APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

STONEY LESTER Petitioner v. UNITED STATES OF AMERICA, Respondent.	:	No. 5:02-cr-37 (CAR)

ORDER ON RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is the United States Magistrate Judge's Recommendation to grant the Government's Motion to Dismiss and dismiss Petitioner's Motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner has filed an Objection to the Recommendation wherein he restates his original arguments and contentions which have been thoroughly and completely addressed in the Recommendation. This Court has fully considered the record in this case and made a *de novo* determination of the portions of the Recommendation to which Petitioner objects. Having done so, the Court finds Petitioner's Objection unpersuasive and agrees with the Recommendation to dismiss the petition. As explained in the Recommendation, because *Johnson*

v. United States[1] does not apply to the Sentencing Guidelines when they were mandatory, it does not constitute a new rule of constitutional law as applied to Petitioner. Moreover, *Johnson* has not been made retroactively applicable to collateral challenges to the career offender guideline enhancement.

Accordingly, the Magistrate Judge's Recommendation [Doc. 167] **regarding the Motion to Dismiss** is **HEREBY ADOPTED AND MADE THE ORDER OF THE COURT**. The Government's Motion to Dismiss [Doc. 163] is **GRANTED**, and Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Doc. 151] is **DISMISSED**.

The **Recommendation to deny a certificate of appealability**, however, is **NOT ADOPTED**. Under 28 U.S.C. § 2253(c)(1), an appeal cannot be taken from a final order in a habeas proceeding unless a certificate of appealability is issued. To obtain a COA, a movant must make a "substantial showing of a denial of a constitutional right."[2] The decision to issue a certificate of appealability requires "an overview of the claims in the habeas petition and a general assessment of their merits."[3] The movant satisfies this requirement by demonstrating that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude

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[1] ___ U.S. ___, 135 S. Ct. 2551 (2015).

[2] 28 U.S.C. § 2253(c)(2).

[3] *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

the issues presented are adequate to deserve encouragement to proceed further."[4]

The Court finds reasonable jurists could disagree on whether *In re Griffin*[5] was correctly decided and whether *Beckles v. United States*[6] (decided after *Griffin*) extends to the pre-*Booker*[7] sentencing guidelines. Thus, a certificate of appealability is **GRANTED** on whether *Johnson*[8] applies to the career offender provision of the pre-*Booker* Sentencing Guidelines.

It is **SO ORDERED** this 31st day of January, 2018.

S/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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[4] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000).

[5] 823 F.3d 1350 (11th Cir. 2016).

[6] 137 S. Ct. 886 (2017).

[7] 543 U.S. 220 (2005).

[8] 135 S. Ct. 2551 (2015).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

STONEY LESTER Petitioner v UNITED STATES OF AMERICA, Respondent.	No. 5:02-cr-00037-CAR-CHW-1 Proceedings under 28 U.S.C. § 2255 Before the U.S. Magistrate Judge

RECOMMENDATION

Currently before the Court is Petitioner, Stoney Lester's, Motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The Eleventh Circuit Court of Appeals authorized Petitioner to file a second or successive motion to vacate upon making a prima facie under 2255(h)(2) that his motion "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." Doc. 142. 28 U.S.C. § 2255(h). Petitioner, who was sentenced as a career offender under the pre-Booker and then mandatory Guidelines, points to the new rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015) which invalidated the residual clause of the Armed Career Criminal Act as unconstitutionally vague. Petitioner argues that identical language found in the career offender

guideline enhancement's residual clause, under which Petitioner was sentenced, is also void for vagueness. Because *Johnson* did not invalidate the then mandatory Sentencing Guidelines and has not been made retroactive to collateral challenges to the Sentencing Guidelines, it is **RECOMMENDED** that the Government's Motion to Dismiss be **GRANTED** and that Petitioner's Motion brought pursuant to Section 2255 be **DISMISSED**.

BACKGROUND

Petitioner pleaded guilty to one count of distribution of more than five grams of crack cocaine in July 2004. According to the Final Presentence Investigation Report, Petitioner qualified for a career offender enhancement found in USSG §4B1.1 resulting in a total offense level of 34. Doc. 166. Based on this offense level and a criminal history category of VI, Petitioner's guidelines sentencing range was 262 to 327. Petitioner objected to his career offender enhancement and argued that a prior conviction for sale of marijuana did not constitute a prior controlled substance offense as defined in the Guidelines. Doc. 94 at 5. Petitioner's objection was overruled and he was sentenced to 262 months imprisonment on June 2004. The Eleventh Circuit Court of appeals affirmed the issue on appeal. Petitioner's first motion to vacate filed under 28 U.S.C. § 2255 was denied in May 2006 without prejudice so that Petitioner could "recast his claims." Doc. 111. Petitioner did so, and he was denied relief on August 14, 2007. Doc 126. Petitioner did not appeal that adverse decision, but was granted authorization by the Eleventh Circuit Court of Appeals to file a second or successive

habeas petition. Doc. 148. Upon an unopposed motion by the Government, this case was stayed pending a decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). *Beckles* has now been decided and the issues have been re-briefed in light of the holding.

DISCUSSION

Because Petitioner previously filed an unsuccessful motion to vacate under 2255 in 2006, the current motion is impermissibly second or successive unless Petitioner satisfies the requirements in 2255(h) and 2244(b). Under Section 2255(h), before Petitioner may file a second or successive petition in the district court, he must first obtain authorization to do so from the Eleventh Circuit Court of Appeals. In this case, Petitioner obtained authorization based on 2255(h)(2), when the Eleventh Circuit certified that he made a prima facie showing that his motion contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Doc. 148 at 8. Once authorization is obtained, however, a district court must "dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirement in Section 2244. 28 U.S.C. § 2244(b)(4). As the Eleventh Circuit has explained, "things are different in the district court," as "[t]he statute puts on the district court the duty to make the initial decision about whether the petitioner meets the 2244(b) requirements — not whether he has made out a prima facie case for meeting them, but whether he

actually meets them." *Jordan v. Sec't, Dept. of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007). In making this finding, the district court must decide the issues de novo.

Similar to Section 2255(h), under Section 2244(b):

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense

Petitioner argues that he meets the requirement under 2244(b)(2)(A), in light of *Johnson*. In *Johnson,* the Supreme Court of the United States announced a new rule of constitutional law which was made retroactively applicable to cases on collateral review. *See Welch v. U.S.*, 136 S. Ct. 1257 (2016). *Johnson*, however, invalidated the residual clause of the Armed Career Criminal Act, and

Petitioner was not sentenced under the Armed Career Criminal Act. Petitioner was sentenced as a career offender under U.S.S.G. § 4B1.1, a sentencing guideline enhancement. Petitioner argues that because § 4B1.2's residual clause contains language identical to the language found unconstitutional in *Johnson*, *Johnson* applies to his enhancement and constitutes a new rule of constitutional law.

In *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), decided after *Johnson*, the Eleventh Circuit held that the "advisory guidelines cannot be unconstitutionally vague." Then in *Beckles v. U.S.*, 616 F. App'x 415 (11th Cir. 2015) (per curiam), the Eleventh Circuit affirmed the district court's denial of relief to a petitioner arguing, as the Petitioner in this case argues, that the "residual clause" in the career offender guideline enhancement was unconstitutionally vague under *Johnson*. The Eleventh Circuit rejected this argument, finding that "*Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or the Guidelines commentary." *Id.* at 416. The Petitioner in *Beckles* was granted certiorari to the Supreme Court, on the question of whether "*Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)." *Beckles v. United States*, 136 S. Ct. 2510 (June 27, 2016). The Supreme Court affirmed "[b]ecause the advisory Sentencing Guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)'s

residual clause is not void for vagueness." *Beckles*, 137 S. Ct. at 897.

Petitioner distinguishes *Matchett* and *Beckles*, arguing that because he was sentenced before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005)—at a time when the Guidelines were "mandatory" rather than advisory—the Guidelines fixed "the permissible sentences for criminal offense" and are therefore subject to vagueness challenges. As Petitioner recognizes, however, his argument is foreclosed by *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016). In *Griffin*, the Eleventh Circuit concluded that "the Guidelines—whether mandatory or advisory—cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." 823 F.3d at 1354 (citing *Matchett*, 802 F.3d at 1193-96); *see also In re Anderson*, 829 F.3d 1290 (2016) (citations omitted) (explaining that *Griffin* concluded that the reasoning in *Matchett* applies to the Guidelines when they were mandatory).

Petitioner's argument that *Beckles* "rejected" the logic used in or otherwise abrogated *Griffin* is without merit. The decision in *Beckles* left "open the question whether defendants sentenced to terms of imprisonment" during the period in which the sentencing guidelines were mandatory, "may mount vagueness attacks on their sentences." *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor concurring). Moreover, even if *Beckles* called *Griffin* into question, Eleventh Circuit precedent "[h]olds that *Welch* does not make *Johnson* retroactive for purposes of filing

a successive [Section] 2255 motion raising a *Johnson*-based challenge to the Sentencing Guidelines." *In re Sams*, 830 F.3d 1234, 1240 (11th Cir. 2016) (citing *Griffin*, 823 F.3d at 1355- 56). "[T]he Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). A new rule can also be found retroactive "through multiple holdings that logically dictate the retroactivity of the new rule," *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003), but the issue has already been decided. The Eleventh Circuit has determined that *Welch*, *Johnson*, nor any other Supreme Court case logically dictates the retroactivity of *Johnson* in the Guidelines context.

Because *Johnson* does not apply to the Sentencing Guidelines when they were mandatory, it does not constitute a new rule of constitutional law as applied to Petitioner. *Johnson* has also not been made retroactively applicable to collateral challenges to the career offender guideline enhancement. Therefore, Petitioner does not satisfy the statutory requirements found in Section 2244(b) and he is not entitled to relief based on *Johnson*.

CONCLUSION

In light of binding Eleventh Circuit precedent, the mandatory sentencing guidelines are not subject to vagueness challenges and the holding in *Johnson* has not been made retroactively applicable to collateral challenges to the career offender guidelines enhancement. Consequently, it is **RECOMMENDED** that Petitioner's Motion to

Vacate, Set Aside, or Correct sentence Pursuant to 28 U.S.C. § 2255 be **DISMISSED**.

Under Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." It does not appear that Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is **FURTHER RECOMMENDED** that the Court deny a certificate of appealability in its final order.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, **WITHIN FOURTEEN (14) DAYS** after being served with a copy thereof. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the

party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 13th day of October, 2017.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-111730-A

In re: STONEY LESTER,

Petitioner,

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h)

Before WILLIAM PRYOR, ROSENBAUM, and JILL PRYOR, Circuit Judges.

Stoney Lester seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. He may file such a motion only if it is "certified as provided . . . by a panel of the appropriate court of appeals to contain" either:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) 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). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C). Here, Mr. Lester's application invokes § 2255(h)(2), relying on the rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On August 18, 2003, Mr. Lester pled guilty to possession with intent to distribute more than five grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(I) and (b)(l)(B)(iii) and 18 U.S.C. § 2. **[Doc. 59.]** On June 10, 2004, the sentencing court determined that Mr. Lester qualified as a career offender under United States Sentencing Guidelines Manual § 4B1.1 and sentenced him to 262 months' imprisonment. [**Doc. 95.]** The sentencing court's career-offender determination was based, in part, on its conclusion that Mr. Lester's non-violent walkaway escape qualified as a "crime of violence" under the residual clause of U.S.S.G. § 4B1.2(a). **[App. Doc. 7.]**

When the district court sentenced Mr. Lester in 2004, the guidelines were "mandatory and binding on all judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). "Because they [were] binding on judges, . . . the Guidelines ha[d] the force and effect of laws." *Id.* at 234; *see also id.* at 237 ("[T]he fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance."). In *Booker,* the

Supreme Court held that mandatory application of the Sentencing Guidelines violated the Sixth Amendment right to a trial by jury. *Id.* at 243–44. From that time onward, the guidelines have been merely advisory for sentencing courts.

Mr. Lester alleges that, due to the application of the career offender enhancement, his potential sentencing range under the then-mandatory guidelines was increased from a maximum of 151 months' imprisonment to a minimum of 262 months' imprisonment. **[*Id.*]** In his application, Mr. Lester argues that his sentence is no longer valid following the Supreme Court's decision in *Johnson*.

In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA")—the phrase "involves conduct that presents a serious potential risk of physical injury to another"—was unconstitutionally vague. 135 S. Ct. 2551. The rule announced in *Johnson* applies retroactively on collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1258 (2016).

After *Johnson* was decided, but before *Welch*, a panel of this Court held that *Johnson* was not retroactively applicable to inmates sentenced under the career offender guideline. *See In re Rivero*, 797 F.3d 986 (11th Cir. 2015). *Rivero* held that, although *Johnson* announced a new substantive rule of constitutional law, it was not retroactively applicable on collateral review within the meaning of § 2255(h) because "no combination of holdings of the Supreme Court necessarily dictate[d]" it retroactive, *see Tyler v. Cain*, 533 U.S. 656 (2001), and because *Johnson* was not the type of ruling that

the Supreme Court contemplated as being retroactive in *Teague v. Lane*, 489 U.S. 288 (1989).[1] *Rivero*, *191* F.3d at 989 (internal quotation marks omitted). Alternatively, the panel held that the rule announced in *Johnson* could not apply retroactively to Mr. Rivero, an inmate sentenced under the career offender guideline, because "[t]he Supreme Court has never held that the Sentencing Guidelines are subject to a vagueness challenge." *Id.* at 991. Mr. Rivero, like Mr. Lester, was sentenced as a career offender when the guidelines were mandatory.

Under our prior panel precedent rule, we are bound to follow *Rivero's* holding "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). "While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." *Id.* (internal quotation marks omitted). In *Archer*, we considered the impact of *Begay v. United States*, 553 U.S. 137 (2008)—in which the Supreme Court

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[1] In *Teague v. Lane*, the Supreme Court decided that "new constitutional rules of criminal procedure will not be applicable to cases on collateral review." 489 U.S. at 310. But the Court carved out constitutional rules that are exempt from nonretroactivity, including new rules that "place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 307. These include rules that "necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004). The Supreme Court deems these rules "substantive," rather than "procedural." *Id.* at 351-52.

concluded that the offense of driving under the influence is not a "violent felony" within the meaning of the ACCA—on Mr. Archer's prior Florida conviction for carrying a concealed weapon. *Archer*, 531 F.3d at 1348–49. We previously had upheld Mr. Archer's career offender enhanced sentence based on binding precedent holding that a conviction for carrying a concealed weapon constituted a crime of violence. *Id.* at 1349. But we acknowledged in *Archer* that our previous analysis for determining what offenses qualify as violent felonies was in direct conflict with *Begay's* reasoning. *Id.* at 1352. Even though *Begay* concerned a different crime (drunk driving) than our precedent had discussed (unlawfully carrying a concealed weapon) and concerned the ACCA rather than the career offender guideline, "*Begay* remain[ed] 'clearly on point.'" *Id.* We therefore concluded that our prior panel precedent had been undermined to the point of abrogation and that we were "bound to follow this new rule of law." *Id.*

Under this same analysis, *Rivero's* alternative holding may have been undermined to the point of abrogation by intervening Supreme Court precedent. Of course, at this stage, "[w]e do not hear from the government," the applicant lacks a meaningful opportunity to brief the merits of his case, we have no record, and we "do not have the time necessary to decide anything beyond the prima facie question" because § 2244(b)(3)(D) instructs us to render a decision on Lester's application within 30 days. *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007). Recognizing these constraints, and for the reasons that follow, we

conclude that Mr. Lester has made a prima facie showing that his application "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h).

Five months after *Rivero* was decided, the Supreme Court handed down a retroactivity decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). At issue in *Montgomery* was the retroactive applicability of the rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited on Eighth Amendment grounds the imposition of a mandatory life-without-parole sentence for juvenile offenders. The state of Louisiana argued that *Miller* "mandates only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty" and so "*Miller* is procedural [and not retroactive] because it did not place any punishment beyond the State's power to impose." *Montgomery*, 136 S. Ct. at 734. The Court in *Montgomery* rejected this argument, saying it "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant's culpability." *Id.* at 734–35. The Court held that the *Miller* rule was substantive in nature, rather than procedural, because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 733 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). Because the *Miller* rule was substantive, it

necessarily was retroactive, the Court explained, because "courts must give retroactive effect to new substantive rules of constitutional law." *Id.* at 728; *see also id.* ("It is undisputed . . . that *Teague* requires the retroactive application of new substantive . . . rules in federal proceedings.").

In *Welch*, decided three months after *Montgomery*, the Supreme Court applied these principles to the rule announced in *Johnson*, holding that *Johnson's* rule was substantive and must be given retroactive effect. *See* 136 S. Ct. at 1264-66. Together, *Montgomery* and *Welch* abrogated the *Rivero* panel's holding that *Johnson* was not retroactively applicable because the Supreme Court had not made it so and it was not the type of rule that should be given retroactive effect. *Cf In re Robinson*, No. 16-11304, 2016 WL 1583616, at 1 (11th Cir. Apr. 19, 2016) (noting that *In re Franks*, 815 F.3d 1281 (11th Cir. 2016), which followed *Rivero* in holding that *Johnson's* rule is not retroactive, "is no longer good law" in light of *Welch).*

Our Court has not decided whether the *Rivero* panel's alternative holding—that the rule announced in *Johnson* cannot apply to inmates sentenced under the then-mandatory career offender guideline because the Supreme Court has never held that the vagueness doctrine applies to the guidelines—remains viable in light of *Montgomery* and *Welch.* But considering that an enhancement to a sentence under the mandatory career offender guideline is just as binding on a district court as one imposed under the ACCA, *see Booker*, 543 U.S. at 233, 237, it is, at the very least,

debatable among reasonable jurists whether the holdings in *Montgomery* and *Welch* undermine this holding. *See Archer*, 531 F.3d at 1352 (explaining that, although *Begay* concerned different facts, it "remain[ed] clearly on point" because it directly conflicted with our prior caselaw's analysis): Thus, Mr. Lester has made a sufficient showing that *Rivera's* alternative holding may have been abrogated by recent Supreme Court decisions, and thus, he may be entitled to relief under *Johnson*.

Whether *Rivera's* holding merely is called into question by *Montgomery* and *Welch*, or whether it was "undermined to the point of abrogation" by those cases, is an important question on which the district court, and our court in turn, would benefit from the parties' full briefing. *Archer*, 531 F.3d at 1352. Our ruling today in no way binds the district court, which must decide the question "fresh, or in the legal vernacular, *de novo.*" *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). At this stage, all we decide is that Mr. Lester has made a prima facie showing that his motion "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h). We therefore grant Mr. Lester leave to file a new § 2255 motion.

APPLICATION GRANTED.

WILLIAM PRYOR, Circuit Judge, concurring in result only:

I concur in the decision to grant Stoney Lester's application to file a successive to motion to vacate on the ground that he has made a prima facie showing that he is entitled to relief and that the district court, with the assistance of adversarial briefing, must address the merits in the first instance. But I write separately to express my view that Lester is likely not entitled to relief.

"[T]he Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive." *Tyler v. Cain*, 533 U.S. 656,663 (2001) (second alteration in original) (quoting 28 U.S.C. § 2255(h)(2)). And it must do so "unequivocally, in the form of a holding." *In re Anderson*, 396 F.3d 1336, 1339 (11th Cir. 2005). It "does not make a rule retroactive through *dictum* or through multiple holdings, unless those holdings 'necessarily dictate retroactivity of the new rule.'" *Id.* (quoting *Tyler*, 553 U.S. at 666). For the decision in *Johnson* to be retroactive as applied to the mandatory sentencing guideline, the Supreme Court must have held that *Johnson* invalidated the residual clause of the career-offender guideline and that a decision invalidating a mandatory sentencing guideline is retroactive on collateral review. But the Supreme Court has done neither.

The Supreme Court has never held that the decision in *Johnson* applies to the career-offender guideline. *Johnson* held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. *See*

Johnson v. United States, 135 S. Ct. 2551, 2563 (2015). But the Supreme Court has never held that the vagueness doctrine applies to the mandatory sentencing guidelines. And *Peugh* did not *hold* that the vagueness doctrine applies to the sentencing guidelines. It held the Ex Post Facto Clause applies to sentencing guidelines. *See generally Peugh v. United States*, 133 S. Ct. 2072 (2013). As then–Judge Sotomayor explained, although "the vagueness doctrine is 'related' to the rule of lenity and the *ex post facto* doctrine, because all concern fair notice," "they are not necessarily identical in scope." *Sash v. Zenk*, 439 F.3d 61, 65 (2d Cir. 2006). Because no holding or series of holdings *necessarily dictates* that *Johnson* invalidated the residual clause of the career-offender guideline, Lester's motion is likely futile.

The Supreme Court has never held that a decision invalidating a mandatory sentencing guideline is retroactive on collateral review. A new rule of constitutional law is retroactive if it is substantive or if it is a watershed rule of criminal procedure. *See Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). The government argues that the guidelines are procedural because they do not "alter the statutory boundaries for sentencing set by Congress for the crime," but instead "produce changes in how the sentencing process is to be conducted." And "[a] decision that strikes down a procedural statute . . . would itself be a procedural decision." *Id.* at 1268. After all, even *United States v. Booker*, 543 U.S. 220 (2005), was a new procedural rule that was not retroactive. *See Varela* v. *United States*, 400 F.3d 864, 867 (11th Cir. 2005).

Although we express no view on the merits of the government's argument that *Johnson* is procedural as applied to the mandatory guidelines, no decision of the Supreme Court *necessarily dictates* that the government is wrong. Because the Supreme Court has never held that the mandatory sentencing guidelines are substantive rather than procedural rules, Lester's motion is likely futile. But the district court, with the benefit of adversarial briefing, must decide this issue in the first instance.

JILL PRYOR, Circuit Judge, concurring:

I concur fully in the order granting Mr. Lester leave to file a second 28 U.S.C. § 2255 motion. I write separately to explain why I believe he may be entitled to relief.

For second or successive § 2255 motions, a new rule of law is retroactive only if the Supreme Court has made it so. *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (citing 28 U.S.C. § 2244(b)(2)(A)). A new rule of constitutional law can be made retroactive "not only through an express pronouncement of retroactivity, but also 'through multiple holdings that logically dictate the retroactivity of the new rule.'" *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003) (quoting *Tyler*, 533 U.S. at 668 (O'Connor, J., concurring)). In my view, Mr. Lester may be entitled to relief based on a combination of Supreme Court holdings.

In *Johnson v. United States*, the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") was so vague that it violated due process. 135 S. Ct. 2551, 2563 (2015). The text of that residual clause is identical in all respects to the residual clause of the career offender guideline, which was mandatory when Mr. Lester was sentenced under it. *See* U.S. Sentencing Comm'n, *News Release: U.S. Seeks Comment on Revisions to Definition of Crime of Violence*, at 1 (Aug. 7, 2015). We have interpreted the two clauses using "[p]recisely the same analytical framework." *United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994).

The distinction between the ACCA's residual clause and the residual clause under which Mr. Lester was sentenced is that Congress passed the ACCA and the Sentencing Commission promulgated the career offender guideline. But the Supreme Court has told us that because the mandatory guidelines were "binding on judges," they had "the force and effect of laws." *United States v. Booker*, 543 U.S. 220, 234 (2005). Thus, "the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance." *Id.* at 237.

Booker tells us that the mandatory career offender residual clause must be given the same constitutional treatment as the ACCA's identical residual clause. It necessarily follows, then, that *Johnson's* due process ruling applies with equal force to the mandatory career offender guideline. For purposes of the *Tyler v. Cain* retroactivity analysis, *Johnson* supplies us with a new rule of constitutional law. The only question is whether this rule has been made retroactive through multiple Supreme Court holdings. I believe it has.

In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court held that *Johnson's* rule is retroactively applicable for persons sentenced under the ACCA's residual clause. *Welch's* retroactivity holding was based in part on the Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Montgomery* instructs that the test for retroactivity is simply whether a new rule of constitutional law is substantive. If it is, then "courts must give [it] retroactive effect." *Id.* at 728 (citing *Teague v. Lane*,

489 U.S. 288 (1989)). In *Welch*, the Supreme Court held, with respect to the ACCA's residual clause, that the rule announced in *Johnson* was substantive and therefore retroactive. *Welch*, 136 S. Ct. at 1264-66.

Montgomery further informs us that the "if substantive, then retroactive" test is mandated by the Constitution: "[T]he Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final." 136 S. Ct. at 729. *Welch's* retroactivity holding therefore was constitutionally required. And because under *Booker* the mandatory guidelines must be treated the same for constitutional purposes as the ACCA, the Constitution requires that *Welch's* retroactivity holding also be applied to the mandatory guidelines.[2]

The government argued in *Welch* that *Johnson's* rule may be procedural rather than substantive as applied to the guidelines. But even aside from *Booker*, I see little logical appeal in treating the mandatory guidelines differently from the ACCA. The government distinguished the guidelines from the ACCA by asserting that *Johnson* "would not . . . alter the statutory boundaries for sentencing set by Congress for the defendant's crime," Reply Brief for the United States at 9, *Welch v. United* States, No.

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[2] A panel of our court held in *In re Rivero*, *191* F.3d 986, 991 (11th Cir. 2015), that for *Johnson's* rule to be retroactive as regards the career offender guideline the Supreme Court must also have held that the guidelines are subject to vagueness challenges. But I believe *Rivera's* holding is undermined by the "if substantive, then retroactive" test of *Montgomery* and *Welch*.

15-6418 (Mar. 23, 2016), emphasizing that the guidelines merely "serve as information that the judge must legally consider in imposing the sentence." Transcript of Oral Argument at 20, *Welch v. United States*, 136 S. Ct. 1257 (2016) (No. 15-6418) (counsel for the government arguing). But the mandatory guidelines definitively did alter the statutory boundaries for sentencing, requiring a statutory minimum penalty above what otherwise would be a much lower maximum. In Mr. Lester's case, rather than a maximum possible 151-month sentence, he was subject to a mandatory minimum of 262 months.[3]

For these reasons, I believe Mr. Lester may be entitled to relief under *Johnson*. However, I fully agree that it is up to the district court to decide the merits of his motion.

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[3] Nor would the existence of a "procedural component" of *Johnson's* rule in the mandatory guidelines context necessarily mean that it is not substantive and retroactive. *Montgomery*, 136 S. Ct. at 734. In *Montgomery*, the Supreme Court acknowledged that some juvenile offenders convicted of murder could still receive a sentence of life without parole upon resentencing. *Id* at 733-34. This fact did not, however, make *Miller's* rule procedural or otherwise take it outside the realm of retroactively applicable rules. The same likely is true here: upon resentencing, a district court conceivably could vary from the applicable guidelines range and impose the same sentence on Mr. Lester. But this procedural aspect of *Johnson's* rule as applied to the mandatory guidelines does not transform it from substantive to procedural. *See Montgomery*, 136 S. Ct. at 734-35.

APPENDIX D

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

18 U.S.C. § 3553(b) (2000 ed.) provides:

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

28 U.S.C. § 2255 provides:

Federal custody; remedies on motion attacking sentence

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

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) 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; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this

section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

APPENDIX F

2000 Federal Sentencing Guidelines Manual

Section 4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level *
(A) Life	**37**
(B) 25 years or more	**34**
(C) 20 years or more, but less than 25 years	**32**
(D) 15 years or more, but less than 20 years	**29**
(E) 10 years or more, but less than 15 years	**24**
(F) 5 years or more, but less than 10 years	**17**
(G) More than 1 year, but less than 5 years	**12.**

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Section 4B1.2(a). Definitions of Terms Used in Section 4B1.1

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

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.