No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN LANG SANFORD,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a court may grant a 28 U.S.C. § 2255 petition collaterally challenging a sentence under *Johnson* when the sentencing judge never specified – and therefore the record is silent on – whether the petitioner's original sentence was enhanced pursuant to the Armed Career Criminal Act's (ACCA) now-invalidated residual clause.[1]

[1] Other petitions presenting a variation of this question include: *Curry v. United States,* (U.S. 18-229) (filed Aug. 20, 2018); *Perez v. United States,* (U.S. 18-5217) (filed Jul. 10, 2018); *Sailor v. United States,* (U.S. 18-5268) (filed Jul. 18, 2018); *King v. United States* (U.S. 17-8280) (filed Mar. 27, 2018).

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

In this post-conviction proceeding under 28 U.S.C. § 2255, Petitioner Steven Lang Sanford respectfully prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Eleventh Circuit, denying a certificate of appealability ("COA") on the claims set forth here, and subsequently entering judgment against Mr. Sanford

OPINION BELOW

The Order of the Eleventh Circuit Court of Appeals denying Mr. Sanford's request for a COA was entered in *Sanford v. United States of America,* No. 18-11179-F (11th Cir. June 6, 2018). (App. A-1).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The Eleventh Circuit entered judgment against Mr. Sanford on June 6, 2018. This Petition is timely filed.

STATUTORY PROVISIONS INVOLVED

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

> In the case of a person who violates section 922(g) of this title and has three previous convictions … 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[.]

The same statute defines a "violent felony" as:

> [A]ny 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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another …

18 U.S.C. § 924(e)(2)(B).

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.
>
> …
>
> (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.

…

(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.

STATEMENT OF THE CASE

The question presented here has arisen frequently in the wake of this Court's precedents in *Johnson v. United States,* 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016): are federal courts precluded from granting collateral relief under *Johnson* where the record is silent or unclear about whether the sentencing court relied on the residual clause? The courts of appeals are now divided 4-3 on that general question. The First, Sixth, Tenth, and Eleventh Circuits require movants to prove the sentencing court relied on the residual clause. By contrast, the Third, Fourth, and Ninth Circuits have held it is sufficient that the sentencing court *may have* relied on the residual clause, and that the movant is no longer an armed career criminal under current law. This question is one of national importance: it affects hundreds if not thousands of federal prisoners serving ACCA sentences. It is recurring: many sentencing records are silent, since the residual clause had previously encompassed numerous offenses, obviating any need to specify the clause. And its resolution is urgently needed: it will determine whether numerous federal prisoners will be required to continue serving what are now indisputably illegal sentences.

A. LEGAL BACKGROUND

In *Johnson* the Court held that the residual clause of the ACCA, 18 U.S.C. § 924(e)(1), was unconstitutionally vague, and could not serve as the basis for an enhanced sentence. 135 S. Ct. at 2257. The Court based its holding on two features of the residual clause. First, when applying the residual clause, judges must adopt

the "categorical" approach and look at the elements of a crime of conviction, not the particular facts of the crime as committed by the defendant. *Id.* As a result, the Court found the residual clause left "grave uncertainty" as to how a judge should "estimate the risk" of physical injury posed by any particular crime, because it in essence required courts to hypothesize what type of conduct an "ordinary" instance of a particular crime would entail. *Id.* The Court found no discernable guidepost existed for how judges were to make that determination. *Id.* at 2557-58. Second, and compounding this problem, the Court found the residual clause left unacceptable "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. The Court observed that the residual clause had left both this Court and the lower courts fragmented with "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560. As such, the Court concluded "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.*

In *Welch,* 136 S. Ct. 1257, a little less than a year after *Johnson,* this Court addressed the retroactive applicability of *Johnson's* invalidation of the ACCA's residual clause. Applying the general framework from *Teague v. Lane,* 489 U.S. 288, 311-13 (1989), the Court recognized that while new rules of criminal procedure do not become applicable to cases that are already final at the time the rule is announced, new *substantive* rules generally do apply retroactively. *Welch,* 136 S. Ct. at 1264. A rule is substantive when it "alters the range of conduct or the class of persons that

the law punishes." *Schriro v. Summerlin,* 542 U.S. 348, 353 (2004). Applying this test, the Court concluded *Johnson* had announced a substantive rule. *Welch,* 136 S. Ct. at 1265. Prior to *Johnson,* a felon in possession of a firearm with three qualifying prior convictions, one of which was covered by only the residual clause, faced a mandatory minimum sentence of fifteen years. *Id.* After *Johnson* "the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison." *Id.* As such, "*Johnson* changed the substantive reach" of the ACCA. *Id.* The Court thus found "*Johnson* is retroactive in cases on collateral review." *Id.* at 1268.

B. PROCEDURAL BACKGROUND

In July of 1995, the district court sentenced Mr. Sanford for, among other things, two counts of possession of a firearm by a convicted felon (18 U.S.C. §§ 922(g)(1) and 924(e)). In doing so, the court determined Mr. Sanford qualified for sentencing pursuant to the ACCA based on ten prior Florida burglary convictions. The enhancement increased Mr. Sanford's potential sentences on those counts from a ten-year maximum, to a 15-year mandatory minimum. Ultimately the court sentenced him to 327 months' imprisonment. Mr. Sanford's judgment and sentence was affirmed on appeal.

After receiving permission from the Eleventh Circuit Mr. Sanford filed a successive § 2255 motion based on the decision in *Johnson*. Relying on *Beeman v. United States,* 871 F.3d 1215 (11th Cir. 2017), the district court concluded Mr. Sanford had failed to demonstrate his ACCA enhancement was predicated on the residual clause of the ACCA. Without being able to affirmatively tie his sentence to

the residual clause, Mr. Sanford could not meet his burden under § 2255. The court entered an order denying the motion and a certificate of appealability on February 20, 2018. Mr. Sanford filed a notice of appeal on March 15, 2018. The Eleventh Circuit also denied a COA, stating that reasonable jurists would not debate whether any of the Florida burglary priors were qualifying offenses under the ACCA's enumerated offenses clause, as the sentencing court clearly considered them to be so. (App. A-1).

REASONS FOR GRANTING THE WRIT

THE CIRCUITS ARE OPENLY DIVIDED ON THE QUESTION PRESENTED.

There is an acknowledged and entrenched conflict among the circuits, that is outcome-determinative on defendants' § 2255 petitions for relief under *Johnson.* As courts have recognized, post-*Johnson* and *Welch,* this question has arisen frequently because "[n]othing in the law requires a [court] to specify which clause of [the ACCA] - residual or elements clause - it relied upon in imposing a sentence." *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016), *abrogation recognized by Curry v. United States,* 714 F. App'x 968 (11th Cir. 2018). Thus, "at many pre-*Johnson* [ ] sentencings, the court did not specify under which clause it found the ACCA predicate offenses to qualify." *United States v. Geozos,* 870 F.3d 890, 894 n.4 (9th Cir. 2017). Therefore, similarly situated § 2255 movants are being treated differently – some subject to an unconstitutional 15-year mandatory minimum, others a lawful 10-year maximum, depending on where their motion is filed.

I. THE FIRST, SIXTH, TENTH, AND ELEVENTH CIRCUITS REQUIRE MOVANTS TO PROVE RELIANCE ON THE RESIDUAL CLAUSE.

a. In *Beeman*, a divided panel of the Eleventh Circuit held that "[t]o prove a *Johnson* claim, the movant must show that – more likely than not – it was the use of the residual clause that led to the sentencing court's enhancement of his sentence." 871 F.3d at 1221-23. The majority also held "[i]f 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 the use of the residual clause." *Id.* at 1222. In the case of "a silent record,"

i.e. where there is no way of knowing the basis for the district court's ruling, a defendant's claim fails. *Id.* at 1224.

Beeman abrogated the prior Eleventh Circuit panel decision in *Chance*, 831 F.3d 1335, and in doing so, completely disregarded that panel's concerns regarding fairness and consistency. The panel in *Chance* gave the example of two defendants sentenced on the basis of the residual clause on the same afternoon by the same judge. 831 F.3d at 1341. In one instance "the judge thought to mention that she was sentencing the defendant under § 924(c)'s residual clause." *Id.* In the other she did not. *Id.* In an effort to eradicate this random unfairness, the *Chance* panel declared "it makes no difference whether the sentencing judge used the words 'residual clause' or 'elements clause' … If *Johnson* means that an inmate's … companion conviction should not have served as such," then his sentence is no longer lawful. *Id.* In light of *Beeman,* however, the two defendants would now be treated different with one obtaining relief while the other does not.

b. The First Circuit adopted the same harsh approach in *Dimott v. United States,* 881 F.3d 232 (1st Cir. 2018), *cert denied, sub nom Casey v. United States,* 17-1251 (June 25, 2018). Expressly agreeing with *Beeman,* the court "h[e]ld 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." *Id.* at 240, 243. Moreover, the court expressly disagreed with the contrary approaches taken by other circuits. *Id.* at 242 ("Our view is different from those taken in *Geozos, Winston,* and *Taylor*."). And because there

were no suggestions that the movants in that case were sentenced under the residual clause, the court of appeals affirmed the denial of the motions. *Id.* at 240-41, 243. Judge Torruella dissented in part, noting the "emerging split amongst the circuits," on how to resolve silent-record *Johnson* cases. *Id.* at 245 n.9.

c. The Sixth Circuit adopted the same approach in *Potter v. United States,* 887 F.3d 785 (6th Cir. 2018). It rejected the notion that "*Johnson* open[s] the door for prisoners to file successive collateral attacks any time the sentencing court *may* have relied on the residual clause." *Id.* at 788 (emphasis in original). Instead, and favorably citing to *Beeman,* it concluded the movant bears the burden to prove such reliance. *Id.* In that case, the court of appeals emphasized that "[n]either the presentence report nor the sentencing transcript shows that the district court relied on the residual clause." *Id.* And it speculated that the district court had likely sentenced the movant under the enumerated-offenses clause. *Id.* Because the movant supplied no contrary evidence, the court affirmed the denial of his § 2255 motion. *Id.* at 787-89.

d. The Tenth Circuit in *United States 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 (10th Cir. 2017), *cert. denied*, 17-7157 (Apr. 30, 2018). The Tenth Circuit instructed the 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. *United States v. Washington,* 890 F.3d 891, 896 (10th Cir. 2018). *See also, United States v. Driscoll,* 892 F.3d 1127, 1135 (10th Cir. 2018) ("We now further adopt *Beeman*'s 'more likely than not' burden of proof here, at the merits stage of a first § 2255 challenge.").

II. THE THIRD, FOURTH, AND NINTH CIRCUITS DO NOT REQUIRE MOVANTS TO PROVE RELIANCE ON THE RESIDUAL CLAUSE.

Had Mr. Sanford's § 2255 petition asserting a *Johnson* claim on a silent record arisen in the Third, Fourth, or Ninth Circuits, it would have been granted, or at least considered on the merits.

a. In *United States v. Winston,* 850 F.3d 677 (4th Cir. 2017), the defendant received a sentence with an ACCA enhancement based in part on his prior conviction for Virginia common law robbery. *Id.* at 679. The record was silent as to whether the sentencing judge "relied on the residual clause to conclude that the Virginia common law robbery conviction qualified as a violent felony." *Id.* at 682. Post-*Johnson,* the defendant filed a successive § 2255 motion, asking the district court to vacate his

ACCA-enhanced sentence. *Id.* at 680. Finding the defendant could bring a § 2255 motion based on *Johnson,* the Fourth Circuit observed that despite the silent record "[w]e will not 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.* at 682. Imposing such a burden upon movants "would result in 'selective application' of the new rule of constitutional law announced in *Johnson* [ ]." *Id.* The court thus held "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.* As a result, a silent record is nevertheless sufficient basis for a meritorious *Johnson* claim in the Fourth Circuit.

b. In *Geozos,* the defendant was sentenced to a 15-year mandatory minimum sentence under the ACCA based on five prior convictions. But, as the Ninth Circuit observed, the record was silent as to whether those prior convictions "qualif[ied] under the 'residual clause' of the statute, the 'force clause,' or both." 870 F.3d at 892. After this Court's decisions in *Johnson* and *Welch,* the defendant filed his § 2255 motion, arguing his sentence was no longer lawful. Reversing the district court's determination to the contrary, the Ninth Circuit ruled that the § 2255 motion was procedurally proper because the defendant's "claim does rely on *Johnson* [ ]." *Id.* at 894. Recognizing that if at sentencing the district court had stated that the past convictions "were convictions for 'violent felonies' *only* under the residual clause … [w]e would know that [the d]efendant's sentence was imposed under an invalid -

indeed, unconstitutional - legal theory." *Id.* at 895 (emphasis in original). By contrast, had the sentencing court "specified that a past conviction qualified as a 'violent felony' *only* under the force clause, we would know that the sentence rested on a constitutionally valid legal theory." *Id.* But, given the silence in the record on this issue, the Ninth Circuit ruled "it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id.* In this situation, the Ninth Circuit recognized the applicable principle of *Stromberg v. California,* 283 U.S. 359 (1931), that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that *may have* rested on that ground." *Id.* at 896 (citing *Griffin v. United States,* 502 U.S. 46, 53 (1991)) (emphasis in original). It thus held, "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* [ ]" and the petitioner is eligible for relief under *Johnson. Geozos,* 870 F.3d at 896.

In so holding, the Ninth Circuit acknowledged that in certain situations, "it may be possible to determine that a sentencing court did *not* rely on the residual clause - even when the sentencing record alone is unclear - by looking to the relevant background legal environment at the time of sentencing." *Id.* at 896. Thus, if "binding circuit precedent at the time of sentencing was that crime *Z* qualified as a violent felony under the force clause, then a court's failure to invoke the force clause expressly at sentencing, when there were three predicate convictions for crime *Z,*

would not render unclear the ground on which the court's ACCA determination rested." *Id.* But, absent this type of material, the Ninth Circuit held a silent record provided the basis for a meritorious *Johnson* claim. *Id.* at 897.

c. The Third Circuit is the most recent appellate court to address the question presented. *United States v. Peppers,* --F.3d --, 2018 WL 3827213 (3d Cir. 2018). To satisfy the "gatekeeping inquiry" of section 2255, the court "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 the 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, 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.*

III. THE DECISION BELOW IS WRONG.

The issue presented in this petition was fully preserved below and is dispositive. Yet the district and the appellate courts denied Mr. Sanford a certificate of appealability on the merits, claiming he had failed to demonstrate reasonable jurists could debate the issue. Under 28 U.S.C. § 2253(c)(2), a court of appeals must grant leave to appeal where the appellant makes a "substantial showing of the denial of a federal constitutional right." As this Court reiterated in *Buck v. Davis*, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims

or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The circuit splits regarding a petitioner's burden are clear demonstrations that these issues are being constantly debated. At a minimum this Court should grant the petition and remand to the Eleventh Circuit for consideration of the issues in full.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Steven Lang Sanford prays that this Court grant his Petition for a Writ of Certiorari, or, alternatively, grant summary reversal and remand the case to the Court of Appeals with instructions to grant a COA or to review Petitioner's application for a COA anew.

Respectfully submitted,

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