No. 18-_____

IN THE
Supreme Court of the United States

CHARLES HARPER,

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 applied the *Johnson* rule 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 how may he meet that burden?

May a § 2255 defendant, faced with a silent record below, prove that his ACCA-enhanced sentence was indeed based upon the residual clause through a process of elimination or, put another way, that a predicate offense does not fit within the statute's 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?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Harper 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The unpublished opinion of the Eleventh Circuit, *Harper v. United States*, — Fed. Appx. —, 2018 WL 3434506 (11th Cir. July 16, 2018), is included in the appendix below. Pet. App. 1. The appendix also includes the district court's order denying Mr. Harper's § 2255 motion. Pet. App. 9.

JURISDICTION

The Eleventh Circuit filed its opinion on July 16, 2018, affirming the district court's denial of Mr. Harper's § 2255 motion. 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[.]

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, 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 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 adopted 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. The enhancement leads to a vast increase in a defendant's term of imprisonment (fifteen years to life imprisonment). Since *Johnson*, the courts of appeals (and even this Court) have faced a fast-rising tide of § 2255 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 the 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. Harper's appeal based solely upon its *Beeman* rule. That is not all. Mr. Harper's predicate offenses, the Georgia aggravated assault convictions, likely to do not fit within the ACCA's non-residual clauses.

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*),[1] the enumerated crimes (*Descamps* and *Mathis*),[2] and the residual clauses (*Johnson* and *Welch*).[3] 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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[1] *Curtis Johnson v. United States*, 559 U.S. 133 (2010).

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

[3] *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

We begin 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.

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 May 2002, Mr. Harper pled guilty to a single federal crime: possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). At the sentencing hearing, the district court concluded that Mr. Harper qualified for an enhanced punishment under the ACCA and sentenced him to serve 211 months in federal prison. In applying the ACCA enhancement, the Court relied upon several purported violent felonies, including a pair of Georgia aggravated assault convictions.

During the sentencing hearing, which occurred in July 2002, the district court was silent on which prong—elements clause, enumerated crimes clause, or residual clause—these purported ACCA predicate convictions fit into. The court simply counted the crimes without announcing why. Meanwhile, there was no Eleventh Circuit case holding then (or now, for that matter) that these Georgia crimes fell within any of these three ACCA 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. Harper filed a § 2255 motion to vacate the ACCA sentence.[4] He argued that after *Johnson*, the ACCA residual clause was void for vagueness, and that his Georgia aggravated assault convictions were no longer violent felonies. The district court denied the § 2255 motion on two grounds: the Georgia convictions qualify under the ACCA's elements clause, not

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[4] The § 2255 motion was not Mr. Harper's first, but the Eleventh Circuit granted his application to file the second or successive motion based upon *Johnson*.

the residual clause; and, for that reason, the motion was not truly a *Johnson* motion and was barred by the one-year statute of limitations of 28 U.S.C. § 2255(f). Pet. App. 8. The district court granted a certificate of appealability to Mr. Harper on those two questions. He appealed.

The Eleventh Circuit affirmed the district court's order denying the § 2255 motion, but on different grounds. The appeals court did not rely upon the elements clause or pass judgment upon the merits of Mr. Harper's aggravated assault convictions. The panel relied instead, and exclusively, upon its own recent, binding precedent: *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). Pet. App. 7-8. 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. Harper's own silent historical record and affirmed the district court's denial of the § 2255 motion. Pet. App. 7.[5]

[5] The Eleventh Circuit rejected the district court's alternative holding that Mr. Harper's *Johnson* § 2255 motion was time-barred. Pet. App. 6 ("Here the district court erred when it determined that Harper's § 2255 motion was untimely. . . . Harper filed his . . . motion within one year of *Johnson*.")

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 judges. *Beeman v, United States*, 899 F.3d 1218, 1224 (11th Cir. 2018) (order denying rehearing en banc). The competing tracts distill the debate nicely, and demonstrate just how intractable the opposing views have become. Mr. Harper now finds himself caught in that *Beeman* vise.

In *Beeman*, the author of the panel's 2-1 majority opinion 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* panel's 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.[6]

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 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 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. Harper's own case), the dissent—and at least three other federal circuit courts—say otherwise. And the question is not only divisive, but it is common. No fewer than nine federal circuits have already published opinions on this topic.

Did the district court impose an ACCA sentence upon Mr. Harper by way of that statute's residual clause? Although the historical record at the time of the sentencing hearing in July 2002 is silent on that query, the Eleventh Circuit panel held that silence against Mr. Harper. Pet App. 8a. The court declared, because *Beeman* says so, that Mr. Harper failed to carry his burden of proof because he could not show that was "more likely than not that that his

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[6] 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.

sentence was enhanced under the ACCA's residual clause." Pet App. 7a. At the same time, the panel, mirroring the *Beeman* rule, prohibited Mr. Harper from offering proof that his Georgia aggravated assault convictions did not fit within the ACCA's non-residual clauses. The Eleventh Circuit, with its harsh *Beeman* rule, mapped Mr. Harper'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.

The federal circuits grow more fractured by the day. In the federal reporters, we spy at least two divergent camps, each occupied by at least four allies. That inconsistency is widespread—at least nine circuits have chosen sides in the debate and even within several of those circuits we find vibrant dissents. Meanwhile, at least a dozen (and counting) certiorari petitions have brought the question to this Court's doorstep, and several of those petitions remaining pending.[7]

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[7] 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); and *Washington v. United States*, No. 18-5594 (pending). The Court has also denied 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); *Perez v. United States*, No. 18-5217 (cert. denied Oct. 9, 2018).

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, and he may meet that burden by citing post-sentencing precedents of this Court.

Three circuit courts mirror the dissenting opinions in *Beeman*. Indeed the Fourth Circuit was the first appeals court to declare that a silent record is a path toward, not an obstacle to, relief. 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. Harper'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). There the 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 *Curtis Johnson* (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 the *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.

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

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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).

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, but not to pass through 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 limited *Potter's* reach.

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 v. United State*s, 898 F.3d 680, 688-89 (6th Cir. 2018). 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*, 136 S. Ct. 1257 (2016). *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 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. Harper, those with a "murkier record" than the defendant in *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.[9] "AEDPA makes it hard enough for

[9] Chief Judge Cole also finds support in this Court's so-called *Stromberg* principle. 898 F.3d at 693. This Court has

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 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 depends not on the facts of his own case,

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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.

but on the fluke of geography. Mr. Harper will now serve a sentence that is contrary to law simply because his own federal crime occurred in Georgia, which sits in the Eleventh Circuit, rather than across the state line in South Carolina, which is in the Fourth Circuit.

And Mr. Harper is far from alone. As this Court well knows, many thousands of defendants sentenced under the ACCA (and maybe its defunct residual clause) 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). The ACCA is everywhere. Just this month, the Court heard arguments in two more ACCA-related cases.[10] This sentencing statute is as close to a national crisis as one might find in the federal criminal code.

That is not all. There is much at stake for each defendant in these *Johnson*-related ACCA cases. An ACCA sentence carries a breathtakingly harsh prison sentence. 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

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[10] *Stokeling v. United States*, No. 17-5554 (argued on Oct. 9, 2018); *United States v. Stitt*, No. 17-765 (same).

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 Because Mr. Harper's ACCA Predicates Likely Do Not Count Under the ACCA's Non-Residual Clauses.

Mr. Harper'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. Harper will likely gain *Johnson* relief from his harsh sentence because his predicate offenses likely no longer count under the ACCA.

How do we know? Both dissents in the pair of *Beeman* opinions tell us so. The dissent from the panel opinion: "Beeman's [Georgia] aggravated assault predicate likely would not qualify as a crime of violence under the elements clause." 871 F.3d 1230 n.8 (Williams, D.J., dissenting). And the dissent (by two more judges) from the order denying rehearing en banc: "Mr. Beeman has a good argument that a Georgia conviction for aggravated assault did not require the type of intent necessary for it to serve as an ACCA predicate offense. He should have been given an opportunity to present that argument in court." 899 F.3d at 1230 (Martin, J., joined by Jill Pryor, J., dissenting from denial of rehearing en banc).

Like Mr. Beeman's, Mr. Harper's ACCA sentence depends upon the Georgia aggravated assault statute. Although no Eleventh Circuit opinion has ever resolved the ACCA fate of the Georgia aggravated assault statute, that is only because the Court has recently hidden behind the *Beeman* shield. Once this Court removes that shield, the crime will evaporate under the sunlight of this Court's ACCA jurisprudence. And Mr. Harper's 211-month ACCA sentence will perish.

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

Mr. Harper, 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. Harper, 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. Harper 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 immunizes unlawful sentences from this Court's own jurisprudence. In Mr. Harper'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 one Eleventh Circuit judge mused: "[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 from the denial of rehearing en banc).

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).

The *Beeman* test is dangerous medicine and worthy of this Court's cure:

> For those rare prisoners who somehow made it past [the Eleventh Circuit's] review of their authorization applications and through the District Court's front doors, they will face one last, likely fatal, roadblock. District Courts will now decide whether prisoners should get the benefit of *Johnson* without being able to consider developments in that law intended to help them evaluate who qualifies as a violent repeat offender. In the end, of the thousands of inmates who filed authorization applications raising potentially meritorious *Johnson* claims, very few will ever get a full review of the merits of their claims and even fewer will get relief.

Ovalles, 2018 WL 4830079, at *36 (en banc) (Martin, J., dissenting).

The *Beeman* flaws may be—indeed must be—cured by a contrary rule, one adopted by at least three other circuit courts. This Court should say so.

CONCLUSION

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

Respectfully Submitted,

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