No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTRON EDWARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR 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, may he show that a predicate offense does not fit within the statute's alternative sources: the elements and enumerated offense 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?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished but reported at *United States v. Edwards*, 733 Fed.Appx. 526 (11th Cir. 2018) and reproduced as Appendix A. App. 1a. The district court's order accepting in part, and rejecting in part the magistrate judge's report and recommendations, and denying the 28 U.S.C. § 2255 motion is unreported but reproduced as Appendix B. App. 5a. The magistrate judge's report and recommendations granting the 28 U.S.C. § 2255 motion is unreported but reproduced as Appendix C. App. 11a.

JURISDICTION

The Eleventh Circuit issued its decision on August 2, 2018. One motion for extension of time was filed in this case. The petition is timely under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) provides, 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 a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(2)(B) provides, in part:

> [T]he term "violent felony" means any crime punishable

> by imprisonment for a term exceeding one year . . . that—(i) has as an element 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 provides, in part:

> (a) 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.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> . . .
>
> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
>
> . . .
>
> (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—
>
> (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.

The version of Florida's first-degree arson statute at the time of Mr. Edwards' conviction provided:

> (1) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged:
>
> (a) Any dwelling, whether occupied or not, or its contents;
>
> (b) Any structure, or contents thereof, where persons are normally present, such as: jails, prisons, or detention centers; hospitals, nursing homes, or other health care facilities; department stores, office buildings, business establishments, churches, or educational institutions

> during normal hours of occupancy; or other similar structures; or (c) Any other structure that he or she knew or had reasonable grounds to believe was occupied by a human being,
>
> is guilty of arson in the first degree . . . .

Fla. Stat. § 806.01(1) (1991).

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

The Armed Career Criminal Act ("ACCA") transforms a ten-year statutory maximum penalty into a fifteen-year mandatory minimum for federal defendants convicted of certain firearms offenses. 18 U.S.C. §§ 924(a)(2), 924(e). The enhancement applies where the defendant has a three "violent felonies" or "serious drug offenses."

The ACCA contains three definitions of a "violent felony"—a felony 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)(2)(B). The definition in subsection (i) is known as the "elements" or "force" clause. The first half of the definition in subsection (ii) is known as the "enumerated" offense clause. And the second half of the definition in subsection (ii) is known as the "residual" clause.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause was unconstitutionally vague. *Johnson*, however, left undisturbed the validity of both the elements and enumerated offenses clauses. *Id.* at 2563. The following Term, this Court held that *Johnson* announced a new, substantive rule of constitutional law, and it therefore had retroactive effect to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

Following *Johnson* and *Welch*, thousands of federal prisoners filed motions to vacate their ACCA sentences, pursuant to 28 U.S.C. § 2255. Precisely because of the broad, amorphous nature of the catch-all residual clause, however, sentencing courts had rarely had occasion to specify which definition of "violent felony" applied in any particular case. Where the record is silent in this way, there is an emerging split among the lower courts regarding how and whether a defendant may meet his burden of proving that his sentence was based upon the now-forbidden residual clause.

II. FACTUAL BACKGROUND

In 2014, Antron Edwards 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 of Mr. Edwards' prior convictions were "serious drug offenses" and that four of his prior convictions were "violent felonies." That made Mr. Edwards an Armed Career Criminal under 18 U.S.C. § 924(e)(1), so he was subject to a statutory *minimum* sentence of 15 years. On November 5, 2014, the district court imposed that fifteen-year minimum sentence. Without ACCA, the statutory *maximum* sentence would have been ten years. *See* 18 U.S.C. § 924(a)(2). Having waived the right in his plea agreement, Mr. Edwards did not appeal.

At sentencing, the district court did not specify how any of Mr. Edwards' predicate convictions qualified as "violent felonies" under the ACCA (i.e. under the elements clause, enumerated offenses clause, or residual clause), and nothing else

in the record clarifies this point. The court simply counted the crimes without announcing why. That silence is the crux of the legal question before this Court.

Two years ago, in the wake of this Court's decision in *Johnson*, Mr. Edwards filed a § 2255 motion to vacate his sentence. The § 2255 motion was his first. Requesting "relief in light of the Supreme Court's decision in *Johnson*" Mr. Edwards' motion alleged that his 15-year sentence was "imposed in excess of the statutory maximum" because he was "no longer an Armed Career Criminal" without operation of the ACCA's now-unconstitutional residual clause. The government immediately conceded that three of Mr. Edwards' priors no longer qualified as "violent felonies," leaving at issue only Mr. Edwards' prior conviction for Florida first degree arson.[1]

The sole focus of proceedings in the district court was whether this Florida arson conviction matched the generic definition of arson in the enumerated offenses clause. At the time of his conviction, Florida defined first degree arson, in relevant part, as:

> Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged . . . any dwelling whether occupied or not, or its contents . . . is guilty of arson in the first degree . . . .

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[1] Pet. App. 13a. Specifically, the government conceded that Mr. Edwards' prior convictions for Georgia burglary, Florida burglary, and Florida fleeing and eluding a high-speed chase were not "violent felonies."

Fla. Stat. § 806.01(1) (1991). First, Mr. Edwards argued that under *Descamps v. United States*, 570 U.S. 254 (2013),[2] Florida arson was indivisible insofar as determining whether a fire was started "willfully and unlawfully" or "while in the commission of any felony." Indeed, Mr. Edwards' own indictment (as well as others he later presented to the court of appeals) charged that he committed the prohibited conduct "willfully and unlawfully, or while in the commission of any felony." Pet. App. 16a. Further, Mr. Edwards argued that, even if divisible, arson committed "willfully and unlawfully" was still broader than the mens rea required for generic arson.

Ultimately, the district court denied Mr. Edwards' § 2255 motion on one ground: that Florida first degree arson qualified under the enumerated offenses clause. The court granted a certificate of appealability to Mr. Edwards on that question and he appealed the order. Taking a cue from the Eleventh Circuit's newly-announced decision in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), the government's response on appeal argued for the first time that Mr. Edwards' § 2255 motion must be denied because he had not proven that the sentencing court had relied exclusively on the residual clause in finding that first degree arson qualified as a violent felony. As discussed more below, in *Beeman* the Eleventh Circuit had 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

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[2] Mr. Edwards' § 2255 motion was filed before this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). On appeal Mr. Edwards demonstrated how *Mathis* further underscored the indivisibility of Florida's arson statute.

what it called the "historical" record. *Id.* at 1224 n.5. A defendant must show that the sentencing record or clear precedent from the time of sentencing shows that a predicate offense fit within the residual clause, and only the residual clause. *Id.* Despite the fact that this new approach had not been litigated below, the Eleventh Circuit affirmed the denial of Mr. Edwards' § 2255 motion exclusively on the basis of *Beeman*, declining to reach the substantive issue of whether his Florida arson qualified under the enumerated offenses clause. Pet. App. 3a-4a.

REASONS FOR GRANTING THE PETITION

I. The lower courts are hopelessly divided.

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 permit him to meet that burden by citing post-sentencing precedent of this Court.

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. *Winston v. United States*, 850 F.3d 677, 682 (4th Cir. 2017) (emphasis added). As a result, 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 "[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 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 court 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. 850 F.3d at 682 n.4.

That holding, moreover, was unaffected by the fact that the movant's claim in that case depended on the "interplay" between *Johnson* and *(Curtis) Johnson v. United States*, 559 U.S. 133 (2010), which had narrowed the elements clause. *Id*. at 682 n.4. It explained: "Any argument that Winston's claim did not 'rely on' *Johnson* II, because that claim would not be successful, does not present a procedural bar. Instead, that issue presents the substantive argument whether, even after receiving the benefit of *Johnson* II, the defendant still is not entitled to relief, because his conviction nonetheless falls within the [elements] clause." *Id*. Accordingly, the court proceeded to the merits of the *Johnson* claim, analyzing whether Winston had three predicate offenses under current law. *Id.* at 682–86. The court of appeals determined that the district court had erred, and it remanded for a determination about whether he remained an armed career criminal. *Id*. at 686. On remand, the district court concluded that he did not, and it ordered his immediate release from custody. *United States v. Winston*, 2017 WL 1498104 (W.D. Va. Ap. 25, 2017).

Likewise, the Ninth Circuit concluded in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), that, "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in [Johnson]." *Id*. at 896.

In *Geozos* the record was silent as to whether the defendant's prior convictions "qualif[ied] under the 'residual clause' of the statute, the 'force clause,' or both." *Id*. at 892. Reversing the district court's determination to the contrary, the Ninth Circuit ruled that the § 2255 motion was procedurally proper because the defendant's "claim does rely on Johnson [ ]." *Id*. at 894. Recognizing that if, at sentencing, the district court had stated that the past convictions "were convictions for 'violent felonies' *only* under the residual clause . . . [w]e would know that [the defendant's sentence was imposed under an invalid—indeed, unconstitutional—legal theory." *Id*. at 895 (emphasis in original). By contrast, had the sentencing court "specified that a past conviction qualified as a 'violent felony' only under the force clause, we would know that the sentence rested on a constitutionally valid legal theory." *Id*. But, given the silence in the record on this issue, the Ninth Circuit ruled "it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id*.

In this situation, the Ninth Circuit recognized the applicable principle of *Stromberg v. California*, 283 U.S. 359 (1931), 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."*Geozos*, 870 F.3d at 896 (citing *Griffin v. United States*, 502 U.S. 46, 53 (1991)) (emphasis in original).[3] The court thus held, "when it is unclear whether a sentencing court

[3] The so-called "*Stromberg* principle" stems from three cases where general verdicts could have rested on a ground that was later held unconstitutional. A jury

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 [ ]" and the petitioner is eligible for relief under *Johnson*. *Geozos*, 870 F.3d at 896.

In so holding, the Ninth Circuit acknowledged that in certain situations, "it may be possible to determine that a sentencing court did not rely on the residual clause—even when the sentencing record alone is unclear—by looking to the relevant background legal environment at the time of sentencing." *Id*. at 896. Thus, if "binding circuit precedent at the time of sentencing was that crime Z qualified as a violent felony under the force clause, then a court's failure to invoke the force clause expressly at sentencing, when there were three predicate convictions for crime Z, would not render unclear the ground on which the court's ACCA determination rested." *Id*. But, absent this type of material, the Ninth Circuit held a silent record provided the basis for a meritorious *Johnson* claim. *Id*. at 897.

Similarly, the Third Circuit held in *United States v. Peppers*, in the context of a second, successive § 2255, that "§ 2255(h) only requires a petitioner to show that

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found Mr. Stromberg guilty of "violating a California statute prohibiting the display of a red flag in a public place for any one of three purposes: (a) as a symbol of opposition to organized government; (b) as an invitation to anarchistic action; or (c) as an aid to seditious propaganda." 283 U.S. at 361. The California courts doubted the constitutionality of criminalizing the display of a red flag for the first purpose, but affirmed the general verdict believing the remaining two provisions were constitutional. *Id*. at 367. This Court reversed because, "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id*. at 368; *see also Williams v. North Carolina*, 317 U.S. 287, 290–91 (1942); *Cramer v. United States*, 325 U.S. 1 (1945).

his sentence may be unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court," and that the defendant met that standard by demonstrating that he may have been sentenced under the residual clause of the ACCA. 899 F.3d 211, 221 (3d Cir. 2018). The Third Circuit also acknowledged that the purpose of §2244 and §2255 was to restrict "a defendant's ability to collaterally attack his conviction or sentence, especially with a second or successive attack." *Id*. at 222. However, in *Peppers*, the Third Circuit concluded that "[t]he statutory text, case law from our sister circuits, and policy considerations indicate that § 2255(h) only requires a movant to show that his sentence may be, not that it must be, unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court. *Id*. at 222. "To interpret the language [in the statute] as the government suggests would effectively turn the gatekeeping analysis into a merits determination, which defeats the purpose of the jurisdictional review." *Id*. at 223.

Once a defendant passes through the gate and on to the merits, the *Peppers* court 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 Fourth and Ninth circuits. *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.

The court explained that "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*, "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)). 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 Circuit's Beeman rule.

The Eleventh Circuit has chosen the opposite approach, though not without substantial internal disagreement. 871 F.3d at 1215. It is this approach, announced in *Beeman v. United States*, which bound the panel below to reject Mr. Edwards' appeal without merits consideration of any of the issues that had been litigated in the district court. Pet. App. 3a-4a.

In *Beeman*, the majority concluded that a *Johnson* claim may be established only if it is "more likely than not" that his ACCA sentence was based on the use of the residual clause. 871 F.3d at 1221-22. A movant *can never* satisfy this burden if "it is just as likely that the sentencing court relied on the elements or enumerated

crimes clause, solely or as an alternative basis for the enhancement." *Id*. at 1222.[4] Characterizing the inquiry as one of "historical fact," the *Beeman* court stated:

> 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 [movant's prior conviction] 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 here: whether [at his original sentencing the movant] was, in fact, sentenced under the residual clause only.

Id. at 1224 n.5. Thus, under the majority's standard, a silent record must be construed against a movant, and a movant may not rely on current law to establish that he was sentenced under the residual clause.

In contrast, the *Beeman* dissent urged the court to adopt a rule that, when the sentencing record is inconclusive, *Johnson* error is established when the movant

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[4] Before *Beeman*, two different Eleventh Circuit panels had taken two opposing positions when adjudicating applications for leave to file successive § 2255 motions. In *In re Moore*, 830 F.3d 1268 (11th Cir. 2016), the panel stated in dicta that "a movant has the burden of showing that he is entitled to relief in a § 2255 motion," and "in this context the movant cannot meet that burden unless he proves that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence." *Id*. at 1272–73. Less than a week later, a different panel of the Eleventh Circuit opined, in its own dicta, that *In re Moore* "seems quite wrong" because it required courts to "ignore" this Court's precedents in *Descamps* and *Mathis*, "except in the rare instances where the sentencing judge thought to make clear that she relied on the residual clause." *Chance*, 831 F.3d at 1339-40. The panel opined that "the required showing is simply that [the statute] may no longer authorize his sentence as that statute stands after *Johnson*," fearing that the alternative would allow *Johnson* relief to arbitrarily turn on whether the sentencing judge had made a "chance remark." *Id*. at 1340–41.

shows that he could not possibly be properly sentenced under any other clause of the "violent felony" definition. *Id*. at 1229-30. The dissent emphasized that under its rule, movants would still have to prove that they were more likely than not sentenced under the residual clause, but movants would be able to satisfy that burden by establishing that, if sentenced today, they could not be sentenced under the elements or enumerated offenses clauses. *Id*.

The First Circuit, again over dissent, adopted that same harsh approach in *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018), *cert denied sub nom*, *Casey v. United States*, 138 S. Ct. 2678 (2018). Expressly agreeing with *Beeman*, the court "h[e]ld that to successfully advance a *Johnson II* claim on collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause." *Id*. at 240, 243. The court rejected the argument that a defendant may carry this burden by relying upon post-sentencing case law to show that his predicate never properly qualified under the elements or enumerated offenses clauses (and thus must have qualified under the residual clause). *Id*. at 243. The court acknowledged that in doing so it was choosing sides in a growing rift between the circuits. *Id*. at 242 ("Our view is different from those taken in *Geozos* [and] *Winston*").

The Tenth Circuit adopted essentially the same approach in *United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017). Under that approach, a movant faced with a silent record must show that his prior convictions would not have been captured by the elements or enumerated crimes clauses under "the relevant

background legal environment" at the time of his sentencing. *Id.* That inquiry requires district courts to study 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. In doing so, the court of appeals effectively placed the burden of proof on the movant to show that the sentencing court relied only on the residual clause. Because the movant could not refute the district court's finding to the contrary, the court of appeals affirmed the denial of his § 2255 motion. *Id.* at 1129–30. In subsequent cases, the Tenth Circuit more formally adopted *Beeman*'s approach to the burden of proof. *See United States v. Driscoll*, 892 F.3d 1127, 1135 & n.5 (10th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018).

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 Eighth Circuit concluded that courts should consider "the relevant background legal environment at the time of . . . sentencing" to ascertain whether the movant was sentenced under the residual clause. *Id.* at 1015 (citing to *Snyder*, 871 F.3d at 1129).

While it has not expressly decided the issue, in dicta the Fifth Circuit has also indicated its agreement with *Beeman*. 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). 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 offenses clause. *Id*. at 725-26.

In dicta, the court endorsed the "more likely than not" standard used by the Eleventh 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.

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 support a second or successive § 2255 motion.

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 or ambiguous 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 States*, 898 F.3d 680, 688-89 (6th Cir. 2018). The *Raines* 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." *Id*. 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. Edwards, 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 693.7 "AEDPA makes it hard enough for habeas petitioners unquestionably serving illegal sentences to obtain relief. We should not make it harder." *Id*.

Including this split result from the Sixth Circuit, at least nine circuits have chosen sides in this debate. This widespread conflict, often staked out over vibrant dissent, demonstrates just how pronounced the conflict has become. Indeed, it is clear that the federal circuits grow more fractured by the day on this issue. Meanwhile, at least a dozen (and counting) certiorari petitions have brought the question to this Court's doorstep, and several of those petitions remain pending.[5]

II. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT TO RESOLVE THE ISSUE.

Mr. Edwards' 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. 3a-4a. What is more, if this Court rejects the *Beeman* approach, then Mr. Edwards may gain *Johnson* relief from his sentence because his predicate conviction for Florida first degree arson likely no longer counts under the ACCA. Mr. Edwards demonstrated below that Florida first degree arson is likely indivisible under this Court's precedent. Specifically, that the statute's mens rea element can be satisfied when the offense is committed "willfully and unlawfully, or while in the commission of any felony." *See Mathis,* 136 S.Ct. at 2249 (statute is

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[5] A collection of petitions pending before this Court present variations on this very question, including: *Prutting v. United States*, No. 18-5398; *Washington v. United States*, No. 18-5594; *Wyatt v. United States*, No. 18-6013; *Jackson v. United States*, 18-6096; *Beeman v. United States*, 18-6385; *Upshaw v. United States*, No. 18-6760; *Galbreath v. United States*, No. 18-6767; *Harris v. United States*, No. 18-6936; *Licon v. United States*, No. 18-6952; *Smith v. United States*, No. 18-6989; *Hernandez v. United States*, No. 18-7086. The Court has also denied petitions on this topic, including, for example: *Couchman v. United States*, No 17-8480 (cert. denied Oct. 1, 2018); *Perez v. United States*, No. 18-5217 (cert. denied Oct. 9, 2018); and *King v. United States*, No. 17-8280 (cert. denied Oct. 1, 2018).

indivisible where it merely "enumerates various factual means of committing a single element") (citing *Schad v. Arizona*, 501 U.S. 624, 636 (1991) (holding that Arizona's first degree murder statute covering both premeditated murder and killing in the course of a felony set out merely two means by which the mens rea element could be satisfied, and thus did not require jury unanimity as to the means).

Indeed, the peculiar folly of *Beeman*'s "historical fact" framework, and its requirement of affirmative proof of sole reliance on the residual clause, is particularly evident in cases like this. Mr. Edwards' federal sentence was imposed in 2014—after this Court's decision in *Descamps* but before *Mathis*. Put another way, the sentencing court's assessment was issued midway through this Court's line of cases clarifying the application of the categorical/modified categorical approach. It may well be that a sentence sandwiched in this way between *Descamps* and *Mathis* was decided with a vague understanding that enumerated offenses clause might not apply, but with little need to analyze it further because the broadly-applicable residual clause still made the issue moot. In light of these circumstances, Mr. Edwards' case provides this Court with an ideal vehicle for answering the question presented.

III. THE ELEVENTH CIRCUIT'S APPROACH IS WRONG.

Winston, *Geozos*, *Peppers*, and the *Beeman* dissent convincingly explain why the position adopted in *Beeman* is unworkable and unfair. First, the *Beeman* standard disregards how ACCA sentencings are actually conducted. District courts

need not, and routinely do not, disclose which clause or clauses they rely on when applying the ACCA. *Chance*, 831 F.3d at 1340 ("Nothing in the law requires a [court] to specify which clause. . . it relied upon in imposing a sentence."). Indeed, before *Johnson*, with the broad and amorphous residual clause's wide safety net firmly in place, judges and litigants had especially 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. The *Beeman* standard, in failing to account for this reality, effectively "penalize[s] 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." *Winston*, 850 F.3d at 682. Applying *Beeman* will lead to arbitrary results in individual cases and "selective application" of *Johnson*'s constitutional holding. *Id.* (citing *Chance*, 831 F.3d at 1341).

Second, by focusing solely on "historical facts" without considering intervening Supreme Court precedent, the *Beeman* standard deprives movants in silent-record cases of the only means they may have to prove they were sentenced under the residual clause. In declining to consider intervening Supreme Court precedent—especially cases like *Mathis*, which clarified what the "violent felony" definition always required—*Beeman* incorrectly characterized how movants raising *Johnson* claims were attempting to satisfy their burdens. As the *Beeman* dissent

noted, there is a difference between raising a *Descamps* (or *Mathis*) claim and relying on *Descamps* to establish that you must have been sentenced under the residual clause. 871 F.3d at 1226 (William, J., dissenting) ("The majority conflates Beeman's argument that he could not have been sentenced under the elements clause—made in the context of establishing his *Samuel Johnson* claim—with the argument that he was improperly sentenced under the elements clause—which would constitute an untimely *Descamps* claim."). Indeed, the Eleventh Circuit's reliance on the "relevant background legal environment" is directly at odds with this Court's own pronouncements that neither *Descamps* nor *Mathis* were intended to break new ground. *See Descamps*, 570 U.S. at 260 ("Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case"); *Mathis*, 136 S.Ct. at 2257 ("Our precedents make this a straightforward case. For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements"). What is more, this Court instructs that "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." *Roadway Express*, 511 U.S. at 312-13 (emphasis added). Declining to apply changes in the law would "not only 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 (Williams, J., dissenting).

Moreover, ignoring *Descamps* and *Mathis* in favor of "historical fact" effectively treats movants differently based on arbitrary factors. For example,

movants who have identical prior convictions will be treated differently based solely on when (or where) they were sentenced. *See Chance*, 831 F.3d at 1340 (noting the unfairness of ignoring intervening decisions of the Supreme Court in favor of "a foray into a stale record").

The Eleventh Circuit's approach in *Beeman* unjustly and unlawfully restricts the retroactive application of this Court's decision in *Johnson* and ensures that numerous defendants like Mr. Edwards will continue serving unconstitutional sentences.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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