No. _____

In The
Supreme Court of the United States

RALPH CURRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Johnson v. U.S.*, the Court invalidated the "residual clause" of the Armed Career Criminal Act but left undisturbed its two alternative clauses. The first question presented is:

> Where a sentencing record is silent as to the basis for an enhancement under the Armed Career Criminal Act (ACCA), may a District Court grant a successive 28 U.S.C. § 2255 motion to vacate the sentence based on the Court's invalidation of the residual clause in *Johnson* if (1) movant establishes that the sentencing court "may have" relied on the residual clause, as the Fourth and Ninth Circuits hold; or (2) must movant prove by a "preponderance of the evidence" that his sentence depends on the ACCA's residual clause, as the Third Circuit holds; or (3) must movant prove that it was "more likely than not" that the residual clause led to the enhancement—without relying on post-sentencing caselaw clarifying (confirming) that the sentencing court could not properly have relied on one of the alternative clauses, as the First, Sixth, Tenth and Eleventh Circuits hold?[1]

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[1] Other petitions presenting variations of this question include: *Prutting v. U.S.*, 18-5398 (pending); *Perez v. U.S.*, 18-5217 (pending); *King v. U.S.*, 17-8280 (pending); *Oxner v. U.S.*, 17-9014 (pending); *Robinson v. U.S.*, 17-8457 (pending); *Couchman v. U.S.*, 17-8480 (pending); *Casey v. U.S.*, 17-1251 (cert. denied June 25, 2018); *Rhodes v. U.S.*, 17-8667 (cert. denied May 29, 2018); *Westover v. U.S.*, 17-7607 (cert. denied April 30, 2018); *Snyder v. U.S.*, 17-7157 (cert. denied April 30, 2018).

QUESTIONS PRESENTED FOR REVIEW—
Continued

Regardless of how, or even whether, the Court answers this first question, petitioner presents a second question regarding the proposed mandate of the Court of Appeals. The District Judge, adopting the "may have" test, *granted* petitioner's motion to vacate *without a hearing*. The Court of Appeals reversed, adopting a stricter, "more likely than not" standard and ordered that petitioner's motion to vacate be *dismissed*, rather than *remanding for a hearing*. In response, the District Judge filed a "Notice to Parties," explicitly declaring that she, in fact, had relied on the residual clause when she imposed the enhanced sentence. Still, the Court of Appeals denied rehearing. The second question presented is:

> Whether the Court of Appeals "departed from the accepted and usual course of judicial proceedings," Rule 10, Rules of the Supreme Court of the United States, when, upon reversing the District Court's grant (without a hearing) of petitioner's motion to vacate, it ordered that the motion be dismissed, rather than remanding for a hearing, as mandated by 28 U.S.C. § 2255.

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PETITION FOR WRIT OF CERTIORARI

RALPH CURRY petitions the Supreme Court of the United States for a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion, *Curry v. U.S.*, 714 F. App'x 968 (CA11 2018), is reproduced at App.1.

The District Court's "Notice to Parties," 16-cv-22898, DE25:1, is reproduced at App.6.

The Opinion and Order Adopting and Affirming Magistrate's Report, Overruling Objections, and Granting Motion to Vacate, *Curry v. U.S.*, No. 05-CR-20399, 2016 WL 6997503 (S.D. Fla. Nov. 30, 2016), is reproduced at App.10.

The Eleventh Circuit's denial of a petition for rehearing and rehearing en banc is reproduced at App.23.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on March 2, 2018. A petition for rehearing and rehearing en banc was denied on May 22, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) provides, in part:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(2)(B) provides, in part:

[T]he 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

28 U.S.C. § 2255 provides:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is

otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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

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

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

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to

apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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

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

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

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of

counsel under this section shall be governed by section 3006A of title 18.

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

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

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

28 U.S.C. § 2244 provides, in relevant part:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;

* * *

STATEMENT

Ralph Curry was sentenced to 322-months under the Armed Career Criminal Act (ACCA). Eleven years later, Curry timely filed his second 2255 motion to vacate his sentence, arguing that his ACCA sentence was unconstitutional because the sentencing judge had relied on the ACCA's "residual clause," which this Court invalidated in *Johnson*. A Magistrate concluded that the sentencing judge "may have" relied on the residual clause and recommended granting the motion. The District Judge—the same judge who had originally sentenced Curry—agreed, noting further "that there is also a reasonable likelihood that Curry's ACCA sentence was 'in fact' based on the residual clause." App.19, n.8. The District Judge granted the motion without a hearing and resentenced Curry to time served.

The Eleventh Circuit reversed, holding that the District Judge had applied the wrong (too low a) burden of proof. Seizing on Curry's concession that "the [sentencing] record was unclear regarding which convictions, and which clause of the ACCA, the sentencing court relied on," the Eleventh Circuit held that Curry failed to meet the higher burden of "show[ing] that it was more likely than not that the residual clause led to the sentencing court's enhancement of his sentence." App.4. But rather than remand for further proceedings under the higher burden of proof, the Eleventh Circuit ordered that the motion to vacate be *dismissed*. App.5.

A few days later, the District Judge filed a "Notice to Parties," stating: "The undersigned was Defendant Curry's sentencing judge and *relied on the residual clause* in determining that his three prior state convictions satisfied the ACCA criteria." App.7 (emphasis added). Curry petitioned for rehearing, alerting the Court of Appeals to the Notice, and requested, at a minimum, that the court remand for further findings, rather than mandating a dismissal. The court denied rehearing but stayed the mandate.

A. Legal Background

The ACCA provides for an enhanced penalty for "a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1).

The ACCA defines "violent felony" as a felony that: "(i) has as an element the use, attempted use, or

threatened use of physical force against the person of another [known as the 'elements clause' or 'force clause']; or (ii) is burglary, arson, or extortion, involves use of explosives [known as the 'enumerated crimes clause'], or otherwise involves conduct that presents a serious potential risk of physical injury to another [known as the 'residual clause']." 18 U.S.C. § 924(e)(2)(B).

In *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), the Court declared the ACCA's residual clause unconstitutionally vague. In *Welch v. U.S.*, 136 S.Ct. 1257 (2016), the Court held that *Johnson* constituted a new substantive rule of constitutional law that had retroactive effect in cases on collateral review and provided a one-year period for filing claims.

Although *Johnson* invalidated the "residual clause," *Johnson* left undisturbed the two alternative "violent felony" definitions in the ACCA, i.e., the "elements clause" (also known as the "force clause") and the "enumerated crimes clause." "Burglary" is listed as an enumerated crime, but *Florida* burglary does not fit within either of those two alternative clauses. *U.S. v. Esprit*, 841 F.3d 1235, 1241 (CA11 2016) (citing *James v. U.S.*, 550 U.S. 192, 212 (2007)). At the time of Curry's sentencing, courts were relying on the residual clause, if not the other two clauses, to categorize Florida burglary as an ACCA predicate. See *U.S. v. Matthews*, 466 F.3d 1271, 1275-76 (CA11 2006); see also *Taylor v. United States*, 495 U.S. 575, 600 n.9 (1990).

B. Procedural And Factual Background

In 2005, Curry was convicted of drug trafficking, carrying a firearm during a drug trafficking offense, and being a felon in possession of a firearm and ammunition. If not for the ACCA, Curry faced a guideline range of 111-123 months incarceration. Revised PSI, 05-Cr-20399, DE95:3-4.

Curry, however, was sentenced to 322 months under the ACCA. Among his prior convictions, Curry had one prior for Florida sale of cocaine, one prior for Georgia aggravated assault and two priors for Florida burglary. "At his November 9, 2005 sentencing, the [district court] designated Curry an Armed Career Criminal without specifying which [three] prior convictions the Court relied on to reach that determination." App.12. The sentencing judge, therefore, did not specify whether the two Florida burglary priors qualified as ACCA predicates under the residual clause or one of the alternative clauses.

Curry did not object to the enhancement. Nor did Curry pursue an appeal.

Following the decisions in *Johnson* and *Welch*, Curry applied for leave to file a second 2255 motion. The Eleventh Circuit granted leave, concluding he made a *prima facie* showing that he was reasonably likely to benefit from the rule announced in *Johnson*:

> It is unclear which of Curry's prior offenses the sentencing court relied upon when sentencing him as an armed career criminal. Furthermore, a review of the record reveals that, in light of *Johnson*, it is uncertain whether Curry has three predicate offenses to support the ACCA enhancement.
>
> * * *
>
> [I]t appears that Curry may only have two qualifying ACCA predicate offenses—an aggravated assault conviction in Georgia and a Florida conviction for the sale, purchase, or delivery of cocaine.

Order Granting Leave, 16-13231 (CA11 July 1, 2016) at 4, 8.[2] Thus, the panel implied that the Florida burglaries might not qualify as ACCA predicates.

Curry filed his successive 2255 motion asserting a *Johnson* claim, which the District Court referred to a Magistrate for a Report and Recommendation. DE3. The Government conceded that the motion was timely filed, DE12:7, but, emphasizing that the sentencing record was silent as to which prior convictions the

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[2] Actually, it remains an open question whether Georgia aggravated assault is a violent felony under the ACCA. *Harper v. U.S.*, 17-15394, p.7 (CA11 July 16, 2018); accord *Beeman v. U.S.*, 2018 WL 3853960, at *12 (Martin, J., with whom Jill Pryor, J., joins, dissenting from the denial of rehearing en banc) ("Beeman has a good argument that a Georgia conviction for aggravated assault did not require the type of intent necessary for it to serve as an ACCA predicate offense.").

sentencing judge relied upon to impose the enhancement, opposed Curry's motion on the merits:

> In this case, burglary was listed in the enumerated clause of the ACCA and the court could very well have relied upon that clause and not the residual clause invalidated by *Johnson* in finding the burglary was a violent offense, and that Movant's sentence could be enhanced. Given the void in the record on this issue, Movant cannot meet his burden in showing that he falls within the scope of *Johnson*.

DE12:15. The Government thus argued that the sentencing judge, when imposing the enhanced sentence, may not have relied on the residual clause at all, but instead may have deemed Florida burglary a violent offense under the enumerated clause, which, according to definitive post-sentencing caselaw, would itself have been error. See *Esprit*, 841 F.3d at 1241 ("[A]s a categorical matter, a Florida burglary conviction is not a 'violent felony' under ACCA."). In other words, the Government posited that the sentencing judge may have committed a different error (i.e., relying on the alternative clause) that would not warrant relief. So even though Florida burglary cannot support an ACCA enhancement under *any* clause, the Government insisted that Curry, who does not otherwise have three qualifying prior convictions, should be denied relief and serve out the 322-month sentence.

The Magistrate rejected the Government's argument and recommended that habeas relief be *granted without an evidentiary hearing*. DE14. Noting

conflicting dicta between two Eleventh Circuit opinions, compare *In re Chance,* 831 F.3d 1335 (CA11 2016) with *In re Moore*, 830 F.3d 1268, 1273 (CA11 2016), and disagreement among district judges within the circuit and elsewhere, the Magistrate adopted the test set forth in *In re Chance* and found that (1) Curry "carried his burden of proving that he may have been sentenced under ACCA's residual clause," and (2) a prior Florida burglary conviction "does not satisfy the ACCA's elements clause [or] . . . the enumerated crimes clause." DE14:17-18.

The District Judge—the same judge who sentenced Curry—adopted the Magistrate's Report and *granted* the motion to vacate *without a hearing*. She also followed *In re Chance* and articulated the test as requiring that a movant

> establish by a preponderance of the evidence that: (1) the record does not refute his assertion that the sentencing Court may have relied on the residual clause in applying the ACCA enhancement, in violation of *Johnson*, and (2) under current binding precedent . . . his Florida burglary convictions no longer qualify as ACCA crimes of violence.

App.18. She agreed that Curry met his burden, observing that "the Government recently conceded in another case from this District that Florida burglary convictions are no longer ACCA 'crimes of violence' . . . and the Eleventh Circuit agreed." App.19-20 (citing *Esprit*).

Even though the District Judge declined to follow *In re Moore*, she nevertheless found that Curry could

meet its higher burden: "While the record's ambiguity is sufficient [to grant the motion] pursuant to *Chance*, the law at the time of sentencing suggests there is also a reasonable likelihood that Curry's ACCA sentence was 'in fact' based on the residual clause." App.19, n.8. She noted that the Government could not cite "any controlling precedent holding that" Florida burglary satisfied either the elements clause or the enumerated offense clause at the time of Curry's sentencing in 2005, yet "prior Florida burglary convictions were upheld under the residual clause." *Id*. (citing *Matthews*).

Curry was re-sentenced to time served and released from prison. The District Court determined that Curry had served more than the newly calculated sentencing guidelines recommended after finding that Curry no longer qualified as an armed career criminal, a finding not disputed by the Government.[3]

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[3] The District Judge later explained her reasons for the sentence:

> Defendant had already served 139 months and 27 days. When applying the 18 U.S.C. section 3553 factors, the Court considered that the Defendant had served more time than the corrected guideline required. Moreover, during his eleven years in custody, Defendant had no disciplinary actions, held responsible inmate work positions, made an effort to rehabilitate himself, finished his GED, ministered spiritually to other inmates, obtained a culinary degree and otherwise prepared for a positive return to society. In the more than two years since being on supervised release, he has not presented any issues.

App.8.

The Government appealed. Before the Government's Reply Brief was due, the Eleventh Circuit decided *Beeman v. U.S.*, in which a divided panel held that, in order to prove a *Johnson* violation in an initial (first) 2255 motion, the movant must prove that it was "more likely than not" that the sentencing court relied *solely* on the residual clause. 871 F.3d 1215, 1221-25 (CA11 2017). Embracing *In re Moore*, the *Beeman* majority held that

> the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause.

Id. at 1222.

Even on a silent sentencing record, the *Beeman* majority acknowledged that the movant still could meet his "burden of establishing that he, in fact, was sentenced as an armed career criminal solely because of the residual clause." *Id*. at 1224. The success of a 2255 motion would not necessarily "depend on the 'fluke' of a district court having expressly stated which clause it was relying on." *Id*. "Some sentencing records may contain direct evidence: comments or findings by the sentencing judge indicating that the residual clause was relied on and was essential to application

of the ACCA in that case." *Id.* at n.4. Other sentencing records might contain "sufficient circumstantial evidence to show the specific basis of the enhancement." *Id*. For example, "if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause." *Id*. at 1224, n.5.

According to the *Beeman* majority, however, *post*-sentencing caselaw, e.g., *Mathis v. U.S.*, 136 S.Ct. 2243 (2016) and *Descamps v. U.S.*, 570 U.S. 254 (2013), clarifying (confirming) that it would have been error for the sentencing court to have relied upon the alternative clauses, does *not* prove that the sentencing court relied on the residual clause. 871 F.3d at 1224 & n.5.[4] Post-sentencing caselaw would still "not answer the question" posed by the *Beeman* majority: "[W]as Beeman in 2009 sentenced solely per the residual clause?"[5]

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[4] Beeman's *Johnson* challenge turned on whether his prior for Georgia aggravated assault qualified as a violent felony. The majority wrote: "a sentencing court's decision today that Georgia aggravated assault no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact here: whether in 2009 Beeman was, in fact, sentenced under the residual clause only." 871 F.3d at 1224, n.5. Curry, too, has a prior for Georgia aggravated assault. See note 2.

[5] According to the *Beeman* majority, a movant who relies on post-sentencing caselaw to argue that a prior conviction does not qualify as an ACCA predicate under the alternative clauses is not raising a pure *Johnson* claim. Instead, such an argument constitutes an "untimely" *Descamps/Mathis* claim, referring to this

Beeman, whose motion to vacate had been *denied* by the District Court, had "not suggested in [the Court of Appeals] that a remand for an evidentiary hearing would do him any good." *Id*. at 1221. So the *Beeman* majority affirmed the dismissal of his motion.

The *Beeman* dissenter had no quarrel with the majority placing the burden on the movant to "demonstrate that it is 'more likely than not' that he was sentenced under the residual clause in order to obtain relief under *Johnson*." 871 F.3d at 1227-28 (Williams, D.J., dissenting). "When the sentencing record is inconclusive, a movant must still bear the burden of showing—either through direct or circumstantial evidence—that he was, in fact, sentenced under the residual clause." *Id*. at 1229. She disagreed, however, "on how that standard may be met." *Id*. at 1228.

Embracing *In re Chance*, and two more-recently-decided circuit cases, *U.S. v. Winston*, 850 F.3d 677, 682 (CA4 2017) and *U.S. v. Geozos*, 870 F.3d 890 (CA9 2017), the *Beeman* dissenter could "see no basis for predicating a defendant's right to relief on the precision of the

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Court's "decisions describing how federal courts should determine whether an offense qualifies as a predicate offense under the ACCA's enumerated offenses and elements clauses." *Beeman*, 871 F.3d at 1218. The Eleventh Circuit has held that *Descamps* and *Mathis* did not announce a right "newly recognized by the Supreme Court," 28 U.S.C. § 2255(f)(3), "its holding[s] merely clarified existing precedent;" therefore "a § 2255 movant wishing to raise a *Descamps* [or *Mathis*] claim cannot rely on subsection (f)(3) as the starting point for the calculation of the [one-year] limitations period." *Beeman*, 871 F.3d at 1220.

verbiage employed by a judge . . . at the time of sentencing," 871 F.3d at 1228-29, while ignoring post-sentencing caselaw that clarifies (confirms) that the movant "could not have been properly sentenced under any other portion of the statute." *Id.* at 1230. In her view, a movant could satisfy his "burden of showing . . . that he was, in fact, sentenced under the residual clause," by proving that it would have been error for the sentencing court to enhance the sentence based on one of the alternative clauses. Clarifying post-sentencing caselaw could thus serve as "circumstantial evidence . . . demonstrating that [the movant] could not possibly have been sentenced under any other clause of the ACCA." *Id*. at 1229-30.[6]

Citing the 2-1 decision in *Beeman*, the Government filed its Reply Brief in Curry's case, arguing that "[t]he district court's adoption of the erroneous *Chance* formulation [i.e., the "may have" test] is exactly what *Beeman* rejects and why *Beeman*, as binding authority, requires reversal here." CA11 No. 17-10822 (filed Oct. 23, 2017), p.8. The Government's Reply Brief did not address the additional finding by the District Judge that "there is also a reasonable likelihood that Curry's ACCA sentence was 'in fact' based on the residual

[6] The *Beeman* dissenter noted: "As the majority correctly points out, *Descamps* did not articulate a new rule of constitutional law, but rather 'merely clarified existing precedent.' . . . If that is the case, not only is Beeman permitted to rely on *Descamps* in arguing that he is entitled to *Johnson* relief, but he is, in fact, required to do so." 871 F.3d at 1227 n.2.

clause." App.19, n.8. Instead, the Government argued that

> [Curry] cites to no precedent in November 2005 (when he was sentenced) showing that Florida burglary qualified as a violent felony only under the residual clause. And he voices no disagreement with the government's presentation in its opening brief that no such precedent exists. Indeed, at least as late as January 2013, this Court in *U.S. v. Weeks*, 711 F.3d 1255 (CA11 2013), held that Florida burglary qualified under the enumerated-offenses clause using the modified categorical approach, and just as critically, that the residual clause was not the only option for classifying Florida burglary as a violent felony.

Reply Brief, p.4. Significantly, well before the Government filed its Reply Brief, it had confessed in another case that *Weeks* was wrongly decided, conceding that "a Florida burglary conviction cannot serve as a predicate offense for [an] ACCA enhancement" under the enumerated crimes clause. *Esprit*, 841 F.3d at 1237.

Without oral argument, the Eleventh Circuit, based on the *Beeman* decision, reversed the District Court's grant of Curry's motion:

> Here, under *Beeman*, the District Court erred by granting Curry's § 2255 motion because Curry concedes that the record was unclear regarding which convictions, and which clause of the ACCA, the sentencing court relied on to impose the ACCA enhancement. The District Court—observing that this Court had

> not yet decided the standard of proof a movant must meet to succeed on his *Johnson* claim—rested its decision to vacate Curry's sentence on *In re Chance*, in which a panel of this Court stated in dicta that "the required showing is simply that § 924(c) may no longer authorize [a movant's] sentence as that statute stands after *Johnson*—not proof of what the judge said or thought at a decades-old sentencing." 831 F.3d 1335, 1341 (CA11 2016). Subsequent to the District Court's grant of Curry's motion to vacate his sentence, we decided *Beeman*, which discarded the approach taken by the panel in *In re Chance* and instead adopted the above-discussed standard.

App.4. But rather than remand for further proceedings consistent with the higher burden, the Eleventh Circuit "remand[ed] for the District Court to *dismiss*" Curry's motion. *Id*. at 5 (emphasis added).

In response to the appellate opinion, the District Judge filed a "Notice to Parties," *sua sponte*, explaining that she was "Curry's sentencing judge and *relied on the residual clause* in determining that his three prior state convictions satisfied the ACCA criteria." She wrote:

> The Eleventh Circuit indicates that it was required to reverse because the record was silent as to the sentencing court's basis for imposing the ACCA enhancement, specifically whether the enhancement was based on the residual clause. The undersigned regrets not putting its reasoning explicitly on the record

> . . . . The undersigned determined that the *enumerated clause did not apply* but found that the Defendant's prior convictions met the requirements for an enhancement *under the ACCA's residual clause*.

App.6-7 (emphasis added).

Curry timely petitioned for rehearing, alerting the panel to the District Judge's Notice and requesting a remand for "further findings" rather than a dismissal. The court denied rehearing and en banc review, App.23, but stayed the mandate "until the final disposition of the case by the Supreme Court. . . ." DE27:3. Curry remains at liberty under supervised release pending the outcome of this petition.

REASONS FOR GRANTING THE WRIT

"In the nearly three years since the Supreme Court's decision in *Johnson*, courts across the country have received thousands of motions from federal prisoners challenging their ACCA enhancements." *U.S. v. Wilfong*, No. 16-6342, 2018 WL 1617654, at *3 (CA10 Apr. 4, 2018). Those cases generated a question that "cropped up somewhat frequently in the wake of *Johnson* [] and *Welch*: When a defendant was sentenced as an armed career criminal, but the sentencing court did not specify under which clause(s) it found the predicate

'violent felony' convictions to qualify, how can the defendant show that a new claim 'relies on' *Johnson* [], a decision that invalidated only the residual clause?" *Geozos*, 870 F.3d at 894.

I. THERE IS AN ACKNOWLEDGED CONFLICT IN THE CIRCUITS ON THE QUESTION PRESENTED.

As of this writing, eight circuits have confronted the first question presented, with the Third Circuit weighing in just as this petition was going to print, see *U.S. v. Peppers*, 2018 WL 3827213 (CA3 Aug. 13, 2018), and two judges from the Eleventh Circuit registering their dissent from the denial of rehearing en banc in *Beeman* the very next day. 2018 WL 3853960, at *9 n.2 (CA11 Aug. 14, 2018) (Martin, J., with whom Jill Pryor, J., joins, dissenting from the denial of rehearing en banc) (noting the split in the circuits).

A. The Fourth And Ninth Circuits Require A Movant To Prove That The Sentencing Court "May Have" Relied On The Residual Clause When Imposing The Enhanced Sentence, Which Movant Can Prove By Citing Post-Sentencing Caselaw

The Fourth Circuit, in *U.S. v. Winston*, 850 F.3d 677 (CA4 2017), addressed a successive motion to vacate that was denied by the District Court. Winston had a total of four prior convictions, two for serious

drug offenses that qualified under the ACCA. *Id*. at 680. He also had a prior for robbery and a prior for rape. The sentencing record was silent as to whether the sentencing judge had relied on the residual clause in counting one or both of them as qualifying offenses under the ACCA. Because the sentencing record was silent, the Government argued that Winston failed to overcome the procedural hurdle unique to successive petitioners (what other courts refer to as a "threshold question," *Geozos*, 870 F.3d at 894, or "§ 2255(h)'s gatekeeping requirements, *Peppers*, 2018 WL 3827213, at *13), to establish that his claim "relie[d] on" *Johnson*. See 28 U.S.C. § 2244(b)(2)(A). The Fourth Circuit disagreed, embracing the Eleventh Circuit's dicta in *In re Chance*, that because

> nothing in the law require[d] a [sentencing] court to specify which clause it relied upon in imposing a sentence . . . when an inmate's sentence *may have* been predicated on application of the now-void residual clause and, therefore, *may* be an unlawful sentence under the holding in *Johnson* [], the inmate has shown that he "relies on" a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A).

Id. at 682 (emphasis added).

Having decided that Winston had satisfied the procedural hurdle imposed upon successive petitioners, the Fourth Circuit then "consider[ed] the merits of Winston's appeal." *Winston*, 850 F.3d at 683. The Fourth Circuit analyzed whether his prior conviction for Virginia robbery would otherwise qualify under the

ACCA's alternative clauses. The court applied *post*-sentencing caselaw to conclude "that Winston's conviction for Virginia common law robbery does not qualify as a violent felony under the ACCA." *Id*. at 685. The court rejected the Government's contention that the court was bound by pre-sentencing caselaw even if it was "no longer binding because it ha[d] been undermined by later [post-sentencing] Supreme Court precedent." *Id*. at 683. The Fourth Circuit reversed the denial of Winston's 2255 motion and remanded for further proceedings (to address whether Winston's other prior (rape) otherwise qualified under the ACCA, an issue that had not yet been addressed in the District Court, failing which, Winston's sentence would, presumably, be vacated for lack of a third qualifying offense). *Id*. at 686.

The Ninth Circuit employed a similar approach in *U.S. v. Geozos*, in which a petitioner also brought a successive 2255 motion invoking *Johnson*. Favorably citing *Winston* in concluding that movant had satisfied the "threshold" requirement of section 2255, see 28 U.S.C. § 2244(b)(3)(C), the court held "that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson*," 870 F.3d at 896 & n.6. Given a silent sentencing record and the "background legal environment at the time of sentencing," i.e., no "binding circuit precedent at the time of sentencing" that the prior convictions "qualified as a violent felony under

[an alternative ACCA] clause," *id*. at 896, the Ninth Circuit held that the movant had adequately established that the enhanced sentence relied on the ACCA's residual clause. *Id*. at 897.

The Ninth Circuit then addressed the merits of movant's *Johnson* claim, "look[ing] to the substantive law concerning the [alternative ACCA clauses] as it *currently* stands, not the law as it was at the time of sentencing." *Id.* at 898 (emphasis in original). The court explained that "once the bar to considering a second or successive petition or motion has been overcome, the analysis of the merits is the same as if the petitioner were bringing a first petition or motion." *Id*. Applying current (post-sentencing) law, including the "Supreme Court's interpretation of" the alternative ACCA clauses, *id*. at 897 & 898 n.7 (citing *Mathis*), the Ninth Circuit concluded that none of the prior convictions otherwise qualified under ACCA's alternative clauses, reversed the District Court, "remand[ed] with instructions to vacate Defendant's sentence," and "direct[ed] that Defendant be released from custody immediately." *Id.* at 901.[7]

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[7] The Fourth and Ninth Circuits thus reached the *merits* of movants' respective *Johnson* claims. In this Court, the Government has (mistakenly) argued that *Winston* and *Geozos* addressed only the "threshold statutory requirement for obtaining second-or-successive Section 2255 relief," not the merits of the movants' claims. *Casey* BIO:14.

The Government has also argued that "any tension between the reasoning of [the Fourth and Ninth Circuit] decisions and the [First Circuit] decision below . . . does not warrant review," because "the rule adopted in *Winston* and *Geozos* derives from dicta

B. The Third Circuit Requires A Movant To Prove By A "Preponderance Of The Evidence" That His Sentence Depends On The ACCA's Residual Clause, Which Movant Can Prove By Citing Post-Sentencing Caselaw

The Third Circuit is the most recent appellate court to address the first question presented, in the context of a movant's successive 2255 motion. *Peppers*,

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in . . . *In re Chance* . . . [that] the Eleventh Circuit has since overruled." *Casey* BIO:14. That observation is irrelevant, first because those circuits had already considered and rejected the Eleventh Circuit's contrary dicta *In re Moore*, which was itself the *reasoning* adopted by the *Beeman* court; and second, because those cases continue to be applied in those circuits, even after *Beeman*—more of a reason for the Court to intervene. See, e.g., *U.S. v. Donnelly*, 710 F. App'x 335, 335-36 (CA9 2018) (quoting *Geozos*, the Ninth Circuit "reverse[d] the district court's order denying Donnelly's motion and remand[ed] with instructions to vacate Donnelly's sentence," where "[t]he sentence may have been based on an invalid legal theory because 'it is unclear from the record whether the sentencing court relied on the residual clause' "); *U.S. v. Johnson*, 2018 WL 834950, at *3 (W.D. Va. 2018) (applying *Winston*'s "may have" test, District Court applied post-sentencing law in deciding to vacate enhanced sentence); *Pannell v. U.S.*, 2018 WL 542978, at *3 (W.D. Va. 2018) (applying *Winston* to successive motion to vacate, District Court concluded that sentence "may have been predicated on the residual clause," and then analyzed, under current law, whether the prior convictions might otherwise qualify as ACCA predicates under the alternative clauses); *U.S. v. Hairston*, 2018 WL 561861, at *9 (W.D. Va. 2018) (applying *Winston* to first motion to vacate, District Court vacated sentence finding that "sentence may have been predicated on the residual clause," and movant "no longer has three predicate convictions to support his armed career criminal designation").

2018 WL 3827213. Its opinion largely echoes the views expressed by the *Beeman* dissenter, 871 F.3d at 1227-28 (Williams, D.J., dissenting), and by the two judges dissenting from the denial of rehearing en banc. *Beeman*, 2018 WL 3853960, at *6 (opinion of Martin, J., with whom Jill Pryor, J., joins).

To satisfy the "gatekeeping inquiry" of section 2255, the Third Circuit "require[d] only that a defendant prove he *might have* been sentenced under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced under that clause." *Id*. at *1. Favorably citing the Fourth (*Winston*) and Ninth (*Geozos*) Circuits, the Third Circuit rejected the Government's view that a movant "can only pass through the jurisdictional gate by producing evidence that his sentence depended 'solely' upon the ACCA's residual clause." *Id.* at 6. To clear the gate, the Third Circuit reiterated, a movant need only "demonstrate that he may have been sentenced under the residual clause of the ACCA, which was rendered unconstitutional in *Johnson*." *Id.* at *6.

Once through the gate and on to the merits, the Third Circuit held that a movant could "rely on post-sentencing cases (i.e., the current state of the law) to support his *Johnson* claim." *Id.* at *1. Acknowledging that "[l]ower federal courts are decidedly split on whether current law, including *Mathis* [and] *Descamps* . . . may be used when determining which ACCA clauses a defendant's prior convictions may implicate," *id*. at *12, the court held that "once a defendant has satisfied § 2255(h)'s gatekeeping requirements by

relying on *Johnson*, he may use post-sentencing cases . . . to support his *Johnson* claim because they . . . ensure we correctly apply the ACCA's provisions." *Id*. at *13. Noting also "that different tests have emerged for determining whether a movant has proven a *Johnson* claim at the merits stage," *id.* at 18, n.21 (comparing the Ninth (*Geozos*) with the Eleventh (*Beeman*) Circuit), the Third Circuit placed the burden upon "the movant to prove by a preponderance of the evidence that his sentence depends on the ACCA's residual clause." *Id.*

C. The First, Sixth, And Tenth Circuits Are Aligned With The Eleventh Circuit In Imposing On A Movant The Burden To Prove That It Was "More Likely Than Not" That The Residual Clause Led To The Sentencing Court's Enhancement Of His Sentence, Which Movant Cannot Prove By Citing Post-Sentencing Caselaw

The First Circuit, in a 2-1 decision, agreed with the Eleventh Circuit's *Beeman* majority "that to successfully advance a *Johnson* [] claim on collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause." *Dimott v. U.S.*, 881 F.3d 232, 240, 243 (CA1 2018), cert. denied sub nom. *Casey v. U.S.*, 17-1251 (June 25, 2018).[8] The

[8] In the First Circuit, the movant's failure to meet this burden rendered his motion "untimely," whereas in the Eleventh (and other circuits), the motion is timely but meritless. Whether the

First Circuit rejected the movant's contention that, to meet his burden of proof, movant could rely on post-sentencing caselaw to argue that the prior conviction (Maine burglary) never properly qualified as an ACCA predicate under the other clauses (i.e., that by process of elimination, the sentencing court could only have relied on the then-valid—but now invalid under *Johnson*—residual clause to enhance the sentence). What mattered to the First Circuit was that, at the time of the sentencing, courts were relying on the alternative clauses to enhance sentences (even if we now know erroneously), so movant failed to satisfy his burden of proving that he was sentenced solely pursuant to the ACCA's residual clause. *Id*. at 241. The First Circuit disagreed with the contrary approaches taken by the Fourth (*Winston*) and Ninth (*Geozos*) Circuits. *Id.* at 242. The dissenter, consistent with other circuits, would hold that, on a silent sentencing record, post-sentencing caselaw invalidating reliance on the alternative clauses could prove that the movant was entitled to relief. 881 F.3d at 246 (Torruella, J., dissenting).

The Sixth Circuit, in *Potter v. U.S.*, affirmed the denial of a successive 2255 motion where "[t]he district court declined the request on the ground that he sentenced Potter under a different clause." 887 F.3d 785, 786 (CA6 2018). The Sixth Circuit rejected Potter's

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motion is denied as untimely or as meritless—each for failure to meet this burden of proof—is immaterial to the propriety of resolving the question presented.

argument that post-sentencing caselaw (*Mathis*) proved "that his prior Georgia burglary conviction does not meet the Act's definition of 'burglary.'" *Id*. at 788. The court commented that *Johnson* did not "open the door for prisoners to file successive collateral attacks any time the sentencing court *may* have relied on the residual clause." *Id*. Embracing the First (*Dimott*) and Eleventh (*Beeman*) Circuits, the *Potter* court disapproved of an approach that "would require the government to prove years later . . . that the prisoner's sentence is lawful." *Id*. As recently described by another Sixth Circuit panel,

> "[t]he cases cited by the government reflect a circuit split, which, at the time of the government's filing of its brief, did not include our circuit. But we have since entered the fray [in *Potter*], siding with the Tenth [*Snyder*] and Eleventh [*Beeman*] Circuits in putting a *Johnson* claimant up to the seemingly improbable task of proving that his sentencing judge "relied only on the residual clause in sentencing" him.

Raines v. U.S., 2018 WL 3629060, at *2 (CA6 July 31, 2018).

Raines, unlike *Potter* (and *Curry*), involved a first motion to vacate, so the movant did not face the statutory hurdles unique to second-or-successive motions. *Id*. at *3. Applying post-sentencing law, *Raines* "reverse[d] the district court's judgment denying his § 2255 motion, and remand[ed] to the district court so that Raines may be resentenced without the ACCA

enhancement." *Id*. at *7. One judge, explaining that *Potter* applies exclusively to second-or-successive petitions,

> [wrote] separately to note that if *Potter*'s dicta that a second-or-successive habeas petitioner must show that a sentence was based only on the residual clause were read as law, then it would collide with *Welch*. . . . That is because the Court in *Welch* found that the petitioner had shown the denial of a "constitutional" right even though he challenged an ACCA enhancement as invalid for both constitutional and statutory reasons. . . . To be consistent with *Welch*, we should not require a second-or-successive habeas petitioner to show that a sentence was based only on the residual clause.

2018 WL 3629060, at *7, *10 (Cole, C.J., concurring).

The Tenth Circuit, in *U.S. v. Snyder*, affirmed the denial of a first 2255 motion in which "the district court found, as a matter of historical fact, that it did not apply the ACCA's residual clause in sentencing [movant] under the ACCA." 871 F.3d 1122, 1128 (CA10 2017) (cert. denied Apr. 30, 2018) (17-7157). The Tenth Circuit instructed lower courts, in the face of a silent sentencing record, to look to the "relevant background legal environment" at the time of sentencing to determine whether an alternative clause, as opposed to the residual clause, may have been used to enhance the sentence. And "the relevant background legal environment is, so to speak, a 'snapshot' of what the

controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions." *Id*. at 1129.

More recently, in the context of the denial of a second-or-successive 2255 motion, the Tenth Circuit joined the First (*Dimott*) and Eleventh (*Beeman*) Circuits in "hold[ing] the burden is on the defendant to show by a preponderance of the evidence—i.e., that it is more likely than not—his claim relies on *Johnson*," and explicitly rejected the "*may have* relied on the residual clause" approach of the Fourth (*Winston*) and Ninth (*Geozos*) Circuits. *U.S. v. Washington*, 890 F.3d 891, 896 (CA10 2018); see also *U.S. v. Driscoll*, 892 F.3d 1127, 1135 (CA10 2018) ("We now further adopt *Beeman*'s "more likely than not" burden of proof here, at the merits stage of a first § 2255 challenge.).

D. The Fifth Circuit Has Acknowledged The Split In The Circuits But Granted Relief To The Movant Without Choosing Sides

In an appeal from the denial of a successive motion to vacate, the Fifth Circuit noted the disagreement among the circuit and District Courts over the burden placed on a movant. *U.S. v. Taylor*, 873 F.3d 476, 479-81 (CA5 2017). It described cases in the Fourth Circuit (*Winston*), Ninth Circuit (*Geozos*) and "numerous district courts around the country" as "reject[ing] the government's position that the defendant must

demonstrate that the district judge actually relied on the residual clause during sentencing." *Id*. at 479-80. It described the Tenth (*Snyder*) and Eleventh (*Beeman*) Circuits as requiring more, emphasizing that in those circuits "it is the state of the law at the time of the sentencing that matters." *Id*. at 481. But the Fifth Circuit determined that it "need not decide today which, if any, of these standards we will adopt because we conclude that Taylor's § 2255 claim merits relief under all of them." *Id*.

> [H]ere, unlike the cases from the Tenth and Eleventh Circuits, there was precedent suggesting that Taylor's third predicate conviction could have applied only under the residual clause. Thus, even using the Tenth Circuit's 'snapshot' inquiry or the Eleventh Circuit's 'more likely than not' test, Taylor would prevail. Theoretically, the district court mistakenly could have been thinking of the elements clause when sentencing Taylor. But this court will not hold a defendant responsible for what may or may not have crossed a judge's mind during sentencing.

Id. at 482. The Fifth Circuit "reverse[d] the district court and grant[ed] Taylor's 28 U.S.C. § 2255 motion." *Id*. Rather than remand, the appellate court "exercise[d its] authority . . . to reform Taylor's sentence" and "order[ed] Taylor's immediate release." *Id*.

II. CURRY'S CASE IS A SUPERIOR VEHICLE TO RESOLVE THE QUESTION PRESENTED BECAUSE THE DISTRICT JUDGE, WHO ORIGINALLY SENTENCED HIM, GRANTED HIS 2255 MOTION TO VACATE

Three years of percolation has produced a mature conflict dividing the lower courts. At least ten certiorari petitions have outlined for this Court the competing views. See note 1. The Court has denied review in at least four cases, and at least six other petitions remain pending as of this writing.

For its part, the Government, in its Briefs in Opposition (BIO) to those petitions, admits that "inconsistency exists in the approaches of different circuits," *King* BIO:10; and that "courts of appeals have applied a different standard to determine whether a successive petition should be authorized." *Couchman* BIO:18. But the Government has argued that "further review of any conflict is unwarranted," given the circumstances in those cases. *King* BIO:17; *Couchman* BIO:18; see also *Casey* BIO:14 ("And any tension between the reasoning of those decisions [of the Fourth and Ninth Circuits] and the decision below . . . does not warrant review.").

Curry's "circumstances" are different. Curry's case does not collide with any of the roadblocks that the Government erected in other cases:

- The Government concedes that Curry's successive motion was timely. DE12:7. Contrast *Dimott*, 881 F.3d at 243 (dismissing claims as untimely).

- The Government raised no procedural bar to Curry obtaining relief, either in the District Court or in the court of appeals. Contrast *Westover* BIO:19, n.3 ("The government preserved that [procedural default] argument in the district court . . . and on appeal."); *Casey* BIO:16 ("Petitioner procedurally defaulted his claim by failing to raise it on direct appeal.").

- In all of the other cases, the District Court *denied* the 2255 motion, and the court of appeals affirmed. The Government argued against further review, characterizing the denials as a "factbound determination" that the enhanced sentence was based on an alternative clause, "*not* the residual clause." *Snyder* BIO:13-14, 15, 20; *Westover* BIO:10-12, 15-17; *King* BIO:14, 18-19 ("This case would not be a suitable vehicle in which to address the question presented . . . Petitioner does not present any evidence or argument that the original sentencing court classified his prior conviction . . . as a violent felony based on the residual clause."); *Robinson* BIO:12, 17-18 (arguing that the "case is far from an 'ideal vehicle' for addressing the question presented," where the lower court made a "factbound determination," a "question of historical fact adverse to petitioner" that his "sentence was based on the enumerated offenses clause," and thus "the residual clause was not a basis for the prisoner's ACCA sentence"); *Couchman* BIO:10, 20 (arguing that the case would not be "a good vehicle to consider how a

movant can show a Johnson claim on a silent record," where movant "was, in fact, sentenced under the enumerated offenses clause—not the residual clause," so movant's "claim would fail under any circuit's approach.").

- Unlike the others, Curry—the prevailing party in the District Court—asked the Court of Appeals to remand to allow the District Judge to make the very "factual determination" that the Court of Appeals held was necessary to support granting the motion. Contrast *Dimott*, 881 F.3d at 240 n.7 ("Casey did not ask for remand to the district court to prove that he was in fact sentenced solely under the residual clause."); *Beeman*, 871 F.3d at 1221 ("[Beeman] did not request an evidentiary hearing in the district court, and he has not suggested in this Court that a remand for an evidentiary hearing would do him any good. Instead, he has chosen to proceed on the basis of the record as it now exists. . . .").[9]

Thus, Curry's is the one case in which the District Judge *granted* the motion and resentenced; the one case in which the District Judge (who originally

[9] Even in his petition for rehearing en banc, CA11 No. 16-1670 (filed Nov. 6, 2017), Beeman did not propose a remand for an evidentiary hearing. Rather, he asked the en banc court to address whether, on a silent sentencing record, he may prove that the sentencing court used the residual clause by proving (essentially by process of elimination) "that a predicate offense does not fit with the ACCA's elements and enumerated crimes clauses." See also *Beeman v. U.S.*, 2018 WL 3853960, at *3 (CA11 Aug. 14, 2018) (Julie Carnes, J., respecting the denial of rehearing en banc) ("Beeman provided no evidence to meet his burden.").

sentenced Curry) found that the silent sentencing record established "there is also a reasonable likelihood that Curry's ACCA sentence was 'in fact' based on the residual clause," App.19, n.8; and the one case in which the District Judge—in response to the Court of Appeals opinion—stated that she actually "relied on the residual clause in determining that his three prior state convictions satisfied the ACCA criteria." App.7.

In opposing certiorari review, the Government has acknowledged that a petitioner, like Curry, would be entitled to relief "by reference to the judge's own recollection. . . ." *King* BIO:16; see also *Potter v. U.S.*, 887 F.3d 785, 788 (CA6 2018) ("On top of that, the judge who reviewed his § 2255 motion is the same judge who sentenced him. It is difficult to think of a better source of information about what happened the first time around."); *Raines*, 2018 WL 3629060, at *3 (reinforcing that the appellate court, "as a matter of fact . . . defer[s] to the district court's assertion" as to whether, at the time of sentencing, the District Court relied on the residual clause at sentencing); *Dimott*, 881 F.3d at 245 (Torruella, J., dissenting) ("I fail to see what could better satisfy the majority's evidentiary requirement that petitioner was sentenced under the residual clause than a finding by the sentencing judge, who was also 'certainly present at sentencing' and far more knowledgeable of his own sentencing decisions. I have a difficult time thinking of what further evidence, in the face of a silent record, could be more convincing.").

Curry, therefore, is the one petitioner uniquely capable of establishing, under any burden of proof, that

the residual clause led to his enhanced sentence. He is not asking that any court "presume" constitutional error, he has "demonstrated" it; there is nothing "speculative" about Curry's claim. Contrast *Casey* BIO:15 (arguing against review because petitioner "cannot show that he would necessarily be entitled to resentencing in those circuits based solely on the *speculative possibility* that his original sentence was imposed under the ACCA's residual clause, especially when he cannot offer any argument or evidence to that effect. No court of appeals has expressly endorsed such a reversal of the normal burden of proof on collateral review, under which constitutional error would be *presumed* rather than *demonstrated*.").

Accordingly, this case is a superior vehicle to address the question that has vexed and divided the lower courts: whether Curry was required to show that his enhanced sentence "may have" been based on the unconstitutionally vague ACCA's residual clause—in which case the court of appeals should have *affirmed* the order granting his motion to vacate; or whether Curry was required to show that his enhanced sentence "more likely than not" was based on the residual clause—in which case the court of appeals, at a minimum, should have *remanded for a hearing*.

III. THE COURT OF APPEALS "DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS," RULE 10, RULES OF THE SUPREME COURT OF THE UNITED STATES, BY DISMISSING THE CASE RATHER THAN REMANDING FOR A HEARING, AS MANDATED BY 28 U.S.C. § 2255.

"A prisoner in custody . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate" it. 28 U.S.C. § 2255(a). When such a motion is filed, the prisoner is entitled to a "prompt hearing" so that the court may "make [the] findings of fact" necessary to evaluate his claim "[u]nless the motion and the files and records of the case *conclusively show that the prisoner is entitled to no relief*." 28 U.S.C. § 2255(b) (emphasis added); *accord Fontaine v. U.S.*, 411 U.S. 213, 215 (1973);[10] *Machibroda v. U.S.*, 368 U.S.

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[10] *Fontaine* illustrates just how adversely conclusive the record must be before the lower court can, without a hearing, dismiss a 2255 motion. Fontaine moved to vacate his guilty plea, claiming it was coerced and that he was mentally ill at the time. The judge who had accepted the plea and had engaged the defendant in a Rule 11 colloquy denied the 2255 motion without an evidentiary hearing, and the court of appeals affirmed. This Court reversed. Even though the defendant had, when entering the guilty plea, expressly represented to the judge *on the record* that the plea was voluntary, this Court held:

> On this record, we cannot conclude with the assurance required by the statutory standard 'conclusively show'

487, 494 (1962); see also *Herman v. Claudy*, 350 U.S. 116, 118-19 (1956) ("[W]here a denial of . . . constitutional protections is alleged in an appropriate proceeding by factual allegations not patently frivolous or false on a consideration of the whole record, the proceeding should not be summarily denied.").

What the record in this case conclusively shows is that Curry is entitled to relief. The District Judge *granted* Curry's motion without a hearing, one which she, in the words of *Machibroda*, "could completely resolve by drawing upon [her] own personal knowledge or recollection." 368 U.S. at 495. Her opinion and post-appeal Notice to Parties establish decisively that Curry would prevail under *any* standard. See, e.g., *U.S. v. Taylor*, 873 F.3d 476, 481 (CA5 2017) (reversing the District Court's denial of Taylor's 2255 motion and ordering his immediate release: "We need not decide today which, if any, of these standards we will adopt because we conclude that Taylor's § 2255 claim merits relief under all of them.").

The Eleventh Circuit reversed here because, in its view, the District Judge had "rested [her] decision to vacate Curry's sentence on *In re Chance*," a less demanding standard ("may have") than the one later adopted by the Eleventh Circuit in *Beeman* ("more

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> that under no circumstances could the petitioner establish facts warranting relief under § 2255; accordingly, we vacate the judgment of the Court of Appeals and remand to that court to the end that the petitioner be afforded a hearing on his petition in the District Court.

Fontaine, 411 U.S. at 215.

likely than not"). The Eleventh Circuit emphasized Curry's concession that "the record was unclear regarding which convictions, and which clause of the ACCA, the sentencing court relied on to impose the ACCA enhancement." App.4. But where the record is "unclear," a hearing is mandated, not jettisoned, precisely because "on the basis of the application, files, and records of the case alone," the court cannot find the 2255 motion "conclusively to be without merit." *Sanders v. U.S.*, 373 U.S. 1, 15 (1963).

To be sure, an unclear sentencing record, in and of itself, would be insufficient under *Beeman* to support the District Court's grant of Curry's motion to vacate; but that same lack of clarity actually mandates a hearing.[11] Indeed, even *Beeman* recognizes a movant's right

[11] Circuit cases abound holding that, where the record is "unclear"—where nothing in the record contradicts the factual allegations in the 2255 motion—the District Court must grant a hearing. *MacLloyd v. U.S.*, 684 F. App'x 555, 558-59 (CA6 2017) ("In line with the Supreme Court's reasoning in *Machibroda*, we have held that a district court may only forego a hearing where the petitioner's allegations cannot be accepted as true because they are contradicted by the record . . . the burden on the petitioner in a habeas case for establishing an entitlement to an evidentiary hearing is relatively light.") (citations and quotation marks omitted); *U.S. v. Tolliver*, 800 F.3d 138, 141 (CA3 2015) ("2255 requires the District Court to hold a hearing *sua sponte* when, as here, the files and records do not show conclusively that the movant was not entitled to relief."); *U.S. v. McCoy*, 410 F.3d 124, 134 (CA3 2005) ("If McCoy's petition alleges any facts warranting relief under § 2255 that are not clearly resolved by the record, the District Court was obliged to follow the statutory mandate to hold an evidentiary hearing."); *U.S. v. Booth*, 432 F.3d 542, 545-46 (CA3 2005) (holding that it is an abuse of discretion if the District Court "fails to hold an evidentiary hearing when the files

to present "direct" and "circumstantial" evidence to support the 2255 motion. *Beeman*, 871 F.3d at 1224 & n.4.

By instructing the District Court to dismiss Curry's motion to vacate without affording him a hearing to establish his entitlement to relief under any burden of proof, the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a), Rules of the Supreme Court of the United States ("Considerations Governing Review on Certiorari"); *Herman*, 350 U.S. at 118 ("We granted certiorari because summary dismissal in the face of the petitioner's serious allegations appeared to be out of line with decisions of this Court.").

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and records of the case are inconclusive as to whether the movant is entitled to relief"); *Engelen v. U.S.*, 68 F.3d 238, 240 (CA8 1995) ("[A] petition can be dismissed without a hearing if . . . the allegations cannot be accepted as true because they are contradicted by the record. . . ."); *U.S. v. Mosquera*, 845 F.2d 1122, 1124 (CA1 1988) ("Generally, when a court disposes of a § 2255 petition without a hearing, allegations must be accepted as true except to the extent they are contradicted by the record. . . .").

CONCLUSION

The petition for writ of certiorari should be granted.

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