No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

UNISES CHAPOTIN,

***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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the residual clause in Section 4B1.2 of the previously binding United States Sentencing Guidelines is void for vagueness pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015).

2) Whether the Eleventh Circuit's rule that published orders respecting applications for leave to file second or successive 28 U.S.C. § 2255 motions are binding precedent violates due process.

INTERESTED PARTIES

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

RELATED CASES

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

Unises Chapotin v. United States,
No. 16-21965-Cv-Martinez (Dec. 22, 2020)

United States v. Moreno, et al.,
No. 04-20305-3-Cr-Martinez (Dec. 23, 2004)

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

Unises Chapotin v. United States,
No. 21-10586 (July 21, 2022)

In re Unises Chapotin,
No. 16-11936 (May 10, 2016)

United States v. Unises Chapotin,
173 Fed. App'x 751 (Mar. 9, 2006)

United States Supreme Court:

United States v. Unises Chapotin,
No. 06-5471 (Oct. 2, 2006)

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Unises Chapotin ("Petitioner") 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 21-10586-DD in that court on July 21, 2022, *Unises Chapotin v. United States*, which affirmed the order of the United States District Court for the Southern District of Florida, denying Chapotin's § 2255 motion to vacate.

OPINIONS BELOW

The unpublished decision of the court of appeals affirming the district court's denial of § 2255 relief is included in the Appendix (App. A-1), and is available at 2022 WL 2866670. The decision of the district court adopting the magistrate's report and recommendation, denying petitioner's 28 U.S.C. § 2255 motion to vacate sentence, and issuing a certificate of appealability, is included in the Appendix (App. A-2), and is available at 2020 WL 7625739. The report and recommendation of the magistrate judge is included in the Appendix ((App. A-3), and is available at 2020 WL 7632094.

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 July 21, 2022. This petition is timely filed pursuant to SUP. CT. R. 13.1. The lower court had jurisdiction under 28 U.S.C. §§ 1291, 2253, and 2255.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision, statute, and sentencing guideline:

The Fifth Amendment's Due Process Clause provides:

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

U.S.S.G. § 4B1.2(a)(2) (2004)[1] provided:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (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.

[1] Section 4B1.2(a)(2) remained unchanged from petitioner Chapotin's 2004 sentencing through 2015. *Compare* U.S.S.G. § 4B1.2(a)(2) (2004), *with* U.S.S.G. § 4B1.2(a)(2) (2015). Following *Johnson v. United States*, 135 S.Ct. 2551 (2015), the U.S. Sentencing Commission deleted the phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another"—the guidelines' residual clause—from § 4B1.2(a)(2). U.S.S.G., Supp. to App. C, amend. 798 (eff. Nov. 1, 2016).

STATEMENT OF THE CASE[2]

In 2004, Chapotin was a last-minute substitute in a reverse-sting stash house robbery scheme that ended, moments after his involvement began, with his arrest. *United States v. Chapotin*, 173 F. App'x 751, 752 (11th Cir. 2006), *cert. denied* 549 U.S. 916 (2006). Chapotin's co-defendants pled guilty and received sentences of 168 months' imprisonment and 220 months' imprisonment, respectively. (Cr-DE110; Cr-DE108). Chapotin exercised his right to trial, lost, and was sentenced, as a career offender, under the then-mandatory sentencing guidelines, to 384 months' imprisonment. (Cr-DE84, Cr-DE 123).

Prior to sentencing, Chapotin unsuccessfully argued that he did not qualify as a career offender because his prior Florida battery on a law enforcement officer conviction was not a "crime of violence." (Cr-DE98; Cr-DE104). His non-career offender guideline range was 190 to 222 months' imprisonment.[3]

Chapotin pursued a direct appeal of his convictions and career offender sentence, which was denied, aside from the vacatur of his 18 U.S.C. § 922(g)(1)

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[2] Citations to the record of the instant § 2255 litigation in the district court will be referred to by the abbreviation "Cv-DE" followed by the docket entry number and the page number. Citations to the record in the underlying criminal case, *United States v. Moreno*, *et al.*, No. 04-204305-Cr-Martinez, will be referred to by the abbreviation "Cr-DE" followed by the docket entry number and the page number, as applicable.

[3] Undersigned counsel estimates that Chapotin's current advisory guideline range is 180 to 197 months' imprisonment. (Cr-DE230:16-18). Chapotin has served over 221 months (18 years) in prison.

conviction and concurrent sentence—because he never actually or constructively possessed a firearm. See *Chapotin*, 173 F. App'x at 752-53. Despite the Court having rendered the sentencing guidelines advisory during the pendency of Chapotin's appeal, *see United States v. Booker*, 543 U.S. 220 (2005), the district court declined to hold a resentencing hearing. (Cr-DE186; Cr-DE187).

Chapotin did not pursue a motion to vacate pursuant to 28 U.S.C. § 2255(f)(1).

In 2010, the Supreme Court held that Florida misdemeanor battery did not categorically qualify as a "violent felony" under the Armed Career Criminal Act (ACCA). *Johnson v. United States*, 130 S. Ct. 1265, 1269-74 (2010) ("*Curtis Johnson*"). Florida battery on a law enforcement officer is a misdemeanor battery, enhanced by its knowing commission against a law enforcement victim. Fla. Stat. § 784.07(2)(b). Recognizing that there was "no reason to believe that the words present in the ACCA have a different meaning than the same words used in the sentencing guidelines," the Eleventh Circuit subsequently applied *Curtis Johnson* to hold that Florida battery on a law enforcement officer failed to categorically qualify as a "crime of violence" under the guidelines. *United States v. Williams*, 609 F.3d 1168, 1169-70 (11th Cir. 2010).[4]

[4] As discussed in lower court briefings, Chapotin's prior Florida battery on a law enforcement officer conviction does not qualify as a guideline "crime of violence," under either the categorical, or modified categorical, approach. *See* Cv-DE14:16; Brief for Appellant at 76-82, *Chapotin v. United States*, No. 21-10586 (11th Cir. 2021).

In 2015, the Supreme Court declared the ACCA's residual clause, in 18 U.S.C. § 924(e)(2)(B)(ii), void for vagueness. *Johnson*, 135 S.Ct. at 597-602. The Court later held that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016).

Invoking the new rule in *Johnson*, Chapotin filed his first motion to vacate, pursuant to 28 U.S.C. § 2255(f)(3), arguing that *Johnson* invalidated the identically-worded residual clause of the pre-*Booker* career offender guidelines—making his mandatory guideline sentence unconstitutional, and invalid. (Cv-DE1; Cv-DE4).[5,6]

The government never contested Chapotin's claim that, after *Curtis Johnson* and *Johnson*, he does not qualify as a career offender. Instead, the government argued that Chapotin's challenge to his guideline sentence was foreclosed by *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016). (Cv-DE13).[7] In *Griffin,* the Eleventh Circuit

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[5] Chapotin also argued that *Johnson* invalidated the similarly-worded residual clause in 18 U.S.C. § 924(c)(3)(B), making his § 924(c) conviction and sentence unconstitutional, as well. (Cv-DE4). Chapotin later supplemented that claim in light of *Davis*. (Cv-DE27). That claim was denied by the district court, and the appellate court, and is not the subject of the instant petition.

[6] Chapotin had earlier filed an application for leave to file a second or successive § 2255 motion, which was denied because he had never filed a first § 2255. *In re Unises Chapotin*, No. 16-11936 (11th Cir. May 10, 2016).

[7] Chapotin and the government also disagreed as to several threshold issues, including whether Chapotin's claims were procedurally defaulted, cognizable, and timely. While the district court denied relief on those bases as well as on the merits, the appellate court denied relief on the merits, alone. *See* Cv-DE39; *Chapotin v. United States*, No. 21-10586, slip op. at 15 n.12 (11th Cir.

published its decision denying a *pro se* application for leave to file a second or successive (SOS) § 2255 motion, reasoning for the first time that the mandatory sentencing guidelines cannot be void-for-vagueness—and therefore that *Johnson* had no application to the sentencing guidelines. *Griffin*, 823 F.3d at 1354-55.

Several other relevant circuit and Supreme Court cases were issued over the course of Chapotin's § 2255 litigation before the district court:

In *Beckles v. United States*, 137 S. Ct. 886 (2016), the Court ruled that "the advisory sentencing guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine" because "the advisory Guidelines do not fix the permissible range of sentences." 137 S. Ct. at 892, 896.

In *United States v. St. Hubert*, the Eleventh Circuit held that SOS decisions are binding on all future litigants, including those on direct appeal. 909 F.3d 335, 345 (11th Cir. 2018), *overruled in part on other grounds by United States v. Davis*, 139 S. Ct. 2319 (2019), *and by United States v. Taylor*, 142 S.Ct. 2015 (2022). *See also Steiner v. United States*, 940 F.3d 1282, 1293 n.4 (11th Cir. 2019) (relying on *St. Hubert* to reject argument that SOS decisions are not binding in initial § 2255 proceedings).

In *Sessions v. Dimaya*, 138 S.Ct. 1204, 1208 (2018), the Court held that *Johnson* applied to—and invalidated—the residual clause in 18 U.S.C. § 16(b),

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July 21, 2022). Should the Court grant Chapotin's petition, and should petitioner prevail, Chapotin would request that the case be remanded to the Eleventh Circuit to reconsider the threshold questions left unaddressed in its opinion denying relief.

because that clause contained a similarly-worded residual clause than the ACCA, and called for the same categorical approach, and therefore it "suffer[ed] from the same two flaws," that "conspired to make the ACCA's residual clause unconstitutionally vague."

In *Davis*, the Court found 18 U.S.C. § 924(c)(3)'s residual clause materially indistinguishable from the residual clause struck down in *Johnson* and *Dimaya*. 139 S.Ct. 2319, 2326. Because § 924(c)(3)(B) required the same categorical approach found problematic in *Johnson* and *Dimaya*—pursuant to which courts must "imagine the idealized 'ordinary case' of the defendant's crime and then guess whether a 'serious potential risk of physical injury to another' would attend its commission"—the *Davis* Court found § 924(c)(3)(B) unconstitutionally vague. *Id*. at *Id*. at 2326-28, 2336.

In supplemental briefing, Chapotin argued that *Griffin* was wrong, abrogated by *Beckles*, and should not bind his first § 2255 motion because it was issued in the SOS context. (Cv-DE19). In objections, Chapotin also noted that the First and Seventh Circuits had correctly rejected the Eleventh Circuit's reasoning in *Griffin*, and found that *Johnson* applies to, and invalidates, the pre-*Booker* residual clause. (Cv-DE37) (citing *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), and *Shea v. United States*, 976 F.3d 63, 71-74 (1st Cir. 2020)).

Ultimately, the district court adopted the magistrate's report recommending denial of Chapotin's § 2255 motion, in pertinent part because it found that his *Johnson*-based challenge to the mandatory guidelines' residual remained foreclosed

by *Griffin*. (Cv-DE39).

The district court also adopted the magistrate's recommendation to issue a certificate of appealability, *id*., and, thus, a certificate of appeal was issued as to two issues relevant here:

> (1) "whether sentences under the mandatory guidelines are subject to a vagueness challenge"; and
>
> (2) "whether published orders deciding applications for leave to file second or successive motions to vacate are binding upon district courts in deciding first-filed motions to vacate[.]"

Brief for Appellant at 17-18, *Chapotin v. United States*, No. 21-10586 (11th Cir. 2021) (citing Cv-DE33; Cv-DE39).

Chapotin timely appealed. On appeal, Chapotin maintained that *Griffin* was wrong, abrogated by *Beckles* and *Dimaya*, that the position of the Seventh and First Circuits was, instead, correct, and that allowing an SOS order—like *Griffin*—to bind his first § 2255 violated due process. *Id*. at 23-47.

The Eleventh Circuit denied Chapotin's appeal in an unpublished decision. *Chapotin v. United States*, No. 21-10586, slip op. at 20 (11th Cir. July 21, 2022). In pertinent part, the Eleventh Circuit rejected Chapotin's arguments that *Griffin* had been abrogated by *Beckles* and *Dimaya*, because neither opinion, "squarely address[ed] whether the vagueness doctrine applies to the mandatory guidelines," and, relying on the circuit's stringent prior precedent rule, summarily rejected his due process challenge to SOS orders. *Id*. at 12-14 (citing *St. Hubert*, among others). It concluded that "*Griffin* squarely forecloses Chapotin's career offender claim, and we are bound to apply *Griffin*." *Id*. at 15.

This petition followed.

Chapotin's estimated release date is March 28, 2032.

REASONS FOR GRANTING THE WRIT

This petition presents an opportunity to finally resolve whether *Johnson v. United States*, 135 S.Ct. 2551 (2015)—wherein the Court struck the phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another," from the Armed Career Criminal Act (ACCA), as unconstitutionally vague—invalidates the exact same phrase in the mandatory guidelines' residual clause. The stark implications of this question—"left open" by *Beckles v. United States*, 137 S. Ct. 886, 903 n. 4 (2016) (Sotomayor, J., concurring)—are not unfamiliar to the Court. *See Brown v. United States*, 139 S.Ct 14, 16 (2018) (Sotomayor, J., joined by Ginsberg, J., dissenting from denial of certiorari) (observing that issue "presents an important question of federal law that has divided the courts of appeals and in theory could determine the liberty of over 1,000 people"). Yet, they still bear emphasis. Had petitioner Unises Chapotin been convicted in the Seventh or First Circuit Courts of Appeals[8]—where, pursuant to

[8] Or, quite possibly, the D.C. Circuit. *See United States v. Arrington*, 4 F.4th 162, 170 (D.C. Cir. 2021) (holding that § 2255 motion challenging mandatory career offender sentence filed within one year of *Johnson* was timely because it asserted the same right recognized in *Johnson*, and remanding to district court to determine whether *Johnson* invalidated mandatory guidelines' residual clause); *United States v. Sumner*, --F.Supp.3d.--, 2022 WL 951374, at *13 (D.D.C. Mar. 30, 2022) (holding that *Johnson* applies to mandatory guidelines' residual clause); *United States v. Carter*, 422 F. Supp. 3d 299, 317 (D.D.C. 2019) ("*Johnson* compels the conclusion that the residual clause in § 4B1.2 of the mandatory [S]entencing [G]uidelines is void for vagueness."); *United States v. Hammond*, 351 F. Supp. 3d 106, 129 (D.D.C. 2018) (same).

Cross v. United States, 892 F.3d 288 (7th Cir. 2018), and *Shea v. United States*, 976 F.3d 63, 71-74 (1st Cir. 2020), the mandatory guidelines' residual clause was invalidated by *Johnson*—his mandatory guideline career offender sentence would have been vacated. Because he would have been resentenced under an advisory guideline range that would have roughly corresponded with time served, in all likelihood, Chapotin would be free. Instead, having been convicted in the Eleventh Circuit Court of Appeals—where, pursuant to *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), *Johnson* is inapplicable to the mandatory guidelines—Chapotin pleads his case from prison. Without the Court's intervention, that is where he will remain until 2032.

Griffin presents a second familiar, unresolved, and important federal question to the Court—answerable through the granting of this petition—in that *Griffin* was issued in the context of a *pro se* application for leave to file a second or successive (S0S) § 2255 motion. *Id.* at 1351. The Eleventh Circuit's unique SOS procedure, combined with its decision to elevate unreviewable SOS decisions to binding precedent on all litigants, has rightly been the subject of the Court's scrutiny. *See St. Hubert v. United States*, 140 S. Ct. 1727, 1727-30 (2020) (Sotomayor, J., respecting denial of certiorari) (warning that giving SOS orders stemming from "perfunctory [SOS] process" binding effect on other litigants imperils due process). This questionable practice nonetheless remains firmly in place, and it will continue to violate the due process rights of Eleventh Circuit criminal defendants and prisoners in all stages of litigation—including petitioner

Chapotin—absent a contrary ruling from the Court.

I. The Court should resolve the circuit split between the First, Seventh and Eleventh Circuit Courts of Appeals, and hold that the mandatory guidelines' residual clause is unconstitutionally vague.

a. The Eleventh Circuit's decision that *Johnson* is inapplicable to the mandatory guidelines because the guidelines cannot be void-for-vagueness was wrong when it was decided.

In *Griffin*, the Eleventh Circuit denied a *pro se* application for leave to file a second or successive ("SOS") § 2255 motion, based on *Johnson*, by a federal prisoner sentenced as a career offender when the Guidelines were mandatory. *Griffin*, 823 F.3d at 1354–55. In denying the application, the Court concluded that, although its prior opinion in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), addressed only the advisory Guidelines, *Matchett*'s "logic and principles . . . also govern our panel as to Griffin's guidelines sentence when the Guidelines were mandatory." *Id.*[9]

The Eleventh Circuit in *Matchett* had held—before *Beckles*—that the *advisory* Guidelines cannot be void for vagueness. 802 F.3d 1185, 1194-96. The *Griffin* panel determined that the mandatory Guidelines also "cannot be unconstitutionally vague because they do not establish the illegality of any conduct

[9] The Eleventh Circuit alternatively concluded that, even if *Johnson* applied to the mandatory Guidelines, "that does not mean that the ruling in *Welch* makes *Johnson* retroactive for purposes of a second or successive § 2255 motion based on the residual clause." *Griffin*, 823 F.3d at 1355. That alternative conclusion is both incorrect *and* has no bearing on Chapotin's *initial* § 2255 motion.

and are designed to assist and limit the discretion of the sentencing judge." *Griffin*, 823 F.3d at 1354, (citing *Matchett*, 802 F.3d at 1195). The *Griffin* panel opined that, because a defendant has no constitutional right to be sentenced under the Guidelines, the mandatory Guidelines could not be void for vagueness. *See Griffin*, 823 F.3d at 1354–55.

In a subsequent opinion concurring with the denial of authorization to file a successive petition (seeking to challenge a mandatory career offender sentence pursuant to *Johnson*), a different Eleventh Circuit panel thoroughly explained why *Griffin* was wrong when it was decided. *In re Sapp*, 827 F.3d 1334, 1335 (11th Cir. 2016) (Jordan, J., Rosenbaum, J., & Jill Pryor, J., concurring). The concurring panel noted that, "in the era before *Booker* was decided, the Sentencing Guidelines were 'binding on judges.'" *Id*. at 1336 (quoting *United States v. Booker*, 543 U.S. 220, 234 (2005)). Further, "district courts were statutorily required to impose sentences within the range established by the Guidelines." *Id*. at 1336-37 (citing 18 U.S.C. § 3553(b)(1) (2000 ed.)). The *Sapp* panel emphasized that the mandatory Guidelines "had the force and effect of laws." *Id*. at 1337 (quoting *Booker*, at 234).

The *Sapp* concurring opinion argued *Griffin* was wrong to hold that it was "bound" in any way by *Matchett*, because *Matchett*'s holding "hinged on the advisory nature of the Guidelines post-*Booker*." *Id*. at 1337. Specifically, *Matchett* relied on the principle that the advisory Guidelines do not fix sentences because district courts have discretion in sentencing. *Id*. at 1338. Thus, "[g]iven the binding nature of the mandatory Guidelines, the *Griffin* panel could not rely on the *Matchett*

rationale to justify its failure to apply the notice requirement of the Due Process Clause and corresponding vagueness principles." *Id.*

The concurring *Sapp* panel also noted the Eleventh Circuit had previously held that the rule of lenity—"a junior version of the vagueness doctrine"—applied to the mandatory Guidelines. *Id.* (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997), and citing *United States v. Inclema*, 363 F.3d 1177, 1182 (11th Cir. 2004)).[10] Further, members of the Eleventh Circuit had "expressed doubt as to whether that rule applies to the advisory Guidelines," because only the mandatory Guidelines, "statutorily required district courts to impose a sentence within the applicable Guidelines range." *Id.* (citing *United States v. Wright*, 607 F.3d 708, 719 (11th Cir. 2010) (William Pryor, J., joined by Fay, J., concurring).[11]

The concurring *Sapp* opinion further contended that *Griffin*'s observation that the mandatory Guidelines' residual clause did "not establish the legality of any conduct" was irrelevant, because neither did the residual clause struck down in *Johnson*. *Id.* The panel observed that the Supreme Court "has long held"—and reiterated in *Johnson*—that vagueness principles also apply to statutes fixing sentences. *Id.* The *Sapp* panel observed that, not only did the mandatory Guidelines "fix sentences in almost precisely the same was as statutes setting minimum

[10] *See also United States v. Helmy,* 951 F.2d 988, 993–94 (9th Cir. 1991) (assuming that the mandatory Guidelines were subject to the prohibition against vagueness and addressing a vagueness challenge to a Guidelines provision on the merits).

[11] At least one other circuit has applied the rule of lenity to the advisory Guidelines. *See United States v. O'Connor*, 874 F.3d 1147, 1157–58 (10th Cir. 2017).

mandatory sentences [like ACCA]," but the text of the ACCA's residual clause is identical to the Guidelines' residual clause in § 4B1.2(a)(2)—and it has been interpreted using "precisely the same analytical framework." *Id*. at 1338-39 (quoting *United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994)).

The *Sapp* concurrence also made quick work of *Griffin*'s reasoning that the mandatory Guidelines cannot be void for vagueness because there is no constitutional right to be sentenced under the Guidelines at all, as "the Supreme Court rejected" that "syllogism" "six decades ago." *Id*. Instead, "once the Guidelines were promulgated and made mandatory by Congress, then a defendant's due process rights attached." *Id*. (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

Considering both *Johnson* and *Booker*, the concurring *Sapp* panel deemed it "undeniable—that the residual clause of the mandatory career offender guideline had the same effect as the ACCA's identical residual clause." *Id*. Further, the panel said "[i]t necessarily follows, then, that *Johnson* applies with equal force to the residual clause of the mandatory career offender guideline." *Id*.

The *Sapp* concurrence was correct: *Griffin* was contrary to then-existing Supreme Court precedent. And, as discussed below and found by two other Courts of Appeals, *Griffin* is also contrary to *subsequent* Supreme Court precedent.

b. The contrary decisions of the First and Seventh Circuits are correct: *Johnson* applies to, and invalidates, the mandatory guidelines' residual clause.

As the First and Seventh Circuits have correctly held, *Johnson* and its progeny (specifically, *Beckles* and *Dimaya*)—combined with prior Court precedent—

demonstrate that *Johnson* applies to, and invalidates, the residual clause of the pre-*Booker* sentencing guidelines.

In *Cross v. United States*, the Seventh Circuit first observed that *Johnson* "homed in on a confluence of two factors that deprived the residual clause of the ACCA of sufficiently definite meeting." *Cross*, 892 F.3d at 299 (citing *Johnson*, 135 S.Ct. at 2557-58, and *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018)). "First, the ACCA clause required judges to assess the risk of injury associated with a defendant's prior convictions using a categorical approach." *Id*. (citing *Johnson*, 135 S.Ct. at 2557). "Second, it required judges to weigh the apparent danger posed by those idealized offenses against the nebulous metric of 'serious potential risk.'" *Id*. "The 'combin[ed] indeterminacy' concerning how much risk the crimes of conviction posed and the degree of risk required of violent felonies produced unacceptable 'unpredictability and arbitrariness.'" *Id*. (citing *Johnson*, 135 S.Ct. at 2558).

The Seventh Circuit then correctly concluded that "[t]hese same two faults inhere in the residual clause of the guidelines." *Id*. at 300. The guidelines' definition of a "crime of violence" is "identical" to the ACCA's definition of a "violent felony," at issue in *Johnson*. *Id*. (citing *Beckles*, 137 S.Ct. at 890 (describing the residual clauses as "identically worded")). The categorical approach also applies to the guidelines' "violent felony" definition. *Id*. at 300-301. And, it also asks, "judges to weigh the apparent danger posed by those idealized offenses against the nebulous metric of 'serious potential risk.'" *Id.* at 301.

The Seventh Circuit observed that the Court's analysis in *Dimaya*—finding that *Johnson* had "straightforward application" to section 16 of the INA—"reconfirm[ed its] view that the residual clause of the guidelines shares the weaknesses that *Johnson* identified in the ACCA." *Id*. It cited to Justice Gorsuch's concurrence, which "highlighted the key parallels between the ACCA and statutory scheme at issue in *Dimaya*":

> Just like the statute in *Johnson*, the statute here instructs courts to impose special penalties on individuals previously "convicted of" a "crime of violence." Just like the statute in *Johnson*, the statute here fails to specify which crimes qualify for that label. Instead, and again like the statute in *Johnson*, the statute here seems to require a judge to guess about the ordinary case of the crime and conviction and then guess whether a "substantial risk" of "physical force" attends its commission. *Johnson* held that a law that asks so much of courts while offering them so little by way of guidance is unconstitutionally vague. And I do not see how we might reach a different judgment here.

Cross at 302 (quoting *Dimaya*, 138 S.Ct. at 1231 (Gorsuch, J., concurring)). The Seventh Circuit reiterated that "each of those three hallmarks is shared by the guidelines," "[i]n fact, the textual differences between the ACCA and the guidelines pale in comparison to the differences between the ACCA and section 16 [of the INA]". *Id*. *See also Chambers v. United States*, 763 Fed. App'x 514, 522 (6th Cir. 2019) (Moore, J., concurring) ("If *Dimaya* was straightforward, then this case is even more so. After all, unlike the INA, the mandatory Guidelines' residual clause is *completely identical* to the ACCA's residual clause that the Court found to be unconstitutionally vague in *Johnson*.") (emphasis in original).

Next, the Seventh Circuit determined 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'"—thereby "implicat[ing] the 'twin concerns' of the vagueness doctrine." *Cross*, 892 F.3d at 306 (quoting *Beckles*, 137 S.Ct. at 894-95). The Seventh Circuit observed that, as understood by the Court in *Booker*, the mandatory guidelines "fixed sentencing ranges from a constitutional perspective," such that "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 305-06 (citing *Booker*, 125 S.Ct. at 738). Further, the "possibility of departures" does not sufficiently distinguish mandatory guidelines from statutory minima, as statutory minima are also not "exempt from departures," but, per *Johnson*, they nonetheless "must comply with the prohibition against vague laws." *Id.* at 306. Thus, "[t]he existence of some play in the joints is not enough to change the character of either statutory sentencing limitations or the pre-*Booker* guidelines from mandatory to advisory"—or to preclude application of *Johnson* to the mandatory guidelines. *Id.*

Finally, the Seventh Circuit concluded that, as applied to the residual clause of the mandatory guidelines, *Johnson* would "narrow the set of defendants punishable as career offenders," thus "alter[ing] the range of conduct of the class of persons the law punishes." *Id.* at 306-07. Therefore, *Johnson* qualifies as a retroactive, substantive rule for the mandatory guidelines, just as it does for the ACCA. *Id.* (citing *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016)).

Two years later, in *Shea v. United States*, the First Circuit agreed with the Seventh Circuit—and explicitly disagreed with the Eleventh Circuit—in holding that the pre-*Booker* guidelines' "residual clause was unconstitutionally vague and could not be applied to enhance the permissible range of sentences a judge could impose[.]" 976 F.3d 63, 71, 74. The First Circuit reasoned that "no reasonable jurist could think that the rule in *Johnson* applies only to statutes. It is crystal clear that the same two-pronged vagueness test that governed *Johnson* applies with equal force to regulations that have the force of law." *Id.* at 75 (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), and *Beckles*, 137 S.Ct at 894-95, among others).

The First Circuit, like the Seventh, observed that, before *Booker*, the Court had "consistently held that the Guidelines had the force and effect of laws," and, further, that "the mandatory Guidelines '*did* fix the permissible range of sentences' a judge could impose,"—"whether they 'fixed' a higher maximum *or* minimum sentence." *Id.* at 75-77 (citing *Booker*, 543 U.S. at 234, *Beckles*, at 137 S.Ct. at 892, and *Davis*, 139 S.Ct. at 2336, among others) (emphasis in original).[12] The First Circuit also agreed with the Seventh Circuit that the limited availability of departures under the Sentencing Reform Act "did not change the fact that, in all

[12] As noted by the First Circuit—and the *Sapp* panel—the Sentencing Reform Act required the judge to 'impose a sentence of the kind, and within the range' established by the Guidelines." *Id.* at 75 (quoting 18 U.S.C. § 3553(b)); *Sapp*, 827 F.3d at 1336-37.

others, [the mandatory guidelines] worked no differently than a statute setting a sentencing range." *Id*. at 76 (citing *Booker*, 543 U.S. at 234).

The First Circuit thus concluded:

> without a doubt, then, when no departure applied, the vague residual clause that [appellant] claims raised his sentencing range (which told us an offense was a "crime of violence" if it posed a "serious *potential* risk of physical injury to another" in the abstract "*ordinary case*" of the crime [citation omitted]), triggered the "twin concerns underlying the vagueness doctrine – providing notice and preventing arbitrary enforcement."

Id. at 79 (quoting *Beckles*, 137 S.Ct. at 894, among others) (emphasis in original). "Just as it did in *Johnson*, 'invoking so shapeless a provision to condemn someone to prison' . . . 'does not comport with the Constitution's guarantee of due process.'" *Id*. at 80 (quoting *Johnson*, 135 S.Ct. at 2561).

The First and Seventh Circuit are correct—and the Eleventh Circuit is wrong. *Beckles* and *Dimaya*—combined with prior Court precedent—show why *Johnson* applies to, and invalidates, the mandatory guidelines' residual clause.

In *Beckles*, the COurt said that laws that fix the permissible range of sentences are subject to vagueness challenges. *Beckles*, 137 S.Ct. at 892. *Beckles* also reinforced what *Booker* long-ago established, which is that the mandatory Guidelines had "the force and effect of laws" and that, as *de facto* laws, they—*unlike* the advisory Guidelines—fixed sentences. *Id.*[13]

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[13] *See also Brown*, 139 S.Ct at 14 n.3 ("[B]efore *Booker*, this Court consistently held that the Sentencing Guidelines 'b[ound] judges and courts in their uncontested responsibility to pass sentence in criminal cases.'") (quoting *Mistretta*, 488 U.S. 488 U.S. 361, 391 (1989), and citing *Stinson v. United States*, 508 U.S. 36, 42 (1993)); *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The answer

Dimaya next held that *Johnson* has "straightforward application" far beyond the ACCA. The civil law at issue in *Dimaya* neither defined a crime *nor* fixed a criminal sentence. Nonetheless, because the law contained a *similarly-worded* residual clause than the ACCA, and called for the same categorical approach, it "suffer[ed] from the same two flaws," that "conspired to make the ACCA's residual clause unconstitutionally vague." *Dimaya*, 138 S.Ct. at 1208.

The *Dimaya* Court also applied *Johnson*'s void-for-vagueness rule to a type of law the Court had never previously held was subject to the vagueness doctrine, and where, without prior Congressional enactments, the petitioner may not have had any due process rights to start with. *See id*. at 1230-31 (Gorsuch, J., concurring); *id*. at 1245-48 (Thomas, J., dissenting). It also found that no lesser standard of vagueness should apply even though the penalty at issue was civil, because removal is a "particularly severe penalty" and "removal proceedings" are "intimately related to the criminal process." *Id*. at 1213.

The application of the mandatory guidelines' residual clause also subjected petitioner Chapotin to a "particularly severe penalty": approximately 162 additional months (13 ½ years) of prison. Further, the district court had to impose that greater sentence as the result of a *directly* criminal process—not a "related" process. And, this criminal process required the district court to apply the categorical approach to

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to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory.").

determine whether Chapotin's predicate offense qualified as a "crime of violence," under a residual clause that was "materially identical" to the clause struck down in *Johnson*. *See Cross*, 892 F.3d at 300. Yet, because that clause was just as vague as the one struck down in *Johnson*, the sentencing court had no intelligible standard by which to determine whether Chapotin's prior battery on a law enforcement officer constituted a "crime of violence" under the residual clause in § 4B1.2(a)(2). *See Shea*, 976 F.3d at 79 (observing that guidelines residual clause "language gave judges no clear standards for deciding *when* the law bound them to enhance the permissible range – leaving that to 'guesswork' and 'inviting arbitrary enforcement'"); *Johnson*, 135 S.Ct. at 2562 (declaring identical residual clause language "a black hole of confusion and uncertainty that frustrates any effort to impart some sense of order and direction") (quotation omitted).

The mandatory guidelines' residual clause "suffer[ed] from the same two flaws" that "conspired to make the ACCA's residual clause [*and* 18 U.S.C. § 16(b)'s residual clause] unconstitutionally vague." *See Dimaya*, 138 S.Ct. at 1208; *Cross*, 892 F.3d at 299. A "straightforward application" of *Johnson* leads to the undeniable conclusion that the mandatory guidelines' residual clause—responsible for Chapotin's mandatory 384-month prison sentence—is void-for-vagueness.

II. The Court should find that the Eleventh Circuit's rule elevating published SOS orders to binding precedent violates due process.

In affirming the denial of Chapotin's § 2255 motion, the Eleventh Circuit declined to substantively address Chapotin's fully preserved claim that allowing *Griffin*—an SOS case—to bind his first 28 U.S.C. § 2255 motion violated his due

process rights. Instead, the Eleventh Circuit said only that it: "[has] repeatedly rejected this argument, and ha[s] held that published three-judge orders issued in the successive application context are binding precedent in our circuit." *Chapotin*, No. 21-10586, slip op. at 14 (citing *Steiner v. United States*, 940 F.3d 1282, 1293 n.4 (11th Cir. 2019), *St. Hubert*, 909 F.3d at 345, and *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015)). However, *Steiner* and *St. Hubert* also cited only to the prior precedent rule to support the binding authority of SOS orders; neither addressed the due process concerns raised by Chapotin, other judges in the Eleventh Circuit, *see, e.g.*, *In re Williams*, 898 F.3d 1098, 1101-1110 (11th Cir. 2018) (Martin, J., and Wilson, J., specially concurring), and the Court. *See St. Hubert*, 140 S. Ct. at 1727-30 (Sotomayor, J., respecting denial of petition). Aside from a passing remark that SOS orders "are not beyond all review, as the statute does not preclude the Court of Appeals from rehearing such a decision *sua sponte*," *Lambrix* did not discuss due process concerns, either, and again relied on the strength of the circuit's prior precedent rule to support the binding nature of SOS orders. 776 F.3d 789, 794. The Eleventh Circuit's reliance on the feedback loop of the prior panel precedent rule leaves Chapotin little choice but to seek guidance—and redress—from the Court.

Courts generally apply one of two standards to procedural due process claims: from *Mathews v. Eldridge*, 424 U.S. 319 (1976), or *Medina v. California*, 505 U.S. 437 (1992). Allowing an SOS order like *Griffin* binding and preclusive effect on Chapotin's *Johnson* claim violates due process under either standard.

a. Pursuant to *Mathews v. Eldridge*, courts balance three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest" in efficiency and the burden that the "substitute procedural requirement would entail." 424 U.S. 319, 335.

As applied here, first, the private interest is liberty from extra imprisonment. "[A]ny amount of [additional] jail time is significant, and has exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018) (citations and brackets omitted). And "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome." *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016). That is particularly true with respect to an erroneous career-offender enhancement, which is designed to produce sentences "at or near the maximum." 28 U.S.C. § 994(h); *See United States v. LaBonte*, 520 U.S. 751, 752–53 (1997).

Second, the risk of error was particularly high due to the procedure generating SOS orders like *Griffin*. In 2016—the year that *Griffin* was issued—the Eleventh Circuit received 2,258 SOS applications, and decided 2,282. *United States v. St. Hubert*, 918 F.3d 1174, 1179 (11th Cir. 2019) (Tjoflat, J., joined by Carnes, C.J., W. Pryor, J., Newson, J., and Branch, J., concurring in the denial of rehearing

on banc). This amounts to a greater than 10-fold increase in SOS decisions and applications from each of the preceding three years. *Id*. It also works out to more than six SOS decisions a day—if the Court worked all 366 days in 2016. These 2,258 SOS applications were largely *pro se*, and the 2,282 decisions were made on an "emergency thirty-day basis," without the benefit of full adversarial briefing or oral argument (despite addressing the implications of *Johnson*, which itself announced a new rule of constitutional law). *Id.* at 1198 (Wilson, J., joined by Martin, J., J. Pryor, J., and Rosenbaum, J., dissenting from the denial of rehearing on banc). The decisions were also statutorily unappealable. *Id*. (citing 28 U.S.C. § 2244(b)(3)(E)). And, they were not all unanimous. *Id*. at 1207 (Martin, J., joined by J. Prior, J., dissenting from the denial of rehearing en banc). *See also Ovalles v. United States*, 905 F.3d 1231, 1268–73 (11th Cir. 2018) (*en banc*) (Martin, J., dissenting) (discussing examples of SOS order errors).

Griffin is a by-product of the same "troubling tableau." *See St. Hubert*, 140 S. Ct. at 1728 (Sotomayor, J., respecting denial of certiorari). The *pro se* application at issue in *Griffin* was filed on April 28, 2016. Application by Petitioner Marvin Griffin, No. 16-12012 (11th Cir. Apr. 28, 2016). Griffin's *Johnson* claim consists of approximately 8 lines of difficult-to-decipher text. *Id*. One day later, the government filed a 46-page "standing response." Memorandum for the United States Regarding Applications for Leave to File Second or Successive Section 2255 Motions Based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), No. 16-12012 (11th Cir. Apr. 29, 2016). The government's memorandum contended "that the Court should deny

authorization in cases where a defendant claims, in light of *Johnson*, that he was erroneously sentenced as a career offender under the federal Sentencing Guidelines," because "in the guidelines context" *Johnson* "regulates how the sentence is imposed, and is therefore a new procedural rule that has not been 'made' retroactive by the Supreme Court to cases on collateral review." *Id*. at 1-2, 35-39. It was therefore the government's position that *Johnson* did not satisfy 28 U.S.C. § 2255(h)(2) for successive petitioners seeking to challenge the guidelines' residual clause. *Id*. at 4, 6. *It was also "the government's position that the guidelines are subject to vagueness constraints and that Johnson invalidates the guidelines' residual clause"*—notwithstanding that the Eleventh Circuit had "recently held otherwise with respect to the advisory guidelines' residual clause" in *Matchett*, 802 F.3d at 1193–96. *Id*. at 7, 36-37 (emphasis added). The government further advised the court that there was legal support for both *en banc* consideration of issues raised in *Johnson*-based SOS applications, and to exceed the 30-day time period to decide SOS applications, "as every circuit to consider the issue has held, this time provision is 'hortatory or advisory rather than mandatory."" *Id*. at 28-32. Petitioner Griffin filed a 21-page, response. Response, No. 16-12012 (11th Cir. May 11, 2016). Fifteen days later, without oral argument, and despite the parties apparent agreement that *Johnson* invalidated the mandatory guidelines' residual clause, a three-member panel of Eleventh Circuit judges found otherwise, and published its decision. *Griffin*, 823 F.3d at 1354-56.

Given the truncated procedure from which it emerged, the "risk of error" in *Griffin* is self-evident. Other Eleventh Circuit judges immediately and openly recognized that *Griffin* was "deeply flawed and wrongly decided." *See Sapp*, 827 F.3d at 1336-41 (Jordan, J., Rosenbaum, J., and J. Pryor, J., concurring in the denial of an SOS application). *Griffin*'s holding has never been adopted by another circuit, despite *Johnson*'s application to the mandatory guidelines having been discussed in every circuit, in some capacity, over the last six years. *See Shea*, 976 F.3d at 74 (disagreeing with *Griffin* and noting the Eleventh Circuit is the *only* circuit to hold that mandatory Guidelines are categorically immune from vagueness challenges). Yet, *Griffin* remains binding on all litigants in the Eleventh Circuit—and it served to entirely foreclose relief for Chapotin.

Thirdly, the process that Chapotin seeks is not burdensome. Rather, he merely seeks what courts affords litigants every day: a reviewable decision after substantive consideration of his constitutional argument. Judicial doctrines that promote the court and government's interests in efficiency and finality—like the prior precedent rule—cannot trump fundamental fairness and accuracy. *See Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2243 (2022) ("*Stare decisis* . . . does not compel unending adherence to [the] abuse of judicial authority.").

b. Pursuant to *Medina*, procedural rules that "transgress[] any recognized principle of fundamental fairness in operation," violate procedural due process. 505 U.S. 437, 446-48.

Allowing an SOS case like *Griffin* to bind Chapotin's first § 2255 runs afoul of the recognized principle that "decisions that bind other litigants should, at the very least, be based on more than minimal briefing," which, in turn stems directly from "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *See St. Hubert*, 140 S. Ct. at 1730 (Sotomayor, J., dissenting from denial of certiorari) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). Because "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings," *Richards*, 517 U.S. at 798 n.4, "determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Yet—as discussed above—the petitioner in *Griffin*, like virtually all SOS applicants, did not have "a full and fair opportunity to litigate," whether *Johnson* applies to, and invalidates, the mandatory guidelines' residual clause. The lower court's preclusive reliance on *Griffin*, justified by the prior precedent rule, also could not have afforded—and did not afford—Chapotin "a full and fair opportunity" to litigate that crucial constitutional question.

Recognized principles of fundamental fairness require that a court receive adversarial briefing, and meaningfully consider an argument—with the understanding that its decision may be reviewed *en banc* or by certiorari—before cementing a contrary circuit precedent. That did not happen here, or in *Griffin*—or

in the several other SOS orders published by the Eleventh Circuit from that time period.

Under either *Medina*, or *Eldridge*, the Eleventh Circuit's decision to allow post-*Johnson* SOS orders—like *Griffin*—to bind first § 2255 movants—like Chapotin—violates due process.

III. This case is an ideal vehicle to resolve two important questions of federal law that may otherwise go unanswered.

a. Few, if any, litigants will be in a position to pose the first question presented by this petition again. The issue will not come up on direct appeal because the guidelines have been advisory—not mandatory—for 17 years. The time for filing a § 2255 motion based on *Johnson* expired more than six years ago. 28 U.S.C. § 2255(f)(3). The government did not seek certiorari review of *Cross, Shea,* or *United States v. Arrington*, in which the D.C. Circuit held that § 2255 motions challenging mandatory guideline sentences, "asserted" the same "right" recognized in *Johnson*, and were therefore timely if filed within one year of *Johnson*. 4 F.4th 162, 170 (D.C. Cir. 2021). Some prisoners convicted in the First, Seventh and D.C. Circuits have obtained relief from unconstitutional mandatory guideline career offender sentences. *See, e.g., Cross*, 892 F.3d at 307 (remanding to district court for resentencing); *United States v. Sumner*, -- F.Supp.3d. --, 2022 WL 951374, at *13 (D.D.C. Mar. 30, 2022) (holding that *Johnson* invalidates mandatory guidelines' residual clause and ordering resentencing without application of career offender guideline); *United States v. Moore*, No. 00-10247-cr-WGY, 2018 WL 5982017, at *2-3 (D. Mass. Nov. 14, 2018) (vacating mandatory career offender guideline sentence

pursuant to *Johnson* and ordering resentencing hearing). But eight Courts of Appeals have held that *Johnson* did not reopen the one-year statute of limitations under § 2255(f)(3), and therefore *Johnson*-based § 2555 motions that would have been timely in the First, Seventh, and D.C. Circuits, were dismissed in most other jurisdictions as untimely—without ever reaching the question presented here. *See Nunez v. United States*, 954 F.3d 465, 467 (2d Cir. 2020); *United States v. London*, 937 F.3d 502, 503 (5th Cir. 2019); *United States v. Blackstone*, 903 F.3d 1020, 1023 (9th Cir. 2018); *Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018); *United States v. Green*, 898 F.3d 315, 321 (3d Cir. 2018); *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir. 2018); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625, 629-30 (6th Cir. 2017). Certiorari was often sought by the appellant/prisoner in these cases, and it was invariably denied. *See, e.g.*, *Nunez v. United States*, 141 S.Ct. 941 (2020); *London v. United States*, 140 S.Ct. 1140 (2020); *Blackstone v. United States*, 139 S.Ct. 2762 (2019); *Brown*, 139 S.Ct. at 14 n.1 (Sotomayor, J., joined by Ginsberg, J., dissenting from denial of certiorari) (listing certiorari denials simultaneous with *Brown*). And, of course, *Griffin* has precluded the filing of any second or successive § 2255 petitions addressing this issue in the Eleventh Circuit since May 2016. It has also mandated that relief be denied for first-filed § 2255 movants in the district court—most of whom could not have met the Eleventh Circuit's strict COA standard to pursue an appeal. *See Hamilton v. Sec'y, Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (holding "no COA should issue where the claim is foreclosed by binding

circuit precedent 'because reasonable jurists will follow controlling law.'" (quoting *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007)), *cert. denied*, 136 S. Ct. 1661 (2016). While there are undoubtedly other prisoners, like Chapotin, still serving pre-*Booker* career offender sentences, predicated on the guidelines' residual clause, precious few have an avenue for review of—let alone relief from—their unconstitutional sentences.

Not only does Chapotin's petition offer a fleeting opportunity to resolve a long-standing issue that still divides the Courts of Appeals, but, without the guidelines' residual clause, Chapotin is not a career offender. Thus, if *Johnson* applies to, and invalidates, the mandatory guidelines' residual clause, a new sentence within Chapotin's currently applicable guideline range would result in his immediate release.

b. As to the second question presented, Justice Sotomayor suggested that certiorari was appropriately denied in *St. Hubert* because, "the Eleventh Circuit has not yet appeared to address a procedural due process claim head on," and determined to "leave it to that court to consider the issue in the first instance in an appropriate case." *St. Hubert*, 140 S. Ct. at 1728. In this case, Chapotin pressed the due process question before the district court, obtained a certificate of appealability on the issue, and argued it in his briefing before the Eleventh Circuit. *See* Cv-DE37:7-9; Brief for Appellant at 17-18, 43-47, *Chapotin*, No. 21-10586 (11th Cir. 2021); Reply Brief for Appellant at 15-20, *Chapotin*, No. 21-10586. The government also briefed the issue on appeal. Brief for Appellee at 38-40, *Chapotin*, No. 21-

10586. The Eleventh Circuit therefore could have "address[ed] [his] procedural due, process claim head on." It simply chose to rely on the prior panel precedent rule instead. *Chapotin*, slip op. at 14. Through its silence, the Eleventh Circuit has spoken. It is now up to the Court's to reconsider correcting the course.

CONCLUSION

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

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Miami, Florida
October 19, 2022