

NO:

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

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PRESTON HESTER, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED FOR REVIEW**

Whether the district court's failure to determine Mr. Hester's correct SORNA tier level in calculating the correct advisory Guideline sentencing range before imposing sentence violated his right to due process?

## **INTERESTED PARTIES**

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

## **RELATED PROCEEDINGS**

United States District Court (S.D. Fla.):

*United States v. Preston Hester, Jr.*, No. 20-60051-Cr-Dimitrouleas  
(July 31, 2020)

United States Court of Appeals (11th Cir.):

*United States v. Preston Hester, Jr.*, No. 20-12955  
(April 29, 2022)

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Preston Hester, Jr. 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 20-12955 in that court on April 29, 2022, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

## **OPINION BELOW**

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

## **STATEMENT OF JURISDICTION**

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 April 29, 2022. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

## STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

**U.S. Const. amend. V:** “No person shall be. . .compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .”

### **U.S.S.G. § 2A3.5. Failure to Register as a Sex Offender**

**(a) Base Offense Level (Apply the greatest):**

- (1) 16, if the defendant was required to register as a Tier III offender;
- (2) 14, if the defendant was required to register as a Tier II offender; or
- (3) 12, if the defendant was required to register as a Tier I offender.

### **34 U.S.C.A. § 20911**

**Formerly cited as 42 USCA § 16911**

In this subchapter the following definitions apply:

**(1) Sex offender**

The term “sex offender” means an individual who was convicted of a sex offense.

**(2) Tier I sex offender**

The term “tier I sex offender” means a sex offender other than a tier II or tier III sex offender.

**(3) Tier II sex offender**

The term “tier II sex offender” means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

**(A)** is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i)** sex trafficking (as described in section 1591 of Title 18);
- (ii)** coercion and enticement (as described in section 2422(b) of Title 18);
- (iii)** transportation with intent to engage in criminal sexual activity (as described in section 2423(a))1 of Title 18;
- (iv)** abusive sexual contact (as described in section 2244 of Title 18);

**(B)** involves--

- (i)** use of a minor in a sexual performance;
- (ii)** solicitation of a minor to practice prostitution; or
- (iii)** production or distribution of child pornography; or

**(C)** occurs after the offender becomes a tier I sex offender.

**(4) Tier III sex offender**

The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

**(A)** is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

- (i)** aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
- (ii)** abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

**(B)** involves kidnapping of a minor (unless committed by a parent or guardian); or

**(C)** occurs after the offender becomes a tier II sex offender.

## STATEMENT OF THE CASE

On February 20, 2020, a federal grand jury in Broward County, in the Southern District of Florida, returned an indictment against Mr. Hester, charging him with failure to register as a sex offender, in violation of 18 U.S.C. § 2250. On April 30, 2020, Mr. Hester entered a plea of guilty to the one count Indictment, pursuant to stipulated facts but no plea agreement.

Before sentencing, Mr. Hester filed objections to the presentence investigation report and a motion in aid of sentencing. He objected to the imposition of a five year term of supervised release; the imposition of a fine; objected to making a co-payment for mental health treatment; objected to the requirement that he attend anger control/domestic violence treatment because he had already completed it and could not afford the costs; objected to the special condition that did not allow him to have an encryption program on his computer; objected to a total ban on contact with minors; objected to the special condition that he have no involvement in youth organizations; objected to sex offender treatment because he had already completed it and could not afford the costs; objected to the special condition that he could not have adult pornography; and requested that the Three Level Tier system contained in the Adam Walsh Act, (SORNA), be applied and determined by the district court and set forth in the presentence investigation report and the judgment and commitment order so that his proper tier level would be clear. In his motion for a

sentencing variance he asked that the district court consider all of the medical issues that have affected his life.

Sentencing began on July 30, 2020. After hearing argument on Mr. Hester's objections, the district court granted his objection to imposition of a fine and the special condition that he be prohibited from possessing adult pornography but overruled all other objections. The district court also denied Mr. Hester's request for a sentence below the advisory guideline range. The district court determined that Mr. Hester's total offense level was 12 and his criminal history category was IV, resulting in an advisory guideline range of 21-27 months. The district court then sentenced Mr. Hester to 21 months' imprisonment to be followed by five (5) years of supervised release. On August 4, 2020, Mr. Hester timely appealed to the Eleventh Circuit Court of Appeals. On April, 29, 2022, the Eleventh Circuit affirmed the district court's decision.

The United States Attorney's Office for the Southern District of Florida and Preston Hester ("HESTER"), agreed that, had this case proceeded to trial, the United States would have proven beyond a reasonable doubt the following facts, among other additional facts, which occurred in the Southern District of Florida:

On December 18, 2013, HESTER was indicted in a five-count indictment in the Superior Court of Clayton County, Georgia under case number 2013 CR 02550. Count I charged Aggravated Child Molestation of a child under the age of 16 years (GA Statute 16-6-4(c)), Count II charged Child Molestation child under the age of

16 years (GA Statute 16-6-4(a)), Count III charged Statutory Rape of a person under the age of 16 years (GA Statute 16-6-3(b)), Count IV charged Interference of Custody (GA Statute 16-5-45(b)(2)(A)(B)), and Count V charged Enticing a Child under 16 years old for Indecent Purposes (GA Statute 16-6-5(b)). On August 11, 2014, HESTER pled guilty to Statutory Rape in violation of Georgia Statute 16-6-3(b), was sentenced to 5 years in prison, and was required to register in Georgia as a result of that conviction upon release. HESTER was subsequently released from prison on September 12, 2018.

On January 11, 2019, HESTER petitioned the Superior Court for Clayton County, Georgia to be removed from the Sex Offender Registry. On March 12, 2019, Superior Court of Clayton County, Georgia denied HESTER's motion for removal from the Sex Offender Registry.

On February 20, 2019, HESTER registered in Georgia and completed his Registered Sex Offender packet in Muscogee County. HESTER signed and endorsed, with initials, provision "JJ" of the Georgia Sex Offender Registration Notification Form on February 20, 2019, which specifically reads, "Under the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. 2250, if you fail to comply with registration requirements and are involved in interstate travel, you may be subject to federal prosecution."

On October 1, 2019, Muscogee County issued an arrest warrant for HESTER for Failure to Register as a State Sex Offender in Georgia. On January 27, 2020,

agents with the Florida Regional Fugitive Task (FRFTF) arrested HESTER on the aforementioned warrant at 6147 Arthur St, Apartment 5, in Hollywood, Florida. After the arrest, HESTER's fiancé, was interviewed and advised law enforcement that HESTER had been residing with her in Hollywood since the end of October 2019. HESTER was read his Miranda rights and agreed to waive them and speak with law enforcement. In an audio and video recorded interview, HESTER admitted to knowing that he was a Registered Sex Offender that was required to register. HESTER also admitted to previously registering in Georgia.

On February 6, 2020, a search on the Florida Department of Law Enforcement Sex Offender and Predator System was conducted for HESTER and no record of registration was found. The Florida Department of Law Enforcement Sex Offender and Predator Unit confirmed that HESTER is, in fact, required to register in the State of Florida.

**REASON FOR GRANTING THE WRIT**

**THE DISTRICT COURT'S FAILURE TO DETERMINE MR. HESTER'S CORRECT SORNA TIER LEVEL IN CALCULATING THE CORRECT ADVISORY GUIDELINE SENTENCING RANGE BEFORE IMPOSING SENTENCE VIOLATED HIS RIGHT TO DUE PROCESS.**

Mr. Hester was denied due process when the district court sentenced him to a procedurally and substantively unreasonable sentence by failing to make a finding as to his sex offender tier classification under SORNA before imposing sentence. Under the Guidelines, a defendant's sentencing range is determined by a number of factors, including his offense level and criminal history. For defendants like Mr. Hester who are sentenced for failure to register as sex offenders, the offense level is dictated by the defendant's sex offender tier classification under the Sex Offender Registration and Notification Act ("SORNA"), which requires a "sex offender" to register and keep his registration current in each jurisdiction where he lives, works or studies. 34 U.S.C. § 20913(a); U.S.S.G. § 2A3.5. SORNA classifies sex offenders into three tiers depending on the seriousness of their underlying sex offense.

Section 2A3.5 of the Guidelines sets a defendant's base offense level at 16 if the defendant was required to register as a tier III offender, 14 if the defendant was required to register as a tier II offender, or 12 if the defendant was required to register as a tier I offender. A person is a Tier II sex offender if his offense of conviction is

“comparable to or more severe than … abusive sexual contact (as described in section 2244 of title 18)” and is “committed against a minor.” 34 U.S.C. § 20911(3)(A)(iv). A person is a Tier III offender if he commits the same kind of offense “against a minor who has not attained the age of 13 years.” *Id.* § 20911(4)(A)(ii). And if a sex offender does not satisfy the requirements of Tier II or Tier III, then he is a Tier I offender. *Id.* § 20911(2).

In determining which tier is appropriate, the court applies a categorical approach and compares the underlying conviction with the specified federal offense to determine if the offense is comparable to or more severe than the federal offense. *United States v. Vineyard*, 945 F.3d 1164 (11<sup>th</sup> Cir. 2019); *See also United States v. Montgomery*, 966 F.3d 335 (5<sup>th</sup> Cir. 2020); *United States v. Barcus*, 892 F.3d 228 (6<sup>th</sup> Cir. 2018); *United States v. White*, 782 F.3d 1118 (10th Cir. 2015); *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1 (1st Cir. 2015). To apply the categorical approach, courts “look only to the statutory definitions’ – i.e. , the elements – of [an offense], and not ‘to the particular facts underlying those convictions.’” *Descamps v. United States*, 570 U.S. 254, 261, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600, 110 S. Ct. 2143, 109 L.Ed. 2d 607 (1990)). This requires the Court to “compare the elements of the crime of conviction with the elements of the ‘generic’ version of the listed offense—*i.e.*, the offense as commonly understood.” *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). Under this approach, courts focus solely on the

elements of the crime of conviction, “while ignoring the particular facts of the case.” *Id.* at 2248. So, if the underlying offense sweeps more broadly than the SORNA tier definition, then the offense cannot qualify as a predicate offense for that SORNA tier regardless of the manner in which the defendant actually committed the crime.

In this case, despite Mr. Hester’s objection and specific request for a proper determination of his tier level, the district court not only failed to apply the categorical approach to Mr. Hester’s underlying offense but declined to determine the appropriate tier level at all. The following discussion occurred at sentencing:

MR. BERUBE: Objection number 11, paragraph 128, the Adam Walsh Act search condition: Mr. Hester objects to highlighting one provision of the Adam Walsh Act. The defendant is requesting that the three level tier system contained in the Adam Walsh Act, Subtitle A, Sex Offender Registration Notification he sets forth in the pre-sentence investigation report, and that the appropriate tier level for Mr. Hester be set forth. He's requesting that the pre-sentence investigation report and the judgment and commitment order state what his tier level is. The pre-sentence –

THE COURT: What's that got to do with the search condition?

MR. BERUBE: Well, it's part of -- it'll be the length of the search condition, Your Honor. The tier system will say how long he basically stays on the Sex Offender Registry. I realize in the state of Florida it's for life, but the Sex Offender Registry, if he's a Tier 2 or -- let's say he's a Tier 1 offender. He will be registered for 15 years, and that could be shortened if he behaves himself. He would have to petition the Court to see if that would happen. If he's a sex offender, Tier 2 level, the maximum term is 25 years. And, again, if he behaves himself and the Court is satisfied, the length of time on the Sex Offender Registry, it could be reduced.

THE COURT: What's probation's position on my determining the tier level?

THE PROBATION OFFICER: Your Honor, I defer to you as to whether you want to determine it. However, we generally defer to the registering agency. The defendant would have registered with U.S. Probation. He would have to go to local authorities to register, and we leave it to their determination as to which tier level within he falls.

THE COURT: Ms. Anton, what's your position?

MS. ANTON: Judge, in the cases I've handled, it's always been the agency where they register to determine the tier level. I've never had the Court order it as part of the judgment and sentence.

THE DEFENDANT: Can I –

THE COURT: I guess if he doesn't like the tier level, he can always petition me to revisit it at that point, after he's exhausted his administrative remedies.

MR. BERUBE: Your Honor, once again, Mr. Hester would like to address the Court, if you allow.

THE COURT: Okay.

THE DEFENDANT: Your Honor, as I tried to point out to my counsel, on that tier level in particular, as you noticed, as part of some of the things that were pointed out and was part of the discovery, where the government provided me with a copy of a motion that I filed with the court in the state of Georgia petitioning to be removed from the Sex Offender Registry because I had already qualified. And the only reason I did not come off of the Registry was because of me not specifically bringing to the court the documents stating what tier level I was, which in the state of Georgia there's a Level 1, Level 2 and Level 3, which I fell up under the Level 1, which qualified me to come off of the Registry. And because -- but the judge that made that decision, he made that decision in error because he failed to order a copy of that -- of that investigation that was supposed to be done by a board, a board that classified each sex offender. But in the case right now, as I explained to my attorney, dealing with the tier level, I think it's unconstitutional to even have me

be classified as a Tier 1, Tier 2, Tier 3, without having gone through any type of hearing or classification. They just –

THE PROBATION OFFICER: I'm sorry to interject and cut off Mr. Hester, but Ms. Anton has just sent me a message and -- she's been kicked out of the meeting, so she's not hearing any of this now.

THE COURT: We'll wait until she comes back.

THE COURTROOM DEPUTY: We didn't kick her out. She may have lost the connection.

THE PROBATION OFFICER: Yes, she's trying to get back in now. Yes, that's what happened.

THE COURTROOM DEPUTY: Soon as I see her trying to join, I'll open it and let her in. (Ms. Anton rejoins the videoconference.)

THE COURT: All right. Mr. Hester, do you want to go ahead and continue?

THE DEFENDANT: As I was saying, in terms of, you know, with the Georgia situation, I filed that motion and, again, I was denied based on the merits that, you know, I didn't provide my classification level, tier level. And the tier level is a very huge thing. And again, I'm being placed in a particular tier level now without any knowledge as to how I got to that tier level, without any judiciary hearing or any type of hearing, for that matter, to be classified under that tier level.

THE COURT: Well, I don't know what your tier level is going to be. When you get released on supervision, if you get a tier level that you don't like, then you can appeal that.

THE DEFENDANT: But I think -- but my counsel has -- is arguing that they're requiring me or asking for conditions to be placed -- or special conditions to be added based on certain tier levels.

THE COURT: Well, what condition is being requested that differs if it's a different tier level?

THE DEFENDANT: Mr. Berube?

MR. BERUBE: Your Honor, the difference is that depending on the tier level that is imposed dictates the length of time he is to register as a sex offender. Following the federal statute, if he's a Tier 1 sex offender, he's on for 15 years. If he's a Tier 2 sex offender, he's on the Sex Offender Registry for 25 years. And if he's a Tier 3 sex offender, he's on the Registry for life. My position -- our position has always been -- in these types of cases, Your Honor, I understand that they want -- the U.S. Attorney's Office and United States Probation say, well, you're gonna live in Florida, you're on for life. Well, he may not live in Florida. We're following the federal statute. We object to deferring to the state of Florida. I mean, he -- he needs -- this condition is as important to Mr. Hester as any other condition of supervised release that will be imposed. Saying that a person -- you're gonna go to sex offender treatment, but we're not gonna tell you about the tier system or when you can get off, it's totally inconsistent.

THE COURT: Well, if he's in Florida, he never gets off, right?

MR. BERUBE: Well, Judge, see, that's the thing. That's why we're making this objection. I think some day -- some day, who knows when, they're going to look at this and they're going -- someone will say -- some of these people, yes, they made a very serious mistake. They've been on the Registry for 25 years, and we need to release them. Something's going to come and bring this to the forefront. I don't know when. I probably won't be around. But the fact of the matter is, is that people, if they live a clean, law-abiding life, they should be able to get off the Registry.

THE COURT: Well, what's the criteria for Tier 1 versus Tier 2? Does anybody know?

MR. BERUBE: If I recall correctly, Your Honor -- I don't have the statute in front of me. It has to do with the nature of the offense and length of the sentence, but I would defer to Ms. Culberson and Ms. Anton, of course.

THE PROBATION OFFICER: I also do not have the statute in front of me at this moment, but it does -- it is based on the type of offense committed, the underlying offense.

THE COURT: Which would be the statutory rape.

THE PROBATION OFFICER: Correct.

MR. BERUBE: And right now, Your Honor, in the pre-sentence investigation report, Mr. Hester has been listed, I believe, as a Tier 2 sex offender, which means that he is on the list for 25 years.

THE DEFENDANT: And I also would like to add that, again, my original sentence came from the state of Georgia. And I understand that the state of Florida has different rules, but in the state of Georgia, once a nonviolent sex offender completes their sentence and meet the criteria that is set forth in -- within the Georgia statute, and you meet those criterias, you can petition the court and come off of the Registry, and that can be immediately upon completion of your sentence, or 10 years, whichever comes first.

THE COURT: So if you wind up being supervised in Georgia, and if you ask them for relief and they don't give you relief, and you've exhausted that remedy, then if I'm the judge that's supervising your probation or supervised release, then you can ask me for relief at that point. But I don't know that you're ever going to be in Georgia.

THE DEFENDANT: That's my intention at -- I'm sorry. I didn't mean to cut you off, Your Honor. But my intentions were to ask at the end of this, before you make a ruling on the sentence, was for you to -- whatever you rule on as part of my sentence, to be sent to Georgia to carry out, you know, the remainder of my sentence, whether it be a halfway house or any type of imprisonment, to be sent to Georgia and –

THE COURT: I don't have any problems recommending that the Bureau of Prisons houses you somewhere. I don't get involved in where the supervision should be. That's up to the Bureau of Prisons to make an initial assessment as to where you should be supervised, and then they can ask me to approve it.

THE DEFENDANT: So, in other words, if they're requiring me to remain here, in Florida, you're saying I would have to remain here, in Florida?

THE COURT: Until I authorized you to go to Georgia, yeah. Sometimes probation lets you go to Georgia without my getting around to approving their request, but if they won't let you even go to Georgia, then you write

me a letter saying you want to be supervised in Georgia and I'll rule on it. At this point, it's an advisory opinion. I don't know if it's going to materialize.

THE DEFENDANT: The only reason I ask, Your Honor, is because, again, my original charge is in Georgia and I reside in Georgia. I do not reside in Florida. I left Florida over 11 years ago.

THE COURT: My guess would be that if you ask probation to transfer your supervision in Georgia, they're going to grant that. And then, if you go to Georgia, and you don't like the tier system that you're in in Georgia, then you can write me a letter, and I might consider it, I might not consider it. Right now, probation says you should be a Tier 2. You don't want a Tier 2, so maybe you should wait and see what you can work out in Georgia, if you get there.

In order to determine Mr. Hester's appropriate base offense level, the district court was required to compare Mr. Hester's underlying conviction for statutory rape, as defined by the Georgia statute, with the offenses listed in the SORNA's tier definitions. Instead of evaluating and making a legal determination of the appropriate tier level as the law requires, and as Mr. Hester requested, however, the district court failed to make any determination at all. Because Mr. Hester's tier level directly impacted his Guideline calculation the district court erred in failing to make that determination, resulting in a procedurally unreasonable sentence and a denial of due process for Mr. Hester.

## 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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