NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

ALEX JOE HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question in this case has arisen with great frequency in the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). When a *Johnson* movant would not be an armed career criminal if sentenced today, how can he show that his sentence is infected with error under *Johnson* when the sentencing court did not specify which clause of the Armed Career Criminal Act's violent felony definition his prior convictions fell under at the time of his original sentencing?

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PETITION FOR A WRIT OF CERTIORI

Petitioner, Alex Joe Hernandez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unpublished and available in electronic databases at *United States v. Hernandez*, No. 17-6021, 2018 WL 3456264 (10th Cir. July 17, 2018). The order of the district court denying Mr. Hernandez's motion to vacate is unreported and unavailable in electronic databases. It is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment in this case on July 17, 2018. No petition for rehearing was filed. One motion for extension of time was filed in this case. The petition is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

(e)(1) In the case of a person who … has three previous convictions … for a violent felony …, such person shall be … imprisoned not less than fifteen years …. (2) As used in this subsection—

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

18 U.S.C. § 924(e).

STATEMENT OF THE CASE

This case requires the Court to determine whether Alex Joe Hernandez's sentence should be vacated in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Mr. Hernandez pleaded guilty to violating 18 U.S.C. § 922(g)(1). Ordinarily, the maximum sentence for a conviction of felon in possession of a firearm is 10 years' imprisonment, 18 U.S.C. § 924(a)(2), and three years of supervised release. 18 U.S.C. §§ 3559, 3583. However, under the ACCA if a defendant convicted of felon in possession of a firearm "has three previous convictions . . . for a violent felony or a serious drug offense, or both," then the defendant must be "imprisoned not less than fifteen years," 18 U.S.C. § 924(e), and may be placed on supervised release for up to five years. 18 U.S.C. §§ 3559, 3583.

In Mr. Hernandez's case, the Government sought an enhanced penalty under the ACCA based on the following prior convictions: (1) attempted robbery with a dangerous weapon under Oklahoma law; (2) burglary in the second degree under Oklahoma law and (3) deadly conduct in the third degree under Texas law (Case No. 96-052). Supp. vol. I at 16-18. Mr. Hernandez was sentenced on August 21, 2008. At sentencing, the parties argued over whether Mr. Hernandez's deadly conduct conviction was a violent felony under the ACCA. Supp. vol. 1 at 8. There was no argument about the other two predicates at

sentencing. Ultimately, the sentencing court determined that Mr. Hernandez was an Armed Career Criminal and imposed a 180-month mandatory minimum sentence. On direct appeal, this Court affirmed Mr. Hernandez's conviction and sentence. R. Supp. vol. I at 12-13.

More than a decade after Mr. Hernandez's sentencing, this Court decided *Johnson*, which ruled a portion of the ACCA unconstitutional. Specifically, *Johnson* held that one clause of the ACCA's definition of the term "violent felony"—the so-called residual clause—is unconstitutionally vague. 135 S. Ct. at 2557. Under the ACCA, there were previously three ways that a prior conviction could qualify as a violent felony (and thus serve as a predicate for an increased sentence): (1) the conviction was for an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," under the "elements clause;" (2) the conviction was for "burglary, arson, or extortion, [or an offense that] involves the use of explosives," under the "enumerated-offenses clause;" or (3) the offense is for a conviction that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). In *Johnson*, this Court held that this third clause—the residual clause—could not be applied consistently with due process. Subsequently, this Court held that *Johnson* must be applied retroactively to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

Following *Johnson* and *Welch*, thousands of ACCA-sentenced defendants filed post-conviction motions seeking to vacate their sentences under 28 U.S.C. § 2255. Mr. Hernandez filed such a motion *pro se*, arguing that his predicate convictions were no longer ACCA-qualifying "violent felonies." R. vol. I at 8. The Government responded that all of his prior convictions remained violent felonies and the district court agreed with the Government's position. R. vol. I at 24, 31.

As to the first predicate, the district court recognized that Oklahoma burglary can no longer "give rise to an enhanced sentence under the ACCA." R. vol. I at 27. However, the district court found that, under this Court's unpublished case, *United States v. Taylor*, 672 F. App'x 860 (10th Cir. 2016) ("*Eric Taylor*"), Mr. Hernandez's argument that his Oklahoma burglary conviction was no longer an ACCA-qualifying predicate was untimely. Specifically, the district court found that Mr. Hernandez could not rely on the Supreme Court's recent divisibility case, *Mathis v. United States,* 136 S. Ct. 2243 (2016), because *Mathis* did not announce a "new rule." The district court thus found that Mr. Hernandez's *Johnson* claim was untimely because it relied on *Mathis* and not *Johnson*. R. vol. I at 27. As to the second predicate, the district court noted that, on direct appeal, the Tenth Circuit had determined that Mr. Hernandez's conviction for deadly conduct qualified as a violent felony under the elements

clause, and thus Mr. Hernandez's argument on that predicate was barred. *Id.* at 28. As to the third predicate, the district court found that Mr. Hernandez's conviction for Oklahoma attempted robbery with a dangerous weapon also qualified as a violent felony. *Id.* at 30.[1] The Tenth Circuit affirmed, but on other grounds. Applying *United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017), the Tenth Circuit held that both the burglary and the attempted robbery predicates qualified as ACCA predicates under the "background legal environment at the time." *United States v. Hernandez*, No. 17-6021, 2018 WL 3456264, at *4 (10th Cir. July 17, 2018) (citing *Snyder*, 871 F.3d at 1129 ("[T]he relevant background legal environment ... does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions.")). The Tenth Circuit explained that—at the time of sentencing—the district court would have been able to look at the charging documents in each of

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[1] Mr. Hernandez had a second conviction for Texas deadly conduct, but as Mr. Hernandez's PSR states, the second deadly conduct conviction arose out of the same conduct as the first conviction and thus cannot serve as a separate ACCA predicate. R. vol. II at 15. In order to qualify separately, the second deadly conduct conviction had to be committed on a different occasion that was distinct in time from the first conviction. *See, e.g.*, *United States v. Johnson*, 130 F.3d 1420, 1430 (10th Cir. 1997)(under § 924(e)(1), "the statutory reference to offenses 'committed on occasions different from one another' was intended to reach multiple criminal episodes distinct in time.")

the underlying cases to discover which parts of the statutes Mr. Hernandez was convicted under. *Id.*

REASONS FOR GRANTING CERTIORARI

Mr. Hernandez's case is an example of how ambiguity in the record can cut against a movant. Central to the Tenth Circuit's decision is Mr. Hernandez's inability to point to affirmative record evidence that the residual clause played a part at his sentencing. When a movant was sentenced under the ACCA prior to *Johnson*, sentencing records were most often silent as to what clause of the ACCA violent felony definition a certain prior conviction fell under. In most circumstances, a sentencing court could have relied on at least two ACCA clauses to hold that a conviction was a violent felony.

Prior to *Johnson*, the residual clause acted as a catch-all provision, and nearly all crimes that qualified as violent felonies under the other two ACCA prongs would have also qualified under the residual clause. As a result, sentencing courts seldom showed their work or explained their thought processes at sentencing. And because crimes that would have qualified under the enumerated offenses clause or the force clause would have qualified under the residual clause as well, trial counsel had no incentive to object or clarify the record as to which clause applied when her client would have been sentenced un-

der the ACCA in either case. Inconclusive records are thus the norm in *Johnson* litigation. Now, hundreds of movants seeking relief pursuant to *Johnson*, and hundreds of reviewing courts, are trying to make sense of ambiguous records when looking retrospectively at original sentencing proceedings.

The Court should grant review in this case because the circuits are divided over how a movant can show *Johnson* error. This case presents a recurring issue of national importance that will likely affect hundreds of criminal defendants nationwide. This Court's prompt review is also warranted because of the important liberty interests at stake. In many instances, *Johnson* movants are serving sentences far higher than the statutory maximum for which they are eligible because subsequent clarifying case law makes clear that their prior convictions do not qualify under any clause of the ACCA.

I. The Lower Courts Are In Acknowledged Conflict Over How A Movant Can Demonstrate Johnson Error.

The federal courts of appeal (and the district courts before them) have taken a variety of different approaches to resolving the question of how a movant can show *Johnson* error.

For example, the Tenth Circuit's test, as set forth in *Snyder*, in direct conflict with the law in the Fourth Circuit. As noted, the Tenth Circuit has held that if, based on the record and the "relevant background legal environ-

ment," a movant's sentence could have rested on a clause other than the residual clause at sentencing, a movant has not demonstrated *Johnson* error. *Snyder*, 871 F.3d at 1130.

The Fourth Circuit's test flips the inquiry. The Fourth Circuit has held that a *Johnson* movant need only show that his sentence "*may have* been predicated on application of the now-void residual clause, and therefore *may* be an unlawful sentence" in order to demonstrate *Johnson* error. *See Winston v. United States*, 850 F.3d 677, 682 (4th Cir. 2017). In other words, in the Fourth Circuit, an inconclusive record is sufficient to show error.

Acknowledging the common problem of ambiguous ACCA sentencing records, the *Winston* court noted that that "[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence." *Id*. (quoting *In re Chance,* 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus declined to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id*.

The Fourth Circuit further cautioned that requiring a movant to show affirmative reliance on the residual clause in order to demonstrate *Johnson* error would result in "'selective application' of the new rule of constitutional law announced in *Johnson*," in violation of "'the principle of treating similarly

situated defendants the same.'" *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error. In *Winston*, the court found that the *Johnson* error was not harmless because the movant's prior conviction for Virginia robbery was no longer a crime of violence under the remaining clauses of the ACCA. *Winston*, 850 F.3d at 682 n.4.

The *Snyder* panel's approach to this issue is directly at odds with the *Winston* decision. Under the *Winston* rule, Mr. Snyder would prevail because the sentencing court *may have* relied on the residual clause at sentencing. And the *Johnson* error was not harmless in this case because Mr. Snyder's prior convictions do not qualify as violent felonies under the remaining ACCA clauses. Whereas the Fourth Circuit's approach allows for the possibility of unconstitutional reliance on the residual clause where there is ambiguity in the record, the decision below places a far higher burden on *Johnson* movants. Unless the words "residual clause" appear in the record, a movant must use old law to show that his crimes could not have fallen under one of the narrower ACCA clauses at the time of sentencing in order to prevail.

Other circuits have weighed in, and many circuits tests differ from those of the Fourth and Tenth Circuits. For example, a panel of the Eleventh Circuit ruled, over dissent, that "[t]o 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." *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). Whereas in *Winston*, a *Johnson* movant had to show only that his sentence "may have been predicated on application of the now-void residual clause," *Winston*, 850 F.3d at 682, the Eleventh Circuit places a higher burden on movants. Those in the Eleventh Circuit cannot meet their burden to demonstrate *Johnson* error 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." *Id*. at 1222.

The *Beeman* dissent disagreed, urging the court to adopt a rule that *Johnson* error is demonstrated if a movant's prior convictions could not possibly fall under any clause but the residual clause under the legal framework that exists today—making it "more likely than not" that the residual clause affected the original sentencing. *Beeman*, 871 F.3d at 1229–30. Such an approach "gives potentially eligible defendants the opportunity to prove that they are entitled to relief where, as here, the sentencing documents and record transcripts are silent." *Id*. at 1230. Under the rule proposed by the *Beeman* dissent, the demonstration of error and the demonstration of harmlessness "coalesce into a single inquiry," but movants must still demonstrate that their prior convictions do not fall under either of the remaining clauses in order to obtain

relief. *Id.* The dissenting judge noted that this framework had been "part and parcel of many district court determinations." *Id.* at 1226-27. And the dissent worried that "any alternative to this test—in other words, any standard under which an unclear sentencing record precludes relief under *Johnson*—would lead to unwarranted and inequitable results." *Id.* at 1228.

The Ninth Circuit took yet a different approach, borrowing its rule from this Court's opinion in *Stromberg v. California*, 283 U.S. 359 (1931). Applying the *Stromberg* principle, the Ninth Circuit held that "when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory," so an unclear record is sufficient for a movant to show *Johnson* error. *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). The *Geozos* panel ultimately decided that the *Johnson* error in that case was not harmless because the movant's prior conviction for Florida robbery was no longer a violent felony under the current legal framework in that circuit.

In *United States v. Weise*, the Fifth Circuit held that courts must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause or the residual clause. 896 F.3d 720, 724 (5th Cir. 2018). In dicta, the *Weise* court endorsed the "more likely than not"

standard used by the Tenth Circuit over the "may have" standard articulated by the Fourth Circuit. But, ultimately, the *Weise* court refused to decide which standard is required, finding that the defendant could not even establish that the sentencing court "may have" relied upon the residual clause. *Id.* at 726.

In *United States v. Walker*, the Eighth Circuit announced its agreement with the First, Tenth, and Eleventh Circuits, requiring a movant to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the Armed Career Criminal Act enhancement. 900 F.3d 1012, 1015 (8th Cir. 2018).

The Third Circuit joined the Fourth Circuit in looking to the factual record to determine procedural eligibility and then the Fourth and Ninth Circuits by looking to current law on the merits. *United States v. Peppers*, 899 F.3d 211, 221, 224, 230 (3rd Cir. 2018). The Sixth Circuit has done the same, though unlike the Fourth and Ninth it requires *affirmative* evidence in the sentencing record (rather than silence) to establish procedural eligibility before looking to current law to adjudicate the merits. *See Raines v. United States*, 898 F.3d 680, 868, 688-90 (6th Cir. 2018). To compound the confusion, the Sixth Circuit relies on the sentencing record only to determine procedural eligibility for second or successive petitions under § 2255(h)(2), not to determine timeliness under § 2255(f)(3). *Id.* at 687.

II. The Tenth Circuit's Rule Ignores The Pre-*Johnson* Dominance Of The Residual Clause

Before *Johnson*, if a prior conviction "involve[d] conduct that present[ed] a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii), it would necessarily have qualified under the residual clause. Accordingly, burglaries, robberies, and other crimes that may have fallen under the alternative clauses of the ACCA's violent felony definition would have also qualified as violent felonies under the residual clause.

As interpreted pre-*Johnson*, the residual clause was quite broad, encompassing crimes that were relatively minor. In the decade preceding *Johnson*, most ACCA litigation was focused on drawing the outer bounds of the residual clause. For example, this Court's pre-*Johnson* cases asked whether attempted burglary, *James v. United States*, 550 U.S. 192 (2007), driving under the influence of alcohol, *Begay v. United States*, 553 U.S. 137 (2008), failure to report, *Chambers v. United States*, 555 U.S. 122 (2009) and vehicular flight, *Sykes v. United States*, 564 U.S. 1 (2011), were ACCA violent felonies. The fact that such questions were posed to this Court illustrates the breadth of the residual clause.

As a result, there would have been no need to look to the other clauses for confirmation that a far more serious crime was a qualifying ACCA violent felony. For example, if attempted burglaries involved a "serious potential risk

of physical injury," as this Court held in *James*, it stands to reason that completed burglaries would also pose a similar risk, and thus would unquestionably qualify under the residual clause. *James*, 550 U.S. at 195.

The Tenth Circuit's rule presumes that a sentencing judge would have relied on a clause narrower than the residual clause just because that clause was also available to it. Where the sentencing record is inconclusive, it makes far more sense to assume that most judges relied on the expansiveness of the residual clause rather than either of the other clauses, opting for the analytical path of least resistance. The *Winston* decision, the dissent in *Beeman* and the decision in *Geozos* all allow for litigants to show *Johnson* error based on an inconclusive record, and given the mechanics of ACCA sentencing pre-*Johnson*, that result is the correct one.

III. The Tenth Circuit's Rule Will Lead To Arbitrary Results.

Early in the course of the *Johnson* litigation, the Eleventh Circuit highlighted this issue when it questioned why a court would decline to grant relief when a person's sentence was no longer statutorily authorized—even if the "sentencing judge [had not] uttered the magic words 'residual clause.'" *In re Chance,* 831 F.3d 1335, 1340 (11th Cir. 2016). The panel opined that it would be inequitable to mandate the words "residual clause" actually appear in the record because such a step was never required at sentencing. *Id.*

The panel proposed the unsettling hypothetical where two defendants received identical sentences "on the same afternoon from the exact same sentencing judge," but in one case the sentencing judge "thought to mention that she was sentencing the defendant under" the residual clause. *Id.* Granting relief in such a circumstance "based solely on a chance remark" would result in "selective application of [*Johnson*]," in violation of "'the principle of treating similarly situated defendants the same.'" *Id.* at 1341 (quoting *Teague*, 489 U.S. at 304). The dissenting judge in *Beeman* echoed this sentiment, warning that adopting a contrary approach "would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court." *Beeman*, 871 F.3d at 1229.

Concerns over arbitrary application of *Johnson* also animated the Fourth Circuit's rule that a *Johnson* movant need only show that his sentence "*may have* been predicated on application of the now-void residual clause" in order to show *Johnson* error. *Winston*, 850 F.3d at 682 (emphasis added). Prior to *Johnson*, courts were not required to make specific findings, and counsel had no incentive to object, where serious crimes clearly fell within the residual clause. Accordingly, the Fourth Circuit declined to "penalize a movant for a court's discretionary choice not to specify" which clause it relied on. *Id.* And it declined to base its decision on "non-essential conclusions a court may or may

not have articulated on the record in determining the defendant's sentence." *Id*.

The Tenth Circuit's rule creates yet another arbitrariness concern: The legal landscape was in constant flux in the decades prior to *Johnson*, and recreating the landscape at a particular point in time will undoubtedly prove both cumbersome and impractical. As one district judge aptly explained, "[a]ttempting to recreate the legal landscape at the time of a defendant's conviction is difficult enough on its own. But in the context of *Johnson* claims, the inquiry is made more difficult by the complicated nature of the legal issues involved." *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016). It will also mean that movants who are sentenced in 2005 may be judged by a different standard for *Johnson* error than movants who were sentenced in 2010—even though their prior offenses may be the same.

The arbitrariness identified by the *Winston* panel is compounded when "decisions from the Supreme Court that were rendered since [sentencing]" can be ignored "in favor of a foray into a stale record." *Chance*, 831 F.3d at 1340. For example, this Court in *Mathis* emphasized that "[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements." *Id*. at 2257.

The opinion of the Tenth Circuit should be reversed in favor of the more straightforward and equitable rule that an inconclusive record demonstrates *Johnson* error, and current law applies to the question of whether the *Johnson* error was harmless.

IV. The Tenth Circuit's Rule Risks An Independent Due Process Violation.

Finally, the Tenth Circuit's rule creates a separate and independent due process violation: Movants whose prior convictions are not, in fact, ACCA qualifiers are serving unconstitutional sentences, and will remain in jail, doing more time than the law allows. Under section 2255(a), a petitioner may challenge a sentence "imposed in violation of the Constitution or laws of the United States" and "is in excess of the maximum authorized by law." Requiring a defendant to serve above the statutory maximum allowable sentence thus violates due process, as several circuits have noted. *See, e.g.*, *United States v. Grier*, 475 F.3d 556, 572 (3d Cir. 2007) (Rendell, J., concurring) ("Due process requires . . . that the sentence for the crime of conviction not exceed the statutory maximum."); *United States v. Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009) ("[w]here, as here, [a petitioner] was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated"). For these reasons, the decision below is incorrect and should be reversed.

* * *

This Court should step in to resolve the division among the circuits over how a movant can show *Johnson* error. Currently, there are numerous petitions already pending that raise the issue and should be resolved by this Court. *See, e.g.*, *Prutting v. United States*, Case No. 18-5398; *Washington v. United States*, Case No. 18-5594; *Wyatt v. United States*, Case No. 18-6013; *Jackson v. United States*, Case No. 18-6096; *Beeman v. United States*, Case No. 18-6385; *Harris v. United States*, Case No. 18-6936; *Licon v. United States*, Case No. 18-6952. Delay in adjudicating this important question will only cause potentially meritorious claims to stall or be outright denied in violation of *Johnson* movants' due process rights. "Because uniformity among federal courts is important on questions of this order," this Court should "grant[] certiorari to end the division of authority." *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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