No. 18-_____

IN THE
Supreme Court of the United States

CARLTON ROLAND HUNTER,

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Johnson v. United States*, this Court held that the residual clause of the Armed Career Criminal Act is unconstitutional. In *Welch v. United States*, this Court declared that the *Johnson* rule applies retroactively to cases on collateral review. Under 28 U.S.C. § 2255, when a defendant collaterally attacks his sentence under *Johnson*, he bears the burden of proving that the sentence was based upon the now-forbidden residual clause.

But when the record in the district court is silent on that topic, as it so often is, how shall a defendant meet that burden? The courts of appeals are fractured on this question. All agree that a district court must look to the factual record at the sentencing hearing and the case law current at the time of the hearing. But is that all? The First, Eighth, Tenth, and Eleventh Circuits insist that a district court must not look beyond that so-called "historical record," a snapshot of the long-ago sentencing hearing entirely divorced from later case law interpreting the very same enhancement statute. *See, e.g., Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017).

Other circuits, including the Third, Fourth, and Ninth Circuits permit a defendant, faced with a silent record at the original sentencing hearing, to prove the residual clause by ruling out the recidivist statute's alternative clauses (elements and enumerated crimes). And through this process of elimination, the defendant in these circuits may highlight post-sentencing case law clarifying that the sentencing court could not have lawfully relied upon any clause but the residual.

And that is the question here: May a § 2255 defendant, faced with a silent record below, prove his enhanced sentence was indeed based upon the residual clause by showing that a predicate offense does not fit with the statutes alternative sources: the elements and enumerated crimes clauses? And may he prove his case by surveying post-sentencing case law, including this Court's decisions clarifying the meaning of those alternative clauses?[1]

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[1] A collection of petitions pending before this Court present variations on this very question, including: *Curry v. United States*, No. 18-229 (pending); *George v. United States*, No. 18-5475 (pending); *Perez v. United States*, No. 18-5217 (pending); *Prutting v. United States*, No. 18-5398 (pending); and *Washington v. United States*, No. 18-5594 (pending). The Court has denied a handful of petitions on this topic, including: *Casey v. United States*, No. 17-1251 (cert. denied June 25, 2018); *Coachman v. United States*, No 17-8480 (cert. denied Oct. 1, 2018); *King v. United States*, No. 17-8280 (cert. denied Oct. 1, 2018); *Oxner v. United States*, No. 17-9014 (cert. denied Oct. 1, 2018); *Rhodes v. United States*, No. 17-8667 (cert. denied May 28, 2018); *Robinson v. United States*, No. 17-8457 (cert. denied Oct. 1, 2018); *Westover v. United States*, No. 17-7607 (cert. denied April 30, 2018); *Snyder v. United States*, No. 17-7157 (cert. denied April 30, 2018).

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Petitioner Carlton Roland Hunter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The unpublished opinion of the Eleventh Circuit, *Hunter v. United States*, slip op. (11th Cir. Dec. 27, 2017), is included in the appendix below. Pet. App. 1a. The unpublished order of the Eleventh Circuit denying Mr. Hunter's petition for rehearing en banc is also reproduced in the appendix. Pet. App. 6a. Finally, the appendix includes the district court's order dismissing Mr. Hunter's § 2255 motion. Pet. App. 7a.

JURISDICTION

The Eleventh Circuit filed its opinion on December 27, 2017. The same court entered an order denying Mr. Hunter's petition for rehearing en banc on July 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil cases in the courts of appeals.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1), known as the Armed Career Criminal Act, states in part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned for not less than fifteen years[.]

18 U.S.C. § 924(e)(2)(B), also part of the ACCA, provides:

> [T]he term "violent felony" means any 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 3559(c), a federal recidivist statute known as the "three-strikes law," provides the following:

> (c) Imprisonment of certain violent felons.—

(1) Mandatory life imprisonment.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) Definitions.—For purposes of this subsection—

(F) the term "serious violent felony" means—

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49);

robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

28 U.S.C. § 2255(a) provides in part:

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.

INTRODUCTION

This case presents a question upon which there is an acknowledged and irreparable rift amongst the courts of appeals: When a § 2255 defendant challenges his recidivist sentence under the ACCA (or § 3559(c)), how may he meet his burden to prove that the sentence is based upon the unconstitutional residual clause? The circuit courts have identified at least two competing paths: (1) a court shall review only the "historical record," that is, the long-ago sentencing transcript and a snapshot of the then-current case law; or (2) a court must look at the historical record, but when that record is silent, it may also rule out the alternative, non-residual clauses by looking to more recent Supreme Court cases clarifying the law. The Court should grant the petition for a writ of certiorari to choose between these irreconcilable paths for several reasons:

First, the question here is the source of a fractured conflict in the circuit courts. In the Eleventh Circuit, a defendant meets his burden only when the district court explicitly relied upon the residual clause in sentencing the defendant or precedent at the time of sentence made it obvious that the predicate offense qualified only under the recidivist statute's residual clause. *Beeman*, 871 F.3d at 1224-25. Thus, a silent record at the time of sentence defeats a defendant's *Johnson* claim, and he is forbidden to prove his case by eliminating the alternative clauses through a discussion of post-sentencing decisions of this Court, decisions clarifying the scope of those alternative clauses. *Id.* at 1224 & n.5. Several circuits have joined the Eleventh Circuit's view. *See, e.g., Dimott v. United States*, 881 F.3d 232, 240, 243 (1st Cir. 2018); *United States v. Weise*, 896 F.3d 720, 724 (5th Cir. 2018); *Walker v. United*

States, 900 F.3d 1012 (8th Cir. 2018); and *Snyder v. United States*, 871 F.3d 1122, 1128 (10th Cir. 2018). In contrast, the Third, Fourth and Ninth Circuits permit a defendant, with a silent record below, to prove the merits of a § 2255 motion by disproving application of the non-residual clauses through the use of post-sentencing case law. *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018); *United States v. Winston*, 850 F.3d 677, 682-83 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896-97 (9th Cir. 2017). The entrenched conflict will continue, and likely widen, until this Court resolves the question presented.

Second, this question is one of national importance that arises frequently in the lower courts. District courts apply ACCA enhancements to thousands of defendants each year. (And although courts apply § 3559(c) far less frequently, its use is common and drastic). These recidivist enhancements lead to a vast increase in a defendant's term of imprisonment (fifteen years to life under the ACCA, and mandatory life without parole under § 3559(c)). The courts of appeals (and even this Court) have faced a fast-rising tide of cases on the question presented here. And, as we know from the many recent recidivist-statute decisions in this Court, it is important that a statute's enhancements apply uniformly throughout the country. On this question especially, uniformity has proved elusive.

Third, this case is a strong vehicle for this Court to answer the question presented. The facts are undisputed, there are no jurisdictional hurdles for the Court to navigate, and the Eleventh Circuit resolved Mr. Hunter's appeal based solely upon its *Beeman* rule.

Fourth, the Eleventh Circuit's *Beeman* decision is wrong. By requiring the district court and the defendant to peer only into a time capsule—an outdated collection of facts and case law available only at the time of the long-ago sentencing hearing—the Eleventh Circuit mistakenly turns its back on the succeeding history in this very Court. That history includes decisions clarifying the borders of the ACCA's various clauses: the elements (*Curtis Johnson*),[2] enumerated crimes (*Descamps* and *Mathis*),[3] and the residual (*Johnson* and *Welch*).[4] The Eleventh Circuit, by blocking a defendant from proving the residual clause by disproving the others, elevates historical accident over fidelity to this Court's decisions.

The petition for a writ of certiorari should be granted.

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[2] *Curtis Johnson v. United States*, 559 U.S. 133 (2010).

[3] *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016).

[4] *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Welch v. United States*, 136 S. Ct. 1257 (2016).

STATEMENT OF THE CASE

A. Statutory Framework

Mr. Hunter is serving a life sentence because the district court applied the federal three-strikes statute: 18 U.S.C. § 3559(c). But more on that statute in a moment. We begin instead with the Armed Career Criminal Act. Federal law prohibits an individual who has been convicted of a felony from possessing a firearm. 18 U.S.C. § 922(g)(1). The maximum penalty for this crime is, in most cases, ten years in prison. 18 U.S.C. § 924(a)(2). Under the ACCA, however, if a defendant has three or more prior convictions for a "serious drug offense" or a "violent felony," the penalties shift upward to a mandatory minimum of 15 years in prison and a maximum of life in prison. 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (known as the elements clause) or that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B). In *Johnson*, this Court struck down the ACCA residual clause as unconstitutionally void for vagueness. 135 S. Ct. at 2560.

But again Mr. Hunter's is not an ACCA case. The district court enhanced his bank robbery conviction instead under the federal three-strikes law, 18 U.S.C. § 3559(c). That statute mandates a life sentence for those persons who have twice been convicted in the past of serious violent felonies. The law defines a serious violent felony by three routes: an enumerated crimes clause, an elements clause,

and a residual clause. This recidivist statute, § 3559(c), has much in common with the ACCA. Its own elements and residual clauses are nearly identical to the ACCA's. For that reason, *Johnson* surely applies to § 3559(c) and its own vague residual clause.[5]

Meanwhile, a person may challenge his sentence under 28 U.S.C. § 2255(a) on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law." The federal courts, including the Eleventh Circuit, uniformly hold that a § 2255 defendant bears the burden of proving a *Johnson* claim. *See Beeman*, 871 F.3d at 1222. But the controversial question presented in this petition is this: How may a defendant meet that burden?

B. Factual Background

In July 2008, Mr. Hunter pleaded guilty to four federal crimes: armed bank robbery, use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (two counts) and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). At the sentencing hearing, the district court, following the mandate of § 3559(c), imposed a life sentence on the bank robbery (plus a consecutive term of 120 months on the second § 924(c) crime) for a total sentence of life imprisonment plus ten years. In applying the § 3559(c)

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[5] No circuit court has yet said one way or another whether *Johnson* invalidates the § 3559(c) residual clause, but the Seventh Circuit seems to assume that it does. *Haynes v. United States*, 873 F.3d 954, 955 (7th Cir. 2017).

enhancement to the bank robbery, the Court relied upon several Georgia convictions it found to be "serious violent felonies": a 1983 conviction for armed robbery; a 1988 conviction for robbery, use of a firearm in the commission of a robbery, and kidnapping; and a 1999 conviction for robbery by intimidation.

During the sentencing hearing, which occurred in December 2008, the district court concluded that these Georgia convictions fit within § 3559(c)'s serious-violent-felony definition. But the court was silent on which prong—elements clause, enumerated crimes clause, or residual clause—these purported predicate convictions fit into. The court simply counted the crimes without announcing why. Meanwhile, there was no Eleventh Circuit case holding then (or now) that these Georgia crimes fell within any of these three clauses. That silence is the crux of the legal question before this Court here and now.

Two years ago, in the wake of *Johnson*, Mr. Hunter filed a § 2255 motion to vacate the § 3559(c) sentence. The § 2255 motion was his first. He argued that after *Johnson*, the § 3559(c) residual clause was void for vagueness, and that his Georgia convictions were no longer serious violent felonies. The district court denied the § 2255 motion on one ground: the Georgia robbery convictions qualify under § 3559(c)'s *enumerated crimes* clause, not the residual clause. Pet. App. 7a. The district court granted a certificate of appealability to Mr. Hunter on that question and he appealed the order.

The Eleventh Circuit affirmed the district court's order denying the § 2255 motion, but on very different grounds. The appeals court relied not upon the enumerated crimes

clause, but instead upon its own recent, binding precedent: *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). In *Beeman*, the court held that a defendant can meet his § 2255 burden of proving that an ACCA enhancement was based upon the residual clause only by way of what the Eleventh Circuit calls the "historical" record. *Id.* at 1224 n.5. A defendant must show that the sentencing record or clear precedent *from the time of sentencing only* shows that a predicate offense fit within the residual clause, and only the residual clause. *Id.* The panel below applied the *Beeman* rule to Mr. Hunter's own silent historical record and affirmed the district court's denial of the § 2255 motion. Pet. App. 4-5.[6]

C. The Eleventh Circuit's rule in *Beeman v. United States*

The Eleventh Circuit was the first to craft the "historical record" rule it proclaimed in *Beeman*. But the provocative decision has drawn plenty of critics even within the same court. The panel's opinion included a vigorous dissent. 871 F.3d at 1225. The defendant in *Beeman* drew on that dissent in his petition for rehearing en banc. And although the Eleventh Circuit denied that petition, the order included a vibrant debate between one concurring judge and two dissenting judge. *Beeman v, United States*, 899 F.3d 1218, 1224 (11th Cir. 2018). The competing tracts distill the debate nicely, and demonstrate just how intractable the opposing views have become. Mr. Hunter now finds himself caught in that *Beeman* vise.

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[6] Mr. Hunter filed a petition for rehearing en banc to challenge the *Beeman* rule. The Eleventh Circuit denied Mr. Hunter's petition. Pet. App. 6.

In *Beeman*, the panel's majority derided the defendant's attempt to prove his residual-clause claim by disproving the remaining ACCA alternatives through a review of post-sentencing case law:

> But even if such precedent had been announced since Beeman's sentencing hearing (in 2009), it would not answer the question before us. What we must determine is a historical fact: was Beeman in 2009 sentenced solely per the residual clause? . . . Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that [Beeman's predicate offense] no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact: whether in 2009 Beeman was, in fact, sentenced under the residual clause only.

871 F.3d at 1224 n.5. In the end, under the *Beeman* standard, a silent record must be construed against the defendant, and he may not rely upon current law to disprove the ACCA's alternative clauses in order prove that he was sentenced via the unlawful residual clause.

The dissent agreed that a defendant must prove his ACCA sentence was based upon the residual clause, but it

objected to the majority's effort to tie the defendant's hands with the twine of its "historical" record. Wrote the dissent: "I do not believe that the merits of Beeman's timely *Johnson* claim can be properly assessed without reaching the question of whether his [prior] conviction . . . qualifies as a proper predicate offense under the *elements* clause of the ACCA." *Id.* at 1225 (Williams, D.J., dissenting) (emphasis added). A defendant's showing, via recent Supreme Court cases, "that he could not have been convicted under the elements clause of the ACCA is therefore proof of both requirements for success on the merits of a *Johnson* claim: first, that he was sentenced under the residual clause, and, second, that his predicate offenses could not qualify under the ACCA absent that provision." *Id.* at 1230.[7]

REASONS FOR GRANTING THE PETITION

In pressing a § 2255 claim under *Johnson*, how may a defendant prove that he was sentenced under the ACCA's (or § 3559(c)'s) residual clause? When the historical record at sentencing is silent, as it so often is, may a defendant prove that his sentence was based upon the residual clause by ruling out the serious-violent-felony alternatives: the elements and enumerated crimes clauses? And may he do so by relying upon recent and current case law from this Court? Although the Eleventh Circuit says no in *Beeman* (and here in Mr. Hunter's own case), the dissent—and at

[7] The *Beeman* debate blossomed in the court's later order denying the petition for rehearing en banc. 899 F.3d 1218 (11th Cir. 2018). Judges on both sides of the question offered pointed, thoughtful expositions on the question presented here. More on that debate below.

least three other federal circuit courts—say otherwise. And question is not only divisive, but it is common. No fewer than nine federal circuits (and countless district courts) have already published opinions on this topic.

Did the district court impose a § 3559(c) sentence upon Mr. Hunter by way of that statute's residual clause? Although the historical record at the time of the sentencing hearing in December 2008 is silent on that query, the Eleventh Circuit panel held that silence against Mr. Hunter. The court declared that a § 2255 movant fails to carry his burden of proof unless he proves that it was "more likely than not it was use of the residual clause that led to the sentencing court's enhancement of his sentence." Pet App. 4. At the same time, the panel, mirroring the *Beeman* rule, prohibited Mr. Hunter from offering proof that his § 3559(c) predicate offenses did not fit within the statute's alternative, non-residual clauses. The Eleventh Circuit, with its harsh *Beeman* rule, mapped Mr. Hunter's route across the *Johnson* sea, yet forbade him to sail away from the port toward his destination.

1. The Question Irreconcilably Divides the Courts of Appeals.

As the pages on the calendar turn, the federal circuits grow more fractured. In the federal reporters, we spy at least two divergent camps, each occupied by at least four allies. And that inconsistency is widespread—at least nine circuits have confronted the question and even within several of those circuits we find the objections of dissenting voices. Meanwhile, at least a dozen (and counting) certiorari petitions have brought the question to this

Court's doorstep, and many of those petitions remaining pending. The intractable circuit split looks like this:

A. The Third, Fourth, and Ninth Circuits require a defendant to prove that the sentencing court "may have" relied on the residual clause when imposing the enhanced sentence, which the defendant may prove through post-sentencing precedents.

Three circuit courts mirror the dissenting opinions in *Beeman*. Indeed the Fourth Circuit was the first appeals court to speak on this topic. In *United States v. Winston*, that court addressed a second or successive § 2255 motion denied by the district court. 850 F.3d 677 (4th Cir. 2017). The sentencing record, like Mr. Hunter's, was silent as to whether the sentencing judge had relied on the residual clause in counting Winston's convictions under the ACCA. The government argued that with this silent record, the defendant failed to overcome a procedural hurdle unique to successive petitioners (the gatekeeping function of 28 U.S.C. § 2255(h)) to prove that his claim "relie[d] on" *Johnson*. The Fourth Circuit disagreed because "[n]othing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence." *Id.* at 682. It held this: "[W]hen 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 II*, the inmate has shown that he 'relied on' a new rule of constitutional law." *Id.*

Once it decided that Winston satisfied the procedural hurdle imposed upon successive petitioners, the Fourth Circuit then "consider[ed] the merits of Winston's appeal."

Id. at 683. The court measured Winston's prior convictions, including a Virginia robbery conviction, against the ACCA's alternative clauses. *Id.* at 685. Significantly here, it applied post-sentencing case law to conclude that the robbery statute did not fit within the ACCA's elements, or any other, clause. *Id.* The court rejected the government's view that the court was bound to apply only pre-sentencing case law, even if that law was "no longer binding because it ha[d] been undermined by later Supreme Court precedent." *Id.* at 683.

The Ninth Circuit chose the same path in *United States v. Geozos*. 870 F.3d 890 (9th Cir. 2017). In *Geozos*, a defendant also brought a successive motion seeking *Johnson* relief. The court cited *Winston* and held that the defendant had satisfied § 2255(h)'s threshold requirement: "We therefore hold 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 II*." *Id.* at 896 & n.6 (noting that the ACCA provenance is "unclear" when the sentencing record is silent and there is no binding circuit precedent at the time of sentencing). The Ninth Circuit then addressed the merits of the *Johnson* claim. And how did it do so? "[By] look[ing] to the substantive law concerning the [alternative ACCA clauses] as it currently stands, not the law as it was at the time of sentencing." *Id.* at 898 (emphasis in original). The court then studied and applied post-sentencing decisions, including the "Supreme Court's interpretation of" the ACCA's non-residual clauses. *Id.* at 897 & 898 n.7 (citing *Mathis*).

The Third Circuit is the most recent appeals court to announce a position in this burden-of-proof debate. *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). And like the Fourth and Ninth Circuits before it, the court held that a defendant successfully crosses through the § 2255(h) gate when he proves with a silent sentencing record that he "*might have* been sentenced under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced under that clause." *Id.* at 216 (emphasis added). The court rejected the government's view that a defendant can only pass through the gate by producing evidence that his sentence was based "solely" on the residual clause. *Id.* at 221-22.

Once a defendant passes through the gate and on to the merits, the Third Circuit held that he may "rely on post-sentencing cases (i.e., the current state of the law) to support his *Johnson* claim." *Id.* at 216. The court remarked upon the widening circuit split—"[l]ower federal courts are decidedly split on whether current law, including *Mathis*, *Descamps*, and *Johnson 2010* . . . may be used"—but sided with the *Beeman* dissenters. *Id.* at 228. A defendant "may use post-sentencing cases . . . to support his *Johnson* claim because they . . . ensure we correctly apply the ACCA's provisions." *Id.* at 230. "It makes perfect sense to allow a defendant to rely upon post-sentencing Supreme Court case law that explains the pre-sentencing law." *Id.* at 229-30. Decisions like *Mathis*, *Decamps*, and *Johnson 2010* (cases which did not articulate new rules of constitutional law), "instruct courts on what has always been the proper interpretation of the ACCA's provisions. That is because when the Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.*

at 230 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). And this: "[T]hose decisions interpreting the ACCA are not new law at all. . . . [They] are authoritative statement[s] of what the [ACCA] meant before as well as after [those] decision[s]." *Id.* (citing *Rivers*, 511 at 312-13).

The Third Circuit closed the debate with this: "[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 fairness and justiciability." *Id.* at 231.

B. The First, Fifth, Eighth, and Tenth Circuits are aligned with the Eleventh.

The First Circuit, by a narrow 2-1 margin, joined the *Beeman* chorus. In *Dimott v. United States*, the court rejected the argument that a defendant may rely upon post-sentencing case law to show that his ACCA predicate offense never properly qualified under the elements or enumerated crimes clauses. 881 F.3d 232, 230, 243 (1st Cir.), *cert denied sub sum*, *Casey v. United States*, 138 S. Ct. 2678 (2018). Put another way, the *Dimott* panel rejected the view that a defendant may prove through a process of elimination that the sentencing court could only have relied upon the then-valid, but now invalid under *Johnson*, residual clause. *Id.* at 243. The dissenting judge, however, endorsed the contrary view. Consistent with the Third, Fourth, and Ninth Circuits, the *Dimott* dissent would hold that on a silent sentencing record, post-sentencing precedents invalidating reliance on the alternative ACCA clauses could prove that the defendant was wrongly

sentenced based upon the forbidden residual clause. *Id.* at 246 (Torruella, J., dissenting in part).

The Tenth Circuit crafted a rule similar to the Eleventh Circuit's in *Beeman*. In *United States v. Snyder*, it held that faced with a silent record, a district court may consider only the "relevant background legal environment" at the time of sentencing to ask whether a non-residual clause led to the ACCA enhancement. 871 F.3d 1122, 1129 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018). What is that "relevant background legal environment"? It is 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.[8]

The Fifth Circuit, too, joined this *Beeman* cohort, at least for second-or-successive § 2255 motions. *United States v. Weise*, 896 F.3d 720, 724 (5th Cir. 2018). The court concluded that "we must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause[, the elements clause,] or the residual clause." *Id.* The panel explicitly rejected Weise's effort to prove that his ACCA sentence stemmed from the residual clause by using *Mathis* to disprove the enumerated crimes clause. *Id.* at 725-26.

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[8] In *Snyder*, the defendant's *Johnson* motion was his first § 2255 motion. The Tenth Circuit later extended the *Snyder* holding to second-or-successive § 2255 motions. *United States v. Washington*, 890 F.3d 891, 896-97 (10th Cir. 2018).

The Eighth Circuit most recently joined this majority view. *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018). The court echoed, and quoted, the *Beeman* rule: "Where the record or an evidentiary hearing is inconclusive, the district court may consider 'the relevant background legal environment at the time of . . . sentencing' to ascertain whether the movant was sentenced under the residual clause." *Id.* at 1015. By drawing the borders around the snapshot of case law current at the long-ago sentencing hearing, of course, the Eighth Circuit too turns a blind eye to this Court's more recent opinions interpreting the scope of the ACCA's several provisions. But the view is not unanimous, even within the *Walker* panel. *Id.* at 1016-17 (Kelly, J, concurring in part and dissenting in part) ("I would hold that a claim for collateral relief under *Johnson* should be granted so long as the movant has shown that his sentence may have relied upon the residual clause, and the government is unable to demonstrate to the contrary.")

C. The Sixth Circuit straddles both sides of the debate by approving the use of post-sentencing case law to prove the merits of a first § 2255 motion (like Mr. Hunter's), but not to cross the § 2255(h) second-or-successive gateway.

The Sixth Circuit has crafted a hybrid answer to the question presented here. Where a defendant raises a *Johnson* claim in a second-or-successive § 2255 motion, a silent historical record means he must lose and may not salvage the claim by citing post-sentencing case law. *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) (explicitly adopting views of the First and Eleventh

Circuits). But later opinions of the Sixth Circuit have cabined in *Potter* and limited its reach.[9]

When it comes to a defendant's *first* § 2255 motion, the Sixth Circuit agrees with the Third, Fourth, and Nine Circuits, and the dissenters in the Eleventh Circuit: With a silent sentencing record, a defendant may prove his *Johnson* claim by citing post-sentencing case law, including decisions of this Court. *Raines*, 898 F.3d at 688-89. The court explicitly limited the *Potter* rule to second or successive § 2255 motions, *id.* at 686, then measured the merits of Raines's *Johnson* motion by running his predicate offense through the filter of this Court's *Mathis* decision, a decision which arrived long after the original sentencing hearing. *Id.* at 688-89.

In a robust concurring opinion, Chief Judge Cole defended this position in a novel way: by relying heavily upon this Court's decision in *Welch v. United States*. *Id.* at 690 (Cole, C.J., concurring). In fact, he went so far as to argue that *Potter* is wrong even for second or successive § 2255 motions. *Id.* "When the Supreme Court announced *Johnson* and rushed to make it retroactive in *Welch*, it did not do so merely to tantalize habeas petitioners with the possibility of relief from an unconstitutional sentence." *Id.* Any rule like *Potter* (and *Beeman*) that requires an ACCA

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[9] Indeed, the *Potter* holding has since been criticized by at least three Sixth Circuit judges. *See Raines v. United State*s, 898 F.3d 680, 684 (6th Cir. 2018) ("But we have entered the fray, siding with the Tenth and Eleventh Circuits in putting a *Johnson* claimant up to the seemingly impossible task of proving that is sentencing judge 'relied only on the residual clause in sentencing' him.").

defendant to prove on a silent record that the enhancement arose solely from the residual clause would be chimerical: "[F]or many habeas petitioners, tantalize is all that *Johnson* and *Welch* will do." *Id.* "It is a tall order for a petitioner to show which ACCA clause a district court applied when the sentencing record is silent—a burden all the more unjust considering that silence is the norm, not the exception." *Id.* at 690-91.

Chief Judge Cole went on: "This fate for federal prisoners was not handed down from Mount Olympus. To the contrary, the Supreme Court's decision in *Welch* forecloses such a myopic understanding of what is necessary to present a constitutional claim to clear the gate-keeping hurdles of the AEDPA." *Id.* at 691. Why does *Welch* foreclose the harsh rule set out by *Potter* (and *Beeman*)? "Welch did not show that he was sentenced solely under the residual clause. In fact, he could not make this showing because the sentencing court expressly found that his 'violent felony' . . . counted . . . under both the residual clause and the elements clause." *Id.* Thus if *Potter* (and *Beeman*) are right, then even Welch himself would have been barred from the courthouse door, unable to seek review of his *Johnson* claim. But this is not what happened. Chief Judge Cole went on: "Brushing [this] wrinkle[] aside, the Supreme Court found that Welch had made a substantial showing of the denial of a constitutional right. *See Welch*, 136 S. Ct. at 1263." This was so "even though Welch did not show he was sentenced solely under the residual clause." *Id.* at 691-92. "To sum things up, under *Welch* a habeas petitioner shows a denial of a constitutional right and that it is at least up for debate that he is entitled to relief when he brings a challenge under both *Johnson* and another ACCA prong." *Id.* at 692.

Finally, Chief Judge Cole declares that defendants like Mr. Hunter, those with a "murkier record" than Welch, are even more worthy of merits review: "[P]etitioners with an ambiguous sentencing record have an even better argument for bringing a petition because any *Johnson* error would not be harmless (as it could be for petitioners who were expressly sentenced under another clause)." *Id.* at 693.[10] "AEDPA makes it harder for habeas petitioners unquestionably serving illegal sentences to obtain relief. We should not make it harder." *Id.* at 693.

2. The Question Presented is One of National Importance and Arises Frequently in the Lower Courts.

The Eleventh Circuit's rule misapplies, or fails to apply at all, this Court's many recent ACCA precedents. In the Eleventh Circuit, a lower court must travel back in time in search of (1) factual findings that generally don't exist because they did not matter and (2) outdated case law. All while turning a blind eye to this Court's decisions clarifying

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[10] Chief Judge Cole also finds support in this Court's so-called *Stromberg* principle. 898 F.3d at 693. This Court has explained 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." *Griffin v. United States*, 502 U.S. 46, 53 (1991); *see also Stromberg v. California*, 283 U.S. 359 (1931). Therefore, says Chief Judge Cole, "[i]f a defendant's sentence 'may have rested on' a particular ground that 'the Constitution forbids,' then it is an easy extension of *Stromberg* to see that a sentence is invalid also." 898 F.3d at 693.

and correcting that very case law. Thus, in the Eleventh Circuits and those circuits which have adopted *Beeman*, this Court's decisions carry no influence at all.

But at least three circuit courts take the opposite view. These courts permit a judge to inform his understanding of a silent historical record through the later clarifications by this very Court. So as things now stand, a defendant's ACCA sentence (and § 3559(c) sentence too) depends not on the facts of his own case, but on the fluke of geography. Mr. Hunter will now serve a sentence that is contrary to law simply because his own crimes occurred in Georgia, rather than across the state line in South Carolina.

And Mr. Hunter is far from alone. As this Court well knows, many thousands of defendants sentenced under recidivist statutes infected by invalid residual clauses have filed *Johnson*-based § 2255 motions in district courts throughout the country. In the Eleventh Circuit alone, more than 2,000 defendants filed *Johnson*-based applications for permission to purse a second or successive § 2255 motion. *In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring).

There is much at stake for the defendants in these *Johnson* cases. The ACCA and § 3559(c) sentences carry breathtakingly harsh prison sentences. And many of these harsh sentences, we now know, are unlawful. Wrote Judge Martin in dissent from the *Beeman* en banc denial: "[T]he *Beeman* panel . . . imposed administrative impediments, such that [a *Johnson* litigant] can get no review of his sentence. Those impediments are not derived from the statute or Eleventh Circuit or Supreme Court precedent, and they bar relief for prisoners serving sentences that

could not properly be imposed under current law." 899 F.3d at 1224 (Martin, J., dissenting from denial of rehearing en banc). Without a prompt intervention by this Court, the divided paths of the circuit courts will create inconsistent and unfair sentences for countless similarly-situated defendants across the country.

3. This Case Is an Ideal Vehicle to Resolve the Conflict.

Mr. Hunter's life sentence depends entirely upon the fate of the Eleventh Circuit's *Beeman* rule. The appeals court resolved his case only upon that ground, and no other. Pet. App. 4-5. If this Court rejects the Eleventh Circuit's path in *Beeman* (and here), then Mr. Hunter will likely gain *Johnson* relief from his harsh sentence.

Without the residual clause, Mr. Hunter's predicate offenses, Georgia robbery and armed robbery, have no home left within § 3559(c)'s serious violent felony definition. No court, including the district and circuit courts below, have held that that the Georgia convictions fit within the statute's elements clause. Indeed the district court apparently assumed that they do not and instead held that the convictions fit within the sole remaining alternative: the enumerated crimes clause. Pet. App. 7. But the district court was wrong to say so, and Mr. Hunter demonstrated why in his brief before the Eleventh Circuit. Yet that court sidestepped the enumerated-crimes question, the sole question posed in the certificate of appealability, in favor of *Beeman*. But once that ground dissolves here, the § 3559(c) enhancement itself must also evaporate.

4. The Eleventh Circuit's Rule is Wrong Because it Requires Courts to Ignore This Court's Decisions Clarifying the Proper Scope of the ACCA and Leads to Troubling Practical Outcomes.

Mr. Hunter, like every § 2255 defendant, bears the burden of showing that his claim is based upon a new rule of constitutional law. And in a *Johnson* motion, that burden requires him to show that his sentence was based upon the red-lined residual clause. But what evidence may Mr. Hunter, and every other *Johnson* claimant, offer to meet that burden? And especially what shall we make of a silent sentencing record in the district court?

The Eleventh Circuit, here and in *Beeman*, gets it wrong. The court wrongly demands that Mr. Hunter and all other *Johnson* hopefuls must prove, based only upon the "historical record," that a district judge relied on the now-defunct residual clause. The Eleventh Circuit blocks a defendant's effort to prove his case through a process of eliminating the alternative sources: the elements and enumerated crimes clauses. Once the court ties a defendant's elements-clause hand behind his back—the powerful circumstantial evidence that the district court could only have relied upon the residual clause—the court then blames him for that gap in his proof. The Eleventh Circuit's narrow path is flawed in two ways.

First, the rule betrays this Court's many decisions interpreting and clarifying various recidivist sentencing statutes. The *Beeman* rule shields unlawful sentences from this Court's own jurisprudence. In Mr. Hunter's case, that list includes at least *Curtis Johnson*, *Descamps*, and *Mathis*. This blind spot ignores the fact that this Court's

opinions there did not stake new territory, but merely clarified the law as it always has been. *See Peppers*, 899 F.3d at 230. The *Beeman* rule, "implies that the district judge deciding [a] § 2255 motion can ignore decisions from the Supreme Court that were rendered since that time in favor of a foray into a stale record, . . . [and] that the sentencing court must ignore that precedent unless the sentencing judge uttered the magic words 'residual clause.'" *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). And as one judge in the Third Circuit points out, the Eleventh Circuit's practice also undercuts this Court's decision in *Welch*, the retroactive catalyst of all *Johnson* claims. *Raines*, 898 F.3d at 690 (Cole, C.J. concurring).

The *Beeman* rule asks, indeed it demands, that courts ignore the law of the land. Surely this rule cannot stand. As Judge Martin mused in dissent from the order denying the *Beeman* en banc petition: "[T]he *Beeman* panel opinion binds all members of this Court to recreate and leave in place the misunderstandings of law that happened at sentencing. Ignoring for a moment that we must apply Supreme Court precedent, what is the value in binding ourselves to erroneous decisions?" 899 F.3d at 1228 (Martin, J., dissenting from the denial of rehearing en banc).

Second, the Eleventh Circuit rule smacks of unfairness. The problem with the *Beeman* command that a silent record must be construed against a defendant is this: "Nothing in the law requires a judge to specify which clause of [the ACCA] . . . it relied upon in imposing a sentence." *Beeman*, 899 F.3d at 1228 (Martin, J., dissenting from the denial of rehearing en banc). Before *Johnson*, with the residual clause's wide safety net firmly in place, judges and

litigants had little incentive to choose one ACCA violent-felony prong over another. And with no practical reason to check any one of the ACCA violent-felony boxes, judges rarely did so. Only now, after *Johnson*, does that question matter. For the same reason, the circuit courts rarely had an opportunity to pass judgment on the ACCA provenance of most potential predicates. And it is unfair to defendants, especially those whose predicate offenses fit under the residual clause only, to penalize them now with that silence. For these reasons, the *Beeman* path leads to what the panel's dissent called "unwarranted and inequitable results," 871 F.3d at 1228 (Williams, D.J., dissenting), and the dissent from the en banc denial labeled "very real practical concerns." 899 F.3d at 1228-29 (Martin, J., dissenting).

In response to the *Beeman* opinion, Judge Martin noted that "[t]he Supreme Court recently reminded us of our critical duty to exhibit regard for fundamental rights and respect for prisoners as people." *Id.* at 1230 (quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018)). And she criticized her own court for allowing the tainted *Beeman* panel opinion to stand: "When considering claims [of defendants serving sentences no longer permitted by law], 'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" *Id.* (quoting *Rosales-Mireles*, 138 S. Ct. at 1908).[11]

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[11] Not only has the Eleventh Circuit been exceptionally resistant to prisoners' *Johnson* claims, but that court has often made mistakes in erecting *Johnson*-related legal

The *Beeman* flaws may be cured by a contrary rule, one adopted by at least three other circuit courts. As described by Judge Martin in her *Beeman* dissent: "A defendant's method of proving his claim—showing that his sentence could not possibly be based on the elements clause or enumerated crimes clause—is rational, supported in law, embraced by [judges of] this circuit and others, and a proper allocation of the burden for a § 2255 petitioner. It was error for the [*Beeman*] panel to reject it by creating a new test." *Id.* at 1229.

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obstacles. Judge Martin, once again, in dissent from another recent Eleventh Circuit opinion:

> My review reveals a body of law [in the Eleventh Circuit] that has relentlessly limited the ability of the incarcerated to have their sentences reviewed. Decisions of this Court have left only a narrow path to relief for those serving sentences longer than the law now allows. Yet this narrow path is not mandated by decisions of the Supreme Court or Acts of Congress. Indeed, this Court has withheld relief from prisoners even when precedent counsels otherwise.

Ovalles v. United States, — F.3d —, 2018 WL 4830079, at *25 (11th Cir. Oct. 4, 2018) (en banc) (Martin, J., dissenting) (holding that § 924(c)'s residual clause survives *Johnson*).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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