No. 18-1276

In the Supreme Court of the United States

ANDREW LEVERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of petitioner's motion to vacate his sentence based on *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), where the district court found that petitioner had failed to meet his burden of showing that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), that was invalidated in *Johnson*, as opposed to the Act's still-valid enumerated-offenses clause.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Levert v. *Ponce*, No. 2:18-cv-1793-JLS-SHK (Apr. 16, 2018) (order transferring action to N.D. Ala.)

United States District Court (N.D. Ala.):

United States v. *Levert*, No. 2:01-cr-164-LSC-TMP-1 (Dec. 5, 2002)

Levert v. *United States*, No. 2:04-cv-8007-LSC-TMP (Dec. 19, 2005)

Levert v. *United States*, No. 02:16-cv-8084-LSC (Feb. 1, 2018)

Levert v. *Ponce*, No. 02:18-cv-608-MHH-TMP (Nov. 13, 2018)

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

United States v. *Levert*, No. 02-16706 (Oct. 31, 2003)

In re: Levert, No. 05-16588 (Jan. 5, 2006)

Levert v. *United States*, No. 06-11200 (May 1, 2006)

Levert v. *United States*, No. 07-14254 (June 10, 2008)

In re: Levert, No. 08-15296 (Oct. 2, 2008)

In re: Levert, No. 16-13174 (June 29, 2016)

In re: Levert, No. 16-13322 (June 29, 2016)

Levert v. *United States*, No. 18-10620 (Mar. 21, 2019)

United States Supreme Court:

Levert v. *United States*, No. 06-5894 (Oct. 2, 2006)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

In the Supreme Court of the United States

No. 18-1276

ANDREW LEVERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 766 Fed. Appx. 932. The memorandum of opinion of the district court (Pet. App. 12a-22a) is not published in the Federal Supplement but is available at 2018 WL 656031. A prior opinion of the court of appeals (Pet. App. 23a-31a) is not published in the Federal Reporter.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2019. The petition for a writ of certiorari was filed on April 5, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner

was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. The district court sentenced petitioner to 236 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 87 Fed. Appx. 712. The district court later denied petitioner's motion to vacate his sentence under 28 U.S.C. 2255, and both the district court and court of appeals declined to issue a certificate of appealability (COA). 04-cv-8007 D. Ct. Doc. 5 (Dec. 19, 2005); 04-cv-8007 D. Ct. Doc. 20 (Oct. 17, 2007); 06-11200 C.A. Order (May 1, 2006). In 2016, petitioner obtained leave from the court of appeals to file a second or successive Section 2255 motion to challenge his sentence in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Pet. App. 23a-31a. The district court dismissed the motion, *id.* at 21a-22a, and the court of appeals affirmed.

1. In November 1999, local police officers responded to a call regarding an assault at petitioner's home in Birmingham, Alabama. Presentence Investigation Report (PSR) ¶ 5. One of the officers located petitioner near the home, visibly intoxicated, and arrested him for public drunkenness. *Ibid.* During the course of the arrest, officers discovered a Lorcin .380-caliber semiautomatic pistol in petitioner's waistband. *Ibid.* Petitioner was a convicted felon, and a grand jury in the Northern District of Alabama returned an indictment charging him with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). PSR ¶¶ 1, 7. Following a jury trial, petitioner was convicted on that charge. Judgment 1.

A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent

felony" or a "serious drug offense," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a range of 15 years to life imprisonment. See *Logan* v. *United States*, 552 U.S. 23, 26 (2007); *Custis* v. *United States*, 511 U.S. 485, 487 (1994).

The ACCA defines a "violent felony" as an offense punishable by more than a year in prison 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.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause." See *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016).

The Probation Office presentence report informed the district court that petitioner had two prior California convictions for robbery with a firearm and a prior California conviction for assault with a deadly weapon. PSR ¶¶ 35-37. The presentence report further stated that each robbery conviction qualified as a violent felony under both the ACCA's elements clause and its residual clause. PSR ¶¶ 35-36. At sentencing, the district court determined that petitioner's prior convictions qualified him for sentencing under the ACCA. Pet. App. 8a-9a. The court "adopt[ed]" the presentence report's "factual statements," Sent. Tr. 8, but did not other-

wise specify which clause or clauses it relied on in determining that petitioner's prior California robbery convictions were violent felonies, Pet. App. 8a-9a. The court sentenced petitioner to 236 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 87 Fed. Appx. 712.

In 2004, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, principally alleging that he had received ineffective assistance of counsel at trial, at sentencing, and on appeal. 04-cv-8007 D. Ct. Doc. 5, at 2-3. The district court denied the motion, *id.* at 15, and declined to issue a COA, 04-cv-8007 D. Ct. Doc. 20, at 1. The court of appeals likewise denied petitioner's motion for a COA. 06-11200 C.A. Order.

2. In 2015, this Court concluded in *Johnson* v. *United States*, *supra*, that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court subsequently held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. See *Welch*, 136 S. Ct. at 1268. In 2016, the court of appeals granted petitioner's application for leave to file a second Section 2255 motion to challenge his sentence in light of *Johnson*. Pet. App. 24a-30a; see 28 U.S.C. 2255(h). Petitioner then filed a second Section 2255 motion in the district court, arguing that *Johnson* establishes that he was wrongly classified and sentenced as an armed career criminal. 16-cv-8084 D. Ct. Doc. 1, at 4-9 (June 23, 2016). Petitioner argued that, under this Court's statutory interpretation decision in *Descamps* v. *United States*, 570 U.S. 254 (2013), and the Ninth Circuit's decision in *United States* v. *Dixon*, 805 F.3d 1193 (2015), California robbery is not categorically a violent felony under the ACCA's elements

clause or enumerated-offenses clause, and that *Johnson* precluded reliance on the residual clause. 16-cv-8084 D. Ct. Doc. 1, at 5-9.

The district court dismissed petitioner's motion. Pet. App. 12a-22a. Pursuant to 28 U.S.C. 2244(b)(2) and (4), the district court undertook a de novo review of whether petitioner had satisfied the requirements for a second or successive motion. See Pet. App. 5a. Under those provisions of Section 2244, which is cross-referenced by Section 2255(h), a second or successive postconviction claim must be dismissed unless the claimant "shows" that the claim "relies on" a new retroactive constitutional rule or strong new evidence of factual innocence. 28 U.S.C. 2244(b)(2)(A) and (4). The court determined that petitioner had not made that showing, because he had failed to show that his ACCA sentence was "more likely than not" based on the now-invalid residual clause, rather than the ACCA's still-valid elements clause. Pet. App. 16a-18a (quoting *Beeman* v. *United States*, 871 F.3d 1215, 1221-1222 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019)). The court observed that the presentence report "relied on both the elements clause and the residual clause of the ACCA in classifying [petitioner's] two California robbery convictions as violent felonies." *Id.* at 18a-19a. The court further observed that, at the time of petitioner's 2002 sentencing, robberies committed in violation of California's robbery statute were understood to be violent felonies under the elements clause. *Id.* at 20a (citing *United States* v. *David H.*, 29 F.3d 489, 494 (9th Cir. 1994) (per curiam)). Under the circumstances, the court found it "just as likely, if not more likely," that the sentencing court "relied upon the elements clause in classifying [petitioner's] California robbery convictions as violent felonies." *Id.* at 19a.

Because petitioner had failed to establish that the sentencing court relied on the constitutionally invalid residual clause in classifying his prior robbery convictions as violent felonies, the district court found petitioner's Section 2255 motion to be "an improper successive petition" that presented a statutory claim (about the application of the elements clause), rather than a constitutional one, and dismissed the motion. Pet. App. 21a. The court also declined to issue petitioner a COA. *Id.* at 21a-22a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that petitioner did not have a COA but stated that petitioner did "not need a [COA] to appeal" because the district court had dismissed his motion as successive. *Id.* at 3a n.1 (citing *Hubbard* v. *Campbell*, 379 F.3d 1245, 1247 (11th Cir.) (per curiam), cert. denied, 542 U.S. 958 (2004)). The court then determined that the district court had correctly dismissed petitioner's Section 2255 motion as "an inappropriate successive motion" because petitioner had failed to "establish[] that it was more likely than not that the sentencing court relied on the residual clause in concluding that his two California robbery convictions were violent felonies under the ACCA." *Id.* at 8a, 10a. In so doing, the court found that, at the time of petitioner's sentencing, "relevant case law established that California robbery did qualify as a violent felony under the elements clause." *Id.* at 9a (citing *David H.*, 29 F.3d at 494).

4. Petitioner was released from federal prison on May 3, 2019.[1] See Fed. Bureau of Prisons, *Find an inmate*, https://www.bop.gov/inmateloc/.

---

[1] Petitioner's release does not moot his petition for a writ of certiorari because petitioner met Section 2255(a)'s "custody" requirement "at the time his petition [was] filed." *Maleng* v. *Cook*, 490 U.S.

ARGUMENT

Petitioner contends (Pet. 6-21) that the court of appeals incorrectly affirmed the district court's dismissal of his successive Section 2255 motion. In his view, the district court erred in requiring him, as a prerequisite for relief on a claim premised on *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), to show that his ACCA enhancement was based on the residual clause that *Johnson* invalidated.[2] That issue does not warrant this Court's review, and the unpublished disposition below does not provide a suitable vehicle for such review in any event. This Court has recently and repeatedly denied review of similar issues in other cases.[3] It should follow the same course here.

488, 490-491 (1989) (per curiam). Additionally, a defendant remains "in custody" if, like petitioner, he is subject to supervised release. See *Scanio* v. *United States*, 37 F.3d 858, 860 (2d Cir. 1994) (per curiam). And petitioner's five-year term of supervised release exceeds the three-year maximum that would apply if he were not subject to the ACCA. See 18 U.S.C. 3559(a) and 3583(b).

[2] Three other pending petitions raise similar issues. See *Ziglar* v. *United States*, No. 18-9343 (filed May 10, 2019); *Morman* v. *United States*, No. 18-9277 (filed May 10, 2019); *Zoch* v. *United States*, No. 18-8309 (filed Mar. 4, 2019).

[3] See *Walker* v. *United States*, No. 18-8125 (June 17, 2019); *Ezell* v. *United States*, 139 S. Ct. 1601 (2019) (No. 18-7426); *Garcia* v. *United States*, 139 S. Ct. 1547 (2019) (No. 18-7379); *Harris* v. *United States*, 139 S. Ct. 1446 (2019) (No. 18-6936); *Wiese* v. *United States*, 139 S. Ct. 1328 (2019) (No. 18-7252); *Beeman* v. *United States*, 139 S. Ct. 1168 (2019) (No. 18-6385); *Jackson* v. *United States*, 139 S. Ct. 1165 (2019) (No. 18-6096); *Wyatt* v. *United States*, 139 S. Ct. 795 (2019) (No. 18-6013); *Washington* v. *United States*, 139 S. Ct. 789 (2019) (No. 18-5594); *Prutting* v. *United States*, 139 S. Ct. 788 (2019) (No. 18-5398); *Curry* v. *United States*, 139 S. Ct. 790 (2019) (No. 18-229); *Sanford* v. *United States*, 139 S. Ct. 640 (2018) (No. 18-5876); *Jordan* v. *United States*, 139 S. Ct. 593 (2018) (No. 18-5692); *George* v.

1. For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in *Couchman* v. *United States*, No. 17-8480 (July 13, 2018), and *King* v. *United States*, No. 17-8280 (July 13, 2018), a defendant who files a second or successive Section 2255 motion seeking to vacate his sentence on the basis of *Johnson* is required to establish, through proof by a preponderance of the evidence, that his sentence in fact reflects *Johnson* error. To meet that burden, a defendant may point either to the sentencing record or to any case law in existence at the time of his sentencing proceeding that shows that it is more likely than not that the sentencing court relied on the now-invalid residual clause, as opposed to the enumerated-offenses or elements clauses. See Br. in Opp. at 13-18, *King*, *supra* (No. 17-8280); see also Br. in Opp. at 12-17, *Couchman*, *supra* (No. 17-8480).[4] That approach makes sense because "*Johnson* does not reopen *all* sentences increased by the Armed Career Criminal Act, as it has nothing to do with enhancements under the elements clause or the enumerated-crimes clause." *Potter* v. *United States*, 887 F.3d 785, 787 (6th Cir. 2018).

United States, 139 S. Ct. 592 (2018) (No. 18-5475); *Sailor* v. *United States*, 139 S. Ct. 414 (2018) (No. 18-5268); *McGee* v. *United States*, 139 S. Ct. 414 (2018) (No. 18-5263); *Murphy* v. *United States*, 139 S. Ct. 414 (2018) (No. 18-5230); *Perez* v. *United States*, 139 S. Ct. 323 (2018) (No. 18-5217); *Safford* v. *United States*, 139 S. Ct. 127 (2018) (No. 17-9170); *Oxner* v. *United States*, 139 S. Ct. 102 (2018) (No. 17-9014); *Couchman* v. *United States*, 139 S. Ct. 65 (2018) (No. 17-8480); *King* v. *United States*, 139 S. Ct. 60 (2018) (No. 17-8280); *Casey* v. *United States*, 138 S. Ct. 2678 (2018) (No. 17-1251); *Westover* v. *United States*, 138 S. Ct. 1698 (2018) (No. 17-7607); *Snyder* v. *United States*, 138 S. Ct. 1696 (2018) (No. 17-7157).

[4] We have served petitioner with a copy of the government's briefs in opposition in *King* and *Couchman*.

The decision below is therefore correct, and the result is consistent with cases from the First, Sixth, Eighth, and Tenth Circuits. See *Dimott* v. *United States*, 881 F.3d 232, 242-243 (1st Cir.), cert. denied, 138 S. Ct. 2678 (2018); *Potter*, 887 F.3d at 787-788 (6th Cir.); *Walker* v. *United States*, 900 F.3d 1012, 1015 (8th Cir. 2018), cert. denied, No. 18-8125 (June 17, 2019); *United States* v. *Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018). As noted in the government's briefs in opposition in *King* and *Couchman*, however, some inconsistency exists in circuits' approach to *Johnson*-premised collateral attacks like petitioner's. Those briefs explain that the Fourth and Ninth Circuits have interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A)—which provides that a claim presented in a second or successive post-conviction motion shall be dismissed by the district court unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable," *ibid.*; see 28 U.S.C. 2244(b)(4) and 2255(h)—to require only a showing that the prisoner's sentence "may have been predicated on application of the now-void residual clause." *United States* v. *Winston*, 850 F.3d 677, 682 (4th Cir. 2017); see *United States* v. *Geozos*, 870 F.3d 890, 896-897 (9th Cir. 2017); see also Br. in Opp. at 17-19, *Couchman*, *supra* (No. 17-8480); Br. in Opp. at 16-18, *King*, *supra* (No. 17-8280).

After the government's briefs in those cases were filed, the Third Circuit interpreted the phrase "relies on" in Section 2244(b)(2)(A) in the same way, *United States* v. *Peppers*, 899 F.3d 211, 221-224 (2018), and it found the requisite gatekeeping inquiry for a second or successive collateral attack to have been satisfied where

the record did not indicate which clause of the ACCA had been applied at sentencing, *id.* at 224. Further review of inconsistency in the circuits' approaches remains unwarranted, however, for the reasons stated in the government's previous briefs. See Br. in Opp. at 17-19, *Couchman*, *supra* (No. 17-8480); Br. in Opp. at 16-18, *King*, *supra* (No. 17-8280).

Contrary to petitioner's suggestion (Pet. 10-11), this Court's recent decision in *United States* v. *Davis*, No. 18-431, 2019 WL 2570623 (June 24, 2019), does not provide a reason for the Court now to grant review of the question presented here. *Davis* invalidated one of the two definitions of "crime of violence" applicable to 18 U.S.C. 924(c), which criminalizes using, carrying, or possessing a firearm in connection to such a crime. See 2019 WL 2570623, at *13. But all crimes of violence must be federal felonies, and the law is more settled as to which set of such felonies qualified as crimes of violence only under the now-invalidated definition. It is thus far from clear that the burden-of-proof question presented here will affect many post-*Davis* cases.

2. In any event, this case would be an unsuitable vehicle for reviewing the question presented.

a. As a threshold matter, a substantial question exists regarding the court of appeals' jurisdiction to issue the ruling that petitioner now asks the Court to review. A COA is a "jurisdictional prerequisite," *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003), for a prisoner's appeal from any "final order in a proceeding under [S]ection 2255." 28 U.S.C. 2253(c)(1)(B); see *Gonzalez* v. *Thaler*, 565 U.S. 134, 142 (2012). Section 2253 gives both circuit judges and district judges the authority to issue a COA, see also *Gonzalez*, 565 U.S. at 142, but in petitioner's case, neither the district court nor the court

of appeals issued a COA. Instead, the district court denied petitioner's request for a COA, Pet. App. 21a-22a, and the court of appeals believed that petitioner "d[id] not need a certificate of appealability" because the district court had dismissed his Section 2255 motion as successive, *id.* at 3a n.1.

In stating that petitioner did not need a COA, the court of appeals relied on its earlier decision in *Hubbard* v. *Campbell*, 379 F.3d 1245, 1247 (11th Cir.) (per curiam), cert. denied, 542 U.S. 958 (2004).[5] Pet. App. 3a n.1. But the court overlooked its more recent decision in *Jackson* v. *United States*, 875 F.3d 1089 (11th Cir. 2017) (per curiam), in which the court found that it lacked jurisdiction to hear an appeal in circumstances identical to those in petitioner's case. See *id.* at 1089-1091. As in petitioner's case, the court of appeals in *Jackson* authorized the filing of a second or successive Section 2255 motion based on a prima facie conclusion that it satisfied the statutory standard, but the district court later dismissed that motion and declined to issue a COA, after determining on a de novo review that the motion failed to satisfy those criteria. *Id.* at 1090; see Pet. App. 16a-21a. The court of appeals found that "[t]he dismissal constituted an adjudication on the merits" and thus was a "final order" that triggered the COA requirement. *Jackson*, 875 F.3d at 1090-1091. And because "no COA ha[d] been issued," the court of appeals determined that it "lack[ed] jurisdiction" to hear the ensuing appeal. *Id.* at 1091.

---

[5] During the proceedings below, the government likewise took the view that, in light of *Hubbard*, a COA was "not a prerequisite to [the court of appeals'] jurisdiction." Gov't C.A. Br. vi. A jurisdictional defect, however, "can never be forfeited or waived." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002).

Jackson made clear that the situation in that case, like the situation here, differed from the one in *Hubbard*. The court of appeals explained that no COA was required in *Hubbard* because the district court's dismissal of the second or successive Section 2255 motion in that case "was not a 'final order'" that "disposed of the *merits* of the proceeding." *Jackson*, 875 F.3d at 1091 (citation omitted). Rather, the inmate in *Hubbard* had failed to obtain initial authorization from the court of appeals to file a second or successive Section 2255 motion, and the district court therefore dismissed the motion without prejudice for lack of jurisdiction without reaching the merits. *Ibid.*; see *Hubbard*, 379 F.3d at 1247; *Burton* v. *Stewart*, 549 U.S. 147, 149 (2007) (per curiam); *In re Bradford*, 830 F.3d 1273, 1277 (11th Cir. 2016) ("[W]hen a petitioner fails to seek permission from the court of appeals to file a second or successive petition, the district court lacks jurisdiction to consider it."). In a case like this, however, the dismissal is on the merits. See *Jackson*, 875 F.3d at 1091.

The court of appeals' own precedent thus indicates that the court lacked jurisdiction to consider the merits of petitioner's appeal. Other courts of appeals would likely agree that petitioner's appeal could not proceed without a COA. See *United States* v. *Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008) (holding that Section 2253 requires a movant to obtain a COA before appealing the district court's dismissal of an unauthorized second or successive Section 2255 motion); *Resendiz* v. *Quarterman*, 454 F.3d 456, 458 (5th Cir.) (per curiam) (same), cert. denied, 548 U.S. 922 (2006); *Sveum* v. *Smith*, 403 F.3d 447, 448 (7th Cir.) (per curiam) (same), cert. denied, 546 U.S. 944 (2005); *Jones* v. *Braxton*, 392 F.3d 683, 685 (4th Cir. 2004) (same). Accordingly, petitioner's

case would be a poor vehicle for reviewing the question presented because the Court would first have to resolve the threshold question whether the court of appeals had jurisdiction to issue the decision that petitioner now challenges.

b. Petitioner's case would also be an unsuitable vehicle for reviewing the question presented because petitioner has not shown that he would prevail under any circuit's approach. Petitioner's presentence report stated that petitioner's prior California robbery convictions qualified as violent felonies under both the elements clause and the residual clause. PSR ¶¶ 35-36. In addition, at the time of petitioner's 2002 sentencing, the Ninth Circuit had determined that California robbery "includes the element of 'threatened use of physical force against the person of another.'" *United States* v. *David H.*, 29 F.3d 489, 494 (9th Cir. 1994) (per curiam) (quoting 18 U.S.C. 5032). Petitioner thus does not appear to dispute that, under the law in effect at the time of his sentencing, California robbery qualified as a violent felony under the elements clause. Taken together, the circumstances surrounding petitioner's sentencing indicate that the sentencing court viewed California robbery to qualify as a violent felony under the elements clause. Although the court may have believed that California robbery also qualified as a violent felony under the residual clause, that potential "alternative ground for characterizing [petitioner's] robbery convictions as violent felonies," Pet. App. 20a, does not indicate that the petitioner's ACCA sentence may have depended on the residual clause.

As petitioner notes (Pet. 21), the Ninth Circuit "recently" decided that California robbery does not qualify as a violent felony under the elements clause. See

United States v. *Dixon*, 805 F.3d 1193, 1198 (2015). But developments in statutory-interpretation case law years after petitioner's sentencing do not show that petitioner "may have been" sentenced under the residual clause at the time of his original sentencing, *Winston*, 850 F.3d at 682; see *Geozos*, 870 F.3d at 896-897. And a statutory-interpretation claim is not a valid basis for a second or successive Section 2255 motion. See 28 U.S.C. 2255(h); see also 28 U.S.C. 2244(b)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
MICHAEL A. ROTKER
Attorney

JULY 2019