, 2019