NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 2018

Richard C. Wyatt - 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

James Whalen
Federal Public Defender's Office
400 Locust Street, Suite 340
Des Moines, IA 50309
TELEPHONE: 515-309-9610
FAX: 515-309-9625

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

Both the district court and the Eighth Circuit Court of Appeals denied Wyatt a certificate of appealability ("COA"), from the denial of his petition under 28 U.S.C. § 2255. In his § 2255 petition, Wyatt challenged his Armed Career Criminal Act ("ACCA") sentence because the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). In the absence of the residual clause, Wyatt does not have three prior convictions that qualify as violent felonies under either the enumerated or elements clauses of the ACCA. 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 the court could presume that the sentencing court relied on the elements clause of the ACCA to determine that Wyatt was subject to the Act, when doing so requires the court to presume that the sentencing court acted illegally.

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Federal Cases:

Federal Statutes:

Other:

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 2018

Richard C. Wyatt - 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

The petitioner, Richard C. Wyatt ("Wyatt"), through counsel, respectfully requests that a writ of certiorari issue to review the April 11, 2018, judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 18-1238, denying his application for a certificate of appealability. Wyatt's petition for rehearing by the panel was denied on June 18, 2018.

OPINION BELOW

The Eighth Circuit Court of Appeals' denial of Wyatt's application for a COA in Case No. 18-1238 is provided in Appendix A. The Eighth Circuit Court of Appeals' denial of Wyatt's petition for rehearing is provided in Appendix B. The order of the district court denying Wyatt's § 2255 motion is provided in Appendix C.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Wyatt's case under 18 U.S.C. § 3231. The district court denied Wyatt's 28 U.S.C. § 2255 motion on December 8, 2017. (Appendix C). Wyatt timely filed a notice of appeal and application for a COA in the Eighth Circuit, which was denied on April 11, 2018. (Appendix A). Wyatt filed a petition for rehearing by the panel, which was denied on June 18, 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 April 28, 1999, Wyatt pled guilty to a total of nine counts, contained in five different charging instruments, for crimes committed in five different judicial districts. (Crim. Doc. 34; PSR ¶ 15).[1] He was originally charged in December of 1997 in Northern District of Iowa Case No. 97-cr-3015-MWB. (Crim. Doc. 1). The PSR concluded that Wyatt qualified as both a career offender and an armed career criminal. (PSR ¶¶ 99–100). The convictions recited in the PSR as career offender predicates were: (1) a 1981 federal bank robbery conviction; (2) a 1989 federal conviction on three counts of bank larceny; and (3) a 1998 federal conviction for bank robbery. (PSR ¶ 99). The PSR stated that "the defendant may qualify for the Armed Career Criminal enhancement under U.S.S.G. § 4B1.4," but did not specify which prior convictions it relied upon to support that determination. (PSR ¶ 100).

At sentencing the court imposed the 180-month statutory mandatory minimum sentence under the ACCA on count three, the conviction for being a felon

[1] In this brief, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. CR97-3015-MWB, and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. "Tr." refers to the transcript of the sentencing hearing held October 28, 1999. Any references to previous § 2255 motions filed by Wyatt will be to their respective civil case numbers, followed by numbers corresponding to docket entries. References to Eighth Circuit No. 16-2446, wherein Wyatt requested leave to bring a second or successive § 2255 petition, will be referenced as "SOS," followed by the Entry ID 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. 3:16-cv-03064-MWB will be to "Civ. Doc.," followed by the docket entry number.

in possession of a firearm. (Tr. p. 101; Crim. Doc. 45). The court imposed a total sentence of 425 months, comprising concurrent terms of 300 months (one count of bank robbery), 240 months (five counts of bank robbery), 180 months (one count of being a felon in possession of a firearm); a consecutive sentence of 65 months (one count of bank robbery); and a consecutive sentence of 60 months (use of a firearm during a crime of violence). (Crim. Doc. 45).

Wyatt filed his application for leave to file a second or successive § 2255 petition on May 27, 2016. (SOS, Entry ID: 4404497). The application was held in abeyance pending resolution of the question of whether *Johnson* applied to the sentencing guidelines. (SOS, Entry ID: 4408271).[2] On November 20, 2017, the Eighth Circuit granted the SOS application insofar as Wyatt sought permission to challenge his ACCA sentence, but denied his request to challenge his career offender sentence and his § 924(c) sentence. (SOS, Entry ID: 4602188).

Without setting a briefing schedule, the district court issued an Initial Review Order on December 8, 2017, denying Wyatt's § 2255 motion. (Appendix C). The court declined to grant a certificate of appealability. (Appendix C). The Eighth Circuit likewise denied Wyatt's request for a COA (Appendix A), as well as his request for rehearing on that issue. (Appendix B).

---

[2] On May 26, 2016, Wyatt filed a § 2255 motion in the district court challenging his sentence in light of *Johnson*. (Civ. Doc. 1). The district court stayed consideration of the motion until the Eighth Circuit ruled on his request to file a second or successive § 2255 motion. (Civ. Doc. 4, p. 2).

The Eighth Circuit Order denying Wyatt's Application for a COA states no reasons for the decision, so Wyatt assumes that the panel relied upon the reason given by the district court when that court denied Wyatt's motion under 28 U.S.C. § 2255, in which he sought to vacate his ACCA sentence based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Appendix C). The district court's sole reason for denying Wyatt's § 2255 motion was that "Wyatt's sentence was not based on the residual clause of the ACCA," but was, instead, "based on the elements clause due to his bank robbery convictions under 18 U.S.C. § 2113(a) and (d)." (Appendix C).

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 lower courts should not have required Wyatt to affirmatively prove that he was sentenced under the residual clause of the ACCA. Such a requirement unduly restricts the retroactive application of *Johnson v. United States*, 135 S. Ct. 2551 (2015), unfairly penalizing Wyatt because the sentencing court did not make findings that it was not required to make. The lower courts' rulings ignore the broad scope of the residual clause at the time of Wyatt's sentencing, and lead to unfair and arbitrary disparate application of *Johnson.*

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.* § 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, 1140 (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* solely because he failed to affirmatively prove that he was sentenced under the residual clause of the ACCA. As demonstrated below, the reasons underlying the district court's decision are certainly debatable among reasonable jurists, and, in fact, other courts have consistently rejected the district court's reason for denying the petitioner's request for relief under *Johnson*.

I. THIS COURT'S INTERVENTION IS NEEDED TO RESOLVE WIDELY DIVERGENT OPINIONS BY CIRCUIT COURTS AND DISTRICT COURTS NATIONWIDE ON THE QUESTIONS OF WHETHER A PETITIONER SEEKING *JOHNSON* RELIEF MUST AFFIRMATIVELY PROVE THAT HE RELIED UPON THE RESIDUAL CLAUSE, AND WHETHER SUCH PETITIONER CAN EVER PREVAIL WHEN THE RECORD MADE AT THE TIME OF SENTENCING IS SILENT AS TO WHICH CLAUSE OF THE ACCA THE DISTRICT COURT RELIED UPON.

The district court's Initial Review Order denying § 2255 relief to Wyatt is a good example of the perils of trying to determine a sentencing court's reasons for applying an ACCA enhancement years – in this case nearly eighteen years – after the fact. The issue of whether Wyatt was an armed career criminal was not in dispute between the parties at the time of his sentencing. Wyatt, through counsel, did not file any objections to the PSR. (PSR Addendum). The government's only comments about the PSR concerned the government's intent to request an upward departure on the grounds that Wyatt's criminal history category VI underrepresented the seriousness of his criminal history and the likelihood of recidivism. (*Id.*). At sentencing, defense counsel announced that Wyatt was objecting to an enhancement for obstruction of justice, and to the failure of the PSR to recommend a reduction for acceptance of responsibility. (Tr. pp. 3:20–7:6). Consistent with the government's written comments, the prosecutor requested, and the court granted, an upward departure based on underrepresentation of criminal history. (Tr. p. 2:13–14; p. 92:5–20). Neither party introduced copies of court papers concerning Wyatt's prior convictions. The sentencing court's judgment and

statement of reasons are silent as to how the court concluded that Wyatt qualified as an armed career criminal. (Crim. Doc. 45, p. 9).

Where, as here, the record is silent as to which clause of 18 U.S.C. § 924(e)(2)(B) the court relied upon to find that Wyatt had at least three prior convictions that qualified as violent felonies, it should be presumed that the court relied on the residual clause. Although the district court cites recent cases as authority for the proposition that it could have found that Wyatt's priors qualified under the elements clause, it is also true that they could have qualified under the residual clause. Because the question of whether Wyatt qualified as an armed career criminal was not in dispute between the parties, the court had no need, or obligation, to elucidate the reasons for its decision. *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("We 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."); *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) ("[N]othing in the law requires a judge to specify which clause of § 924(c) – residual or elements clause – it relied upon in imposing a sentence.").

In *Walker v. United States*, No. 16-4284, 2018 WL 3965725, *3 (8th Cir. Aug. 20, 2018), the Eighth Circuit Court of Appeals joined three other circuits in holding that a § 2255 movant must affirmatively show that the sentencing court relied solely on the residual clause to apply the ACCA enhancement. *See United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Dimott v. United States*, 881 F.3d

232, 243 (1st Cir. 2018), *cert. denied*, 138 S. Ct. 2678 (June 25, 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017). Other circuits, including the Fourth, Fifth, and Ninth, have reached the contrary conclusion. *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). By implication, the Third Circuit would also find that when the original sentencing record is silent or ambiguous, it should be presumed that the sentencing court relied on the residual clause. *See United States v. Peppers*, 899 F.3d 211, 229–30 (3d Cir. 2018) (finding that where SOS petitioner satisfied gatekeeping requirements of 28 U.S.C. § 2255(h), he may rely on post-sentencing case law that explains presentencing law).

The rationale underlying the cases from the Tenth, First, Eleventh, and now the Eighth Circuit, has its genesis in an earlier Eleventh Circuit case, *In re Moore*, 830 F.3d 1268 (11th Cir. 2016). In that case, the court was considering whether to permit an applicant to file a second or successive § 2255 petition to assert a *Johnson* claim. 830 F.3d at 1269. The court granted the request, finding that the applicant had met the relatively low threshold for pursuing an SOS petition. *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.

Id. 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 Winston*, 850 F.3d at 682; *Taylor*, 873 F.3d at 481–82; *Geozos*, 870 F.3d at 896.

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*, 881 F.3d at 240; *Beeman*, 871 F.3d at 1228, n.3. Neither of these decisions, however, employs any significant analysis beyond that of the *Moore* panel. The 2-1 majority opinion in *Beeman*, authored by a circuit court judge who also sat on the *Moore* panel, generally uses the same reasoning as *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.

In *Beeman*, the majority noted that the contradictory opinions on this issue expressed in *Moore* and *Chance* were dicta, and not binding on the panel. *Beeman*, 871 F.3d at 1221, n.3. The dissent in *Beeman*, however, highlights the reasons why the *Moore* and *Beeman* line of cases are unsound. 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 – a sentiment mirrored by the Eighth Circuit's majority opinion in *Walker* – such interests are "at their weakest" where the sentence imposed "in fact is not authorized by substantive law." *Id.* at 1231 (quoting *Welch*, 136 S. Ct. at 1266); *Walker*, 2018 WL 3965725, at *2. 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.

Id. at 1231.

Other Courts of Appeals have reached similar conclusions to those of the Eleventh Circuit in *Chance* and the dissent in *Beeman*. 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." 850 F.3d at 682. Although not necessarily adopting all of *Winston*'s rationale, the Fifth Circuit held in *United States v. Taylor* 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." 873 F.3d at 481–82. 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.* This contrasts sharply with the *Dimott* court's observation that petitioners 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 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*[.]" *Geozos*, 870 F.3d at 896 (emphasis added).

The sentencing court was certainly under no obligation to make findings as to which clause of the ACCA's violent felony definition it relied on to impose sentence. Moreover, anyone knowledgeable about "the relevant background legal environment at the time of . . . sentencing," *Walker*, 2018 WL 3965725, at *3, would have known that there was no point in Wyatt objecting to the use of the elements clause to classify his robberies as violent felonies, because they would have easily qualified under the residual clause. Indeed, given the state of law at the time of sentencing, there was simply no dispute between the parties that Wyatt qualified as an armed career criminal. The sentencing court's judgment and statement of reasons are thus silent as to how the court concluded that Wyatt qualified as an armed career criminal. (Crim. Doc. 45, p. 9).

It is not surprising, given the extremely elastic scope of the residual clause under Eighth Circuit law, that Wyatt's armed career criminal status was not in dispute. The court and the parties undoubtedly recognized that careful analysis of whether predicate offenses might qualify under the elements clause or the enumerated clause was not necessary, and probably would have been regarded as a colossal waste of time. After all, nine years before Wyatt's sentencing, the Supreme

Court emphasized in *Taylor v. United States*, 495 U.S. 575 (1990), that even when an offense does not categorically qualify as an ACCA predicate under the elements or enumerated clauses, the offense might still qualify as a predicate under the residual clause. Likewise, the Eighth Circuit had already evinced a propensity to rely upon the elasticity of the residual clause to conclude that offenses were crimes of violence. *See United States v. Sun Bear*, 307 F.3d 747, 752 (8th Cir. 2002) (attempted theft of a motor vehicle was a crime of violence because it presented a serious potential risk of physical injury); *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); *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001) (a walkway escape presented a serious potential risk of physical injury).

The district court in *United States v. Ladwig* aptly captured some of the pitfalls of trying to reconstruct the legal landscape that existed over thirteen years ago, particularly in an area of law that has proven to be as problematic as the ACCA definition of violent felony:

> [C]onsiderations of public policy weigh strongly in favor of applying current law. Attempting 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. This area of the law has accurately been described as a "hopeless tangle," *Murray v. United States*, No. 96–CR–5367–RJB, 2015 WL 7313882 at *5 (W.D.Wash. November, 19, 2015), and has stymied law clerks and judges alike in a morass of inconsistent case law. An inquiry that requires judges to ignore intervening decisions that, to some degree, clear the mire of

> decisional law seems to beg courts to reach inconsistent results. Current case law has clarified the requisite analysis and applying that law should provide greater uniformity, helping to ensure that like defendants receive like relief. Indeed, when pressed at oral argument regarding these policy implications, the government acknowledged that its position required judges to ignore decisions that clarified grey areas of the law, precipitating potential inconsistency. Because there is precedent for doing so, and in consideration of the aforementioned problems raised by applying old law, the Court will apply current case law to determine whether Mr. Ladwig's convictions qualify as predicate felonies without the residual clause.

192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016); *see also United States v. Carrion*, 236 F. Supp. 3d 1280, 1287 (D. Nev. 2017) ("[A] rule that requires judges to take a research trip back in time and recreate the then-existing state of the law – particularly in an area of law as muddy as this one – creates its own problems in terms of fairness and justiciability."); *Thrower v. United States*, 234 F. Supp. 3d 372, 381 (E.D.N.Y. 2017) ("The concerns for fairness and consistency articulated in *Ladwig* echo the Supreme Court's rationale for applying current law retroactively 'for purposes of determining whether a party has demonstrated prejudice' in the context of ineffective assistance of counsel claims under *Strickland*.").

Obviously, concern about the finality of judgments is a major reason underlying the decisions of the Eighth, Tenth, First, and Eleventh Circuits. *Walker*, 2018 WL 3965725, at *2; *Beeman*, 871 F.3d at 1222–24; *Washington*, 890 F.3d at 896; *Dimott*, 881 F.3d at 236, 241–42. Admittedly, such concerns were "one of Congress's motivations in passing the Antiterrorism and Effective Death Penalty Act." *Walker*, 2018 WL 3965725, at *2. As noted above, however, such concerns are

"at their weakest" where the sentence imposed "in fact is not authorized by substantive law." *Beeman*, 871 F.3d at 1231 (Williams, J., dissenting) (quoting *Welch*, 136 S. Ct. at 1266). These concerns are even weaker where, as here, those concerns have already been addressed by the gatekeeping requirements of 28 U.S.C. § 2255(h)(2), which requires circuit approval before a petitioner can proceed with a second or successive § 2255 motion in district court. Once those "gatekeeping requirements" have been met, "it makes perfect sense to allow a defendant to rely upon post-sentencing Supreme Court case law that explains the presentencing law." *United States v. Peppers*, 899 F.3d at 229–30 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994) ("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.")). Following intervening precedents such as *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Descamps v. United States*, 570 U.S. 254 (2013), and *Curtis Johnson v. United States*, 559 U.S. 133 (2010), insures that courts will apply the "correct meaning of the ACCA's words." *Peppers*, 899 F.3d at 230. These cases instruct courts on what has always been the proper interpretation of the ACCA's language. *Id.*; *see also Mathis*, 136 S. Ct. at 2251 ("*Taylor* set out the essential rule governing the ACCA cases more than a quarter century ago.").

Attempting to divine what the district court *could have* or might have decided had it, years before, been required to elucidate the basis for its ACCA

findings invites speculation, encourages disparate treatment of similarly situated habeas petitioners, and does nothing to insure the constitutional protections advanced in *Johnson*. Applying the holdings in *Walker*, *Beeman*, *Washington*, and *Dimott*, to cases where the record is silent as to the basis relied upon by the sentencing court to determine that a defendant was an armed career criminal, would effectively limit the retroactive effect of *Johnson* to only those cases where the sentencing court specifically stated on the record that it was relying solely on the residual clause to determine that a prior conviction qualified as a violent felony. It ignores the reality of the legal landscape as it existed for large numbers of defendants subjected to the ACCA enhancement, i.e., that the expansive reach of the residual clause encompassed virtually all likely predicates, thus removing any incentives for challenging such convictions. The rationale of *Walker*, and similar cases, ignores the tendency of lawyers not to raise issues that are futile, and the tendency of judges to only decide what they need to decide.

II. THE COURT SHOULD NOT PRESUME THAT THE SENTENCING COURT RELIED ON THE ELEMENTS CLAUSE OF THE ACCA TO DETERMINE THAT WYATT WAS SUBJECT TO THE ACT, BECAUSE DOING SO REQUIRES THE COURT TO PRESUME THAT THE SENTENCING COURT ACTED ILLEGALLY.

Wyatt's § 2255 petition was denied by the district court in an Initial Review Order, without any opportunity for briefing or argument by Wyatt. (Appendix C). The court's ruling makes no sense, unless the district court was mistaken about the nature and timing of certain of Wyatt's prior convictions. Without specifically

referencing any part of the PSR or the sentencing transcript, the district court declared that Wyatt "was sentenced based on the elements clause due to his bank robbery convictions under 18 U.S.C. § 2113(a) and (d)." (Appendix C, p. 3).

Wyatt had only two prior federal bank robbery convictions – one in 1981 and one in 1998. (PSR ¶¶ 116, 118). However, it is clear that the sentencing court could not have relied upon the 1998 bank robbery conviction referenced in paragraph 118. The ACCA provides, in relevant part, that "a person who violates section 922(g) of this title and has three *previous convictions* . . . for a violent felony . . . committed on occasions different from one another . . . shall be imprisoned not less than fifteen years . . . ." 18 U.S.C. § 924(e)(1) (emphasis added). The offense conduct in PSR ¶ 118 occurred on November 5, 1997. The offense conduct for the crimes for which Wyatt was sentenced in the instant case all concluded no later than October 23, 1997. (*See* PSR ¶¶ 2–4) (N.D. Iowa offenses occurred on or about Oct. 14, 1997); ¶ 6 (S.D. Iowa offense occurred on or about Sept. 23, 1997); ¶ 8 (D. Neb. offense occurred on or about Sept. 10, 1997); ¶¶ 10–12 (E.D. Wis. offenses occurred on or about Oct 2 and Oct. 23, 1997); ¶ 14 (W.D. Mo. offense occurred on or about Sept. 5, 1997); *see also* Crim. Doc. 45, p. 2 (Judgment). Wyatt's April 21, 1998 conviction for bank robbery concerned an offense that concluded on November 8, 1997 – several weeks *after* the latest offense date for which he was being sentenced. (PSR ¶ 118).

The words "previous conviction" in § 924(e) "refer to convictions that occur *before* the defendant violates § 922(g)." *United States v. Talley*, 16 F.3d 972, 977

(8th Cir. 1994) (emphasis added). Wyatt's 1998 bank robbery *conviction* occurred on April 21, 1998. Clearly then, both the conviction and the offense conduct underlying it occurred well *after* Wyatt committed the § 922(g) violation on October 14, 1997. (*See* PSR ¶ 4). It thus would have been a direct violation of § 924(e)(1) for the district court to have relied on the offense as an ACCA predicate.

Wyatt does not dispute that his 1981 bank robbery is a violent felony so, assuming that the sentencing court followed the law and did not count Wyatt's April 21, 1998 conviction for bank robbery, that leaves only one other conviction that could arguably qualify – his 1980 Kansas robbery. Even if the Kansas robbery qualifies, that leaves Wyatt with only two prior violent felonies, so he is no longer an armed career criminal.

The court's use of the plural "convictions" in its order suggests, perhaps, that the district court mistakenly thought that the Kansas conviction was a federal bank robbery conviction rather than a state robbery conviction. (Civ. Doc. 4, p. 3). Of course, it could also mean that the district court erroneously assumed that Wyatt's bank larceny convictions were somehow equivalent to bank robbery convictions.

Wyatt's 1989 conviction on three counts of bank larceny, however, could *only* have been counted under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). It was not an enumerated offense, and federal bank larceny, as defined at 18 U.S.C. § 2113(b), does not have "as an element the use, attempted use, or threatened use of physical force against the person of another," as required by § 924(e)(2)(B)(i).

Indeed, the Eighth Circuit has sustained convictions under § 2113(b) for offenses involving no contact or interaction whatsoever with other persons, let alone the type of "*violent* force – required by *Curtis Johnson*, 559 U.S. at 140. *See, e.g.*, *United States v. Casey*, 158 F.3d 993, 995 (8th Cir. 1998) (defendant opened backs of ATM machines and took money from them); *United States v. Muzingo*, 999 F.2d 361, 362–63 (8th Cir. 1993) (defendant created a fake key to his wife's safe-deposit box); *United States v. Brelsford*, 982 F.2d 269, 270–71 (8th Cir. 1992) (bank employee pilfered money from cash drawer and vault). For this reason, the Fourth Circuit has held that bank larceny is categorically *not* a predicate crime of violence because it can be committed by a "vast array of means . . . that pose no potential risk of physical injury to another, let alone a serious one." *United States v. Martin*, 215 F.3d 470, 475 (4th Cir. 2000).

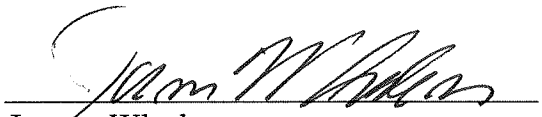
Even if it is assumed merely for the sake of argument that Wyatt's 1980 Kansas robbery conviction would have been counted under the elements clause, when combined with his 1981 federal bank robbery conviction, he would still only have two predicates instead of the three required under the ACCA. To conclude that he had three would have required the sentencing court to either ignore the fact that his 1998 federal bank robbery conviction occurred *after* the offense conduct in the instant case, or it would have required the sentencing court to rely on the residual clause in order to find that bank larceny was a violent felony. Reasonable jurists could certainly conclude that the district court erred by engaging in

speculation as to what it *could have* or *might have* relied upon, years before, to determine Wyatt was an armed career criminal.

CONCLUSION

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

RESPECTFULLY SUBMITTED,



James Whalen
Federal Public Defenders' Office
400 Locust Street, Suite 340
Des Moines, IA 50309
TELEPHONE: 515-309-9610
FAX: 515-309-9625

ATTORNEY FOR PETITIONER