No. _____

IN THE
Supreme Court of the United States

GREGORY EUGENE ALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions:

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*) applies to the mandatory guidelines, and if so, whether Mr. Allen's Florida convictions for burglary of a dwelling qualify as "crimes of violence" under U.S.S.G. § 4B1.2's element's clause.

II. Whether published orders issued by a circuit court under 28 U.S.C. § 2244(b)(3), and in the context of applications to file second or successive 28 U.S.C. § 2255 motions constitute binding precedent outside that context.

LIST OF PARTIES

Petitioner, Gregory Eugene Allen, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Gregory Eugene Allen, respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his motion for a certificate of appealability (COA) on the issue of whether his mandatory guidelines sentence, which was enhanced under the residual clause of § 4B1.2, is unconstitutional in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson)*.

OPINION AND ORDERS BELOW

The Eleventh Circuit's denial of Mr. Allen's motion for a COA in Appeal No. 16-15598 is provided in Appendix A-1. The district court order dismissing his § 2255 motion to vacate sentence is provided in Appendix A-2. The district court order denying COA is provided in Appendix A-3.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Allen's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. Allen's § 2255 motion on June 24, 2016. Mr. Allen subsequently filed a timely notice of appeal and a motion for a COA in the Eleventh Circuit, which was denied on May 19, 2017. *See* Appendix A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

18 U.S.C. § 924. Penalties.

(e)(2) As used in this subsection – . . .

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . , that –

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

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

Fla. Stat. § 810.02(1)(b)(1) Burglary

Burglary is defined as "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein."

Fla. Stat. § 810.011(2) "Dwelling"

"Dwelling" is defined as "a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof."

28 U.S.C. § 2244(b)(3) provides:

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

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

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

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

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

28 U.S.C. § 2253(c) provides in pertinent part:

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

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

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

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

STATEMENT OF THE CASE

On January 25, 2001, Mr. Gregory Allen pled guilty to possession with the intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii). On April 27, 2001, Mr. Allen was sentenced to 262 months' imprisonment—a sentence increased by application of the career offender enhancement.[1] Mr. Allen did not appeal the judgment and sentence. On August 4, 2011, Mr. Allen filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, that was denied without prejudice.

On June 23, 2016, Mr. Allen filed a motion to vacate his sentence under 28 U.S.C. § 2255, asserting that his sentence was unlawfully enhanced in violation of due process in light of *Samuel Johnson*, and requesting that his judgment be vacated and he be scheduled for resentencing. The next day, June 24, 2016, the district court dismissed his § 2255 motion as untimely, stating that:

> The Eleventh Circuit Court of Appeals recently determined in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015) that even in light of *Johnson*, the career offender guideline was not unconstitutionally vague. Consequently, the Plaintiff's argument lacks merit. Additionally, the fact that the Plaintiff was sentenced when the guidelines were mandatory does not entitle him to relief. See *In re: Marvin Griffin*, ___ F.3d ___, 2016 WL 3002293, at *4 (11th Cir. May 25, 2016) (stating that "the logic and principles established in *Matchett* also govern our panel as to Griffin's sentence when the Guidelines were mandatory" and concluding that "[t]he 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.").

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[1] Without the career offender enhancement, Mr. Allen's total offense level would have been 33 and his guideline range 235-293 months. With the career offender enhancement, his total offense level became 34 and his guideline range 262-327 months. Thus, while Mr. Allen received a low-end of the guidelines sentence from the district court, the career offender enhancement increased the low-end of his guidelines by an additional 27 months. At the time of his sentencing, the guidelines were mandatory.

See Appendix A-2. On August 23, 2016, the district court denied Mr. Allen a COA, citing again to *Matchett* and *In re Griffin*.[2]

On September 12, 2016, Mr. Allen filed a motion for a COA with the Eleventh Circuit, requesting a COA on the issue of whether his mandatory guidelines career offender sentence was imposed in violation of his right to due process based on *Samuel Johnson*. In his motion, Mr. Allen argued that reasonable jurists could debate whether *Samuel Johnson* invalidated § 4B1.2's residual clause.

On May 19, 2017, the Eleventh Circuit denied Mr. Allen's motion for a COA, agreeing that the § 2255 motion was untimely because Mr. Allen's reliance on *Johnson* was "misplaced." *See* Appendix A-1. Citing to *In re Griffin*, the Eleventh Circuit went on to indicate that "any argument that such vagueness challenges can be raised against mandatory Sentencing Guidelines, which applied when Allen was sentenced in 2001, is foreclosed by binding Circuit precedent." *See* Appendix A-1.

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[2] *In re Griffin*, 23 F.3d 1350 (11th Cir. 2016), is an Eleventh Circuit published order denying an application to file a second or successive § 2255 motion.

REASONS FOR GRANTING THE WRIT

Samuel Johnson renders the mandatory guidelines' § 4B1.2 residual clause unconstitutionally vague.

I. _Beckles_ confirms that _Samuel Johnson_ applies to the mandatory guidelines, and renders the guidelines' residual clause unconstitutionally vague.

In *Beckles v. United States*, the Court held that the *advisory* sentencing guidelines are not susceptible to constitutional vagueness challenges because they "do not fix the permissible range of sentences," not because the guidelines' residual clause is any less vague than the ACCA's.[3] 137 S. Ct. 886, 892 (2017). Not only did the Court repeatedly limit its holding to "advisory" guidelines,[4] its reasoning depended on the distinction between advisory and mandatory guidelines. As the Court explained, the guidelines "were initially binding on district courts," but "this Court in *Booker* rendered them 'effectively advisory.'" *Id.* at 894 (quoting *United States v. Booker*, 543 U.S. 220 (2005)). The guidelines are now just "one of the sentencing factors" courts must consider. *Id.* at 893 (citing 18 U.S.C. § 3553(a)). Courts "may no longer rely exclusively on the guidelines range," and the guidelines no longer "'constrain [district courts'] discretion.'" *Id.* at 894 (citation omitted). The guidelines "do not mandate any specific sentences" any more

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[3] *See Beckles*, 137 S. Ct. at 890 ("This Court held in [*Samuel Johnson*] that the identically worded residual clause in the [ACCA] was unconstitutionally vague.")

[4] The Court expressly and repeatedly limited its holding to the "advisory" guidelines. *Id.* at 896 (emphasis added) ("We hold *only* that the *advisory* Sentencing guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine."); *see also id.* at 890 ("Because we hold that the *advisory* guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.") (emphasis added); *id.* at 895 ("[W]e hold that the *advisory* sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness.") (emphasis added); *id.* at 897 ("Because the *advisory* sentencing guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)'s residual clause is not void for vagueness.") (emphasis added).

than the other § 3553(a) factors. *Id.* at 896. Because "the advisory guidelines do not fix the permissible range of sentences," but "merely guide the exercise of a court's discretion," they "are not subject to a vagueness challenge under the Due Process Clause." *Id.* at 892. The Court's reliance on this distinction confirms that *Samuel Johnson* renders § 4B1.2's residual clause in the *mandatory* guidelines unconstitutionally vague.

The Court also distinguished the advisory guidelines from the mandatory guidelines in explaining why the "advisory guidelines do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* As to notice, "even perfectly clear guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid . . . an enhanced sentence under the career-offender guideline [because] the sentencing court retains discretion to impose the [same] enhanced sentence . . . 'based on a disagreement with the Commission's views.'" *Id.* (quoting *Pepper v. United States*, 562 U.S. 476, 501 (2011)). Under the mandatory regime, however, a defendant had a substantial due process interest in a sentence within the mandatory range. *Burns v. United States*, 501 U.S. 129, 138 (1991). After *Booker*, "'[t]he due process concerns that . . . require notice in a world of mandatory guidelines no longer' apply." *Beckles*, 137 S. Ct. at 894 (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)). Any due process expectation of a sentence within the guideline range "'did not survive our decision in [*Booker*], which invalidated the mandatory features of the guidelines.'" *Id.* (quoting *Irizarry*, 553 U.S. at 713).

Similarly, the "advisory guidelines also do not implicate" the vagueness doctrine's concern with preventing arbitrary enforcement. *Id.* at 894. District courts do not "enforce" the advisory guidelines but rely on them "merely for advice in exercising [their] discretion." *Id.* at 895. The mandatory guidelines, by contrast, "[bound] judges and courts in . . . pass[ing] sentence in criminal

cases," *Mistretta v. United States*, 488 U.S. 361, 391 (1989), and "[had] the force and effect of laws, prescribing the sentences criminal defendants [were] to receive," *id.* at 413 (Scalia, J., dissenting).[5] The Court's holding and reasoning thus confirm that *Samuel Johnson* renders the mandatory guidelines' residual clause unconstitutionally vague.

II. *In re Griffin* is no longer good law, and even if it were, it would not be binding precedent since it arose in the unique context of an application for leave to file a second or successive § 2255 motion. Published orders issued by a circuit court under § 2244(b)(3), and in the context of applications to file second or successive § 2255 motions, do not constitute binding precedent outside that context.

Mr. Allen acknowledges that in *Griffin*, the Eleventh Circuit concluded that its holding in *Matchett*, declaring the advisory guidelines immune from vagueness, also applied to the mandatory guidelines. 823 F.3d at 1354–56. But *Griffin* was decided before this Court granted certiorari in, let alone decided, *Beckles*. Given *Beckles*' holding and reasoning, it is incumbent on this Court to address that issue.

For the following four reasons, *Beckles* has undermined *Griffin* to the point of abrogation. First, the *Griffin* Court stated that mandatory guidelines cannot be unconstitutionally vague

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[5] The courts of appeals have recognized that similar to statutes, the mandatory guidelines set the minimum and maximum terms authorized. "Before *Booker*, the guidelines were the practical equivalent of a statute." *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013); *see also Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013) ("For a prisoner serving a sentence imposed when the guidelines were mandatory, . . . the guidelines had the force and effect of law."); *Narvaez v. United States*, 674 F.3d 621, 630 (7th Cir. 2011) (erroneous career offender designation "illegally increased" sentence "beyond that authorized"). Due to the "legal force" of the mandatory guidelines, an erroneous career offender designation under the mandatory guidelines was greater than the "maximum authorized by law." *United States v. Foote*, 784 F.3d 931, 942 (4th Cir. 2015). "[T]here is no doubt" that the mandatory guidelines were "law" and that an erroneous career offender designation "results in a sentence substantively not authorized by law." *United States v. Doe*, 810 F.3d 132, 160 (3d Cir. 2015); *see also In re Hubbard*, 825 F.3d 225, 234–35 (4th Cir. 2016) (rejecting government's argument that mandatory guidelines "do not change the range of legally permissible outcomes"); *In re Patrick*, 833 F.3d 584, 588–89 (6th Cir. 2016) (same).

because they "do not define illegal conduct"; instead, they merely guide judges in "sentencing convicted criminals." *Id.* at 1354. *Beckles*, however, reaffirmed that the vagueness doctrine applies not only to "laws that define criminal offenses," but to "laws that *fix the permissible sentences* for criminal offenses." 137 S. Ct. at 892; *see also Samuel Johnson*, 135 S. Ct. at 2557 ("These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."). The mandatory guidelines did just that. They prescribed the sentence to be imposed, set the minimum and maximum sentences authorized by law, and had the "force and effect of laws." *Booker*, 543 U.S. at 234, 259.

Second, the *Griffin* Court asserted there is no constitutional right to be sentenced under the guidelines; therefore, according to that Court, the "limitations the guidelines place on a judge's discretion cannot violate a defendant's right to due process . . . ." 823 F.3d at 1355. But *Beckles* reaffirmed that the guidelines are subject to constitutional requirements. *See Beckles*, 137 S. Ct. at 895 ("Our holding today does not render the advisory guidelines immune from constitutional scrutiny."); *id.* at 894 ("[D]ue process concerns ... require notice in a world of mandatory guidelines."); *Burns*, 501 U.S. at 138 (same); *Booker*, 543 U.S. at 226–44 (holding that the Sixth Amendment requires facts that increase a mandatory guideline range to be proved to a jury beyond a reasonable doubt); *Peugh v. United States*, 133 S. Ct. 2072, 2083–85 (2013) (holding that a retrospective increase in the advisory guidelines violates the *Ex Post Facto* Clause).

Third, the *Griffin* Court stated that receiving notice of a career offender sentence via a presentence report "accord[s] adequate due process." 823 F.3d at 1355. *Beckles*, however, clarified that the vagueness doctrine requires notice prior to the PSR, when the defendant might "regulate his conduct so as to avoid particular penalties within the statutory range," not after he has been convicted and is awaiting sentencing. 137 S. Ct. at 894; *see United States v. Pawlak*,

822 F.3d 902, 909–10 (6th Cir. 2016) (vagueness doctrine requires "ex ante notice"), *abrogated on other grounds by Beckles v. United States*, 137 S. Ct. 886 (2017).

Finally, the *Griffin* Court asserted that *Samuel Johnson* could not be retroactive to the mandatory guidelines because it "does not alter the statutory range set by Congress" or "produce a sentence that exceeds the statutory maximum." 823 F.3d at 1355. Even if there were any such requirement, and there is not, *see Welch*, 136 S. Ct. at 1264–65, the mandatory guidelines set the minimum and maximum sentences authorized by law, and those ranges were set by Congress—through both its delegation of law-making power to the Commission and its approval of the guidelines. *See* 28 U.S.C. §§ 994(a)(1), 994(p); *Booker*, 543 U.S. at 242–43; *Mistretta*, 488 U.S. at 393–94.

Even assuming *arguendo* that *Griffin* remains good law, it is still not binding here given that it arose in the unique context of an application for leave to file a second or successive § 2255 motion. Thus, the Eleventh Circuit also erred in denying Mr. Allen's COA application because *In re Griffin* is not binding outside the SOS context. The Eleventh Circuit has held that published orders in the SOS context have precedential effect in that circuit. *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). However, *Lambrix* was itself a published decision in the SOS context, and reasonable jurists could debate whether any conclusion about the reach of *Lambrix* outside the SOS context is dicta. As the Eleventh Circuit itself has explained: "A decision can hold nothing beyond the facts of that case." *United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016).

One member of the Eleventh Circuit recently explained why SOS orders should not be binding outside the SOS context:

> [Rulings on SOS applications are] made under a statutory directive that sets them apart from merits decisions that result from the deliberative process required of United States appellate courts.

> When Courts of Appeals rule on applications from prisoners who want to file a second or successive habeas petition, the governing statute limits our role to merely deciding whether a prisoner has made a prima facie showing that his claim involves "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). And because the decision on whether to allow a second or successive motion is not a ruling on the merits of a prisoner's habeas claims, the process by which we make these rulings falls well short of what one expects for decisions requiring precedential deference. These applications are almost always filed by prisoners with no lawyers. They include no briefs. In fact, the form used by prisoners for these applications forbids the prisoner from filing briefs or any attachments, unless the form is filed by a prisoner suffering under a death sentence. . . . . The statute requires us to act on these applications within thirty days. 28 U.S.C. § 2244(b)(3)(D). Unlike our Court's merits decisions, the statute strictly prohibits any review of our rulings on these applications. *Id.* § 2244(b)(3)(E). Our Court has even ruled that we can't consider a prisoner's application if that prisoner has already made substantively the same claims in an earlier application. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). This makes it possible for a three-judge ruling (or even a two-judge ruling) on one of these applications to say things rejected by every other member of the court.
>
> It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison. . . . [T]his court's limited rulings on these applications . . . should have no bearing on our merits decision here.

United States v. Seabrooks, 839 F.3d 1326, 1349–50 (11th Cir. 2016) (Martin, J., concurring); *see also United States v. Rosales-Acosta*, 679 F. App'x 860, 863 (11th Cir. 2017) (stating that a published order on an SOS application may not be controlling outside that context).

Notably, even when an SOS application is granted, that grant has no binding effect on the § 2255 proceeding that follows in the district court. *Jordan v. Sec'y Dep't of Corr.*, 485 F.3d at 1351, 1358 (11th Cir. 2007) (holding that the district court should decide every aspect of such a case "fresh or in the legal vernacular, *de novo*"). Moreover, if the district court then denied the subsequent § 2255 motion under its *de novo* review, on appeal, nothing in the Eleventh Circuit's order authorizing the motion would be binding on the subsequent merits panel. *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). Thus, given that *Griffin* was issued in the unique SOS context,

it does not bind any court in considering Mr. Allen's initial § 2255 motion. However, to the extent the Eleventh Circuit feels bound to follow *Griffin*, Mr. Allen maintains that *Griffin* was wrongly decided. Based on the foregoing, Mr. Allen respectfully requests that this Court grant this petition to review whether orders published in the SOS context are binding outside that context.

III. Mr. Allen would not have been a career offender under § 4B1.2 without the residual clause invalidated after *Johnson*.

Assuming *arguendo* that *Johnson*, invalidated the § 4B1.2 residual clause, Mr. Allen no longer has two prior convictions that would qualify as § 4B1.2 predicate offenses. The PSR indicates that Mr. Allen is a career offender due to (i) a "crime of violence" on May 28, 1987, and (ii) a "controlled substance offense" on August 23, 1990. Mr. Allen pleaded to numerous cases on May 28, 1987; however, the only potential "crime of violence" convictions that he acquired that day, as of the date of his original sentencing, could be his Florida burglary of a dwelling convictions.[6]

Prior to *Samuel Johnson*, a conviction for burglary *of a dwelling* under Fla. Stat. § 810.02 may have qualified as a "crime of violence" under the residual clause. *See, e.g., United States v. Weeks*, 711 F.3d 1255, 1262–63 (11th Cir. 2013). However, now that the residual clause is no longer valid, the only way Mr. Allen's burglary of dwelling convictions may qualify as "crimes of violence" is under § 4B1.2's enumerated offenses clause or elements clause.

In 2007, this Court held that Florida burglary is not the enumerated crime of "burglary" in the ACCA enumerated offenses because Florida allows a burglary conviction even when a defendant burglarizes the curtilage of a home.[7] *See James v. United States*, 550 U.S. 182, 212

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[6] Mr. Allen's other May 28, 1987 convictions were for theft or misdemeanors – none of which qualify as potential "crimes of violence."

[7] Because the elements clauses in the ACCA and § 4B1.2 are identically-worded, the

(2007); *United States v. Garcia-Martinez*, 845 F.3d 1126, 1134 (11th Cir. 2017) (holding that burglary of a dwelling is non-generic).

That leaves the elements clause. For an offense to qualify under the elements clause it must have "as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1). "Physical force" means "violent force," force that is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). An offense must categorically require the use of "physical force" against another person to qualify as a "crime of violence" under the elements clause. *See Descamps v. United States*, 133 S. Ct. 2276 (2013). It is clear that Florida burglary of a dwelling does not qualify under the elements clause. *See* Fla. Stat. § 810.02(3). The Florida offense of burglary under Fla. Stat. § 810.02 does not categorically require the use of "physical force," or for that matter, any force.

To further solidify the issue, the Eleventh Circuit recently held that because "no conviction under Florida's burglary statute qualifies as generic burglary, then no [burglary] conviction can serve as an ACCA predicate offense. Thus, as a categorical matter, a Florida burglary conviction is not a violent felony under ACCA." *United States v. Esprit*, 841 F.3d 1235, 1241 (11th Cir. 2016) (internal citation omitted). Thus, it is clear that Mr. Allen's Florida convictions for burglary no longer qualify as "crimes of violence."

Eleventh Circuit often considers cases interpreting one as authority in cases interpreting the other. *See United States v. Fritts*, 841 F.3d 937, 940 n.4 (11th Cir. 2016); *United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15598-C

GREGORY EUGENE ALLEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Gregory Allen, a federal prisoner serving a 262-month sentence for possession with intent to distribute cocaine base, moves for a certificate of appealability ("COA"), in order to appeal the district court's dismissal of his counseled 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence as untimely. In his § 2255 motion, he raised one claim, pursuant to *Johnson v. United States*, 135 S. Ct. 2251 (2015), arguing that he was sentenced under the then-mandatory Sentencing Guidelines as a career offender, based in part on the residual clause of U.S.S.G. § 4B1.2.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a constitutional claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable

whether: (1) the district court was correct in its procedural ruling, and (2) the § 2255 motion stated a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing a § 2255 motion to vacate. 28 U.S.C. § 2255(f). The one-year period of limitations begins to run from the latest of four possible events:

> (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.

Id.

Allen cannot make the requisite COA showing in this case because the district court correctly found his motion to be untimely. The district court entered its final judgment on April 27, 2001. Because Allen did not file a direct appeal, his conviction became final 14 days later. *See* Fed. R. App. P. 4(b)(1)(A); *Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000). Allen did not file his § 2255 motion in the district court until June 23, 2016, and, therefore, it was untimely under § 2255(f)(1) by over 14 years, absent the application of another provision of § 2255(f) or equitable tolling. Allen did not argue that equitable tolling applied or that he was actually innocent of his conviction.

Allen did argue that his § 2255 motion was timely under § 2255(f)(3), due to *Johnson*,

but the district court did not err in concluding that his reliance on *Johnson* was misplaced. The Supreme Court has held that an advisory guideline cannot be unconstitutionally vague, and, therefore, the residual clause of the career-offender guideline is not subject to a vagueness challenge under *Johnson*. *See Beckles v. United States*, 137 S. Ct. 886, 890, 895 (2017). Further, any argument that such vagueness challenges can be raised against mandatory Sentencing Guidelines, which applied when Allen was sentenced in 2001, is foreclosed by binding Circuit precedent. *See In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016) (holding that the logic in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), also governed when the Sentencing Guidelines were mandatory); *see also In re Sapp*, 827 F.3d 1334, 1336 (11th Cir. 2016) (noting that this Court is bound by the holding of *Griffin*). Thus, Allen cannot rely on *Johnson* to extend the time period to timely file his § 2255. *See* 28 U.S.C. § 2255(f)(3).

Accordingly, Allen's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

A-2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GREGORY EUGENE ALLEN,

Plaintiff,

v. CASE NO. 8:16-cv-1735-T-26AAS

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

Plaintiff, proceeding through court appointed counsel, has filed a Motion to Vacate pursuant to 28 U.S.C. § 2255, in which he contends that the decision in Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which held that the residual clause of the Armed Career Criminal Act (the ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague, and which has been held to be retroactive on collateral review by the decision in Welch v. United States, 578 U. S. ___, 136 S. Ct. 1257, ___ L. Ed. 2d ___ (2016), should be applied to him.[1] The problem with his contention is that he was classified as a career offender for sentencing purposes under the United States Sentencing Guidelines, specifically § 4B1.1, and not under the ACCA.

[1] Without the retroactive application of Johnson in Welch, Plaintiff's motion would be clearly time-barred under the provisions of 28 U.S.C. 21 2255(f). As the record in his underlying criminal case reflects, he was sentenced on April 27, 2001, and he did not appeal. See case number 8:00-cr-378, docket 29. In this case, counsel filed Plaintiff's motion on June 23, 2016.

The Eleventh Circuit Court of Appeals recently determined in United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) that even in light of Johnson, the career offender guideline was not unconstitutionally vague. Consequently, the Plaintiff's argument lacks merit. Additionally, the fact that the Plaintiff was sentenced when the guidelines were mandatory does not entitle him to relief. See In re: Marvin Griffin, ___ F.3d ___, 2016 WL 3002293, at *4 (11th Cir. May 25, 2016) (stating that "the logic and principles established in Matchett also govern our panel as to Griffin's sentence when the Guidelines were mandatory" and concluding that "[t]he 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.").

ACCORDINGLY, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion to Vacate (1) is **denied**. The clerk is directed to enter judgment for the Defendant and to **CLOSE** this case. The Court defers determining whether a certificate of appealability should issue pending an appropriate application from Plaintiff's counsel.

DONE AND ORDERED at Tampa, Florida, on June 24, 2016.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

A-3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GREGORY EUGENE ALLEN,

Plaintiff,

v. CASE NO. 8:16-cv-1735-T-26AAS

UNITED STATES OF AMERICA,

Defendant.
_____/

O R D E R

UPON DUE AND CAREFUL CONSIDERATION of the procedural history of this case and the underlying criminal case, it is **ORDERED AND ADJUDGED** that the Plaintiff's Application for Certificate of Appealability (Dkt. 6) is **denied** because the Plaintiff has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).[1] As Plaintiff's counsel readily concedes, binding precedent from the Eleventh Circuit Court of Appeals in the form of In re: Griffin, 823 F.3d 1350 (11th Cir. 2016) and United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) invalidates his legal claim. Furthermore, the fact that the United States Supreme Court has granted certiorari in Beckles v. United States, No. 15-8544, 2016 WL 1029080 (June 27, 2016) does not alter this Court's determination to deny Plaintiff a certificate of

[1] In light of this disposition of the motion, the Court needs no response from Defendant.

appealability. As the Eleventh Circuit recently reaffirmed, such grants of certiorari do not result in a change in the law and cannot be used by courts as a basis to grant relief that would otherwise be denied. See In re: Bradford, ___ F.3d ___ 2016 WL 4014037, at *2 (11th Cir. July 27, 2016). Finally, although other Circuit Courts of Appeals have reached results contrary to the Eleventh Circuit's binding precedent of In re: Griffin and Matchett, this Court is bound to adhere strictly to that precedent until such precedent is overruled either by the Eleventh Circuit sitting *en banc* or by the United States Supreme Court. See United States v. Vega-Castillo, 540 F.3d 1235, 1236 (11th Cir. 2008); accord, In re: Burgest, 2016 WL 3923836, at *2 (11th Cir. July 21, 2016) (unpublished).

DONE AND ORDERED at Tampa, Florida, on August 23, 2016.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

No. _____

IN THE
Supreme Court of the United States

GREGORY EUGENE ALLEN,
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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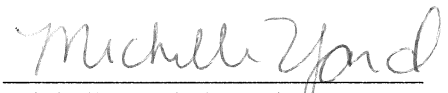
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on this 17th day of August, 2017, true copies of the Petition for Writ of Certiorari and the Motion for Leave to Proceed *In Forma Pauperis* were mailed in an envelope to the Clerk, United States Supreme Court, One First Street, N.E., Washington, D.C. 20543; and to the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

Donna Lee Elm
Federal Defender



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Counsel of Record for Petitioner

No. _____

IN THE

Supreme Court of the United States

GREGORY EUGENE ALLEN,

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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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Gregory Eugene Allen, asks leave to file the enclosed Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39. The filing of this petition is a continuation of the representation of the Petitioner under a Criminal Justice Act (18 U.S.C. § 3006A) appointment of the Office of the Federal Public Defender for the Middle District of Florida, by the United States District Court.

WHEREFORE, Petitioner Gregory Eugene Allen prays for leave to proceed *in forma pauperis*.

Donna Lee Elm
Federal Defender

Michelle Rachel Yard

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