NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 2018

Melvin Jordan, II - Petitioner,

v.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Both the district court and the Eighth Circuit Court of Appeals denied Jordan a certificate of appealability ("COA"), from the denial of his petition under 28 U.S.C. § 2255 (2012). In his § 2255 petition, Jordan challenged his Armed Career Criminal Act ("ACCA") sentence on the grounds that his prior Iowa burglary convictions no longer qualified as violent felonies in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). This petition for writ of certiorari presents the question of whether reasonable jurists can debate the following issues:

(1) Whether a § 2255 petitioner seeking relief under *Johnson* must affirmatively prove that he was sentenced under the residual clause of the ACCA.

(2) Whether a court considering a § 2255 petitioner's entitlement to relief under *Johnson* is prohibited from considering current law when deciding whether the petitioner's prior offenses still qualify as violent felonies under the enumerated clause of the ACCA.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

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The petitioner, Melvin Jordan, II ("Jordan"), through counsel, respectfully requests that a writ of certiorari issue to review the March 22, 2018, judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 17-3509, denying his application for a certificate of appealability. Jordan's petition for rehearing by the panel was denied on May 21, 2018.

OPINION BELOW

The Eighth Circuit Court of Appeals' denial of Jordan's application for a COA in Case No. 17-3509 is provided in Appendix A. The Eighth Circuit Court of Appeals' denial of Jordan's petition for rehearing is provided in Appendix B. The order of the district court denying Jordan's § 2255 motion is provided in Appendix C.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Jordan's case under 18 U.S.C. § 3231. The district court denied Jordan's 28 U.S.C. § 2255 motion on September 15, 2017. Jordan timely filed a notice of appeal and application for a COA in the Eighth Circuit, which was denied on March 22, 2018. (Appendix A). Jordan filed a petition for rehearing by the panel, which was denied on May 21, 2018. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 924 (2012). Penalties. Subsection (e) . . .

> (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 . . . .

STATEMENT OF THE CASE

On January 29, 2008, a grand jury in the Northern District of Iowa charged Jordan in count two of a two-count indictment with the offense of being a felon in possession of a firearm. (Crim. Doc. 3).[1] The petitioner pled guilty as charged to count two of the indictment. (Crim. Doc. 27).

On September 3, 2008, the court determined that petitioner was an armed career criminal and sentenced him to 169 months imprisonment, after reducing his sentence for substantial assistance. (Crim. Doc. 55-3, pp. 1–2). In 2010, the court further reduced petitioner's sentence to 109 months imprisonment, pursuant to Federal Rule of Criminal Procedure 35. (Crim. Doc. 65).

Prior to the instant case, Jordan filed two unsuccessful motions under 28 U.S.C. § 2255. His first was filed December 2, 2013, and was denied on December 6, 2013. (1:13-cv-00137-LRR, Doc. Nos. 1, 2). The district court also denied a

[1] In this brief, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. 1:08-cr-00010-LRR, and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. Any references to previous § 2255 motions filed by Jordan will be to their respective civil case numbers, followed by numbers corresponding to docket entries. References to Jordan's petition to bring a second or successive § 2255 petition, filed June 1, 2016, under Eighth Circuit No. 16-2507, will be referenced as "SOS," followed by paragraph number and/or the date of entry. References to the § 2255 petition underlying the instant petition for writ of certiorari, N.D. Iowa Case No. 1:15-cv-00105-LRR will be to "Civ. Doc.", followed by the docket entry number.

certificate of appealability. *Id.* His second § 2255 motion was filed on March 12, 2014, and denied on April 1, 2014. (1:14-cv-00035-LRR, Doc. 1, 2). The district court also denied a certificate of appealability in that case. *Id.* The Eighth Circuit also denied a certificate of appealability. (8th Cir. No. 14-2296, Entry ID: 4198500).

In the instant case, the petitioner filed a pro se § 2255 motion on September 29, 2015, challenging his ACCA sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). He did not file an application with the Eighth Circuit Court of Appeals for permission to file a second or successive petition until counsel filed one on his behalf on June 1, 2016. (8th Cir. No. 16-2507; Entry ID: 4405924). Although resisted by the government, the circuit granted authorization for Jordan to proceed with a second or successive § 2255 petition on August 2, 2016. (8th Cir. No. 16-2507; Entry ID: 4432940). On September 15, 2017, the district court filed an Order denying Jordan's § 2255 petition. (Appendix C).

On November 12, 2017, Jordan filed a timely notice of appeal from the district court's denial of his § 2255 motion, and an application for a certificate of appealability to the Eighth Circuit Court of Appeals pursuant to Federal Rule of Appellate Procedure 22(b)(2). (Civ. Doc. 15). On March 22, 2018, the Court of Appeals denied Jordan's application for a COA, but stated no reasons for doing so. (Appendix A). Jordan filed a petition for rehearing by the panel, which was denied on May 21, 2018. (Appendix B).

The Order denying Jordan's Application for Certificate of Appealability does not state any reasons for the panel's denial, so Jordan assumes, for purposes of this Petition for a Writ of Certiorari, that the panel relied upon the reasons given by the district court when that court denied Jordan's motion under 28 U.S.C. § 2255. (Appendix C). The district court had two primary reasons for denying Jordan's § 2255 motion: (1) Jordan failed to prove that the sentencing court relied on the residual clause rather than the enumerated clause of the ACCA to find that his prior Iowa burglaries were violent felonies; and (2) current law interpreting the enumerated clause of the ACCA may not be considered in determining whether Jordan's Iowa burglaries qualify as generic burglaries under the enumerated clause. (Appendix C, pp. 6–8).

In *Johnson,* this Court struck down the residual clause of the ACCA as unconstitutionally vague. *Id.* at 2557. *Johnson* is retroactive, thereby opening the door to timely filed petitions under 28 U.S.C. § 2255(a). *Welch v. United States*, 136 S. Ct. 1257 (2016). The predicate convictions underlying Jordan's ACCA status were three Iowa burglaries and one Iowa robbery. (PSR ¶¶ 41, 50, 56, 62, and 68). In light of this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016), Iowa burglary does not qualify as a violent felony under the ACCA because the offense is indivisible, and proscribes a broader range of conduct than generic burglary by including within its purview vehicles and boats. The district court, and then the Eighth Circuit Court of Appeals, denied relief because the record did not

explicitly state that the sentencing court relied upon the residual clause to determine that Iowa burglary was a violent felony, and because the court erroneously believed that it was prohibited from considering current case law to decide whether Iowa burglary still qualified under the enumerated clause.

REASONS FOR GRANTING THE WRIT

Before a petitioner can appeal to the Court of Appeals from an order denying a § 2255 motion, either the district court or the Court of Appeals must grant a COA. 28 U.S.C. § 2253(c)(1)(B). A COA may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," *id.* at § 2253(c)(2), and indicates "which specific issue or issues satisfy the [substantial] showing" requirement. *Id.* § 2253(c)(3).

To satisfy the "substantial showing" requirement, the petitioner must demonstrate that a reasonable jurist would find the district court ruling on his constitutional claim debatable or wrong. *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (citing *Tennard v. Dretke*, 542 U.S. 274, 276 (2004)). The petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1 (1983)). A substantial showing must be made for each issue presented. *Parkus v. Bowersox*, 157 F.3d 1136, 1148 (8th Cir. 1998). The petitioner does not have to show that the appeal is certain to succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003).

In the instant case, the district court denied the petitioner's claim that he is entitled to relief under *Johnson* for two primary reasons: (1) the petitioner failed to

prove that he was sentenced under the residual clause of the ACCA; and (2) current law interpreting the enumerated clause of the ACCA may not be considered in determining whether petitioner's Iowa burglary convictions qualify as crimes of violence thereunder.[2] As demonstrated below, both of the premises underlying the district court's decision are certainly debatable among reasonable jurists, and, in fact, other courts have consistently rejected the district court's reasons for denying the petitioner's request for relief under *Johnson*.

I. REQUIRING JORDAN TO AFFIRMATIVELY PROVE THAT HE WAS SENTENCED UNDER THE RESIDUAL CLAUSE OF THE ACCA, WHERE THE RECORD IS SILENT OR AMBIGUOUS AS TO WHICH CLAUSE OF § 924(e)(2)(B) THE COURT RELIED UPON, PLACES A BURDEN ON JORDAN WHICH UNDULY LIMITS THE RETROACTIVE EFFECT OF *JOHNSON V. UNITED STATES*, AND IS CONTRARY TO THE MAJORITY OF CIRCUITS THAT HAVE CONSIDERED THE ISSUE.

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[2] In a footnote, the district court also suggests that the petitioner's *Johnson* claim is not cognizable because he is currently serving a sentence below 120 months imprisonment, which would be the maximum sentence for a violation of 18 U.S.C. § 922(g) if the petitioner had not been classified as an armed career criminal. (Appendix C, p. 2, n.1). Neither of the cases cited by the court are intended to apply to situations such as this, where a petitioner's sentence was reduced because of substantial assistance. To hold otherwise would presume that the sentencing court must have violated the prohibition against basing substantial assistance reductions on anything other than the nature, extent, and quality of the petitioner's substantial assistance. *See United States v. Williams*, 474 F.3d 1130, 1130 (8th Cir. 2007).

Clearly, reasonable jurists could find that the district court's ruling, adopted by the Eighth Circuit in denying Jordan's application for a COA, is debatable or wrong. The Fourth, Fifth, and Ninth Circuits have rejected the district court's rationale, while the First Circuit supports it. One panel of the Eleventh Circuit supports the district court's position, while another panel of the Eleventh Circuit rejects it.

The courts below relied heavily on *In re Moore*, 830 F.3d 1268 (11th Cir. 2016). In *Moore*, the Eleventh Circuit concluded that a petitioner is ineligible for *Johnson* relief unless he affirmatively proves that the sentencing court, in fact, relied on the residual clause when imposing his sentence. *Id.* at 1272–73.

In *In re Moore*, the court was considering whether to permit an applicant to file a second or successive § 2255 petition to assert a *Johnson* claim. In re Moore, 830 F.3d at 1269. The court granted the request, finding that the applicant had met the relatively low threshold for pursuing an SOS. Id. at 1271. The court then gratuitously stated:

> We add one further thought. We grant this application because it is unclear whether the district court relied on the residual clause or other ACCA clauses in sentencing Moore, so Moore met his burden of making out a *prima facie* case that he is entitled to file a successive § 2255 motion raising his *Johnson* claim. There in the district court though, a movant has the burden of showing that he is entitled to relief in a § 2255 motion – not just a *prima facie* showing that he meets the requirements of § 2255(h)(2), but a showing of actual entitlement to relief on his *Johnson* claim. . . .
>
> In other words, the district court cannot grant relief in a § 2255 proceeding unless the movant meets his burden of showing that he is

> entitled to relief, and in this context the movant cannot meet that burden unless he proves that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence. If the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence – if the court cannot tell one way or the other – the district court must deny the § 2255 motion. It must do so because the movant will have failed to carry his burden of showing all that is necessary to warrant § 2255 relief.

In re Moore, at 1272–73.

A different panel of the Eleventh Circuit rejected *Moore*'s reasoning in *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). First, the court in *Chance* noted that *Moore*'s statement that the movant must prove he was sentenced under the residual clause was dicta, and not binding on any other court. *Id.* at 1339. Second, the *Chance* court found that, not only was the *Moore* court's admonition regarding the burden of proof dicta, "but it also seems quite wrong." *Id.* The *Chance* court declared that *Moore* was wrong for two reasons: (1) *Moore*'s ruling would allow the district courts to ignore intervening developments in the law regarding the application of the categorical approach in deciding whether petitioner's prior offenses qualified under one of the remaining clauses of the ACCA's violent felony definition; and (2) there was no requirement that the sentencing judge make findings as to which clause of § 924(e)(2)(B) it relied upon. *Id.* at 1340. The Fourth, Fifth, and Ninth Circuits have adopted the *Chance* approach. *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Taylor*, 873 F.3d 476, 481–82 (5th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017).

A panel of the First Circuit and a different panel of the Eleventh Circuit have adopted the *Moore* approach over the *Chance* approach. *See Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018); *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). Neither of these decisions, however, employs any significant analysis beyond that of the *In re Moore* panel. The 2-1 majority opinion in *Beeman*, authored by a circuit court judge who also sat on the *In re Moore* panel, generally uses the same reasoning as *In re Moore* to reach the same conclusion, i.e., that a *Johnson* violation exists "[o]nly if the movant would not have been sentenced as an armed career criminal absent the existence of the residual clause," which requires a showing that: (1) the sentencing court solely relied on the residual clause; and (2) there were not at least three other convictions that "could have qualified" under a different clause of the ACCA. *Beeman*, 871 F.3d at 1221 ("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."). The *Dimott* decision, similarly, concludes that the *Beeman* approach "makes sense," because "any other rule would undercut an animating principle of AEDPA: the presumption of finality," and because in the First Circuit's view, "[p]etitioners should bear the burden of proof because they were certainly present at sentencing and knowledgeable about the conditions under which they were sentenced." *Dimott*, 881 F.3d at 240. The Eleventh Circuit's approach in *Moore* and *Beeman* remains the

minority viewpoint, even after the First Circuit's *Dimott* decision is included in the calculus.

Notably, the *Beeman* decision was not unanimous. The dissenting judge points out that "any standard under which an unclear sentencing record precludes relief under *Johnson* – would lead to unwarranted and inequitable results," pointing to the example in *Chance* where two defendants sentenced on the same day would have dramatically different outcomes to their *Johnson* petitions under the majority approach, simply because one judge specified his sentence was imposed under the residual clause and the second judge did not. *Beeman*, 871 F.3d at 1228 (Williams, J., dissenting). The dissent further acknowledges that while the majority decision is premised on interests of finality in § 2255 cases, such interests are "at their weakest" where the sentence imposed "in fact is not authorized by substantive law." *Beeman* at 1231 (quoting *Welch*, 136 S. Ct. at 1266). Accordingly, the dissenting judge aptly concludes as follows:

> [W]hile I understand the majority's desire to identify a bright-line rule through which unmeritorious *Johnson* claims can be culled without engaging in a predicate-by-predicate determination of what crimes still qualify under the ACCA, I cannot agree to a standard that excludes petitioners because the process of evaluation is particularly laborious. I fear that the practical effect of today's opinion is that many criminal defendants like Beeman, who were, in fact, sentenced under a constitutionally infirm statute will be denied their right to seek the relief to which they may very well be entitled by the holdings of the Supreme Court.

Beeman at 1231.

While the precise standard applicable in the Eleventh Circuit remains in disarray, numerous other Courts of Appeals have reached similar conclusions to that of the Eleventh Circuit in *Chance*. For instance, the Fourth Circuit held in *United States v. Winston* that it would not penalize a § 2255 petitioner for the sentencing court's "discretionary choice not to specify under which clause of § 924(e)(2)(B) an offense qualified as a violent felony." *See Winston*, 850 F.3d at 682. Although not necessarily adopting all of *Winston*'s rationale, the Fifth Circuit held in *United States v. Taylor*, 873 F.3d at 481–82, that where the record did not clarify which clause of the ACCA the sentencing court relied upon, the court would "not hold a defendant responsible for what may or may not have crossed a judge's mind during sentencing." The *Taylor* court criticized the district court's suggestion that the petitioner should have sought clarification as to which clause of the ACCA the court relied upon, emphasizing that nothing in the law required the sentencing court to explain the basis for its decision and, moreover, that petitioner had no incentive to request clarification at the time of his sentencing. *Id.* The Ninth Circuit has also 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*[.]" *United States v. Geozos*, 870 F.3d at 896 (emphasis added).

The record in the instant case does not specify which violent felony provision the sentencing court relied upon to classify Jordan's burglary convictions as ACCA predicates. Neither the September 3, 2008, judgment nor the court's Statement of Reasons address the question. (Crim. Docs. 54, 55-3). Defense counsel objected to the ACCA sentence on the ground that Jordan's predicates were part of a continuous course of conduct, but counsel withdrew that objection in lieu of a sentencing agreement. (Sent. Tr. p. 7). The court found that Jordan was an armed career criminal because he had at least three prior convictions for violent felonies, but did not state which clause of the ACCA the court was relying on. (Sent. Tr. p. 8). There was no reason for the court to engage in such analysis.

The PSR simply alleges that Jordan has three prior convictions for violent felonies and lists the convictions, without reference to any specific clause of the ACCA that supports this determination. (PSR ¶ 41). In the addendum, the PSR cites the force clause when explaining why robbery is a violent felony, but cites both the enumeration clause and the residual clause when characterizing burglary as a violent felony. (PSR Addendum, p. 3).

Jordan's sentencing occurred at a time when he had no incentive to challenge his convictions as being non-generic burglaries. A successful challenge on that ground would have been futile because those convictions would still have qualified as violent felonies under the residual clause. *See, e.g., Slaughter v. United States,* No. 4:16-cv-915-CAS, 2017 WL 1196483, at *3 (E.D. Mo. Mar. 31, 2017) ("[W]ithout

Johnson's invalidation of the residual clause, movant would not have a claim under Mathis [v. United States, 136 S. Ct. 2243 (2016)] that he is not an armed career criminal."); *see also Davis v. United States*, 1:16-cv-154-RWS, 2017 WL 1477126, at *2 (E.D. Mo. Apr. 25, 2017) (same); *Givens v. United States*, No. 4:16-cv-1143-CAS, 2016 WL 7242162, at *3 (E.D. Mo. Dec. 15, 2016) (same).

The district court could have relied on the residual clause to find that Jordan's burglaries were violent felonies. Long before Jordan was sentenced in 2008, the Supreme Court emphasized in *Taylor v. United States*, 495 U.S. 575 (1990), that even when a burglary did not fit the definition of generic burglary, the offense might still qualify as a predicate under the residual clause. Moreover, Eighth Circuit case law clearly held that burglaries could constitute crimes of violence (or violent felonies) under the residual clause. *United States v. Hascall*, 76 F.3d 902, 904–06 (8th Cir. 1996); *see also United States v. Mohr*, 407 F.3d 898, 901–02 (8th Cir. 2005) (reiterating rationale of Hascall); *United States v. Peltier*, 276 F.3d 1003, 1006 (8th Cir. 2002) (burglary of a commercial property was a crime of violence under the career offender guideline because it presented a serious potential risk of physical injury).

Affirming the lower court rulings in this case would effectively limit the retroactive effect of *Johnson* to those cases where the district court specifically stated on the record that it was relying only on the residual clause of the ACCA to determine that a prior conviction qualified as a violent felony. The lower court's

rationale ignores the tendency of lawyers not to litigate issues that have already been settled, and of judges to only decide what they need to decide.

II. THE LOWER COURTS' RULINGS THAT JORDAN MAY NOT RELY ON CURRENT LAW TO FIND THAT HIS IOWA BURGLARY CONVICTIONS DO NOT QUALIFY AS VIOLENT FELONIES UNDER THE ENUMERATED CLAUSE IS CONTRADICTED BY OTHER APPELLATE COURTS AND CONTRARY TO SUPREME COURT PRECEDENT.

The government has never argued that, if Jordan was sentenced today, his prior Iowa burglary convictions would count as violent felonies under the ACCA. However, the district court concludes that "it makes no difference whether the movant's burglary convictions would count as predicate [sic] if the court sentenced the movant today." (Appendix C, p. 6). Jordan has never argued that cases such as *Mathis*, 136 S. Ct. 2243, or *Descamps v. United States*, 570 U.S. 254 (2013), provide an independent constitutional basis for granting relief; rather, he has always argued, consistent with abundant precedent, that intervening changes in the law must be considered when determining whether he was prejudiced by the constitutional violation that resulted from reliance on the residual clause to determine that his burglaries constituted violent felonies.

The district court's conclusion that the court may only consider the state of the law at the time of Jordan's sentencing in deciding whether he is entitled to relief under *Johnson* has been rejected by other appellate courts. Most recently, in *Geozos*, 870 F.3d at 897, the Ninth Circuit emphatically stated that, in determining whether a prior conviction qualified as an armed career criminal predicate under

the force clause, "we look to the substantive law concerning the force clause as it *currently* stands, not the law as it was at the time of sentencing." (emphasis in original). In so holding, the court relied upon fundamental principles regarding judicial interpretation of substantive statutes, citing *Rivers v. Roadway Express*, 511 U.S. 298, 312–13 (1994), as authority for the principle that a judicial construction of a statute is an authoritative statement of what the statute meant before, as well as after, the decision of the case giving rise to that construction. *Geozos*, 870 F.3d at 897.

In *Chance*, the Eleventh Circuit rejected the argument that a court deciding a § 2255 motion based on *Johnson* could ignore intervening decisions from the Supreme Court such as *Descamps* and *Mathis*. *In re Chance*, 831 F.3d at 1340. In *Winston*, 850 F.3d at 683–84, the Fourth Circuit applied intervening case law to determine whether a petitioner had been prejudiced by the court's reliance on the residual clause in imposing sentence. More recently, the Seventh Circuit held that a petitioner is "entitled to show that under current caselaw, one or more of [his] remaining predicates could not be counted," in order to demonstrate that a *Johnson* error was prejudicial. *Van Cannon v. United States*, No. 17-2631, 2018 WL 2228251, *4 (7th Cir. May 16, 2018).

Cases such as *United States v. Moreno*, No. 11-178 ADM/LIB, 2017 WL 811874, at *4–6 (D. Minn. Mar. 1, 2017), *In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016), and the others relied upon by the district court, stand in contrast to a series

of well-reasoned cases recognizing that *Curtis Johnson v. United States*, 559 U.S. 133 (2010), *Descamps*, and *Mathis* can and should be considered in deciding whether *Johnson* relief is available. *See, e.g., United States v. Wilson,* 549 F. Supp. 3d 305, 312–13 (D.D.C. 2017); *United States v. Booker*, 240 F. Supp. 3d 164, 169–70 (D.D.C. 2017); *Taylor v. United States*, 223 F. Supp. 3d 912, 917–18 (E.D. Mo. 2016); *see also In re Adams*, 825 F.3d 1283, 1286 (11th Cir. 2016) (granting SOS petition); *United States v. Christian*, 668 F. App'x 820, 820–21 (9th Cir. Sept. 16, 2016); *Mitchell v. United States*, No. 16-03194, 2017 WL 1362040, at *2–3 (W.D. Mo. Apr. 11, 2017) (explaining relationship between Johnson and Mathis, finding that petitioner's claim relies on Johnson, and then applying Mathis to hold that Missouri burglary convictions are no longer violent felonies under the enumerated clause).

In *United States v. Booker*, 240 F. Supp. 3d at 169 the D.C. district court recognized that to show that his priors were not violent felonies under either the force or the enumerated clause, in order to establish prejudice, the petitioner "must necessarily rely on current precedent interpreting [the] ACCA and the elements clause . . . ." *See also United States v. Brown*, 249 F. Supp. 3d 287, 292 (D.D.C. 2017) (citing Booker to hold that simply relying on current precedent, such as Curtis Johnson, to show that a predicate is not a violent felony under the force clause "does not convert [petitioner's Johnson] motion into a habeas motion based on older cases"). The district court in *Taylor*, 223 F. Supp. 3d at 917 noted, with

respect to *Mathis*, that the *Mathis* Court made clear that its analysis was based on Supreme Court precedent articulated over 25 years ago, and that "[b]y applying the teaching of *Mathis* to this case, this Court merely applies the law the Supreme Court articulated prior to the time movant was sentenced." (citing *Mathis*, 136 S. Ct. at 2257).

More recently, the D.C. district court again cited *Booker*, but also pointed out that applying current case law to determine whether a predicate might still qualify under either the force or the enumerated clause is soundly based on Supreme Court precedent concerning statutory interpretation. *United States v. Wilson*, 249 F. Supp. 3d 305, 313 (D.D.C. 2017) (quoting *Rivers v. Roadway Express*, 511 U.S. 298, 313 n.12 (1994)) Indeed, the district court's conclusion that current case law such as *Mathis* may not be considered ignores the fundamental principle of statutory construction articulated by the Supreme Court in *Rivers v. Roadway Express, Inc.* – "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express*, 511 U.S. 298, 312 (1994).

The Supreme Court recognized in *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993), that current law should be applied to determine prejudice in the habeas context. In *Fretwell*, the Supreme Court found that the petitioner was not prejudiced by counsel's failure to object to the use of a capital sentencing aggravating factor even though controlling case law at the time of sentencing would

have supported such an objection, where the controlling case law had been reversed by the time Fretwell filed his federal habeas corpus petition. *Id.* at 371. In other words, the Court found that case law decided after sentencing should be used when analyzing the prejudice component of an ineffective assistance of counsel claim.

CONCLUSION

For the foregoing reasons, Jordan respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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