No. _____

IN THE
Supreme Court of the United States

_____

MICHAEL JACKSON,
Petitioner,
v.

UNITED STATES,
Respondent.

_____

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

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PETITION FOR A WRIT OF CERTIORARI

_____

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A circuit split has recently grown more pronounced as to whether a district court can vacate an illegal sentence enhanced under the Armed Career Criminal Act (ACCA), if it finds that the record established that the sentencing court "may have" relied on the unconstitutional residual clause of the ACCA, as the Third, Fourth and Ninth Circuit have held. On the other side of the split, the First, Sixth, Eighth, Tenth and Eleventh Circuits have held that the court must instead find by a preponderance of the evidence that the residual clause served as the basis of the sentencing court's decision. This raises the following question:

QUESTION PRESENTED

I. May a court may grant a 28 U.S.C. § 2255 petition challenging his sentence under *Johnson* when the evidentiary record is silent as to whether the petitioner's original sentence was enhanced pursuant to the ACCA's now-invalidated residual clause, but at the time of the sentencing the relevant case law had consistently relied on the residual clause to find that the predicate conviction qualified?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael Jackson, respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 1, 2017.

OPINION BELOW

The Eighth Circuit's judgment denying a certificate of appealability is included in Appendix A. A copy of the order denying rehearing is included in Appendix B. The district court's order denying a certificate of appealability is included in Appendix C.

JURISDICTION

On June 1, 2017, the Court of Appeals denied a certificate of appealability, dismissing the appeal. However, Mr. Jackson timely filed a motion to stay, which was granted by the Eighth Circuit. Mr. Jackson subsequently filed a timely petition for rehearing, which was fully and finally denied on July 12, 2018. In accordance with Supreme Court Rule 13.3, this Petition for Writ of Certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, 28 U.S.C. § 2253 and Sup. Ct. R. 13.3 and 13.5.

CONSTITUTIONAL PROVISION INVOKED

The Fifth Amendment to the United States Constitution states that:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The Guilty Plea and Sentencing

Michael Jackson was found guilty in 2002 of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Although that statute typically carries a maximum sentence of 120 months' imprisonment, the court found Mr. Jackson to be an ACCA offender, enhancing his potential sentence to 180 months to life pursuant to 18 U.S.C. § 924(e)(1). The court ultimately sentenced Mr. Jackson to 327 months' imprisonment.

The Post-Conviction Relief Motion

Mr. Jackson filed a successive motion pursuant to 28 U.S.C. § 2255 on February 26, 2016, seeking sentencing relief in light of the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Specifically, Mr. Jackson alleged that in light of *Johnson* and its retroactive application to his case on collateral review, he would no longer be subject to the enhanced penalty provision of the ACCA and, therefore, the sentence he is serving is an illegal sentence predicated upon an unconstitutionally vague, and now invalidated, residual clause of that statute.

Mr. Jackson's predicate convictions, which made him an ACCA offender, were all Missouri burglary convictions. Mr. Jackson argued that because those Missouri

burglary convictions no longer qualify as a violent felony, he is not a violent felon under the ACCA.

On August 31, 2016, the district court denied Mr. Jackson's motion, finding that his Missouri burglary convictions still "qualify as ACCA enumerated offenses." (Appendix C, pg. 7). In so ruling, it did not determine whether the residual clause led the sentencing court to apply the ACCA enhancement at the sentencing hearing. The district court also denied a certificate of appealability, ("COA"). *Id*.

Appeal to the Eighth Circuit

Mr. Jackson sought an application for a COA before the Eighth Circuit, but the Court of Appeals issued its Judgment denying the COA, and dismissed the appeal. *See* June 1, 2017 Judgment (Appendix A). Mr. Jackson then filed a motion for stay, requesting the court to stay the case pending the Eighth Circuit's *en banc* review of whether Missouri burglary is a "violent felony" after *Mathis v. United States*, 136 S.Ct. 2243 (2016). The Eighth Circuit granted the stay, holding the case in abeyance until it issued its decision in *United States v. Charles Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc), which concluded that Missouri burglary, § 569.170 RSMo, was not a violent felony. Based on its holding in *Naylor*, the Eighth Circuit lifted the stay and ordered that Mr. Jackson file his petition for rehearing by April 19, 2018.

Mr. Jackson timely filed a petition for rehearing, but the Eighth Circuit denied that petition on July 12, 2018, in a one sentence order (Appendix B).

REASONS FOR GRANTING CERTIORARI

This case presents an ideal vehicle for this Court to resolve an entrenched circuit split over a frequently recurring issue of federal habeas law. The issue will continue to frequently recur because it pertains not only to the residual clause of the ACCA, but is also likely to be litigated extensively in other legal contexts, like the residual clause of 18 U.S.C. § 924(c) after this Court's holding in *Sessions v. Dimaya*, 138 S.C.t 1204 (2018).

And, in the absence of this Court's guidance, the circuit split is growing more fractured. If Mr. Jackson's case had arisen in the Third, Fourth, or Ninth Circuits, he would have already obtained relief on his §2255 petition and would have been released from prison, because the record was silent as to whether his ACCA enhancement was based on the residual clause. Or, if Mr. Jackson's case had arisen in the First, Fifth, Sixth, or Tenth Circuits, the circuit court would have employed a "legal environment" test to analyze the controlling law at his sentencing hearing, to determine whether his sentence rested on the residual clause. But because Mr. Jackson filed his §2255 in the Eighth Circuit, the court of appeals likely applied a third test---engineered by the Eleventh Circuit---that the "legal environment" test is a factual question to be remanded to the district court to decide in the first instance.

There is no justification for a defendant's eligibility for §2255 relief to turn on the geographic location of the Court of Appeals in which his case arises. Yet that is exactly the situation that continues to exist today as a result of the circuit conflict.

This issue is one of exceptional importance because it is impacting numerous defendants throughout the nation that are serving unconstitutional *Johnson* sentences.[1] Stripped of the ACCA enhancement, many of these defendants (including Mr. Jackson) would be eligible for immediate release because the time they have served on their sentence far exceeds the 120 month maximum sentence they could have been sentenced to without the ACCA enhancement.

Finally, this case is an ideal vehicle for resolving this split. The evidentiary record is entirely silent as to which clause – enumerated or residual – the sentencing judge relied upon in finding Mr. Jackson's prior Missouri burglary convictions ACCA predicates. The very judge who sentenced Mr. Jackson never indicated in later review which clause he applied. Mr. Jackson's relevant prior Missouri burglary convictions under §569.170 RSMo,, indisputably are not qualifying ACCA predicates.[2] Ultimately, this case is an ideal vehicle for resolving the issue because the decision below cannot be affirmed on alternate grounds. Mr.

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[1] Just in the Western District of Missouri, the Federal Public Defender's Office represents no less than five other clients that have a nearly identical *Johnson* burden of proof issue as it pertains to their §2255 motion. *Darrell Walker v. United States*, 16-4284 (pending in 8th Cir.); *Fabian Jackson v. United States*, 17-1623 (pending in 8th Cir.); *Michael Mitchell v. United States*, 09-03012-01-CR-S-RED; *Michael Smith*; 09-05031-01-CR-SW-DGK; and *Edward Evans v. United States,* 06-03059-01-CR-S-FJG.

[2] Mr. Jackson has two convictions under a different Missouri burglary statute, §560.1070 RSMo (1969), and there remains a dispute whether that statute is an ACCA predicate. However, even when assuming that §560.1070 is a "violent felony", Mr. Jackson would still not have three "violent felony" convictions to sustain an ACCA enhanced sentence.

Jackson indisputably would not be an ACCA offender if sentenced today, yet he continues to be incarcerated on an unconstitutional 327 month sentence.

I. The lower courts are in acknowledged conflict over how a §2255 movant can demonstrate he was sentenced pursuant to a void residual clause.

The Eighth Circuit's decision, denying Mr. Jackson a COA, was issued without an express justification by the Court of Appeals. However, because the Eighth Circuit denied Mr. Jackson's petition for rehearing just before it issued *Walker v. United States*, ____ F.3d ____, 2018 WL 3965725, (8th Cir. August 20, 2018), this Court should presume that the denial of a COA was based on the logic employed in *Walker*, which analyzed an indistinguishable issue.

a. The Eighth Circuit's decision in Walker directly conflicts with the Third, Fourth and Ninth Circuits.

The Eighth Circuit's opinion in *Walker* is in direct conflict with the law in the Third, Fourth and Ninth Circuits. The Eighth Circuit acknowledged the circuit split of authority in *Walker*, noting that "[o]ur sister circuits disagree on how to analyze this issue." *Walker*, 2018 WL 3965725, at *2. *Walker* held that when the original sentencing court did not specify whether the residual clause provided for the basis of the ACCA enhancement, the movant must "show that it is more likely than not that the residual clause provided the basis for an ACCA sentence . . . by a preponderance of the evidence." *Walker*, 2018 WL 3965725, at *2-*3.

The Third, Fourth, and Ninth Circuit's test flips the inquiry, so that Mr. Jackson's §2255 would have been granted. Most recently, the Third Circuit held in

United States v. Peppers, that "§ 2255(h) only requires a petitioner to show that his sentence may be unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court", and that the defendant met that standard by demonstrating that he may have been sentenced under the residual clause of the ACCA. *United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018). The Third Circuit was analyzing a second, successive §2255 motion, just like in this case, and *Peppers* acknowledged that such a petition must invoke "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* at 220, quoting 28 U.S.C. § 2255(h)(2). The Third Circuit also acknowledged that the purpose of §2244 and §2255 was to restrict "a defendant's ability to collaterally attack his conviction or sentence, especially with a second or successive attack." *Id*. at 222.

However, in *Peppers*, the Third Circuit concluded that "[t]he statutory text, case law from our sister circuits, and policy considerations indicate that § 2255(h) only requires a movant to show that his sentence may be, not that it must be, unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court. *Id*. at 222. "To interpret the language [in the statute] as the government suggests would effectively turn the gatekeeping analysis into a merits determination, which defeats the purpose of the jurisdictional review." *Id*. at 223.

The Fourth and Ninth Circuits have reached similar conclusions. In *United States v. Winston*, the Fourth Circuit held "that 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)." 850 F.3d 677, 682 (4th Cir. 2017). Likewise, the Ninth Circuit concluded in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), 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*]." *Id.* at 896.

b. *Other circuits have developed a test for determining Johnson error, by placing a "preponderance of the evidence" burden on the movant. Two of these circuits (the Eighth and the Eleventh Circuit) have developed a unique "legal environment" test requiring a remand for factual findings.*

Other circuits have developed a test for determining *Johnson* error, by placing a "preponderance of the evidence" burden on the movant. The Eighth Circuit, in *Walker*, concluded that courts should consider "the relevant background legal environment at the time of ... sentencing" to ascertain whether the movant was sentenced under the residual clause. *Walker*, 2018 WL 3965725, at *3, citing to *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017) ("the relevant background legal environment is, so to speak, a 'snapshot' of what the controlling law was at the time of sentencing"). The Sixth Circuit also permits courts to "consult[] case law (including post-sentencing decisions) to conclude as a matter

of law that [defendant]'s three prior convictions count as ACCA predicates under clauses other than the residual clause." *Raines v. United States*, 898 F.3d 680, 686 (6th Cir. 2018).

However, these circuits are fractured on how to apply this "legal environment" test. The Sixth and Tenth Circuits have concluded that the relevant "legal environment test" is a *legal* issue reviewed *de novo*, because it is predicated on analyzing *prior case law*, as opposed to facts. *See United States v. Driscoll*, 892 F.3d 1127, 1132–33 (10th Cir. 2018); *see also Raines,* 898 F.3d 686. Other circuits have treated this as a legal issue, by reviewing relevant case law to determine whether the prior conviction rested on the residual clause. *See United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018) (Fifth Circuit concluded, after reviewing relevant Fifth Circuit case law that "at the time of sentencing, there was absolutely nothing to put the residual clause on the sentencing court's radar in this case."); *see also Dimott v. United States*, 881 F.3d 232, 241 (1st Cir. 2018) (First Circuit concluded, after reviewing First Circuit case law, that courts were treating the predicate offense, Maine burglary, as "a generic offense.").

However, not all circuits on this side of the split—placing the burden on the defendant–employ the test uniformly. Specifically, the Eighth Circuit has concluded that the "legal environment" test is "a factual question for the district court", and have remanded cases to the district court to decide this issue in the first instance. *Walker*, 2018 WL 3965725, at *3. The Eleventh Circuit has adopted a similar test,

finding that the basis for the ACCA enhancement is "a historical fact", and has remanded several cases for the district court to make this determination in the first instance when the evidentiary record is silent regarding the residual clause. *Beeman v. United States*, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017).[3]

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This Court should step in to resolve the division among the circuits over how a movant can show error based on the residual clause. This issue will frequently re-occur for years to come because it is not just an ACCA *Johnson* issue, but rather is an issue that is likely to be extensively litigated in the context of other residual clauses, like the residual clause of §924(c), or the residual clause of the mandatory guidelines.

As illustrated above, the circuits have divided firmly over who bears the burden in showing that a defendant was sentenced pursuant to the residual clause when the record is silent. Those circuits placing the burden on the defendant cannot agree on a universal test, with two circuits (the Eighth and Eleventh) concluding

[3] Some of the cases remanded by the Eleventh Circuit for the legal environment "findings" are the following: *Winfrey v. United States*, No. 17-13116, 2018 WL 3773638, at *6 (11th Cir. Aug. 9, 2018); *see also Gomez v. United States*, No. 17-14813, 2018 WL 3654841, at *2 (11th Cir. Aug. 1, 2018)*; see also Rose v. United States*, No. 13-15376, 2018 WL 2727387, at *10 (11th Cir. June 6, 2018)*; see also French v. United States*, 732 F. App'x 836, 840 (11th Cir. 2018); *see also Dixson v. United States*, 724 F. App'x 896, 898 (11th Cir. 2018).

that when the evidentiary record is silent, that the case must be remanded because this "legal environment" test is a factual issue for the district court.

Further delay in granting a petition for certiorari to resolve this split will just cause further disparate outcomes. Those defendants in unfavorable circuits will continue to serve unconstitutional sentences of up to life in prison, because of a void provision in the ACCA.

II. This case is an excellent vehicle to resolve this split.

This case is an ideal vehicle for resolving this circuit split. The evidentiary record is entirely silent as to which clause – enumerated or residual – the sentencing judge relied on in finding that Mr. Jackson's prior burglary convictions were ACCA predicates. Mr. Jackson's relevant Missouri prior convictions were for Missouri burglary- a crime that indisputably is not a qualifying violent felony under the ACCA. Ultimately, this case is an ideal vehicle for resolving the issue of how a movant may show residual clause error because the decision below cannot be affirmed on alternate grounds.

To date, the government has sought to persuade this Court *not* to resolve the circuit split. For example, last term, this Court was presented a petition for certiorari in *Casey v. United States*, 17-1251, with a similar issue. In opposing the *Casey* petition for certiorari, the Solicitor General highlighted that Casey's "claim of a circuit conflict relies primarily on [*Winston*] and [*Geozos*], both of which involved second-or-successive motions under Section 2255." *Casey* BIO, pg. 13. The Solicitor

argued that review by this Court in *Casey* was therefore not warranted because "[n]either *Winston* nor *Geozos* directly addressed the question presented in this case, which involves the timelines of a first Section 2255 motion." *Id.* at 14.

But unlike *Casey*, Mr. Jackson's 2255 is a second, successive petition, and therefore highlights a direct circuit split with *Winston* and *Geozos* (and now *Peppers*). Stated another way, the government cannot avoid the circuit split issue presented in this case, because the tension between the circuits is unavoidable here.

Finally, the fact that the Eighth Circuit denied Mr. Jackson a COA in a summary order does not preclude this Court from reaching the merits of the substantive issue. This was the precise procedural posture of the case in *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016), where the Eleventh Circuit "entered a brief single-judge order denying the motion for a certificate of appealability." *Id.* While this Court noted that the narrow question was whether the Court of Appeals erred in denying the COA, it ultimately concluded that the "narrow question, however, implicates a broader legal issue: whether *Johnson* is a substantive decision with retroactive effect in cases (like Welch's) on collateral review." *Id.* at 1264. "If so, then on the present record reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence. On these premises, the Court now proceeds to decide whether *Johnson* is retroactive." *Id.*

Just like in *Welch*, the Court of Appeals denied Mr. Jackson a COA, but that denial "implicates a broader legal issue." Because Mr. Jackson's petition for certiorari is an ideal vehicle to resolve that substantive issue, this Court should turn to its merits.

III. The Eighth Circuit's ruling is incorrect.

As highlighted above, while it did not state a basis to deny Mr. Jackson's COA application, this Court should presume that its rationale was based on its recent opinion addressing this issue of first impression in the Eighth Circuit in *Walker v. United States*, ____ F.3d ____, 2018 WL 3965725 (8th Cir. August 20, 2018). Mr. Jackson's case cannot be meaningfully distinguished from *Walker,* because both involved successive §2255 motions that challenged whether prior Missouri burglary convictions may continue to sustain an ACCA conviction, when the evidentiary record is silent as to whether the residual clause was the basis for the sentence.[4] 2018 WL 3965725, at *1.

Thus, this question merits review because the Eighth Circuit's ruling in *Walker* (and by proxy in Mr. Jackson's case) is incorrect, for two distinct reasons.

First, the *Walker* decision is incorrect because it improperly placed the burden on the defendant to show that his ACCA enhancement rested exclusively on the residual clause, in the face of a silent record. *Walker*, 2018 WL 3965725, at *3.

[4] Additionally, both Mr. Jackson and Mr. Walker were sentenced to ACCA sentences by the *same* sentencing judge, during the same general time period. Mr. Jackson was sentenced in 2003, and Mr. Walker was sentenced in 2005.

However, statutory construction of §2244(b)(2)(A) and §2255(h)(2) highlights that Mr. Jackson "relies on" a new rule of constitutional law, and therefore "satisfies the gatekeeping requirements when he demonstrates that his sentence *may* be unconstitutional in light of the new rule of constitutional law." *Peppers*, 899 F.3d at 222. "To interpret the language [in the statute] as the government suggests would effectively turn the gatekeeping analysis into a merits determination, which defeats the purpose of the jurisdictional review." *Peppers*, 899 F.3d at 223.

And it would read into the statute language that does not exist because §2244(b)(2)(A) states that the defendant must only demonstrate "that the claim relies on a new rule of constitutional law." *Id.* The government's interpretation of §2244(b)(2)(A) adds language that cannot be found in the statute, elevating the standard so that the claim must *exclusively* rely on a new rule of constitutional law. *See Walker*, 2018 WL 3965725, at *3 (holding that "if it is just as likely that the sentencing court relied on the elements or enumerate offenses clause, solely or as alternative basis for the enhancement, then the movant failed to show that his enhancement was due to use of the residual clause."). Had Congress intended this additional evidentiary hurdle in §2244(b)(2)(A), it would have said so it in the statute, but it did not.

The interpretation in favor of the movant is also in accord with this Court's precedent. As the Ninth Circuit observed, under the *Stromberg* principle, courts assume that if a general verdict could be based on an unconstitutional ground, that

verdict is invalid. See *Geozos,* 870 F.3d at 896. While the fact of a prior conviction necessary to secure an ACCA enhancement need not be proven to a jury, see *Apprendi v. New Jersey*, 530 U.S. 466, 488-90 (2000), there is no justification for exempting from *Stromberg* a judge's determination—based on an unconstitutional ground—that a defendant qualifies for an enhanced sentence. Treating such a determination differently simply because it involves sentencing rather than a conviction would violate this Court's rule that any "fact increasing either end of [a sentencing] range produces a new penalty and constitutes an ingredient of the offense." *Alleyne v. United States*, 570 U.S. 99, 112 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (holding that the sentencing court may "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

The principles that were used to strike down the void residual clause, were echoed again by this Court last term in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212, (2018): "'The prohibition of vagueness in criminal statutes,' our decision in *Johnson* explained, is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'" *Id*. quoting *Johnson*, 135 S.Ct., at 2557. "The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes", and "the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors,

juries, and judges." *Dimaya*, 138 S.Ct. at 1212. Properly interpreting the burden of proof in §2255 motions, protects against this very type of arbitrary or discriminatory law enforcement repeatedly sought to be eradicated by this Court in voiding the residual clause in the first place.

Second, the *Walker* decision is also incorrect because not all circuits on that side of the split—placing the burden on the defendant – employ the test uniformly. Specifically, the Eighth and Eleventh Circuit have concluded that the "legal environment" test is "a factual question for the district court", and have remanded cases to the district court to decide this issue in the first instance. *Walker*, 2018 WL 3965725, at *3.

Walker is wrong that this is a factual issue, because "the relevant legal background is, so to speak, a 'snapshot' of what the controlling law was at the time of sentencing.'" *Walker*, 2018 WL 3965725, at *3, quoting *Snyder*, 871 F.3d at 1129. The relevant "legal environment" test is a legal issue, because it is predicated on analyzing prior case law, as opposed to weighing disputed facts. There is no reason why an appellate court would owe deference to a district court in reviewing the relevant case law that existed at the time of the original sentencing hearing.[5]

[5] Examining case law relevant at prior sentencing hearing, is distinct and different from a case where the same sentencing judge makes a determination in ruling on a §2255 motion that it did not rely on the residual clause in sentencing the defendant to an ACCA sentence. *See Massey v. United States*, 895 F.3d 248 (2nd Cir. 2018). Mr. Jackson's case is not like *Massey* because the district court did not make a post-conviction relief determination that it did not rely on the residual clause at the sentencing hearing.

The test in *Walker* is also wrong because it requires a remand for the district court to decide this issue in "the first instance." *Walker*, 2018 WL 3965725, at *3. These "factual" remands will create further inconsistency in how this determination is made by different district courts, in analyzing the same or similar "legal environment" pertaining to Missouri burglary predicate convictions, as well as other predicate convictions. Some defendants will win on remand, and other similarly situated defendants will lose in an arbitrary fashion that will evade meaningful appellate review because of the deferential standard of review for this "factual issue."

Finally, had the Eighth Circuit examined the "legal environment" at the time of Mr. Jackson's (or Mr. Walker's) sentencing hearing, it would have concluded that relief was warranted, even if the burden of proof was placed on movant to prove by a preponderance of the evidence that their sentence rests on the residual clause. The dissenting opinion in *Walker* highlighted in detail why this is so. *Walker,* 2018 WL 3965725, at *4 (Kelly, J., dissenting).

At the time Mr. Jackson was sentenced, the Eighth Circuit extensively relied on the residual clause to find that Missouri burglary was a qualifying predicate conviction, placing the residual clause squarely on the sentencing court's radar. "We have consistently held that burglary is a predicate offense under § 924(e) and U.S.S.G. § 4B1.2." *United States v. Nolan*, 397 F.3d 665, 666 (8th Cir. 2005); *see also United States v. Hascall*, 76 F.3d 902, 904 (8th Cir. 1996) ("As we have said, second-degree burglary poses a 'serious potential risk for physical injury.'"); *United States*

v. Blahowski, 324 F.3d 592, 594-95 (8th Cir. 2003) ("[S]econd-degree burglary poses a 'serious potential risk of physical injury."); *see also United States v. Mohr*, 382 F.3d 857, 860 (8th Cir. 2004) (reversed on other grounds) ("Our court has reasoned that since burglary always creates a 'serious potential risk of physical injury to another,' it qualifies as a crime of violence."). Therefore, the Eighth Circuit's ruling in incorrect.

IV. At a minimum, Mr. Jackson should have received a COA to appeal the issue because reasonable jurists are still debating this issue in the Eighth Circuit, and across the nation.

At a minimum, Mr. Jackson should have received a COA to appeal this issue because reasonable jurists are still debating this issue in the Eighth Circuit, and across the nation. A COA must issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch v. United States*, 136 S.Ct. 1257, 1263–64, (2016). Obtaining a COA "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 1263-64.

A COA should have been issued by the Eighth Circuit to Mr. Jackson to appeal the denial of his §2255, not only because reasonable jurists continue to debate this issue because of the circuit split, but also because this issue is still being

debated within the Eighth Circuit. Specifically, the Eighth Circuit remanded *Walker* to the district court for further proceedings to determine the "legal environment" regarding whether the district court relied on the residual clause to classify Missouri burglary as a qualifying ACCA conviction. 2018 WL 3965725, at *3. If the district court determines on remand in *Walker* that the "legal environment" indicates that Missouri burglary was a qualifying ACCA predicate based on the residual clause (and therefore grant relief), this would also highlight that Mr. Jackson is entitled to relief.

For all of these reasons, at a minimum, this Court should vacate the Eighth Circuit's judgment that denied Mr. Jackson a COA, and remand this matter for further proceedings consistent with its *Walker* opinion.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Jackson respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

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APPENDIX

Appendix A - Judgement of the Eighth Circuit Court of Appeals

Appendix B – Order denying rehearing by the Eighth Circuit Court of Appeals

Appendix C – District Court's Order Denying Certificate of Appealability