No. 17-__

IN THE

Supreme Court of the United States

STONEY LESTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the residual clause of the "violent felony" provision in the Armed Career Criminal Act of 1984 is unconstitutionally vague. In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new substantive rule of constitutional law that is retroactive to cases on collateral review. Petitioner was sentenced under the identically worded residual clause of the mandatory Sentencing Guidelines' career offender provision before the Guidelines were rendered advisory by *United States v. Booker*, 543 U.S. 220 (2005). Petitioner was granted authorization to file a successive motion to vacate his sentence on the basis of the rule in *Johnson*. The district court denied petitioner's motion on the basis of binding Eleventh Circuit precedent, but granted him a certificate of appealability.

The questions presented are:

1. Whether the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989), is categorical, such that *Welch* has made *Johnson*'s rule retroactive for purposes of all cases on collateral review.

2. Whether the rule announced in *Johnson* and made retroactive in *Welch* renders the residual clause of the career offender provision of the mandatory, pre-*Booker* Sentencing Guidelines unconstitutionally vague.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Stoney Lester respectfully petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the district court denying petitioner's motion to vacate his sentence, but granting him a certificate of appealability ("COA"), is unreported but reprinted in the Appendix to the Petition ("App.") at 1a-3a. The court of appeals' order granting petitioner authorization to file his motion to vacate is unreported but reprinted at App. 13a-27a.

JURISDICTION

This petition is filed under this Court's Rule 11. The judgment of the district court was entered on January 31, 2018. App. 3a. Petitioner filed his notice of appeal on February 8, 2018, and the case was docketed in the court of appeals on February 9, 2018 as Case No. 18-10523. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions are set forth at App. 28a-34a.

INTRODUCTION

Lester's 2004 sentence for possession with intent to distribute crack cocaine was increased under the

"residual clause" of the career offender provision of the mandatory, pre-*Booker* Sentencing Guidelines. Lester received the mandatory minimum sentence of 262 months, a sentence 111 months higher than the maximum potential sentence absent application of the Guidelines' residual clause. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the identically worded residual clause of the "violent felony" provision in the Armed Career Criminal Act of 1984 ("ACCA") is unconstitutionally vague. And in *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new substantive rule of constitutional law that is retroactive to cases on collateral review.

Lester received authorization from the Eleventh Circuit to challenge his sentence as unconstitutionally vague under *Johnson*'s rule in a successive motion to vacate his sentence under 28 U.S.C. § 2255(h)(2), but the district court denied that motion on the basis of later-decided Eleventh Circuit precedent, where Lester's appeal is currently pending. *See In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

This Court should grant Lester's request for a writ of certiorari before judgment to address whether federal inmates whose sentences were enhanced under the residual clause of the mandatory, pre-*Booker* Sentencing Guidelines may challenge that provision as unconstitutionally vague in a successive motion to vacate under 28 U.S.C. § 2255(h)(2). There are currently several petitions pending in this Court raising the same underlying questions as Lester's case, but each of those petitioners was denied a COA in the courts below, creating a procedural posture that

complicates review.[1] Lester files this petition for certiorari before judgment because the Eleventh Circuit's decision in *Griffin* already effectively resolves his claim, and because his case is the ideal vehicle for this Court's consideration of the exceptionally important questions presented. Specifically:

- Unlike each of the pending petitions of which he is aware, Lester was granted a COA by the district court on the questions presented.
- The prior felony that the sentencing court determined was a "crime of violence" predicate under the residual clause—a walkaway escape from an unsecured facility—was essential to Lester's career offender designation, and indisputably does not qualify as a predicate "crime of violence" or "controlled substance offense" under any other clause of the career offender provision.
- The career offender enhancement resulted in a mandatory increase in Lester's sentence of nearly a decade. Without the enhancement, the top of Lester's mandatory sentencing range was 151 months—a term that would have expired over two years ago. Application of the enhancement elevated the minimum permissible sentence to 262 months, a term that the district judge reluctantly imposed "because," in his words, "I'm required to." Dkt. 95 at 22-23.[2]

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[1] *See Allen v. United States*, No. 17-5684; *Gates v. United States*, No. 17-6262; *James v. United States*, No. 17-6769; *Robinson v. United States*, No. 17-6877.

[2] Citations to "Dkt." refer to the docket entries in the district court.

In short, there are no procedural obstacles to a ruling that the rule announced in *Johnson* and made retroactive in *Welch* renders the mandatory Guidelines' residual clause unconstitutionally vague, and such a ruling would result in Lester's nearly immediate release from prison.

Given the numerous cases pending in this Court and in the lower courts raising the same underlying issues, the questions presented here are indisputably exceptionally important. As demonstrated in this petition, the lower federal courts are in a state of disarray regarding whether claims like Lester's may proceed. The Eleventh Circuit is a case in point. In *Griffin*, a panel of that court decided in the circumscribed setting of a § 2255(h)(2) authorization request—where the petitioner is unable to submit briefing or petition for rehearing or a writ of certiorari to challenge a denial, *see* 28 U.S.C. § 2244(b)(3)(E)—that *Johnson*'s rule was not retroactive for purposes of challenging the mandatory Guidelines, and that in any event, provisions in the mandatory Guidelines are categorically immune from vagueness challenge. 823 F.3d at 1354-55. Four Eleventh Circuit judges have since detailed at length why "*Griffin* is deeply flawed and wrongly decided," yet the decision remains controlling in that Circuit. *In re Sapp*, 827 F.3d 1334, 1337 (11th Cir. 2016) (Jordan, Rosenbaum, Jill Pryor, JJ., concurring); *see In re McCall*, 826 F.3d 1308, 1310 (11th Cir. 2016) (Martin, J., concurring).

Both the First and Third Circuits have also explicitly disagreed with *Griffin*'s conclusion that petitioners like Lester are not entitled to relief, and have

therefore granted petitioners permission to file a successive motion raising the argument. Several district courts across the country have actually granted relief. Although no court of appeals has yet granted relief to a petitioner, that is primarily a result of the government's litigation decisions—the government has not been appealing adverse district court judgments on this issue, and has even voluntarily dismissed its own appeals from such orders to the First and Ninth Circuits. *See infra* at 12-15. As a result, no circuit conflict more direct than the already open disagreement between the First and Third Circuits and the Eleventh Circuit (which has been joined by the Fourth, Sixth, and Tenth Circuits) is likely to develop on the ultimate question whether *Johnson*-based challenges to mandatory Guidelines sentences may be raised in a successive § 2255 motion.

The Eleventh Circuit and the Fourth Circuit are in open conflict, however, over the predicate question in this case, which concerns the proper operation of *Teague* retroactivity analysis generally and under 28 U.S.C. § 2255(h)(2). Specifically, the Eleventh Circuit held in *Griffin* that although *Welch* declared *Johnson*'s rule retroactive, that rule was *not* retroactive "for purposes of a second or successive § 2255 motion" challenging a mandatory Guidelines sentence. *Griffin*, 823 F.3d at 1355. The Fourth Circuit has recognized that there is no support for "the proposition that a rule can be substantive in one context but procedural in another," and that the proper approach is to treat a new rule of constitutional law as categorically retroactive or not, and to separately

inquire whether that rule provides relief to the petitioner. *In re Hubbard*, 825 F.3d 225, 234 (4th Cir. 2016).

The Eleventh Circuit's holding that petitioners like Lester are not entitled to relief, moreover, is profoundly incorrect. *Griffin* ignored and directly conflicts with longstanding precedents of this Court establishing (1) that the retroactivity analysis under *Teague* and its progeny is categorical, *see, e.g.*, *Davis v. United States*, 564 U.S. 229, 243 (2011); (2) that laws that fix sentences for crimes—and not just laws that define crimes themselves—must provide adequate notice of the conduct they cover, as *Johnson* itself illustrates; and (3) that the mandatory, pre-*Booker* Guidelines were just as binding on district courts as statutory sentencing ranges. This Court's subsequent decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), explicitly confirms the latter two points: *Beckles* explained that both "laws that define criminal offenses *and laws that fix the permissible sentences for criminal offenses*" are subject to vagueness challenges. *Id.* at 892 (emphasis altered). And although *Beckles* concluded that the current advisory Guidelines are not subject to vagueness challenges, it did so precisely because "'[t]he due process concerns that . . . *require[d] notice in a world of mandatory Guidelines* no longer' apply." *Id.* at 894 (emphasis added) (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)).

The petitions already pending in this Court underscore the urgent need for this Court to definitively resolve whether movants in Lester's situation are entitled to relief. And as Lester's own case demon-

strates, many of those movants would be entitled to immediate release from prison if the questions presented are resolved favorably to Lester. Lester's petition offers the ideal vehicle for the Court to resolve these issues promptly and definitively.

The petition for a writ of certiorari before judgment should be granted.

STATEMENT OF THE CASE

A. Lester's Conviction And Sentencing

1. In 2004, Lester received a 262-month sentence after pleading guilty to possession with intent to distribute over five grams of crack cocaine. Using the 2000 version of the Sentencing Guidelines Manual, a probation officer calculated Lester's offense level as 30 and assigned six criminal history points for Lester's 1985 conviction for sale of marijuana and his 1990 conviction for a nonviolent walkaway escape from a halfway house. Dkt. 166 at 7-10. Lester's mandatory sentencing range based on those criteria alone would have been 121-151 months. U.S. Sentencing Guidelines Manual ("USSG") ch. 5, pt. A (2000).

But Lester was not eligible to receive a sentence within that range, because the probation officer also determined that Lester was a "career offender" under USSG § 4B1.1, which applied to any defendant who has committed two or more felonies that qualify as a "controlled substance offense" (for Lester, the marijuana conviction) or a "crime of violence" (the walkaway escape crime). Dkt. 166 at 7. A "crime of violence" was defined as an offense that is punishable by imprisonment for over one year and "(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*." USSG § 4B1.2(a)(1)-(2) (emphasis added). Over Lester's objection (Dkt. 72 at 4-5), the district court agreed that his escape conviction was a crime of violence under the italicized "residual clause," and sentenced him as a career offender. Dkt. 95 at 22-23.

The career offender designation elevated Lester's statutorily mandated sentencing range to 262-327 months. At the time, a federal statute *required* the district court to adhere to that range, 18 U.S.C. § 3553(b) (2000 ed.), and the judge accordingly explained that he was sentencing Lester in that range because "I'm required to do so. It's not a matter of choice." Dkt. 95 at 22-23. The district court sentenced Lester to 262-months' imprisonment, the lowest sentence permitted by the statutory scheme then in effect. Dkt. 85 at 2; *see* 18 U.S.C. § 3553(b) (2000 ed.). Lester's appeal and initial § 2255 motion were not successful. *See United States v. Lester*, 142 F. App'x 364, 370-71 (11th Cir. 2005) (appeal); Dkt. 126 (§ 2255 judgment).

B. *Johnson* And *Welch*

1. On June 26, 2015, this Court held in *Johnson* that the residual clause of the ACCA is unconstitutionally vague. 135 S. Ct. at 2560. The ACCA, like the pre-*Booker* Career Offender Guideline under which Lester was sentenced, mandates an enhanced sentence for certain defendants who have been pre-

viously convicted of multiple "violent felon[ies]" or "serious drug offense[s]," 18 U.S.C. § 924(e)(1), and a residual clause identical to the Guidelines' deems any crime that "involves conduct that presents a serious potential risk of physical injury to another" a violent felony, *id.* § 924(e)(2)(B)(ii). The "hopeless indeterminacy" of that language leaves courts uncertain about both "how to estimate the risk posed by a crime" and "how much risk it takes for a crime to qualify as a violent felony," despite this Court's "repeated attempts and repeated failures" to craft a workable standard. 135 S. Ct. at 2557-58. The application of the vague language of the residual clause to enhance a sentence thus violates the Constitution's guarantee of due process. *Id.* at 2563.

This Court subsequently held in *Welch* that *Johnson* "changed the substantive reach of the [ACCA]" and altered "'the range of conduct or the class of persons that the [ACCA] punishes.'" 136 S. Ct. at 1265 (alterations in original) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Because "'even the use of impeccable factfinding procedures could not legitimate' a sentence based on [the ACCA's residual] clause," *Welch* held, it was clear that *Johnson* announced a new substantive rule that applies retroactively "in cases on collateral review." 136 S. Ct. at 1265 (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)).

C. The Initial Court of Appeals § 2244(b)(3) Proceedings

On April 19, 2016, the day after this Court decided *Welch*, Lester requested authorization from the Eleventh Circuit to file a successive motion to vacate

his sentence, arguing that the rule announced in *Johnson* and made retroactive to cases on collateral review in *Welch* applied with equal force to the mandatory Career Offender Guideline. The court of appeals granted Lester that authorization in an unpublished order. App. 20a. Just days later, however, a separate panel of the court of appeals published *Griffin*, deciding with no input from the parties that the mandatory Guidelines were not subject to vagueness challenges like Lester's. 823 F.3d at 1354.

D. The District Court Proceedings

Lester proceeded to the district court and filed the present motion. The district court accepted a magistrate judge's recommendation to dismiss Lester's motion, relying on *Griffin* for the propositions that this Court has not made *Johnson* "retroactively applicable to collateral challenges to the career offender guideline enhancement," and that in any event, *Johnson*'s rule does not apply to the mandatory Sentencing Guidelines. App. 1a-2a. The court issued a COA, however, and noted that reasonable jurists could disagree over whether *Griffin* "was correctly decided," and whether *Johnson* applies to the career offender provision of the pre-*Booker* Guidelines. App. 2a-3a.

E. Proceedings On Appeal

On February 8, 2018, Lester timely filed a notice of appeal to the Eleventh Circuit. The appeal was docketed in the court of appeals on February 9, 2018 as Case No. 18-10523. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C.

§ 1254. *See* Robert L. Stern, et al., *Supreme Court Practice* § 2.4, at 75 (8th ed. 2002).[3]

REASONS FOR GRANTING THE WRIT

Lester's petition provides this Court the ideal vehicle to answer a question that affects hundreds if not thousands of federal prisoners—*viz.*, whether *Johnson*'s rule, made retroactive in *Welch*, invalidates the residual clause of the mandatory Sentencing Guidelines. The lower courts have reached conflicting decisions on that question. Particularly given the immediate effect a resolution of the question would have on federal inmates like Lester, this Court should grant certiorari to review the question immediately.

I. THE PETITION PRESENTS A RECURRING ISSUE OF WIDESPREAD IMPORTANCE ON WHICH THE LOWER COURTS ARE DIVIDED

As the many petitions pending in this Court that raise similar questions in more complex procedural postures demonstrate, the question whether federal inmates are entitled to mount constitutional vagueness challenges to their career offender enhancements under the residual clause of the mandatory Sentencing Guidelines affects many federal inmates. A group of federal public defender offices recently estimated that approximately 1180 inmates would

[3] Lester petitioned for initial hearing en banc in the court of appeals on March 20, 2018, before recognizing that this Court has relisted several petitions raising the same underlying question as Lester's case but which do not present the question as cleanly as Lester's case does.

qualify for relief under petitioner's proposed rule. *See* Br. of Amici Curiae, *United States v. Brown*, No. 16-7056 (4th Cir.), ECF No. 62-1 at 20.

The lower federal courts are in a general state of disarray on the question. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari before judgment to address the constitutionality of the Sentencing Guidelines "because of the disarray among the Federal District Courts"). Three courts of appeals have joined the Eleventh Circuit in holding that *Johnson* does not afford relief to individuals sentenced under the mandatory Guidelines. *See United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017).

The First and Third Circuits have published opinions granting petitioners authorization to pursue successive motions to vacate a mandatory Guidelines sentence on the basis of *Johnson*, and in the process have directly criticized the Eleventh Circuit's holding. *See Moore v. United States*, 871 F.3d 72, 81 (1st Cir. 2017) ("[W]e find ourselves quite skeptical concerning the government's reliance on recent Eleventh Circuit precedent to contend that the mandatory guidelines 'did not alter the statutory boundaries for sentences set by Congress for the crime.'" (quoting *Griffin*, 823 F.3d at 1355)); *In re Hoffner*, 870 F.3d 301, 310 & n.13 (3d Cir. 2017) (criticizing *Griffin*'s substance and its decision to resolve "a merits question in the context of a motion to authorize a second or successive habeas petition"); *see also Var-*

gas v. United States, 2017 WL 3699225 (2d Cir. May 8, 2017).

Further, numerous court of appeals judges have expressed sharp disagreement with the decisions that foreclose relief, including four Judges of the Eleventh Circuit and Chief Judge Gregory of the Fourth Circuit. *See Sapp*, 827 F.3d at 1337 (Jordan, Rosenbaum, Jill Pryor, JJ., concurring); *McCall*, 826 F.3d at 1310 (Martin, J., concurring); *Brown*, 868 F.3d at 304 (Gregory, C.J., dissenting). As one district judge in the Sixth Circuit explained just last week, "the *right* vindicated in *Johnson* was the right to be free from unconstitutionally vague statutes that fail to clearly define 'crime of violence' or 'violent felony,' not simply the right not to be sentenced under the residual clause of the ACCA." *United States v. Chambers*, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). The view adopted by the courts agreeing with the Eleventh Circuit "invites Potemkin disputes about whether the Supreme Court has explicitly applied its precedents to a specific factual circumstance rather than asking whether the *right* the Supreme Court has newly recognized applies to that circumstance." *Id.*[4]

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[4] Certain courts of appeals denying relief have done so in the context of a first § 2255 motion, relying upon the statute of limitations in § 2255(f)(3), which allows motions to be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." *See Raybon*, 867 F.3d at 628-29. As the First Circuit and other courts have recognized, however, the § 2255(f)(3) analysis mirrors the § 2255(h)(2) question whether petitioners like Lester are rely-

Although no court of appeals has yet granted a successive motion to vacate a mandatory Guidelines sentence on the basis of *Johnson*, several district courts have, and the absence of favorable authority in the courts of appeals appears to be due at least in part to deliberate litigation decisions on the part of the government. For example, after the First Circuit issued its decision in *Moore* emphatically granting authorization to pursue *Johnson*-based challenges to the mandatory Guidelines, the district court in *United States v. Roy*, 282 F. Supp. 3d 421 (D. Mass. 2017), granted a petitioner's motion and ordered resentencing. The government initially noticed an appeal in *Roy*, but then voluntarily dismissed it. Gov't's Mot. for Withdrawal of Appeal, 1st Cir. Case No. 17-2169 (filed Jan. 8, 2018). Other district courts in the First Circuit have granted relief to petitioners, and the government has not appealed. *Reid v. United States*, 252 F. Supp. 3d 63, 66-68 (D. Mass. 2017). The government similarly dismissed its ap-

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ing on the new rule or right recognized in *Johnson*, which *Welch* made retroactive, or whether such petitioners require some other new rule of law. *Moore*, 871 F.3d at 82-83; *Sarracino v. United States*, 2017 WL 3098262, at *5 n.3 (D.N.M. June 26, 2017) ("Although Respondent frames its argument [that *Johnson* does not apply] under § 2255(f), Respondent actually substantively argues that Petitioner's motion does not rely on a 'new rule of constitutional law, made retroactive to cases on collateral review' under § 2255(h)(2)."). Indeed, this Court expressly linked the two provisions in *Dodd v. United States*, 545 U.S. 353, 359 (2005). This Court would therefore be best served by granting review of a successive motion like Lester's—which was filed within a year of *Johnson*—to allow the Court to resolve the proper result under both § 2255(f)(3) and § 2255(h)(2).

peal to the Ninth Circuit of the district court's grant of relief in *United States v. Jefferson*, 2016 WL 6496456 (N.D. Cal. Oct. 19, 2016); Gov't's Mot. to Dismiss Appeal, 9th Cir. Case No. 17-10022 (filed Mar. 22, 2017).[5] If the government continues this practice, there is no likelihood that a direct circuit conflict will develop. Review accordingly should be granted now.

There is, however, a direct circuit conflict between the Fourth and Eleventh Circuits over the predicate question whether a new rule of constitutional law can ever be made only partially retroactive to cases on collateral review. *Compare Griffin*, 823 F.3d at 1355 (holding that the rule made retroactive in *Welch* would be procedural and therefore non-retroactive as applied to Guidelines), *with Hubbard*, 825 F.3d at 234 (expressly rejecting *Griffin*'s "proposition that a rule can be substantive in one context but procedural in another").

II. THIS PETITION IS THE IDEAL VEHICLE FOR RESOLUTION OF *JOHNSON*-BASED MANDATORY GUIDELINES CLAIMS

This petition is the ideal vehicle to resolve the foregoing conflicts.

First, because the district court issued Lester a COA, App. 3a, granting Lester's petition would ena-

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[5] *See also United States v. Parks*, 2017 WL 3732078 (D. Colo. Aug. 1, 2017) (government did not appeal); *United States v. Walker*, 2017 WL 3034445, at *5 (N.D. Ohio July 18, 2017) ("Because the pre-*Booker* mandatory Sentencing Guidelines are sufficiently statute-like to be subject to vagueness analysis, *Johnson* applies directly.") (government did not appeal).

ble this Court to confront the question of *Johnson*'s applicability to the mandatory Guidelines directly and definitively. If the Court attempts to resolve the question presented in the context of reviewing a denial of a COA, it could resolve the case on the ground that a petitioner had merely made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The district court already answered that question in the affirmative, App. 3a, such that the merits question, free of any procedural cloud, would be before this Court if it grants Lester's petition.

Second, as the court of appeals recognized in granting Lester's application for authorization to file a second or successive 28 U.S.C. § 2255 motion, it is indisputable that Lester would not have been categorized as a career offender had the sentencing court not concluded that Lester's non-violent, walkaway escape was a "crime of violence" under the residual clause of USSG § 4B1.2(a). App. 14a. At the time Lester was sentenced, binding precedent of the Eleventh Circuit held that such walkaway escape crimes "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another." *See United States v. Gay*, 251 F.3d 950, 953-55 (11th Cir. 2001). The government has never argued that another of Lester's convictions would otherwise qualify as a predicate offense under the mandatory Career Offender Guideline. Nor has the government argued that Lester's walkaway escape conviction would satisfy the "force" or "enumerated" clauses of the mandatory Guidelines' "crime of violence" definition, *see* USSG § 4B1.2(a).

Third, Lester was sentenced at the very bottom of his enhanced, mandatory sentencing range. It is abundantly clear that Lester *could not* receive a sentence remotely approaching his original 262-month term under the current advisory Guidelines. At a resentencing, the district court would have to calculate Lester's sentence based on the current version of the Guidelines. *See* USSG § 1B1.11(a) (2016); *see also United States v. Clark*, 8 F.3d 839, 844 (D.C. Cir. 1993) ("[R]esentencing occurs under the version of the Guidelines in effect at the time of resentencing" absent ex post facto concerns). Under those Guidelines, Lester's advisory sentencing range would be 51-63 months.[6] Re-imposing a 262-month sentence would require a departure of more than four times the advisory Guidelines range. Any such sentence would plainly constitute an abuse of discretion, particularly given that Lester has already served a lengthy term of incarceration, the probation officer determined there was no basis for an upward departure, and the district court reluctantly imposed the most lenient sentence available under the bind-

[6] Today Lester would be charged under 21 U.S.C. § 841(b)(1)(C). His base offense level for 15.5 grams of crack cocaine would be 18. *See* USSG § 2D1.1(c)(11) (2016 ed.) (at least 11.2g but less than 16.8g of cocaine base). Assuming that the same two enhancements and criminal history points applied, Lester's offense level would be 22 and his criminal history category would be III. USSG Ch. 5 Pt. A (Sentencing Table) (2016 ed.). The resulting guideline range would be 51-63 months. *Id.* Even assuming Lester would be resentenced to the maximum permissible term under the advisory Guidelines, he has already served that sentence *twice*, *plus* an additional 50 months.

ing Guidelines range. *See Gall v. United States*, 552 U.S. 38, 50 (2007) ("[A] major departure should be supported by a more significant justification than a minor one."). Accordingly, Lester would effectively be eligible for immediate release should the Court grant his petition and decide his case favorably.

III. THE ELEVENTH CIRCUIT'S RULE IS INCORRECT

The Eleventh Circuit's conclusion that inmates in Lester's situation are not entitled to relief is also profoundly flawed. Lester's entitlement to relief turns on two questions. The first is procedural: whether Lester's claim "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The second is the substantive merits question: whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague under *Johnson*, rendering his sentence "in violation of the Constitution." *Id.* § 2255(a). The answer to each question is yes. Every step of the Eleventh Circuit's contrary holding violates this Court's precedent.

A. This Court Has Made *Johnson*'s Rule Retroactive To All Cases On Collateral Review.

Lester easily satisfies the requirements of § 2255(h)(2): *Johnson* announced a new rule of constitutional law that was previously unavailable to him, and that rule was "made retroactive to cases on collateral review" by *Welch*, which held without qualification that *Johnson* is a "substantive decision and

so has retroactive effect under *Teague* in cases on collateral review." *Welch*, 136 S. Ct. at 1265. That is the end of the threshold inquiry under § 2255(h)(2). The only remaining question is the substantive merits inquiry—whether the rule announced in *Johnson* and made retroactive in *Welch* renders Lester's career offender enhancement unconstitutional. As explained below, Lester need not rely on any other new rule of law apart from *Johnson* to secure relief. *See infra* Part III.B.

The Eleventh Circuit concluded in *Griffin* that *Welch*'s holding did not make "*Johnson* retroactive for purposes of a second or successive § 2255 motion" challenging a mandatory Guidelines sentence, because in the panel's view the mandatory Guidelines' career offender enhancement did not have the same "substantive" effect as the ACCA enhancement. 823 F.3d at 1355. That conclusion contravenes this Court's precedent in two respects.

First, this Court has held that *Teague*'s retroactivity analysis "is concerned with whether, *as a categorical matter*, a new rule is available . . . as a *potential* ground for relief." *Davis*, 564 U.S. at 243 (first emphasis added); *see Teague*, 489 U.S. at 316 (plurality opinion) (retroactive rules must be "applied retroactively to *all* defendants on collateral review"). As three Judges of the Eleventh Circuit put it in criticizing *Griffin*, a "new substantive rule of constitutional law is either retroactive on collateral review or it is not." *Sapp*, 827 F.3d at 1340. The categorical nature of the inquiry is confirmed by the plain text of § 2255(h)(2), which requires that this Court make the "rule" retroactive "to cases on collateral review,"

not to somehow make the rule retroactive to *particular* cases.

Griffin contravenes that precedent by determining "without a single case citation or other authority in support . . . that a substantive rule of constitutional law expressly made retroactive by [this] Court can later be made only partially retroactive by a circuit court." *Sapp*, 827 F.3d at 1339-40. As the Fourth Circuit observed, there is no support for "the proposition that a rule can be substantive in one context but procedural in another." *Hubbard*, 825 F.3d at 234. Indeed, *Griffin*'s approach cannot be reconciled with other precedent of the Eleventh Circuit itself. *See In re Pinder*, 824 F.3d 977, 978-79 (11th Cir. 2016) (it was "clear" that motion satisfied § 2255(h)(2) because the "Supreme Court has held that the rule announced in *Johnson* applies retroactively on collateral review" in *Welch*, and "[w]hether that new rule of constitutional law invalidates Pinder's sentence must be decided in the first instance by the District Court").

Griffin's approach ignores that the question whether a particular case falls within the scope of a retroactive rule is separate from whether that rule is retroactive. *See Davis*, 564 U.S. at 243-44 ("[R]etroactive application of a new rule of substantive Fourth Amendment law *raises* the [merits] question whether a suppression remedy applies; it does not answer that question."); *O'Dell v. Netherland*, 521 U.S. 151, 159 (1997) ("Before we can decide whether petitioner's claim falls within the scope of *Simmons*, we must determine whether the rule of *Simmons* was [retroactive].").

Second, *Griffin* incorrectly asserts that invalidating the residual clause of the mandatory Guidelines would not have a "substantive" effect on Lester's sentence. As detailed below, because the Guidelines established sentencing ranges that a federal statute made *mandatory* at the time that Lester was sentenced, the improper career offender enhancement *required* the district judge to impose a 262-month sentence when the maximum lawful sentence would otherwise have been 151 months, nearly a decade shorter. The enhancement therefore had precisely the same unconstitutional effect that the ACCA enhancement did: it resulted in a prison term "years longer than the law otherwise would allow." *Welch*, 136 S. Ct. at 1261.

B. The Pre-*Booker* Guidelines Are Subject To Vagueness Challenges Because They Fixed The Permissible Sentences For Criminal Offenses.

1. The merits question is whether—in light of the new, retroactive rule announced in *Johnson*—Lester's sentence is unconstitutional because the residual clause under which his walkaway escape was deemed a "crime of violence" is unconstitutionally vague. *Johnson* holds that the identically worded residual clause of the ACCA was so vague that it violated due process notice requirements. The only remaining issue is whether the fact that the provision that enhanced Lester's sentence was written by the Sentencing Commission rather than Congress is so constitutionally significant that due process notice requirements do not apply. *See Moore*, 871 F.3d at 81.

This Court definitively resolved that issue in *Booker,* in a dispositive analysis that *Griffin* does not even mention, much less rebut. The Court in *Booker* held that the mandatory Guidelines had "the force and effect of laws" and were "binding on judges." 543 U.S. at 234. The Court specifically rejected the proposition that a district judge was "bound only by the statutory maximum" sentence. *Id.* Although departures from the mandatory Guidelines range were available in specified circumstances, the Court explained, they were not available as a matter of discretion and would be "unavailable . . . as a matter of law" in most cases, meaning "the judge [was] bound to impose a sentence within the Guidelines range." *Id.* Lester's sentencing judge certainly understood that principle. Dkt. 95 at 22-23. As the *Sapp* concurrence noted, "the mandatory Guidelines definitively did alter the substantive boundaries for sentencing, requiring in effect statutory minimum and maximum penalties for most cases." 827 F.3d at 1340. Indeed, *Booker* explicitly held that for those reasons, "the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, *lacks constitutional significance*." 543 U.S. at 237 (emphasis added).

In deciding that the now-advisory Guidelines are not subject to a vagueness challenge, this Court specifically contrasted the current regime with the pre-*Booker* Guidelines that "were initially binding on district courts." *Beckles*, 137 S. Ct. at 894. Because the Guidelines are now merely advisory, "'[t]he due process concerns that . . . *require[d] notice in a world of mandatory Guidelines* no longer' apply." *Id.* (em-

phasis added) (quoting *Irizarry*, 553 U.S. at 714). That analysis confirms that due process notice requirements *did apply* to the mandatory Guidelines.

There is no relevant practical or even theoretical difference between the impact of an ACCA enhancement and the mandatory Guidelines enhancement that Lester received. Absent the ACCA enhancement, the maximum sentence for being a felon in possession of a firearm is 10 years; with it the minimum is 15 years. *See Johnson*, 135 S. Ct. at 2555. Absent the Guidelines enhancement, the maximum sentence for Lester's drug crime was 151 months; with it, the minimum was 262 months. *Supra* at 7-8. In both situations, the application of a statutorily mandated clause which indisputably provides inadequate notice of the consequences of committing the crime results in a sentence "years longer than the law otherwise would allow." *Welch*, 136 S. Ct. at 1261. The fact that the statute defining Lester's drug offense set out a higher maximum sentence is entirely irrelevant; once the Guidelines were promulgated and established a permissible sentencing range for Lester's crime, a statute mandated that the sentencing court impose a sentence within that range. *See* 18 U.S.C. § 3553(b) (2000 ed.).

2. *Griffin*'s contrary analysis is flawed from start to finish. Most fundamentally, *Griffin* incorrectly holds that only laws that "define illegal conduct" are subject to vagueness challenges. 823 F.3d at 1354. *Johnson* itself refutes that proposition: the ACCA enhancement did not define illegal conduct either, and the Court explicitly held—relying upon decades-old precedent—that the prohibition on vagueness

applies not just to "statutes defining elements of crimes, but also to statutes fixing sentences." 135 S. Ct. at 2557; *see United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."); *Beckles*, 137 S. Ct. at 892 ("laws that fix the permissible sentences for criminal offenses" are subject to vagueness challenges (emphasis omitted)).[7] That error alone requires correction by this Court. *See also Sapp*, 827 F.3d at 1338 ("The ACCA itself . . . does not establish the illegality of any conduct, but instead fixes certain sentences. Yet the Supreme Court held that the ACCA's residual clause was void for vagueness.").

Griffin also repeatedly asserts variations on the theme that the mandatory Career Offender Guideline enhancement could not be vague because it did "not alter the statutory boundaries for sentencing set by Congress for the crime." 823 F.3d at 1355. As explained *supra* at 22-23, however, that assertion simply ignores the binding nature of the mandatory Guidelines, as dictated by statute, *see* 18 U.S.C. § 3553(b) (2000 ed.), and as consistently set forth in many of this Court's cases, most notably *Booker*. Before *Booker*, the top end of the mandatory Guidelines range was the functional equivalent of a "statutory maximum" sentence—"the fact that the Guidelines were promulgated by the Sentencing Commission,

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[7] *Griffin* quoted this principle but then failed to offer any analysis of whether the mandatory Guidelines fixed sentences. 823 F.3d at 1353.

rather than Congress, *lacks constitutional significance*." *Booker*, 543 U.S. at 237 (emphasis added). The Guidelines were binding, after all, *because Congress said so*. 18 U.S.C. § 3553(b) (2000 ed.); *see Sapp*, 827 F.3d at 1340; *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013) ("Before *Booker* the guidelines were the practical equivalent of a statute."). *Griffin* does not explain how the mandatory Guidelines could be sufficiently immutable to implicate the Sixth Amendment but not the Fifth.

Finally, the *Griffin* panel asserted that Griffin's pre-sentencing report accorded him all the notice of his career offender designation that due process required. 823 F.3d at 1355. The defendant in *Johnson* was similarly notified that his sentence was being enhanced based on ACCA's residual clause, *see* 135 S. Ct. at 2556, but this Court did not dwell on that fact for the obvious reason that the purpose of the Due Process Clause's notice requirement is to provide notice of the potential penalties *before a crime is committed*, *see, e.g.*, *Batchelder*, 442 U.S. at 123. In any event, *Johnson* made clear that telling the defendant that a vague provision is being applied to him does not make the provision any less vague.

IV. A GRANT OF CERTIORARI BEFORE JUDGMENT IS WARRANTED IN THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE

A petition for a writ of certiorari before judgment in a case pending before a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require imme-

diate determination in this Court." Sup. Ct. R. 11. Lester's petition meets that exacting requirement.

As detailed in this petition, the questions presented are of grave importance not only to Lester but also to countless other federal inmates and to the federal judiciary, which is muddling through a deluge of requests without definitive guidance from this Court. Deviation from normal appellate practice in Lester's case is warranted because there is nothing to be gained by litigating his case before the Eleventh Circuit—*Griffin* already expresses that court's views—and because Lester's case provides the Court with the best conceivable vehicle in which to definitively resolve these issues.

This Court has on several occasions granted certiorari before judgment to provide expeditious resolution of exceptionally important legal questions.[8] For example, the Court granted certiorari before judgment in *Mistretta v. United States*, 488 U.S. 361 (1989), "because of the disarray among the Federal District Courts" over the exceptionally important question of the constitutionality of the Sentencing Guidelines. *Id.* at 371. Here the disarray extends to the courts of appeals. *See supra* at 12-15.

Granting certiorari before judgment here is particularly appropriate because for Lester and other similarly situated prisoners, every day that passes is

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[8] *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 259-260 (2003); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Nixon*, 418 U.S. 683 (1974).

a day they remain imprisoned on the basis of an unconstitutional sentence.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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