No. 18-____

IN THE

Supreme Court of the United States

ANDREW LEVERT,

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

PETITION FOR A WRIT OF CERTIORARI

Allison Case
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF ALABAMA
505 20th Street North
Suite 1425
Birmingham, AL 35203

Brian H. Fletcher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2633
jlfisher@omm.com

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

QUESTION PRESENTED

Whether, or under what circumstances, a criminal defendant pursuing a second or successive motion under 28 U.S.C. § 2255 is entitled to relief under a retroactive constitutional decision invalidating a federal statutory provision, where the record is silent as to whether the district court based its original judgment on that provision or another provision of the same statute.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew Levert respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 2019 WL 1306802 and reprinted in the Appendix to the Petition ("App.") at 1a–11a. The decision of the district court is unpublished but reprinted at App. 12a–22a. The decision of the court of appeals granting petitioner leave to file a petition under 28 U.S.C. § 2255 is unpublished but reprinted at App. 23a–31a.

JURISDICTION

The court of appeals issued its decision on March 21, 2019, App. 1a, and petitioner did not seek rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the U.S. Code are reprinted at App. 32a–51a.

INTRODUCTION

Under 28 U.S.C. § 2255, a federal prisoner may file a motion analogous to a habeas petition challenging his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States" or that it "was in excess of the maximum authorized by law." *Id.* § 2255(a). But to file a successive motion for relief under this statute, the defendant must first demonstrate that his "claim . . . relies

on" a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *Id.* § 2244(b)(2)(A); *see id.* § 2255(h)(2).

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court struck down the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), explaining that it violated the Due Process Clause because it "both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S. Ct. at 2557. The next year, the Court held that *Johnson*'s invalidation of the residual clause was a constitutional rule "that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). This holding dictates that defendants whose ACCA sentences depended on the residual clause are entitled to habeas relief. *See, e.g.*, *United States v. Rockwell*, 207 F. Supp. 3d 915 (W.D. Ark. 2016); *Robinson v. United States*, 2016 WL 11486311 (M.D. Ala. Oct. 21, 2016).

But this Court has never explained how courts should address post-conviction claims brought under Section 2255 where the record is silent as to whether the judgment rests on a statutory clause that has been held unconstitutional or a different clause of the same statute. And in the few years since *Welch*, the federal courts of appeals have plunged into disarray about what federal prisoners bringing *Johnson* claims must show to obtain relief under that frequently recurring circumstance.

The Third, Fourth, and Ninth Circuits have held that a defendant bringing a successive motion under Section 2255 is entitled to *Johnson* relief so long as he

shows that his sentence *may have* relied on the residual clause—at least where, as here, there is currently no other statutory basis to support his sentence. But the Eleventh Circuit in this case held—in line with the First, Sixth, Eighth, and Tenth Circuits—that a defendant in this situation may obtain relief only if he somehow proves that the court *in fact* based his ACCA sentence on the residual clause.

This Court has denied certiorari in past cases presenting this issue, but the time to resolve it is now. The question presented has now fully percolated, and the courts of appeals are deeply and intractably divided. The stakes are also high. Countless individuals serving enhanced sentences under ACCA—sentences that are at least five years and sometimes decades longer than could otherwise have been imposed—have potential *Johnson* claims. As things stand now, their ability to obtain relief varies dramatically according to the happenstance of geography.

Furthermore, the question presented is not limited to *Johnson* claims. It also applies to defendants raising claims under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). And this Court is currently considering whether another federal statute very similar to those at issue in *Johnson* and *Dimaya* is likewise unconstitutional. *See United States v. Davis*, No. 18-431. If the Court holds that it is, an entire new class of federal prisoners will bring successive habeas motions parallel to the current litigation over *Johnson* and *Dimaya*. And still other decisions in the future, invalidating federal or state laws, could lead to other groups of defendants bringing successive claims in the same basic posture. It would be far better to resolve the

intractable split on the standard that governs such claims *before* that further litigation materializes.

STATEMENT OF THE CASE

1. In 2002, a jury convicted Petitioner Andrew Levert of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). That statute typically carries a maximum sentence of ten years' imprisonment. *Id.* § 924(a)(2). But under ACCA, a federal defendant's sentencing range is enhanced to fifteen-years-to-life if he has certain qualifying prior convictions. *See id.* § 924(e)(1). At the time of petitioner's sentencing, qualifying convictions included (i) certain specified enumerated offenses; (ii) offenses involving the use of physical force against another person; and (iii) any other offense falling under the "residual clause," which covered offenses "involv[ing] conduct that present[ed] a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B).

Relying on petitioner's three prior convictions under California law—two for robbery under California Penal Code § 211 and one for assault with a deadly weapon—the district court found petitioner to be an ACCA offender. His presentencing report "listed both the residual clause and the [use-of-force] clause as the bases for classifying his three prior convictions as predicate violent felonies under the ACCA." App. 8a–9a. But the district court did not specify whether it believed the robbery convictions—the convictions at issue here—fell under ACCA's use-of-force clause (sometimes also called the "elements clause") or under the residual clause. *See id.* The district court ultimately sentenced petitioner to 236 months (nearly twenty years) of imprisonment. *Id.* 14a.

The Eleventh Circuit affirmed petitioner's conviction and sentence. *United States v. Levert*, 87 F. App'x 712 (11th Cir. 2003).

Over the years, petitioner challenged his conviction and sentence in various ways, including by bringing a motion under 28 U.S.C. § 2255. But he never obtained any relief.

2. In 2016, after this Court invalidated the residual clause in *Johnson*, petitioner sought leave to file a successive motion under Section 2255, asking for permission to argue that he should be resentenced to time served under the ten-year statutory maximum that applies absent ACCA. DE1. Petitioner maintained that *Johnson* enabled him to bring a successive petition because it announced a new rule of constitutional law that this Court made retroactive. He added that *Johnson*'s invalidation of the residual clause entitled him to relief because his California robbery convictions did not fall within any other provision of ACCA: Robbery is not among ACCA's enumerated offenses, and case law post-dating his conviction made clear that California's robbery statute does not require the intentional use of physical force. DE1, at 5–6 (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010), *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 (2004), and *United States v. Dixon*, 805 F.3d 1193, 1199 (9th Cir. 2015)).

The Eleventh Circuit allowed petitioner to file his motion. App. 23a–31a. But the district court denied him relief on the ground that he had not shown—as binding Eleventh Circuit precedent required him to do—that it was "more likely than not" that the residual clause rather than the use-of-force clause "led to

the sentencing court's enhancement of his sentence." App. 19a (quoting *Beeman v. United States*, 871 F.3d 1215, 1221–22 & n.3 (11th Cir. 2017), *cert. denied*, 139 S. Ct. ___, 2019 WL 659904 (U.S. Feb. 19, 2019)).

3. The Eleventh Circuit affirmed. It reasoned that where, as here, "'it is just as likely the sentencing court relied on the elements or residual clause, solely or as an alternative basis for the [ACCA] enhancement,'" a defendant "fail[s] to carry his burden to prove his *Johnson* claim on the merits." App. 8a (quoting *Beeman*, 871 F.3d at 1221–22). And, in the Eleventh Circuit's view, where a defendant bringing a successive motion under Section 2255 fails to make out a meritorious *Johnson* claim, it is irrelevant whether ACCA, as currently construed, can sustain his sentence. *Id.* 9a–10a.

4. This petition follows.

REASONS FOR GRANTING THE WRIT

The courts of appeals are divided over whether, or under what circumstances, a retroactive constitutional decision invalidating a federal statutory provision entitles a defendant pursuing a successive motion under 28 U.S.C. § 2255 to relief, where the record is silent as to whether the district court based its original judgment on that provision or different provision of the same statute. This Court should use this case, which squarely presents this important legal issue, to resolve the conflict. And it should hold—consistent with a careful analysis of the plain text of the governing statutes—that relief must be granted at least where, as here, it is clear that no still-valid provision of the statute can support the judgment.

I. The courts of appeals are openly split over the question presented.

1. As several courts and the federal government have recognized, the circuits are split over whether a retroactive constitutional decision invalidating a federal statutory provision entitles a defendant pursuing a successive motion under 28 U.S.C. § 2255 to relief, where the record is silent as to whether the district court based its original judgment on that provision or different provision of the same statute. *See, e.g.*, *United States v. Walker*, 900 F.3d 1012, 1014 (8th Cir. 2018), *petition filed*, No. 18-8125 (Feb. 25, 2019); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir.), *cert. denied*, 138 S. Ct. 2678 (2018); Br. in Opp. 4–6, *Garcia v. United States*, No. 18-7379 (U.S. Mar. 13, 2019) ("*Garcia* BIO"). The Eleventh Circuit here applied the same basic rule that the First, Sixth, Eighth, and Tenth Circuits have adopted, barring defendants in this situation from obtaining post-conviction whenever the record is silent. *See Dimott*, 881 F.3d at 242–43; *Potter v. United States*, 887 F.3d 785, 787–88 (6th Cir. 2018); *Washington*, 890 F.3d at 896; *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), *cert. denied*, 139 S. Ct. ___, 2019 WL 659904 (U.S. Feb. 19, 2019).

The Third, Fourth, and Ninth Circuits disagree. In those circuits, a defendant bringing a successive motion under Section 2255 is entitled to relief so long as he shows that his sentence "may have" rested on the invalid clause—at least where there is currently no other statutory basis to support his sentence. *United States v. Peppers*, 899 F.3d 211, 221 (3d Cir.

2018); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 897–98 (9th Cir. 2017). Three different judges on the U.S. District Court for the District of Columbia have reached the same conclusion, as have other district courts. *See United States v. Wilson*, 249 F. Supp. 3d 305, 311–13 (D.D.C. 2017) (collecting cases).

2. In the past, the Government suggested that it would be premature to grant certiorari to resolve this conflict because the Fourth and Ninth Circuits might reconsider their views. Br. in Opp. 17–18, *King v. United States*, No. 17-8280 ("*King* BIO"). But that suggestion no longer holds water. The Fourth Circuit has since reaffirmed its position that a defendant may bring a successive motion under Section 2255 when his "ACCA-enhanced sentence 'may have been predicated on application of the now-void [] clause.'" *United States v. Hodge*, 902 F.3d 420, 426 (4th Cir. 2018) (quoting *Winston*, 850 F.3d at 682). And district courts throughout the Fourth Circuit are now granting relief on the basis of that "controlling law." *United States v. Westry*, 2017 WL 2221714, at *2 (E.D. Va. May 19, 2017); *see also, e.g.*, *Cade v. United States*, 276 F. Supp. 3d 502 (D.S.C. 2017); *United States v. Foster*, 2017 WL 2628887 (W.D. Va. June 19, 2017). District courts throughout the Ninth Circuit are likewise granting relief based on circuit law. *See, e.g.*, *Agtuca v. United States*, 2018 WL 2193134 (W.D. Wash. May 14, 2018); *United States v. Wilson*, 2018 WL 2049926 (D. Nev. May 2, 2018); *United States v. Fouche*, 2017 WL 4125133 (S.D. Cal. Sept. 18, 2017). It does not appear the Government is appealing any of these decisions.

In any event, the Third Circuit issued its decision in *Peppers* after the Government's suggestions for further percolation. *Peppers* thoroughly considered and rejected the Government's position, thus cementing the split of authority. *See, e.g.*, *Garcia* BIO 5 (conceding that *Peppers* staked out a definitive position on this issue). The conflict is now fully entrenched, and only this Court can resolve it.

II. The question presented is extremely important.

The question presented is one of exceptional importance because thousands of defendants over the past few decades received ACCA sentences where the district court did not specify whether the sentences rested on the residual clause or some other provision of the statute. *See, e.g.*, *In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring) (noting that, in the Eleventh Circuit alone, over 2,000 defendants have filed successive motions raising *Johnson* claims); *Washington*, 890 F.3d at 896 (in "many ACCA cases" involving *Johnson* claims, "the record is often silent"); *Raines v. United States*, 898 F.3d 680, 691 (6th Cir. 2018) (Cole, C.J., concurring) ("silence is the norm, not the exception"). What is more, many of the alternative bases for invoking ACCA have been shown in recent years to be much narrower than courts thought in the past. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Johnson v. United States*, 559 U.S. 133 (2010). The question presented therefore determines whether a large number of federal prisoners can get relief.

And that relief is highly consequential. Stripped of the ACCA enhancement, many defendants would be eligible for immediate release from prison or other forms of custody because the time they have already served on their sentences far exceeds the ten-year maximum prison sentence allowed without ACCA.

It is also critical to understand that the question presented does not pertain merely to those with *Johnson* claims. It arises whenever a defendant was convicted or sentenced according to a judgment that did not specify on which of two alternative bases on which it rests, and this Court later rules one of those bases unconstitutional. Indeed, this question is now similarly arising in Section 2255 cases in which defendants are advancing claims based on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, this Court held that the residual clause of 18 U.S.C. § 16—one of two definitions under the statute—was unconstitutional. *Dimaya*, 138 S. Ct. at 1223. That provision applied not only in immigration cases like Dimaya's, but also was incorporated in several criminal statutes. *See. e.g.*, *Dade v. United States*, 2019 WL 361587, at *2 (D. Idaho Jan. 29, 2019) (analyzing whether defendant convicted of interstate domestic violence, 18 U.S.C. § 2261(a)(1), is entitled to post-conviction relief because predicate act was a "crime of violence" under Section 16(b)), *appeal filed*, No. 19-35172 (9th Cir. Mar. 1, 2019).

To take one more example: This Court is currently considering whether the residual clause of the federal statute forbidding using a firearm during a crime of violence, 18 U.S.C. § 924(c), is void for vagueness. *See United States v. Davis*, No. 18-431 (oral argument

scheduled for April 17, 2019). If this Court so holds, that decision will also likely be retroactive under *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Yet, like ACCA, Section 924(c) contains alternatives besides the residual clause for satisfying the statute. *See* 18 U.S.C. § 924(c)(3). Consequently, if this Court holds that Section 924(c)'s residual clause is unconstitutional, another whole category of defendants will quickly file Section 2255 claims in the federal courts—many raising the exact question presented here. Indeed, many of these claims are already on file, awaiting this Court's decision in *Davis*. *See, e.g.*, *Taylor v. United States*, 8th Cir. No. 16-4192 (stayed pending the outcome in *Davis*).

The effect of the question presented is not even limited to federal prisoners. The same rules that govern successive habeas motions for federal prisoners also govern successive petitions by state prisoners. *See* 28 U.S.C. § 2244(b)(2). Accordingly, the Ninth Circuit recently applied its "may have been based on" rule to allow a state prisoner to pursue a successive petition arguing that *Johnson* entitles him to relief from a California conviction. *See Henry v. Spearman*, 899 F.3d 703, 705–06 (9th Cir. 2018).

In all events, the sooner this Court brings order to the rules that govern claims under the general circumstances presented here, the better. The lower courts should not have to expend resources in case after case sorting through the habeas statutes and competing arguments regarding such claims. And the many defendants in these cases should not be subjected to years of additional prison time based solely on geography.

III. The Eleventh Circuit's ruling is incorrect.

The Eleventh Circuit's construction of the federal habeas statute improperly conflates the statutory gateway for bringing a second or successive habeas claim with whether a claim has substantive merit and entitles the defendant to relief. Once those distinct aspects of federal habeas law are disentangled, it becomes apparent that defendants in petitioner's position are entitled to relief.

1. The federal habeas statute imposes a "prerequisite[]"—or "gateway" requirement—for bringing any second or successive motion for habeas relief. *Tyler v. Cain*, 533 U.S. 656, 662 (2001); *Peppers*, 899 F.3d at 221. Courts must dismiss any such motion unless, as relevant here, "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." 28 U.S.C. § 2244(b)(2)(A); *see also id.* § 2255(h)(2).[1]

All agree that *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *See Welch*, 136 S. Ct. at 1268; App. 15a. The key threshold question, therefore, is whether petitioner's "claim" for post-conviction relief "relies on" *Johnson*'s new rule of constitutional law

[1] There is some disagreement over whether this requirement is "jurisdictional" or merely a mandatory claims-processing rule. *See, e.g.*, *Peppers*, 899 F.3d at 221 n.3. But that question is immaterial here. All that matters is that Section 2244(b)(2)(A) establishes a threshold showing a defendant must make before a court may consider his claim on the merits.

(namely, that ACCA's residual clause is void for vagueness).

It obviously does. A "claim" is a movant's "demand for . . . a legal remedy." Black's Law Dictionary, *Claim* (10th ed. 2014). The phrase "relies on" means "to depend" or "to need (someone or something) for support." Merriam-Webster Dictionary, *Rely on*, https://www.merriam-webster.com/dictionary/rely%20on/upon. The plain text of Section 2244(b)(2)(A), therefore, dictates that a "claim . . . relies on" a new rule of constitutional law whenever the defendant asks for relief based on the new rule. The inquiry is *not* whether the request is meritorious; it is simply whether the claim marshals the new rule of constitutional law as a component of its argument for relief.

This Court's decision in *Tyler* is instructive. There, the petitioner sought habeas relief on the ground that the definition of "beyond a reasonable doubt" given to his jury contravened this Court's intervening decision in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). The Court did not opine on whether Tyler's claim was meritorious. Nor was it clear whether *Cage* was retroactive. But despite that uncertainty, neither this Court nor the State questioned that Tyler's claim *relied on Cage*; indeed, the Court called it a "*Cage* claim." *Tyler*, 533 U.S. at 656; *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (explaining that the respondents' claim "relie[d] upon" certain due process cases, even though the claim ultimately lacked merit).

The same analysis holds here. Petitioner asserts that his sentence is unconstitutional because it violates *Johnson*. Regardless of whether that claim has

merit—that is, whether the now-invalid residual clause had a sufficient influence on his sentence to require that it be vacated—there can be no doubt that the claim relies on *Johnson*.

2. Once a defendant like petitioner passes through the gateway for bringing a successive motion for post-conviction relief, he must, of course, establish that his claim is meritorious. "[I]f a court hears a second-or-successive [habeas motion] on the merits, the standards are no different than hearing a first [such motion] on its merits." *Case v. Hatch*, 731 F.3d 1015, 1038 n.12 (10th Cir. 2013). That means a defendant in petitioner's position must demonstrate that his sentence actually violates *Johnson*.

Well-settled precedent points the way for analyzing that claim. "[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin v. United States*, 502 U.S. 46, 53 (1991). Thus, if a criminal judgment has two or more possible statutory grounds, one of the grounds has been held unconstitutional, and "it is impossible to say under which clause of the statute the conviction was obtained," then "the conviction cannot be upheld." *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 368 (1931)).

That is exactly petitioner's situation: When the district court imposed his ACCA sentence, it necessarily determined either that his robbery convictions constituted generic robbery under the enumerated-offense clause or that they were offenses that carried a "serious potential risk of physical injury to another" under the residual clause. But as in *Stromberg*, one

cannot say which. Consequently, petitioner's sentence contravenes *Johnson*.

3. That leaves the question of remedy. The *Stromberg* rule—as is it sometimes called—does not entitle a defendant to habeas relief where the conviction or enhanced sentence can be sustained on a still-valid clause of the statute at issue. *See, e.g.*, *Becht v. United States*, 403 F.3d 541, 548 (8th Cir. 2005). After all, a defendant is not entitled to the "extraordinary remedy" of post-conviction relief, *Bousley v. United States*, 523 U.S. 614, 621 (1998), unless he demonstrates that the constitutional violation in his case "had [a] substantial and injurious effect" on his judgment. *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

But, as the Third and Ninth Circuits (and the Seventh Circuit, in equivalent circumstances) have explained, this required showing is easily made the situation here. *Peppers*, 899 F.3d at 230–31; *Geozos*, 870 F.3d at 897–98; *see also Van Cannon v. United States*, 890 F.3d 656, 661–62 (7th Cir. 2018) (Sykes, J.). Current case law makes clear that petitioner's prior convictions do *not* qualify as ACCA predicates under the enumerated offense clause. App. 9a (citing *United States v. Dixon*, 805 F.3d 1193, 1199 (9th Cir. 2015)). And "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312–13 (1994). Indeed, the Government itself has previously acknowledged that statutory de-

cisions "narrow[ing] the scope" of ACCA are "new substantive rules that [a]re retroactive in ACCA cases on collateral review." Br. for United States 32, *Welch v. United States*, No. 15-6418; *see also* Br. for United States 12–13, *Bousley v. United States*, No. 96-8516 (acknowledging the *Rivers v. Roadway Express* principle applies in federal habeas proceedings); *Van Cannon*, 890 F.3d at 660 (noting Government's concession that *Mathis* applies in this context).[2]

Putting all of this together yields a straightforward result: (1) petitioner's "claim . . . relies on" *Johnson*—and he thus passes through the second-or-successive gateway—because his assertion that his sentence is unconstitutional depends on that new precedent; (2) his claim is meritorious because the district court may have based his ACCA sentence on the residual clause; and (3) petitioner is entitled to post-conviction relief because no other provision of ACCA can currently sustain his sentence.

4. None of the arguments the Eleventh Circuit and the Government have advanced against this analysis withstands scrutiny.

a. Noting that successive claims for post-conviction relief must involve new rules of constitutional

---

[2] The Eighth and Tenth Circuits also recognize that once a defendant passes through the second-or-successive gateway with a valid *Johnson* claim, "current law" construing ACCA determines whether he is entitled post-conviction relief. *Golinveaux v. United States*, 915 F.3d 564, 570 (8th Cir. 2019); *United States v. Lewis*, 904 F.3d 867, 873 (10th Cir. 2018). The Eighth and Tenth Circuits simply disagree with the Third, Fourth, and Ninth Circuits over when a defendant gets to remedy stage.

law and that a movant bears the burden of showing he is entitled to relief under Section 2255, the Eleventh Circuit has reasoned that a defendant seeking relief under *Johnson* must show "that it is more likely than not that the sentencing court relied upon the residual clause to enhance his sentence under the ACCA." App. 8a (citing *Beeman*, 871 F.3d at 1221–22). This reasoning mashes Section 2255's two distinct inquiries together, asking in a single "merits determination" whether the sentencing court relied on the residual clause. *Peppers*, 899 F.3d at 223.

This fusion—combining the "relies on" element of the second-or-successive gateway, *see* 28 U.S.C. § 2244(b)(2)(A), with the defendant's burden of proving that a constitutional violation occurred—is improper. Section 2244's "relies on" requirement has nothing to do with whether the defendant is entitled to relief; "it is a procedure for determining whether a court may hear a second-or-successive [habeas] petition on its merits." *Case*, 731 F.3d at 1038 n.12. And that procedure focuses the "relies on" inquiry solely on the defendant's "claim," not on whether the claim has merit. 28 U.S.C. § 2244(b)(2); *see Tyler*, 533 U.S. at 662; *In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017) ("[W]e do not address the merits at all in our gatekeeping function.").

If a defendant passes through Section 2244's second-or-successive gateway, the habeas court's attention should then turn to assessing the sentencing court's actions. The standards for judging those actions "are no different than hearing a first [habeas] petition on its merits." *Case*, 731 F.3d at 1038 n.12.

Those standards require the defendant to show, under the *Stromberg* rule, that the judgment is infected with constitutional error and, under *Brecht*, that the error had a substantial and injurious effect on the verdict. But, as explained above, those showings are readily made here. *See supra* Part III.2–3.

b. In its prior briefs opposing review of the question presented, the Government has made the same error as the Eleventh Circuit, arguing that a defendant bringing a successive habeas motion "who fails to prove that his ACCA sentence actually depended on application of the residual clause fails to carry his burden of demonstrating a constitutional violation that would entitle him to collateral relief." *King* BIO 13. This argument makes no effort to separate Section 2244's gatekeeping requirement from the merits or to construe its language. Indeed, the Government entirely ignores both the word "claim" and the phrase "relies on," the critical statutory language. To repeat once more: applying the plain text of that provision here makes clear that petitioner's "claim . . . relies on" *Johnson*. 28 U.S.C. § 2244(b)(2). The question whether that claim entitles him to relief is completely distinct.

On that latter question, the Government has argued that the *Stromberg* rule does not govern here because the rule does not apply "in the collateral-review context." *King* BIO 16. But that is plainly wrong. In *Hedgpeth*, this Court accepted that the *Stromberg* rule applies in habeas cases in which one possible basis for a conviction has been declared invalid. The Court merely held that the rule is subject in that con-

text to the additional *Brecht* inquiry whether the invalid basis had a "substantial and injurious effect" on the judgment, as opposed to requiring relief so long as an error was not "harmless beyond a reasonable doubt" under *Chapman v. California*, 386 U.S. 18, 23–24 (1967). *See Hedgpeth*, 555 U.S. at 61–62.

The Government has also drawn a contrast between general jury verdicts and judicial determinations such as the one here. *See King* BIO 16. The basis for a jury verdict that does not specify between alternative options "generally cannot be examined," the Government has reasoned, whereas "the basis for a district court's determination that a defendant's prior conviction qualifies as a violent felony under the ACCA can be determined after the fact by reference to the judge's own recollection, the record in the case, the relevant legal background, and an examination of the statute of conviction." *Id.* Much of that may be true. But all that follows is that defendants invoking *Stromberg* to obtain habeas relief based on judicial determinations will sometimes have a harder time satisfying the *Brecht* "substantial and injurious effect" test than defendants challenging jury verdicts. And the Government's argument cannot aid it in a case like this one, where it is now clear that there is *no* basis in ACCA for sustaining the sentence—and, therefore, the availability of the residual clause at the time of sentencing necessarily harmed the defendant.[3]

---

[3] By much the same token, the Government is mistaken that the rule petitioner seeks "would produce anomalous results." *King* BIO 18. According to the Government, petitioner's rule would mean that defendants who did not press their sentencing courts

IV. This case is an excellent vehicle to resolve the conflict.

In contrast to many of the previous cases presenting this issue to this Court, two aspects of this case make it an ideal vehicle for resolving the conflict over the question presented.

First, the record is undeniably silent as to whether the sentencing court determined that petitioner's prior robbery convictions satisfied ACCA's residual clause or the statute's enumerated offense clause. The sentencing judge never indicated which clause he had in mind. *See* App. 14a (noting that the sentencing transcript is silent on this front).

Second, petitioner's prior convictions for California robbery do not fall under any provision of ACCA as currently construed. Robbery is not one of ACCA's enumerated offenses. Nor does California robbery fall

---

to specify the basis for applying ACCA would be able to seek relief, whereas those who did and caused the courts to specify a basis other than the residual clause would not. *Id.*; *see also Potter*, 887 F.3d at 788. But as just noted, defendants with silent records *cannot* obtain relief when their ACCA enhancements can be sustained based on another provision in the statute. That leaves only defendants such as petitioner, whose sentences cannot be sustained on other grounds. As to those defendants, the Government neglects to mention that "[n]ine circuits" hold that federal prisoners *can* obtain relief under 28 U.S.C. § 2241—the habeas "savings clause"—when a subsequent decision makes clear that the statute under which they were convicted or sentenced does not apply to them. Pet. for Cert. 23–24, *United States v. Wheeler*, No. 18-420 (citing cases). The Government recently asked this Court to abrogate that precedent, *id.* at 26, but this Court denied certiorari. 139 S. Ct. ____, 2019 WL 1231947 (U.S. Mar. 18, 2019).

under the statute's use-of-force clause. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court explained that a crime does not inherently involve the use of physical force against another if it "encompass[es] accidental or negligent conduct." *Id.* at 11; *see also Johnson*, 559 U.S. at 140 ("the phrase 'physical force' means *violent* force"). Applying that precedent, the Ninth Circuit has recently made clear that California robbery statute "criminalizes conduct not included within the ACCA's definition of 'violent felony'" because it reaches "accidental[] or negligent[]" uses of force. *Dixon*, 805 F.3d at 1197–98 (citing *People v. Anderson*, 252 P.3d 968, 970–72 (Cal. 2011)); *see also United States v. Garcia-Lopez*, 903 F.3d 887, 892–93 (9th Cir. 2018); *United States v. Walton*, 881 F.3d 768, 775 (9th Cir. 2018). Accordingly, if this Court were to resolve the question presented in line with precedent from the Third, Fourth, or Ninth Circuit, petitioner would be entitled to relief.

* * *

It is sometimes important not to lose the forest for the trees. Neither of the two possible bases for enhancing petitioner's prison sentence from ten years to nearly twenty years is currently valid. Yet the Government insists upon defending the enhanced sentence imposed pursuant to ACCA.

This is what habeas is for. And faithfully applying Sections 2244 and 2255 confirms there is no obstacle to relief. Because the Government refuses to relieve petitioner from his sentence, and the Eleventh Circuit has declined or afford relief, this Court should ensure that justice is done—and that the law is set straight for all of the others also in petitioner's position.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Allison Case
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF ALABAMA
505 20th Street North
Suite 1425
Birmingham, AL 35203

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2633
jlfisher@omm.com

Brian H. Fletcher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

April 5, 2019