No. 18-_____

In the

Supreme Court of the United States

ORTINO GARCIA LICON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Where a federal prisoner demonstrates that ACCA's residual clause was the only lawful *substantive* basis to enhance his sentence, but fails to show as a *historical* matter that the sentencing judge was *subjectively thinking about* ACCA's residual clause, does he satisfy the requirements for a successive motion to vacate under 28 U.S.C. § 2255(h)(2)?

II

Is Texas burglary of a "habitation" a generic burglary?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Ortino Licon was the defendant and movant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ortino Licon asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's order denying a certificate of appealability was unpublished. Pet. App. 1a–2a. The Appendix also contains copies of the district court's original judgment of conviction (Pet. App. 4a–6a); the Fifth Circuit's order authorizing a successive motion to vacate (Pet. App. 7a–8a); and the district court's orders dismissing the authorized successive motion and denying a certificate of appealability. Pet. App. 9a–10a.

JURISDICTION

The Fifth Circuit denied a certificate of appealability on July 24, 2018. Pet. App. 1a. Mr. Licon filed a timely motion for reconsideration, which was denied on September 7, 2018. Pet. App. 3a; *see* Fed. R. App. P. 40(a)(1)(A) & 5th Cir. R. 27.2 (providing that motions for a three-judge panel to rehear single-judge orders are called motions for "reconsideration." This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interaction of 28 U.S.C. §§ 2244 & 2255. It also involves analysis of the Armed Career Criminal Act, 18 U.S.C. § 924(e), and in particular how that statute applies to Texas burglary of a "habitation," Texas Penal Code §§ 30.01(1) & 30.02. Those provisions are reprinted in the Appendix. Pet. App. 11a–16a.

STATEMENT OF THE CASE

Ortino Licon pled guilty to possessing a firearm after felony conviction in violation of 18 U.S.C. § 922(g)(1). The district court concluded that two prior convictions were "serious drug offenses" and two burglary convictions were "violent felonies." That made Mr. Licon an Armed Career Criminal under 18 U.S.C. § 924(e)(1), so he was sentenced to 188 months in prison. Pet. App. 4a. Without ACCA, the statutory maximum sentence was 120 months. *See* 18 U.S.C. § 924(a)(2).

At the original sentencing hearing in October 2008, the district court did not specify which portion of the "violent felony" definition applied to Petitioner's burglaries, probably because it did not make one whit of difference at the time. If a burglary is generic, it is a violent felony under the enumerated offense clause. But offenses "similar to generic burglary" were also deemed violent felonies under ACCA's residual clause. *See (Arthur) Taylor v. United States*, 495 U.S. 575, 600 n.9 (1990) ("The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii).").

But once this Court struck down ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2251 (2015), and then held that the rule was substantive and retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016), *Arthur Taylor*'s distinction between "generic" burglaries and non-generic offenses "similar to generic burglary" became very important. This was "the rare case in which this Court

announces a new rule of constitutional law and makes it retroactive within one year." *Dodd v. United States*, 545 U.S. 353, 359 (2005).

Petitioner—who had previously moved, unsuccessfully, to vacate his conviction and sentence—sought permission to file a successive application for collateral relief under 28 U.S.C. § 2255(h)(2). He argued that his two "burglary of a habitation" convictions were violent felonies under ACCA's defunct residual clause, but not generic burglaries under the enumerated-offense clause. A three-judge panel of the Fifth Circuit granted authorization to file the application, instructing the district court to "dismiss the § 2255 motion without reaching the merits if it determines that Licon has failed to make the showing required to file such a motion." Pet. App. 8a (citing 28 U.S.C. § 2244(b)(4) & *Reyes-Requena*, 243 F.3d 893, 899 (5th Cir. 2001)).

Despite the authorization order under § 2255(h)(2), the district court decided that it lacked jurisdiction to consider Petitioner's motion on the merits. Pet. App. 9a. The court went so far as to hold that *no reasonable jurist* could disagree with this conclusion, Pet. App. 10a, and the Fifth Circuit ultimately agreed. Pet. App. 1a–2a. The Fifth Circuit acknowledged that the burglaries were not generic under its recent substantive en banc decision in *United States v. Herrold*, 883 F.3d 517, 529 (5th Cir. 2018), which had held that *no* form of Texas burglary is "generic" under ACCA. According to the Fifth Circuit, Petitioner could not rely on that intervening decision because "*Herrold* is not a new rule of constitutional law made retroactively applicable to cases on collateral review by the Supreme Court." Pet. App. 2a n.1.

REASONS TO GRANT THE PETITION

Mr. Licon's application for post-conviction relief should be simple to resolve in his favor: he was an Armed Career Criminal under ACCA's residual clause, but is not an Armed Career Criminal without that clause. His claim for post-conviction relief thus both "contains" and "relies on" the new substantive constitutional rule announced in *Johnson*. *Compare* 28 U.S.C. § 2255(h)(2) *with* § 2244(b)(2)(A). Moreover, this Court "made" the rule in *Johnson* retroactive, either in *Johnson* itself or shortly thereafter in *Welch*. Section 2255(h)(2) requires no more.

To reach the opposite outcome—and to hold that *every reasonable jurist* would inevitably reject Petitioner's straightforward argument—the Fifth Circuit embraced several dubious assumptions: (1) that Petitioner "was not sentenced under the residual clause"; (2) that the district court lacked subject-matter jurisdiction to consider the claim on the merits; and (3) that the Fifth Circuit's intervening en banc decision holding that Texas burglaries are all non-generic was "of no moment" to the analysis. Pet. App 2a.

Granting review in this case would likely resolve several subsidiary legal disputes that have bedeviled the lower courts.

I. TEXAS BURGLARY OF A HABITATION IS NON-GENERIC.

There are two independent reasons why Petitioner's burglary convictions are non-generic, and this Court appears likely to confirm one or both of those reasons in pending cases. First, the Court heard argument in *United States v. Stitt*, No. 17-765, and *United States v. Sims*, No. 17-766, on October 9, 2018. Those cases ask whether burglary of a motor vehicle adapted for sleeping counts as a "generic" burglary. It

does not. *See Shepard v. United States*, 544 U.S. 14, 15–16 (2005) (ACCA "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle.").

Like the "burglary" crimes at issue in *Stitt* and *Sims*, Texas burglary of a "habitation" includes burglary of a vehicle that has been "adapted for the overnight accommodation of persons." Texas Penal Code § 30.01(1). Thus, it might be appropriate to hold this petition pending the outcome in *Stitt* and *Sims*.

Second, in *Herrold* itself (No. 17-1445) or in *Quarles v. United States*, No. 17-778, the Court may grant certiorari and reaffirm the principle that a "generic" burglary requires proof that the trespass was accompanied by a contemporaneous plan to commit some other crime. Texas burglary, by contrast, includes a trespass followed by the commission of any other crime-of-opportunity, even a non-intentional reckless offense. *See* Texas Penal Code § 30.02(a)(3). Thus, it might be appropriate to hold the petition pending the outcome in *Herrold* and *Quarles*.

Petitioner thus has two very strong arguments that his so-called "burglary" convictions were not enumerated, generic burglaries. That means they could only be violent felonies under ACCA's *residual* clause. So long as that clause remained in place, he could not challenge his sentence. But under the new constitutional rule announced in *Johnson*, his claim should succeed.

II. WHEN ASKED TO APPLY THE STRAIGHTFORWARD TEXT OF 28 U.S.C. § 2255(h)(2) TO APPLICATIONS LIKE PETITIONER'S, THE LOWER COURTS ARE FLOUNDERING.

Before filing a "second or successive motion" for collateral relief under 28 U.S.C. § 2255, a federal prisoner's proposed motion

> must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). Everyone agrees that *Johnson* was the right kind of rule: it was *new*; this Court "made" the rule retroactive in *Johnson* itself or in *Welch*; and it was "previously unavailable" to prisoners sentenced before *Johnson*. If a proposed motion "contains" the rule in *Johnson*, and particularly if a Court of Appeals "certifie[s]" that proposition, then a prisoner has satisfied all of the threshold requirements for a successive motion and is entitled to a ruling on the merits.

Unfortunately, the lower courts have transmogrified this straightforward inquiry into multiple complex theoretical questions, and then have divided multiple ways on how to approach those theoretical questions. Rather than a coherent nationwide framework for analyzing successive *Johnson* motions, the lower courts have created "a riddle, wrapped in a mystery, inside an enigma." Absent prompt intervention from this Court, the disaster will only grow worse.

A. Lower courts disagree about whether the *substantive* gatekeeping standard for state prisoners—28 U.S.C. § 2244(b)(2)(A)—applies to federal prisoners' motions under § 2255(h)(2).

A federal prisoner who wishes to file a successive motion to vacate must convince the court of appeals to "certify" his proposed motion "as provided in section

2244." 28 U.S.C. § 2255(h). This is sometimes described as obtaining "prefiling authorization." For its part, Section 2244 provides both *substantive* standards and *procedural* requirements for *state* prisoners who wish to file successive petitions for habeas corpus.

The procedural rules for state prisoners are set out in § 2244(b)(3):

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244(b)(3). Of those procedural rules, § 2244(b)(3)(A) is clearly incorporated by § 2255(h), and § 2244(b)(3)(B) and (D) can be applied without controversy.

Lower courts appear to agree that appellate courts should evaluate proposed § 2255 motions under § 2244(b)(3)(C)'s *prima facie* standard. *See, e.g.*, *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997) ("We take the phrase 'as provided in

section 2244,' which appears in section 2255, to mean that in considering an application under section 2255 for permission to file a second or successive motion we should use the section 2244 standard, and thus insist only on a prima facie showing of the motion's adequacy."

But the courts disagree about whether *federal* prisoners must satisfy the *substantive* standard for state prisoners articulated in § 2244(b)(2), or if it is sufficient to satisfy the substantive standards in § 2255(h). Those two substantive standards are "quite similar" but not identical. *United States v. MacDonald*, 641 F.3d 596 (4th Cir. 2011). Under the "new rule" prong for *state* prisoners, § 2244(b)(2)(A) provides:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—(A) the applicant shows that the claim *relies on* a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(Emphasis added). Under the "new rule" prong for *federal* prisoners:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to *contain* . . . (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h)(2) (emphasis added).

Comparing these parallel provisions, "there is a slight difference between the two sections." *In re Hoffner*, 870 F.3d 301, 307 n.9 (3d Cir. 2017). "Section 2244(b)(2)(A) asks whether a claim 'relies on' a qualifying new rule. Section 2255(h) asks whether the motion 'contain[s]' a qualifying new rule." *Id.* (citations omitted).

Under the better-reasoned view, "§ 2244(b)(2) sets forth the controlling standard for state prisoners, and § 2255(h) spells out the standard applicable to those in federal custody." *MacDonald*, 641 F.3d at 609. Under this text-driven view, a successive § 2255 motion need only "contain" the new rule in *Johnson*. 28 U.S.C. § 2255(h); *see also In re Bradford*, 830 F.3d 1273, 1276 n.1 (11th Cir. 2016) (Section 2255(h) "cannot incorporate § 2244(b)(2) because § 2255(h) and § 2244(b)(2) provide different requirements for the prima facie case that an applicant must make to file a successive habeas petition or motion."); *Raines v. United States*, 898 F.3d 680, 692 (6th Cir. 2018) (Cole, C.J., concurring) (Section 2244(b)(4) "focuses on what a 'claim' requires, while § 2255(h) focuses on what a 'motion must . . . contain.' This 'difference in language'—in one section, what a claim requires; in the other, what a motion requires—'demands a difference in meaning.'").

Even so, several appellate courts have stated that a federal prisoner in Petitioner's shoes must show that his claim "relies on" the new rule in *Johnson* to satisfy the gatekeeping standard. *See*, *e.g.*, *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017) ("The threshold question is whether Defendant's claim relies on the rule announced in *Johnson II* such that he may bring that claim in a second or successive § 2255 motion."); *In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017) ("We now hold that whether a claim 'relies' on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis."); *Donnell v. United States*, 826 F.3d 1014, 1016 (8th Cir. 2016) ("Section 2244(b)(2)(A) requires certification that a claim 'relies on' a new rule, and it makes sense to interpret § 2255(h)(2) similarly despite a

modest difference in wording."); *c.f. Massey v. United States*, 895 F.3d 248, 249–50 (2d Cir. 2018) (the motion must "*contain[ ]* a claim that *relies on* a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.").

B. Most circuits have held that a *district court* must conduct its own "gatekeeping" analysis, even after the circuit court grants authorization under § 2255(h).

For a state prisoner's successive petition for habeas corpus, appellate authorization is only the first threshold requirement. After the Court of Appeals authorizes the filing of a successive "application," the prisoner must "show[ ]" "the district court" that each claim within that application "satisfies the requirements of this section." § 2244(b)(4). Section 2255 has no parallel procedure. *C.f.* 28 U.S.C. § 2255(h).

Yet most circuit courts—including the Fifth Circuit—have held that a *federal* prisoner must also surmount a second "gatekeeping" step in district court. Judge Posner's opinion in *Bennett v. United States* was early and influential:

> The [Court of Appeals's] grant [of authorization] is, however, it is important to note, tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion. 28 U.S.C. § 2244(b)(4). The movant must get through two gates before the merits of the motion can be considered

Bennett, 119 F.3d 468, 470 (7th Cir. 1997). Almost all of the regional courts agree. *See Peppers*, 899 F.3d 211, 220 (3d Cir. 2018) ("But, even after we authorize a second or successive petition, § 2244 still requires the district court to 'dismiss any claim

presented in a second or successive application . . . unless the applicant shows that the claim satisfies the [gatekeeping] requirements[.]"); *United States v. Murphy*, 887 F.3d 1064, 1067–1068 (10th Cir. 2018), *cert. denied*, 18-5230, 2018 WL 3462559 (U.S. Oct. 29, 2018); *Massey v. United States*, 895 F.3d 248, 250–251 (2d Cir. 2018) (holding that the district court should have dismissed the authorized successive motion without reaching the merits); (*Darnell) Moore v. United States*, 871 F.3d 72, 85 (1st Cir. 2017) ("We have left much work for the district court. That is by necessity, as the district court is required to redo the very analysis performed in this opinion before entertaining a successive § 2255 motion."); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016) ("[T]he district court is free to decide for itself whether Embry's claim relies on a new rule made retroactive by the Supreme Court, see 28 U.S.C. § 2244(b)(4)."); *In re (Jasper) Moore*, 830 F.3d 1268, 1271–1272 (11th Cir. 2016); *(Kamil) Johnson v. United States*, 720 F.3d 720, 720–721 (8th Cir. 2013); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000).

Many courts—including the Fifth Circuit—assume that the district-court gatekeeping inquiry is a *jurisdictional* prerequisite to resolving the merits. *See*, *e.g.*, *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018), *as revised* (Aug. 14, 2018). Respondent agrees with these courts that § 2255 incorporates the district-court review procedure found in § 2244(b)(4), but argues that the requirement is non-jurisdictional. *See e.g.* U.S. Letter Brief, *Williams v. United States*, No. 17-3211 (6th Cir. filed June 14, 2018).

Of course, nothing in the text of § 2255 requires this procedure in the district court. Successive motions by *federal* prisoners must only "be certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h). Given the uniform (and mistaken) approach taken by the lower courts, this Court should grant certiorari to set everyone on the correct course.

C. When describing what the district court must decide during the gatekeeping stage, the lower courts are all over the map.

"Increasing a defendant's sentence under the [ACCA residual] clause denies due process of law." *Johnson*, 135 S. Ct. at 2557. That much is known. But what does it mean to say that a defendant's sentence was increased "*under*" ACCA's residual clause? The problem can be illustrated by the following hypothetical: imagine four defendants who have identical criminal records. On three previous occasions, each of these defendants (aided and abetted by one another) committed the crime that Texas calls "burglary of a habitation." Each defendant is subsequently arrested by federal authorities for possessing a firearm after felony convictions, and as luck would have it, all four of them are sentenced under the Armed Career Criminal Act in the same federal courthouse on October 20, 2008 (the same day Petitioner was sentenced), but by four different district judges.

- In Albert's case, the judge announces that Texas burglary of a habitation is the generic, enumerated offense of "burglary," so it is a violent felony.
- In Bob's case, the judge announces that Texas burglary of a habitation is a residual-clause violent felony.
- In Carl's case, the judge—gravely mistaken or confused—declares that Texas burglary of habitation satisfies ACCA's elements clause.

- In David's case, the judge applies ACCA but says nothing about the legal analysis.

In any sensible system, these four sentences would stand or fall together. Texas burglary either *is* a violent felony, or it *is not*. If these defendants (or Petitioner) had appealed their sentences prior to *Johnson*, then appellate courts would have no trouble invoking the residual clause to affirm. At the time, appellate courts usually recognized that it didn't matter *which* clause made a crime violent, so long as the "violent felony" classification was correct.

More importantly, the *meaning* of "burglary" did not change between 2008 and the present. True, federal courts often struggled to interpret the statute correctly, and for a while there was confusion about what it meant for a prior offense to be divisible. But ACCA has always meant the same thing. If Texas burglary is non-generic, it has *always* been non-generic. If the residual clause was the only *lawful* basis to "increase a defendant's sentence," then (in a very real sense) these defendants' sentences were all *increased* under ACCA's residual clause, no matter what the sentencing judge thought or said. Unfortunately, lower courts have not all agreed with this analysis.

1. Regardless of whether a residential burglary offense was "generic," it could always be classified as violent under the residual clause.

As noted earlier, this Court explicitly held in *Arthur Taylor* that the Government was "free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement" under the residual clause. 495 U.S. at 600 n.9. At the time, the Fifth Circuit was more than willing to affirm an

ACCA-enhanced sentence under the residual clause, if the Government bothered to raise that argument. *See United States v. Ramirez*, 507 F. App'x 353, 354 (5th Cir. 2013).

This Court repeatedly suggested that burglary was the quintessential residual-clause offense. In 2004, this Court described burglary as the "classic example" of a crime satisfying the related residual clause in 18 U.S.C. § 16(b):

> A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, *but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.*

Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) (emphasis added). The Court picked up that same thread in *James v. United States*, 550 U.S. 192 (2007). *James* held that Florida *attempted* burglary was a violent felony under ACCA's residual clause because it presented a risk of confrontation similar to generic burglary. The enumerated offense of generic burglary provided the "baseline from which to measure whether other similar conduct" satisfied that clause. *Id.* at 203. Because attempted burglary presented the exact same risks as generic burglary, it was a residual-clause violent felony.

2. Recognizing the role that the residual clause played, many courts have considered and even granted *Johnson*-based motions where a non-generic burglary gave rise to an ACCA enhancement.

Because the residual clause was always a backstop preventing prisoners from challenging mistaken conclusions about "generic" burglaries, many courts have held that an ACCA sentence based on non-generic burglaries is unconstitutional and

subject to collateral attack under *Johnson*. The "vast majority" of district judges—who best understood how sentencing decisions were made prior to *Johnson*—were willing to grant relief under the theory that they "might" have relied on ACCA's residual clause. *Thrower v. United States*, No. 04-CR-0903, 2017 WL 1102871, at *4 (E.D.N.Y. Feb. 13, 2017), and cases cited therein ("[T]he vast majority of the district courts that have considered the issue have decided that a petitioner meets his burden of proving constitutional error if the record is unclear and the petitioner shows that the sentencing court may have relied on the residual clause in calculating his sentence."). As another district judge explained:

> Prior to *Johnson*, regardless of *Descamps* and the alleged invalidity of utilizing the modified categorical approach concerning the Washington State residential burglary statute, Defendant's 1996 residential burglary conviction could have been a predicate "violent felony" under the residual clause. . . . As such, until *Johnson*, Defendant's 1996 residential burglary conviction remained a "violent felony" through the ACCA residual clause.

United States v. Gomez, 2:04-CR-2126-RMP, 2016 WL 1254014, at *3 (E.D. Wash. Mar. 10, 2016) (citing *James* and *Arthur Taylor*); *see also Hardeman v. United States*, 1:96-CR-192 & 1:16-CV-703, 2016 WL 6157433, at *2–4 (W.D. Tex. Oct. 21, 2016) (explaining that the Government "continued" to argue that non-generic Texas burglaries were still violent felonies under the residual clause "until *Johnson* was decided," and rejecting Government's attempt to ignore *Johnson*'s impact on the analysis of non-generic burglaries). *In re Adams*, 825 F.3d 1283, 1284 (11th Cir. 2016) (allowing a defendant to challenge the classification of a prior burglary offense under *Johnson* and *Descamps* in a successive § 2255 motion).

3. Appellate courts tend to treat *Johnson* error as a question of *historical fact*, rather than abstract legality, but they are divided over how that historical question should be decided.

For good or for ill, the circuit courts that have addressed the question thus far have treated *Johnson* error as a historical question: if a sentencing judge subjectively applied ACCA's residual clause (or might have done so), the defendant suffered *Johnson* error. But if a sentencing judge expressly applied one of the other clauses—even if that decision turns out to be error—then most appellate courts would deny post-conviction relief under *Johnson*.

The courts are bitterly divided over the burden a defendant must satisfy at the gatekeeping stage. The Third, Fourth, and Ninth Circuits have all adopted a *permissive* approach: if a defendant shows that the sentencing court *might have* relied on the residual clause, then the defendant satisfies the gatekeeping standard and is entitled to a ruling on the merits. *Peppers*, 899 F.3d at 216; *Geozos*, 870 F.3d at 896; *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Once the case proceeds to the merits in these circuits, the defendant is permitted to utilize intervening precedent to show that the enumerated offense and elements clauses do not justify the sentence.

The First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have all embraced a *stricter* approach to the gatekeeping standard. In these circuits, a successive movant has to *prove*, by a preponderance of the evidence, that the sentencing court was *actually thinking about* ACCA's residual clause when imposing the sentence. *See, e.g., Dimott v. United States*, 881 F.3d 232, 240, 243 (1st Cir. 2018); *United States v. Wiese*, 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). The Eleventh Circuit holds that the residual clause must have been the *sole* basis for the enhancement:

> To prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely *or as an alternative basis for the enhancement*, then the movant has failed to show that his enhancement was due to use of the residual clause.

Beeman v. United States, 871 F.3d 1215, 1221–1222 (11th Cir. 2017) (emphasis added). This is an extraordinary position: a defendant whose sentence was enhanced under both the enumerated offense and residual clauses because of a non-generic burglary offense could *never* obtain relief from his ACCA sentence: his pre-*Johnson* direct appeal would be doomed from the start, because the residual clause would suffice, and his post-*Johnson* § 2255 motion would be doomed because he could not show that the residual clause was the sole subjective basis of the enhancement. That approach has to be wrong.

III. WHICHEVER STANDARD THIS COURT ADOPTS, PETITIONER SHOULD PREVAIL.

A. At a minimum, federal defendants are entitled to use intervening *substantive* developments to show constitutional error while on collateral review.

Many of the stricter circuits demand that a prisoner rely *only* on the law that existed at the moment of sentencing. See, *e.g.*, *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017) (limiting consideration to a "'snapshot' of what the controlling law was at the time of sentencing" without taking "into account post-sentencing

decisions that may have clarified or corrected pre-sentencing decisions."); *accord* *Wiese*, 896 F.3d at 715 (post-sentencing decisions are "of no consequence to determining the mindset of a sentencing judge in 2003").

Whatever might be said of *procedural* decisions, these courts miss the mark to the extent they prohibit reliance on *substantive* decisions. As this Court explained in *Bousley v. United States*, "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on" decisions that interpret the substantive scope of a federal criminal statute. *Bousley v. United States*, 523 U.S. 614, 620–621 (1998). Bousley was permitted to use a subsequent decision—*Bailey v. United States*, 516 U.S. 137 (1995)—to prove that he suffered constitutional error during an *earlier* guilty plea. By the same logic, Petitioner is permitted to use intervening substantive decisions to show that the enumerated offense and elements clauses were not enough to justify his ACCA sentence.

B. Even if the Court were to restrict itself to a "snapshot" of Supreme Court and Fifth Circuit law known on the date of sentencing, the enumerated offense clause would be excluded and the residual clause would be the only lawful basis for the enhancement.

The sentencing record here is silent about whether the district *court* was subjectively thinking about the enumerated offense clause, the residual clause, both, or neither. But the precedent available *on the date of sentencing* would forbid application of the enumerated offense clause. Conversely, precedent available *on the date of sentencing* would encourage application of the residual clause.

First, adhering to *Arthur Taylor*'s definition of generic burglary, the Fifth Circuit had twice held that Texas Penal Code § 30.02(a) was not *categorically* generic burglary. The Court recognized that the theory of burglary at § 30.02(a)(3)—a trespass *followed by* commission of some other crime—was non-generic because it did not require proof that the defendant *intended* to commit that other crime when he trespassed. *See United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008); *accord United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007) ("For example, teenagers who unlawfully enter a house only to party, and only later decide to commit a crime, are not common burglars."). In other words, the district court *would have* or *should have* understood that Texas burglary of a habitation was broader than generic burglary.

Second, this Court had already explained what was required to "narrow" a guilty plea to an overbroad burglary offense to generic burglary: "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. The district court *would have* or *should have* known that it "was not permitted to rely on the PSR's characterization of the offense in order to make its determination of whether it was a" violent felony. *United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005).

Third, the sentencing court did not have access to charging documents, a plea colloquy, or a judicial confession admitting that Petitioner committed a generic

burglary. True, at the time Petitioner was sentenced, there was Fifth Circuit precedent suggesting that § 30.02(a) was divisible, and a judicial confession to burglary under Texas Penal Code § 30.02(a)(1) was a generic burglary. But the Government never bothered to submit a judicial confession for Petitioner's prior burglary offenses. The sentencing court simply relied on the fact that Petitioner was convicted of two Texas burglary of a habitation offenses.

Fourth, the court would have understood that offenses *similar to* generic burglary were still violent felonies under ACCA's residual clause. *Leocal*, 543 U.S. at 10; *James*, 550 U.S. at 203; *Arthur Taylor* 495 U.S. at 60. All-in-all, there was plenty of precedent at sentencing to teach the sentencing court and the parties that the court could not apply the enumerated offense clause, but that it could apply the residual clause.

In holding that Petitioner did not meet his "jurisdictional" burden, the Fifth Circuit faulted him for failing to achieve the impossible. Petitioner could not disprove the dubious assertion that the district court *mistakenly* applied the enumerated offense clause rather than correctly applying the residual clause. In many other circuits, that would not serve as a hinderance.

CONCLUSION

Petitioner respectfully asks that this Court grant certiorari, and either instruct the Fifth Circuit to issue a certificate of appealability or hold outright that Petitioner satisfied all the prerequisites for a merits ruling.

Respectfully submitted,

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