No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CORY WASHINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Cory Washington is serving an illegal sentence. However, the Tenth Circuit Court of Appeals held that he is not entitled to relief. The question is whether a district court can vacate an illegal sentence enhanced under the Armed Career Criminal Act (ACCA) if it finds that the record established that the sentencing court "may have" relied on the unconstitutional residual clause of the ACCA, as the Fourth and Ninth Circuit held; or, as the First, Sixth, Tenth and Eleventh Circuits have held, must the court find by a preponderance of the evidence that the residual clause served as the basis of the sentencing court's decision.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes and Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cory Washington, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A) is reported at *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018). The order of the district court denying Mr. Washington's motion to vacate is unreported and unavailable in electronic databases. It is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment on this case on May 15, 2018. No petition for rehearing was filed. This petition is being filed within 90 days after the entry of the judgment below, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

> (e)(1) In the case of a person who … has three previous convictions … for a violent felony …, such person shall be … imprisoned not less than fifteen years …. (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

18 U.S.C. § 924(e).

The statutory subsection governing the filing of second or successive § 2255 motions provides as follows:

> (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. § 2255(h).

STATEMENT OF THE CASE

Introduction

Mr. Washington's sentence was enhanced because he had three prior "violent felony" convictions as that term is defined by the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). Following this Court's decision in *Johnson v. United States,* 135 S. Ct. 2551 (2015), the Tenth Circuit concluded that two of Mr. Washington's predicate convictions are not violent felonies under the ACCA. *See United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir.

2017) (holding that Oklahoma pointing a weapon is "not categorically a violent felony"); *United States v. Taylor*, 672 F.App'x 860, 863 (10th Cir. 2016) (unpublished) (determining that Oklahoma second-degree burglary "cannot give rise to an ACCA sentence"). Thus, it is inarguable that Mr. Washington is serving an illegal sentence. The only question is whether he is procedurally barred from obtaining relief.

Procedural Background

In 2011, Mr. Washington pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and knowingly possessing a destructive device not registered to him, in violation of 26 U.S.C. §§ 5861(d), 5845(f). Vol. II at 5.[1] Ordinarily, the maximum sentence for a conviction of felon in possession of a firearm is 10 years' imprisonment, 18 U.S.C. § 924(a)(2), and three years of supervised release, 18 U.S.C. §§ 3559, 3583. However, under the ACCA, if a defendant convicted of felon in possession of a firearm "has three previous convictions . . . for a violent felony or a serious drug offense, or both," then the defendant must be "imprisoned not less than fifteen years," 18 U.S.C. § 924(e), and may be placed on supervised release for up to five years, 18 U.S.C. §§ 3559, 3583.

[1] Citations to the record are to the two-volume record on appeal filed in the court below.

Under the ACCA, there were previously three ways that a prior conviction could qualify as a violent felony (and thus serve as a predicate for an increased sentence):

(1) the conviction was for an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," (**the force clause**);

(2) the conviction was for "burglary, arson, or extortion, [or an offense that] involves the use of explosives," (**the enumerated-offenses clause**); or

(3) the offense is for a conviction that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (**the residual clause**).

18 U.S.C. § 924(e)(2)(B).

In *Johnson*, this Court held that the third clause of the ACCA, the residual clause, could not be applied consistent with due process. *Johnson*, 135 S. Ct. at 2563. Subsequently, this Court held that the rule in *Johnson* – that the residual clause was unconstitutional – must be applied retroactively to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

Mr. Washington's sentence was enhanced under the ACCA because of the following three convictions:

1) A 1992 conviction for Oklahoma pointing a weapon.

2) A 1994 conviction for Oklahoma burglary in the second degree.

3) A 1994 conviction for assault and battery with a dangerous weapon.

Sup. Vol. I at 92. Importantly, the Tenth Circuit Court of Appeals has since determined that two of these prior convictions are not violent felonies under the remaining clauses of the ACCA. *See Titties*, 852 F.3d at 1275; *Taylor*, 672 F.App'x at 863.

After *Johnson* was decided, Mr. Washington filed a pro se 28 U.S.C. § 2255 motion asking the district court to vacate his illegal sentence. Supp. Vol. I at 57-64. Mr. Washington requested that the court vacate his sentence "due to the application of the enhancement under the Armed Career Criminal Act's § 924(e)(1) and § 924(e)(2)(B)'s residual clause." *Id*. at 59. Specifically, Mr. Washington argued that all of his prior convictions – burglary, pointing a weapon, and assault with a dangerous weapon – only qualified as violent felonies "under the 'catch-all' definition of 'violent felony' contained in the Armed Career Criminal Act's § 924(e)(2)(B)'s residual clause." *Id*. at 63.

The district court appointed Mr. Washington counsel. Counsel filed a brief in support of Mr. Washington's § 2255 motion and "merged and incorporated" Mr. Washington's initial pro se motion into the supplemental pleading. *Id*. at 69.

In response, the government argued that Mr. Washington was not entitled to relief for two reasons. First, the government claimed that Mr. Washington was not making a *Johnson* claim but was instead relying on *United States v. Mathis*, 136 S. Ct. 2243 (2016). Supp. Vol. I at 96-97. To this

end, the government argued that Mr. Washington's motion was untimely and procedurally barred. *Id*. at 97. Second, the government claimed that all three of Mr. Washington's predicates – assault, second-degree burglary, and pointing a weapon – all qualified as violent felonies under the remaining clauses of the ACCA, and, thus, any potential reliance on the residual clause was harmless. *Id*. at 98-107.

The district court adopted the government's first argument and dismissed Mr. Washington's motion. *Id*. at 149. The court stated that Mr. Washington had presented no "evidence showing that the [sentencing] court relied on the residual clause." *Id*. at 149. This statement appears premised on the fact that the record is devoid of any explicit reliance on the residual clause by the sentencing judge. Because of this, the court held that Mr. Washington had failed to raise a *Johnson* claim and his motion was procedurally barred. *Id*. The district court denied a certificate of appealability and Mr. Washington timely appealed. *Id*. at 201.

The Tenth Circuit affirmed the district court's holding. In short, the Tenth Circuit held that Mr. Washington was not entitled to relief because his petition was barred under 28 U.S.C. § 2255(h) and, as a result, he must serve the entirety of his illegal sentence.

In its decision, the court observed that under § 2255(h) a defendant seeking authorization from a court of appeals to file a second or successive § 2255 motion must make a prima facie showing that the motion relies on:

> (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.

Washington, 890 F.3d 891, 894–95 (10th Cir. 2018) (citing 28 U.S.C. § 2255(h)). The court then noted that once authorization has been granted a district court has an independent obligation to determine whether the § 2255 motion actually "relies" on a new rule of constitutional law. *Id*. at 895.

Mr. Washington argued that, in the context of a *Johnson* claim, a § 2255 motion "relies" on the new rule created in *Johnson* so long as it is possible that the sentencing court "may have" relied on the residual clause. *Id*. at 896 (citing *Stromberg v. California*, 283 U.S. 359 (1931) (holding that where a general jury verdict rests on one of three possible grounds and one of those grounds is unconstitutional, the conviction must be set aside)). In Mr. Washington's case, because the record was completely silent regarding which prong of the ACCA served as the basis for his enhanced sentence, he had satisfied § 2255(h). The Tenth Circuit rejected this argument. *Id*. at 896.

The Tenth Circuit held that in order to "rely" on *Johnson* a § 2255 motion must prove by a preponderance of the evidence that the residual clause served as the basis for the district court's decision to impose an enhanced sentence. *Id*. To this end, because the sentencing record was completely silent as to which subsection of the ACCA the district court relied on, the Tenth Circuit looked to the "relevant legal background environment" at the time of Mr. Washington's sentencing for clues regarding what the district court was thinking. *Id*. at 896-97.

Of importance here, the Tenth Circuit held it was not most likely that the sentencing court relied on the residual clause when it found that Mr. Washington's Oklahoma conviction for pointing a weapon was an ACCA predicate offense. *Id*. at 898. The Court acknowledged that at the time of Mr. Washington's sentencing the residual clause was expansive and included many "low-level crimes" such as eluding a police officer, discharging a firearm at an occupied building or vehicle, and failing to stop at the command of a police office. *Id*. at 899 (citing *United States v. Thomas*, 643 F.3d 802 (10th Cir. 2011); *United States v. Ford*, 613 F.3d 1263 (10th Cir. 2010); *United States v. Wise*, 597 F.3d 1141 (10th Cir. 2010)). But, the court held, this did not tip the scales in Mr. Washington's favor.

The court held that the force clause was more likely at play because at the time of Mr. Washington's sentencing the Tenth Circuit had held that two

different state statutes qualified under the force clause. *Id*. at 898 (citing *United States v. Herron*, 432 F.3d 1127 (10th Cir. 2005) (holding that Colorado menacing qualifies as a violent felony under the force clause of the ACCA) and *United States v. Ramon Silva*, 608 F.3d 663 (10th Cir. 2010)). Because these two different statutes qualified under the force clause, the Tenth Circuit reasoned it was likely the sentencing court also relied on the force clause when it determined that Mr. Washington's Oklahoma conviction was a violent felony. *Id*. at 899.

Additionally, the *Washington* panel observed that three years after Mr. Washington's sentencing, the Tenth Circuit held that the Oklahoma pointing a firearm statute qualified, in part, as a violent felony under the force clause of the ACCA. *Id*. at 900 (citing *United States v. Hood*, 774 F.3d 638, 645-46 (10th Cir. 2014)). The court stated that "[w]hile *Hood* was, of course, not part of the background legal environment at the time of [Mr. Washington's] sentencing, *Hood* faced a nearly identical legal environment…." *Id*. In other words, the fact that a sentencing judge held that Oklahoma pointing a firearm qualified as a violent felony under the ACCA's force clause three years after Mr. Washington's sentencing was evidence that the district court in Mr. Washington's case was thinking the same thing. Accordingly, the Tenth Circuit affirmed the district court's holding and rejected Mr. Washington's claim for relief.

Mr. Washington now seeks this Court's review.

REASONS FOR GRANTING CERTIORARI

The Court should grant review in this case because the circuits are divided over how a movant can show *Johnson* error. This case presents a recurring issue of national importance that will likely affect hundreds of criminal defendants nationwide. This Court's prompt review is also warranted because of the important liberty interests at stake. In many instances, *Johnson* movants are serving sentences far higher than the statutory maximum for which they are eligible because subsequent clarifying case law makes clear that their prior convictions do not qualify under any clause of the ACCA.

Moreover, the issue is one of exceptional importance. The Tenth Circuit decision in this case has the potential to create arbitrary results. The decision in *Washington* undercuts the interest of treating similarly situated defendants in a similar manner.

Finally, this case is an ideal vehicle for resolving the issue of how a movant can show *Johnson* error because the decision below cannot be affirmed on alternate grounds. Mr. Washington would not be an armed career criminal if sentenced today.

I. The lower courts are in acknowledged conflict over how a § 2255 movant can demonstrate *Johnson* error.

The federal courts of appeal (and the district courts before them) have taken a variety of different approaches to resolving the question of how a movant can show *Johnson* error. *See United States v. Taylor*, 873 F.3d 476, 480 (5th Cir. 2017) (collecting cases). This Court should grant review in order to resolve the lower courts' acknowledged circuit split.

a. The Tenth Circuit's decision in *Washington* directly conflicts with the Fourth Circuit.

The decision below is in direct conflict with the law in the Fourth Circuit. As noted, the Tenth Circuit has held that, based on the record and the "relevant background legal environment," a movant is not entitled to relief unless they can demonstrate by a preponderance of the evidence that the sentencing court relied on the residual clause. *Washington*, 890 F.3d at 896.

The Fourth Circuit's test flips the inquiry. The Fourth Circuit has held that a *Johnson* movant need only show that his sentence "may have been predicated on application of the now-void residual clause, and therefore may be an unlawful sentence" in order to demonstrate *Johnson* error. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). In other words, in the Fourth Circuit, an inconclusive record is sufficient to show error.

Acknowledging the common problem of ambiguous ACCA sentencing records, the *Winston* court noted that that "[n]othing in the law requires a

[court] to specify which clause it relied upon in imposing a[n ACCA] sentence." *Id*. (quoting In re *Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus declined to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id*.

The Fourth Circuit further cautioned that requiring a movant to show affirmative reliance on the residual clause in order to demonstrate *Johnson* error would result in "'selective application' of the new rule of constitutional law announced in *Johnson*," in violation of "'the principle of treating similarly situated defendants the same.'" *Id*. (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error. In *Winston*, the court found that the *Johnson* error was not harmless because the movant's prior conviction for Virginia robbery was no longer a crime of violence under the remaining clauses of the ACCA. *Winston*, 850 F.3d at 682 n.4.

The *Washington* panel's approach to this issue is directly at odds with the *Winston* decision. Under the *Winston* rule, Mr. Washington would prevail because the sentencing court may have relied on the residual clause at sentencing. And the *Johnson* error was not harmless in this case because Mr. Washington's prior convictions do not qualify as violent felonies under the remaining ACCA clauses. Whereas the Fourth Circuit's approach allows for

the possibility of unconstitutional reliance on the residual clause where there is ambiguity in the record, the decision below places a far higher burden on *Johnson* movants. Unless the words "residual clause" appear in the record, a movant must resort to old law to show that the sentencing court most likely relied on the residual clause in order to prevail.

b. Four other circuits have developed tests for determining *Johnson* error that further cement the split.

Four other circuits have developed tests for what a § 2255 movant must demonstrate to receive post-*Johnson* relief. Like the Tenth Circuit, a panel of the Eleventh Circuit ruled, over dissent, that "[t]o prove a *Johnson* claim, 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." *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). Whereas in *Winston*, a *Johnson* movant had to show only that his sentence "may have been predicated on application of the now-void residual clause," *Winston*, 850 F.3d at 682, the Eleventh Circuit places a higher burden on movants. Those in the Eleventh Circuit cannot meet their burden to demonstrate *Johnson* error 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." *Id*. at 1222.

The *Beeman* dissent disagreed, urging the court to adopt a rule that *Johnson* error is demonstrated if a movant's prior convictions could not

possibly fall under any clause but the residual clause under the legal framework that exists today—making it "more likely than not" that the residual clause affected the original sentencing. *Beeman*, 871 F.3d at 1229–30. Such an approach "gives potentially eligible defendants the opportunity to prove that they are entitled to relief where, as here, the sentencing documents and record transcripts are silent." *Id*. at 1230. Under the rule proposed by the *Beeman* dissent, the demonstration of error and the demonstration of harmlessness "coalesce into a single inquiry," but movants must still demonstrate that their prior convictions do not fall under either of the remaining clauses in order to obtain relief. *Id.* The dissenting judge noted that this framework had been "part and parcel of many district court determinations." *Id.* at 1226-27. And the dissent worried that "any alternative to this test—in other words, any standard under which an unclear sentencing record precludes relief under *Johnson*—would lead to unwarranted and inequitable results." *Id*. at 1228.

Likewise, the First Circuit, also over dissent, held that to prove a *Johnson* claim a movant must show by a preponderance of the evidence that the residual clause was used to enhance a sentence under the ACCA. "A mere possibility is insufficient." *Dimott v. United States*, 881 F.3d 232, 240 (1st Cir. 2018). And the Sixth Circuit most recently held that a movant carries the burden to show that a sentencing court "only relied on the residual clause" in

order to receive *Johnson* relief. *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018).

On the other side of the divide, the Ninth Circuit took yet a different approach, borrowing its rule from this Court's opinion in *Stromberg v. California*, 283 U.S. 359 (1931) – a rule that was expressly rejected by the panel in *Washington*. Applying the *Stromberg* principle, the Ninth Circuit held that "when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory," so an unclear record is sufficient for a movant to show *Johnson* error. *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). The *Geozos* panel ultimately decided that the *Johnson* error in that case was not harmless because the movant's prior conviction for Florida robbery was no longer a violent felony under the current legal framework in that circuit.

* * *

This Court should step in to resolve the division among the circuits over how a movant can show *Johnson* error. Delay in adjudicating this important question will only cause potentially meritorious claims to stall or be outright denied in violation of *Johnson* movants' due process rights. "Because uniformity among federal courts is important on questions of this order," this

Court should "grant[] certiorari to end the division of authority." *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

II. This issue is one of exceptional importance and, as such, is deserving of this Court's review.

The Tenth Circuit's rule requires a movant to show *Johnson* error by demonstrating that, under the "relevant background legal environment" at the time of sentencing, neither of the remaining violent felony clauses—the enumerated offenses clause or the force clause—would have likely captured the movant's prior convictions. *Washington,* 890 F.3d at 897. This approach is misguided and presents the very real potential to create arbitrary results.

First, the decision below does not reflect the reality of how ACCA sentencings were conducted in practice prior to *Johnson*. Before *Johnson*, the residual clause acted as a catch-all provision, encompassing all prior convictions that "involve[d] conduct that present[ed] a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). As a result, sentencing judges did not need to rely on the other two clauses at sentencing. The Tenth Circuit's rule is counterintuitive because it assumes that judges would have based ACCA sentencing determinations on narrower portions of the violent felony definition, when relying on the residual clause would have been the easier and more available route.

Second, as many circuit and district judges have cautioned, the Tenth Circuit's rule will lead to arbitrary results: if a sentencing court happened to state on the record that it relied on the residual clause, a movant is granted relief, but if a sentencing judge was silent as to what clause it was relying on, a movant with identical prior convictions could remain incarcerated. Moreover, the "relevant legal background environment" standard is prone to inconsistent analysis. Such a rule is profoundly unfair.

Finally, the decision below means that movants whose prior convictions are no longer ACCA-qualifiers under today's law run the risk of spending years longer in prison than the law allows, in violation of due process.

a. The decision below ignores the pre-*Johnson* dominance of the residual clause.

Before *Johnson*, if a prior conviction "involve[d] conduct that present[ed] a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii), it would necessarily have qualified under the residual clause. Accordingly, burglaries, robberies, and other crimes that may have fallen under the alternative clauses of the ACCA's violent felony definition would have also qualified as violent felonies under the residual clause.

As interpreted pre-*Johnson*, the residual clause was expansive, encompassing crimes that were relatively minor. In the decade preceding *Johnson*, most ACCA litigation was focused on drawing the outer bounds of the

residual clause. For example, this Court's pre-*Johnson* cases asked whether attempted burglary, *James v. United States*, 550 U.S. 192 (2007), driving under the influence of alcohol, *Begay v. United States*, 553 U.S. 137 (2008), failure to report, *Chambers v. United States*, 555 U.S. 122 (2009) and vehicular flight, *Sykes v. United States*, 564 U.S. 1 (2011), were ACCA violent felonies. The fact that such questions were posed to this Court illustrates the breadth of the residual clause.

As a result, there would have been no need to look to the other clauses for confirmation that a far more serious crime was a qualifying ACCA violent felony. For example, if attempted burglaries involved a "serious potential risk of physical injury," as this Court held in *James*, it stands to reason that completed burglaries would also pose a similar risk, and thus would unquestionably qualify under the residual clause. *James*, 550 U.S. at 195.

The Tenth Circuit's rule presumes that a sentencing judge would have relied on a clause narrower than the residual clause just because that clause was also available to it. Where the sentencing record is inconclusive, it makes far more sense to assume that most judges relied on the expansiveness of the residual clause rather than either of the other clauses. In other words, a court most likely took that the analytical path of least resistance. The *Winston* decision, the dissent in *Beeman* and the decision in *Geozos* all allow for litigants

to show *Johnson* error based on an inconclusive record, and given the mechanics of ACCA sentencing pre-*Johnson*, that result is the correct one.

b. The Tenth Circuit's rule will lead to arbitrary results.

The decision below will lead to arbitrary results. Early in the course of the *Johnson* litigation, the Eleventh Circuit highlighted this issue when it questioned why a court would decline to grant relief when a person's sentence was no longer statutorily authorized—even if the "sentencing judge [had not] uttered the magic words 'residual clause.'" *In re Chance,* 831 F.3d 1335, 1340 (11th Cir. 2016). The panel opined that it would be inequitable to mandate the words "residual clause" actually appear in the record because such a step was never required at sentencing. *Id.*

The panel proposed the unsettling hypothetical where two defendants received identical sentences "on the same afternoon from the exact same sentencing judge," but in one case the sentencing judge "thought to mention that she was sentencing the defendant under" the residual clause. *Id.* Granting relief in such a circumstance "based solely on a chance remark" would result in "selective application of [*Johnson*]," in violation of "'the principle of treating similarly situated defendants the same.'" *Id.* at 1341 (quoting *Teague*, 489 U.S. at 304). The dissenting judge in *Beeman* echoed this sentiment, warning that adopting a contrary approach "would be unfair, but also would nullify the

retroactive effect of a change in the law pronounced by the Supreme Court." *Beeman*, 871 F.3d at 1229.

Concerns over arbitrary application of *Johnson* also animated the Fourth Circuit's rule that a *Johnson* movant need only show that his sentence "*may have* been predicated on application of the now-void residual clause" in order to show *Johnson* error. *Winston*, 850 F.3d at 682 (emphasis added). Prior to *Johnson*, courts were not required to make specific findings, and counsel had no incentive to object, where serious crimes clearly fell within the residual clause. Accordingly, the Fourth Circuit declined to "penalize a movant for a court's discretionary choice not to specify" which clause it relied on. *Id.* And it declined to base its decision on "non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence." *Id*.

The Tenth Circuit's rule creates yet another arbitrariness concern: The legal landscape was in constant flux in the decades prior to *Johnson*, and recreating the landscape at a particular point in time will undoubtedly prove both cumbersome and impractical. As one district judge aptly explained, "[a]ttempting to recreate the legal landscape at the time of a defendant's conviction is difficult enough on its own. But in the context of *Johnson* claims, the inquiry is made more difficult by the complicated nature of the legal issues involved." *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash.

2016). It will also mean that movants who are sentenced in 2005 may be judged by a different standard for *Johnson* error than movants who were sentenced in 2010—even though their prior offenses may be the same.

The arbitrariness identified by the *Winston* panel is compounded when "decisions from the Supreme Court that were rendered since [sentencing]" can be ignored "in favor of a foray into a stale record." *Chance*, 831 F.3d at 1340. For example, this Court in *Mathis* emphasized that "[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements." *Id.* at 2257. Applying a correct interpretation of this Court's precedent, even at the time of Mr. Washington's sentencing, his prior offenses did not satisfy the force clause and should only have qualified under the residual clause. Where the *Winston* court held that it was required to consider the interplay between *Johnson* and subsequent cases of this Court clarifying the scope of the violent felony definition, the *Washington* panel applied stale and now-abrogated interpretations of this Court's precedent to the question of whether a *Johnson* error occurred.

The opinion of the Tenth Circuit should be reversed in favor of the more straightforward and equitable rule that an inconclusive record demonstrates *Johnson* error and current law applies to the question of whether the *Johnson* error was harmless.

III. This case is an ideal vehicle for resolving this recurring issue of national importance.

Mr. Washington's case is an ideal vehicle to resolve the question of how a movant can show *Johnson* error on a silent record because it requires only a clear-cut analysis of that narrow question. The judgment cannot be affirmed on alternative grounds.

Mr. Washington does not have the requisite three prior violent felony convictions to sustain his ACCA sentence. After *Johnson*, the Tenth Circuit has held that two of Mr. Washington's prior convictions do not qualify as violent felonies. *See Titties*, 852 F.3d at 1275 (10th Cir. 2017) (holding that Oklahoma pointing a weapon is "not categorically a violent felony"); *Taylor*, 672 F.App'x at 863 (10th Cir. 2016) (unpublished) (determining that Oklahoma second-degree burglary "cannot give rise to an ACCA sentence"). Mr. Washington's case does not present any other procedural issues. Thus, the only question in this case is how a movant can show *Johnson* error on an inconclusive record.

This case also presents an inherently national issue, and one that is likely to recur in great numbers. As this Court is well aware, hundreds—if not thousands—of individuals sentenced under the ACCA have filed *Johnson*-based motions seeking relief. Such cases have been filed in districts throughout the country. The quantity of *Johnson* motions still being decided is

overwhelming. In some circuits, *Johnson* movants are being released if their prior convictions no longer qualify as ACCA violent felonies under today's law; in others, *Johnson* movants must serve years longer in prison based solely on the procedural question presented in this case. This sort of disparity is profoundly unfair and antithetical to basic notions of fairness and justice. Under current law, Mr. Washington is not an armed career criminal, and the question of a *Johnson* movant's burden to show error was squarely presented in the case below.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Date: August 13, 2018.

Respectfully submitted,

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