No. _____

In the Supreme Court of the United States

EDDIE RAY WIESE, JR., *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that under Rule 29.3, Supreme Court Rules, he served the within Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari on Counsel for the United States, and for other parties required to be served, by sending a copy of each via FedEx to their post office addresses on December 26, 2018:

The Honorable Noel Francisco
Solicitor General of the United States
U.S. Department of Justice
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Counsel further certifies that all parties required to be served have been served.

s/ Bradford W. Bogan
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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Eddie Ray Wiese, Jr., by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(7), respectfully moves this Honorable Court for leave to proceed *in forma pauperis*, and for leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully submitted.

s/ Bradford W. Bogan
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QUESTION PRESENTED FOR REVIEW

When a federal prisoner demonstrates that the Armed Career Criminal Act'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 relied on the residual clause, does he satisfy the requirements for a successive motion to vacate under 28 U.S.C. § 2255(h)(2)?

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

Petitioner, Eddie Ray Wiese, Jr. asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on July 23, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The published opinion of the Fifth Circuit, *United States v. Wiese*, 896 F.3d 720 (2018), is reproduced at Pet. App. 1a–7a. The Fifth Circuit's order denying panel rehearing is reproduced at Pet. App. 8a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit entered its judgment on July 23, 2018. Wiese timely petitioned for panel rehearing on September 6, 2018. The panel denied the petition on September 24, 2018. This petition is filed within 90 days after the denial of rehearing. *See* Sup. Ct. R. 13.1, 13.3, 30.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

These statutes are reproduced at Pet. App. 9a–15a:

- 18 U.S.C. § 922(g)(1)
- 18 U.S.C. § 924(a)(2)
- 18 U.S.C. § 924(e) (Armed Career Criminal Act)
- 28 U.S.C. § 2244
- 28 U.S.C. § 2255

STATEMENT

A. Statutory framework.

The Armed Career Criminal Act (ACCA) increases the penalties for certain felons who unlawfully possess firearms. The maximum penalty is generally 10 years' imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2). But if the defendant has at least three prior convictions for a "violent felony," a "serious drug offense," or both, the ACCA increases the penalty to a minimum of 15 years in prison and a maximum of life. 18 U.S.C. § 924(e)(1). Also, the maximum term of supervised release increases from three years to five years. *See* 18 U.S.C. §§ 3559(a)(1), (3); 3583(b)(1), (2). A violent felony is "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the force-element clause), "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-offenses clause), "or otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B).

In *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015), this Court held that the residual clause is unconstitutionally vague, and that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." In *Welch v. United States*, 136

S. Ct. 1257, 1268 (2016), the Court made that rule retroactive to cases on collateral review.

These decisions opened the door for prisoners to challenge their ACCA sentences under 28 U.S.C. § 2255(a) on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States … or that the sentence was in excess of the maximum authorized by law." A prisoner who wants to file a second or successive motion under § 2255 must pass through two "gates" before a court may reach the merits of his claim. *Reyes-Requena v. United States*, 243 F.3d 893, 896–99 (5th Cir. 2001).[1] First, the "motion must be certified as provided in section 2244 by a panel of

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[1] *Accord Darnell Moore v. United States*, 871 F.3d 72, 85 (1st Cir. 2017); *Massey v. United States*, 895 F.3d 248, 250–51 (2d Cir. 2018); *United States v. Peppers*, 899 F.3d 211, 220 (3d Cir. 2018); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016); *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997); *Kamil Johnson v. United States*, 720 F.3d 720, 720–21 (8th Cir. 2013); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000); *United States v. Murphy*, 887 F.3d 1064, 1067–68 (10th Cir.), *cert. denied*, 139 S. Ct. 414 (2018); *In re Jasper Moore*, 830 F.3d 1268, 1271–72 (11th Cir. 2016).

the appropriate court of appeals to contain … 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); *Reyes-Requena*, 243 F.3d 897–99. To obtain this certification, a defendant must make "a 'prima facie showing' that his or her motion satisfies § 2255's requirements for a second or successive motion."[2] *Reyes-Requena*, 243 F.3d at 898–99 (holding that "prima facie" standard of 28 U.S.C. § 2244(b)(3)(C) has been incorporated into § 2255(h)). As relevant here, a defendant must "show[ ] that [his] claim *relies on* 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. § 2244(b)(2)(A) (emphasis added).

After the court of appeals authorizes the filing of a second or successive § 2255 motion, the district court must also determine whether the defendant's claim "relies on" the previously unavailable new retroactive rule. *See* 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive

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[2] A "prima facie showing" is "'simply a sufficient showing of possible merit to warrant a fuller explanation by the district court.'" *Reyes-Requena*, 243 F.3d at 899 (quoting *Bennett*, 119 F.3d at 469).

application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."); *Reyes-Requena*, 243 F.3d at 899. "The district court then is the second 'gate' through which the petitioner must pass before the merits of his or her motion is heard." *Reyes-Requena*, 243 F.3d at 899.

B. Factual and procedural background.

In 2003, Wiese pleaded guilty, with a written plea agreement, to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).[3] At sentencing, the district court found that he was subject to enhanced punishment under the ACCA and sentenced him to 235 months' imprisonment and five years' supervised release.

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[3] As part of the agreement, Wiese waived his right to challenge his sentence on direct appeal and in any postconviction proceeding, including a proceeding under § 2255. But as the court noted below, the waiver did not bar Wiese's motion "because the Government must invoke an appeal waiver to enforce it and has not done so here." *Wiese*, 896 F.3d at 722 n.1 (citing *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006)); *see also United States v. Brown*, 547 F. App'x 637, 638 n.1 (5th Cir. 2013) (per curiam).

The record is silent on the precise basis for the ACCA enhancement. Along with the indictment, the Government filed a "Sentencing Enhancement Information" that alleged Wiese was subject to the ACCA. But the Government did not show its work. That is, the information alleged that Wiese "has at least three previous convictions for a violent felony or serious drug offense, or both," and went on to list three burglaries and one drug offense, without identifying which clauses of the relevant definitions captured those offenses.[4] The plea agreement and supporting factual basis did not mention the ACCA enhancement at all. At Wiese's rearraignment, the Government read the enhancement information aloud, and Wiese pleaded true to it, with no further elaboration. The presentence report mentioned the enhancement information and said that Wiese was subject to the ACCA, but did not identify the qualifying predicates, much less what clause they fit. The district court made no findings on this point at sentencing. The only time the ACCA came up was when Wiese's counsel argued that the court should

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[4] Wiese had 13 prior burglary convictions, one of which was for attempt.

deny the Government's motion for an upward departure because "the armed career criminal motion … precludes" it.

In 2016, in the wake of *Johnson* and *Welch*, the Fifth Circuit granted Wiese authorization to file his second § 2255 motion challenging his sentence.[5] The motion claimed that Wiese's sentence was imposed in violation of the Constitution and laws of the United States, and exceeds the statutory maximum, because his prior burglary convictions no longer qualify as violent felonies under the ACCA post-*Johnson*. In particular, Wiese argued that none of his prior burglary convictions qualify as ACCA predicates because the offense lacks an element of force and because the Texas burglary statute is indivisible and encompasses some conduct that lies outside the generic definition of burglary, an enumerated violent felony.

The district court denied Wiese's § 2255 motion on the merits. The court concluded that Wiese's divisibility and overbreadth ar-

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[5] Wiese filed his first § 2255 motion in 2004. The district court denied that motion on the merits.

guments on Texas burglary were foreclosed by Fifth Circuit precedent. Resorting to the modified categorical approach and an examination of *Shepard*[6] documents submitted by the Government, the court found that ten of Wiese's burglary convictions were for the generic form of the offense and thus continue to qualify as ACCA predicates under the enumerated-offenses clause.

C. The Fifth Circuit held that the district court lacked jurisdiction to consider Wiese's claim because he did not show that the sentencing judge relied on the residual clause as the basis for the ACCA enhancement.

The Fifth Circuit granted Wiese a certificate of appealability "as to the issue whether he should receive relief on his claim that he no longer qualifies for sentencing under the ACCA." *See* Order, *United States v. Wiese*, No. 17-50445 (5th Cir. Mar. 26, 2018). By that time, the Fifth Circuit had revisited its burglary precedent in light of this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). In *United States v. Herrold*, the en banc court held that Texas burglary categorically is not "burglary" under the ACCA. *United States v. Herrold*, 883 F.3d 517, 536–37 (2018), *pe-*

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[6] *Shepard v. United States*, 544 U.S. 13 (2005).

tition for cert. filed, No. 17-1445 (U.S. Apr. 19, 2018). That is because the statute, Texas Penal Code § 30.02, is indivisible and one of the alternative means of committing the offense involves conduct that lies outside the generic definition of burglary. *Id.* at 522–23, 529, 536–37.

Despite this change in case law, the Fifth Circuit held that the district court lacked jurisdiction to reach the merits of Wiese's claim. Pet. App. 2a–3a. In the court's view, "[t]he dispositive question for jurisdictional purposes" was "whether the sentencing court relied on the residual clause in making its sentencing determination—if it did, then *Johnson* creates a jurisdictional predicate for the district court, and for our court on appeal, to reach the merits of Wiese's motion." Pet. App. 5a. Citing cases from other circuits, the court "join[ed] the majority … in concluding that we 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." Pet. App. 5a (citing *United States v. Washington*, 890 F.3d 891, 897–98 (10th Cir. 2018), *petition for cert. filed*, No. 18-5594 (Aug. 13, 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018), *cert. denied sub nom. Casey v. United States*, 138 S. Ct. 2678 (2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir.

2017), *petition for cert. filed*, No. 18-6385 (Oct. 16, 2018)). Although two of those cases—*Dimott* and *Beeman*—involved first § 2255 motions rather than successive ones, the court found them to "illuminate the successor issue." Pet. App. 5a n.5.

The court then noted a circuit split on how to determine "whether the original sentencing court relied on the residual clause"—again citing cases involving first § 2255 motions as well as successive ones. Pet. App. 5a. Some circuits apply a "more likely than not" standard. Pet. App. 5a (citing *Dimott*, 881 F.3d at 240 (first); *Potter*, 887 F.3d at 788 (successive); *Washington*, 890 F.3d at 896 (successive); *Beeman*, 871 F.3d at 1221–22 (first)). Others require only that the sentencing court "may have" relied on the residual clause. Pet. App. 5a (citing *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (successive); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (successive)).

The court suggested that "more likely than not" is the correct standard, but declined to decide that question because it believed that Wiese could not satisfy the more lenient "may have" standard. Pet. App. 5a–6a. The sentencing judge did not say "which clause was used for the sentencing enhancement," and Texas burglary categorically qualified under the enumerated offenses clause under Fifth Circuit precedent at the time of Wiese's sentencing. Pet.

App. 6a. As well, information in the presentence report supported a finding that ten of Wiese's burglaries were of the generic type. Pet. App. 6a.

Finally, and again citing cases involving first § 2255 motions and successive ones, the court rejected Wiese's reliance on *Mathis* and *Herrold* because neither decision "state[d] a new rule of constitutional law that has been made retroactive to cases on collateral review by the Supreme Court." Pet. App. 6a–7a (citing *Dimott*, 881 F.3d at 237 (first); *Massey*, 895 F.3d at 252–53 (successive); *Holt v. United States*, 843 F.3d 720, 723–24 (7th Cir. 2016) (successive); *United States v. Safford*, 707 F. App'x 571, 573 (10th Cir. 2017) (successive), *cert. denied*, 139 S. Ct. 127 (2018); *Perez v. United States*, 730 F. App'x 804, 810–11 (11th Cir.) (per curiam) (successive), *cert. denied*, 139 S. Ct. 323 (2018)).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's approach to successive § 2255 motions raising *Johnson* claims conflicts with the Third and Fourth Circuits' approaches.

The Fifth Circuit held that the district court lacked jurisdiction to reach the merits of the claim Wiese raised in his successive § 2255 motion because he did not show that his claim "relied on" the new rule of constitutional law announced in *Johnson*. That holding conflicts with the approaches of the Third and Fourth Circuits and implicates a broader split over the standards for evaluating *Johnson* claims.

As the court noted, the circuits are divided over what a prisoner must show to pass through the "relies on" gate in § 2244(b)(2)(A). Pet. App. 5a. Some say that a defendant must show that it is "more likely than not" that the sentencing court based the ACCA enhancement on the residual clause. Pet. App. 5a. Others say that a defendant need only show that his sentence "may have" rested on the residual clause. Pet. App. 5a. The court declined to pick a side in that split, reasoning that Wiese could not satisfy even the may-have standard, given that Fifth Circuit law at the time of his sentence said that Texas burglary under § 30.02(a)(1) of the Penal Code qualified as generic "burglary" under the ACCA's enumerated-offenses clause. Pet. App. 5a–6a. That is incorrect. Under the

may-have approach applied by the Fourth Circuit in *United States v. Winston*, 850 F.3d 677 (2017), and the Third Circuit in *United States v. Peppers*, 899 F.3d 211 (2018)—Wiese not only could show that his claim relies on *Johnson*, but he would prevail on the merits.

Wiese and Winston were in exactly the same posture. Under circuit precedent when both men were sentenced—Wiese in 2003, Pet. App. 3a, Winston in 2002, 850 F.3d at 679—the prior convictions now at issue qualified as ACCA violent felonies under one of the other two clauses. Wiese's Texas burglaries qualified as generic "burglary" under the enumerated-offense clause, Pet. App. 6a, and Winston's Virginia common-law robbery qualified under the force-element clause, 850 F.3d at 683 (citing *United States v. Presley*, 52 F.3d 64, 69 (4th Cir. 1995), "in which we held over twenty years ago that Virginia common law robbery qualifies as a violent felony under the ACCA's force clause"). Both men were sentenced under the ACCA. Pet. App. 3a; 850 F.3d at 680. Wiese's sentencing judge did not say which clause of the ACCA's violent felony definition captured his burglaries, Pet. App. 6a, and Winston's sentencing judge did not say which clause captured his robbery, 850 F.3d at 682. Both men pursued successive § 2255 motions challenging the

constitutionality of their ACCA sentences in the wake of *Johnson* and *Welch v. United States*, 136 S. Ct. 1257 (2016).

Winston prevailed. The Fourth Circuit held that, when a defendant's sentence "*may have been* predicated" on the residual clause, he has shown that his claim "relies on" the new rule recognized in *Johnson*, "regardless of any non-essential conclusions [the district] court may or may not have articulated on the record in determining [his] sentence." 850 F.3d at 682 (emphasis added). Winston's sentence implicated the residual clause because intervening Supreme Court case law had undermined the Fourth Circuit's precedent on Virginia robbery and the force-element clause. *Id.* at 682 & n.4. For that reason, and because the record was silent on the precise grounds for the ACCA enhancement, Winston showed that his claim relied on *Johnson* and he passed through the § 2244(b)(2)(A) gate. *Id.* Under current law, Winston's robbery conviction no longer qualifies as an ACCA predicate. *Id.* at 682–85. Thus, he was entitled to pursue his claim. *Id.* at 686.

As Winston prevailed, so would Wiese. In fact, Wiese would do better than Winston. Winston had another prior conviction that could potentially support the ACCA enhancement post-*Johnson*, so the Fourth Circuit remanded his case to the district court to resolve that question. *Id.* at 686. Not so with Wiese. His sentence

rises or falls on his prior burglaries. And under *Winston*, Wiese wins. The sentencing court did not say which ACCA violent felony clause supported Wiese's enhancement, Pet. App. 6a, and under current law Wiese's burglaries no longer qualify as ACCA predicates. *See United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), *petition for cert. filed*, No. 17-1445 (U.S. Apr. 18, 2018). Thus, like Winston, Wiese passes through the § 2244(b)(2)(A) relies-on gate. And because Wiese no longer qualifies for the ACCA enhancement absent those burglaries, he is entitled to relief on the merits.

So too under the Third Circuit's decision in *Peppers*, which agreed with the Fourth Circuit's approach in *Winston* and held that, "when [a defendant] demonstrates that his sentence *may* be unconstitutional in light of the new rule of constitutional law[,]" he has satisfied the § 2244(b)(2)(A) relies-on gatekeeping requirement. 899 F.3d at 223. Peppers himself carried that burden by showing that he was sentenced under the ACCA "because the district court and the parties believed he had at least three prior convictions qualifying as violent felonies under that statute[,]" and the district court "did not specify the clauses under which those prior convictions qualified as violent felonies." *Id.* at 224. Moving on to the merits of Pepper's claim, and applying current law, the Third

Circuit held that at least one of his prior convictions no longer qualifies as an ACCA predicate. *Id.* at 227–34.

Under the may-have-been standard as applied by the Third and Fourth Circuits, Wiese's claim not only "relies on" *Johnson*'s new rule, he is entitled to relief on the merits because, under current law, his burglaries no longer qualify as ACCA predicates and, without them, he no longer qualifies as an armed career criminal. Among the circuits' approaches to this question, the Third and Fourth Circuits' approach in *Peppers* and *Winston* are the most faithful to the statutory text.

Decisions from other circuits requiring a defendant to show that it is more likely than not that the sentencing court relied on the residual clause, and limiting the inquiry to the legal landscape at the time of sentencing, are untethered from the text of the applicable statutes. Nothing in § 2244 or § 2255 suggests, much less compels, a conclusion that a defendant must show that he was sentenced under the residual clause to have his *Johnson* claim considered on the merits. All the statutes require is that a defendant's claim "relies on" the retroactive new rule under which he claims relief. *See* 28 U.S.C. §§ 2244(b), 2255(h)(2).

Even if the more-likely-than-not approach is correct, Wiese should still prevail. As the dissent in *Beeman* argued, "In the case

of *Johnson*, the plain language of the decision makes clear that relief under the holding is not predicated upon a specific finding at sentencing, but rather the absence of a constitutional basis for the sentence imposed." 871 F.3d at 1229 n.5 (Williams, J., dissenting) (citing and quoting *Welch*, 136 S. Ct. at 1265: "*Johnson* establishes, in other words, that 'even the use of impeccable factfinding procedures could not legitimate' a sentence based on that clause.").Thus,

> [i]n a case like this, where a movant attempts to satisfy the first prong of the *Johnson* inquiry through circumstantial evidence by demonstrating that he could not have been properly sentenced under any other portion of the statute, the first and second prongs for success on the merits coalesce into a single inquiry. … [A defendant's] showing that he *could not* have been convicted under the elements clause of the ACCA is therefore proof of both requirements for success on the merits of a *Johnson* claim: first, that he was sentenced under the residual clause, and second, that his predicate offenses could not qualify under the ACCA absent that provision.

Id. at 1230.

The circuit split over these questions is mature and intractable, and affects many prisoners who have raised *Johnson* claims in successive § 2255 motions. The Court should resolve it.

CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted.

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Attorney for Defendant-Appellant

DATED: December 26, 2018

APPENDIX

UNITED STATES of America, Plaintiff-Appellee

v.

Eddie Ray WIESE, Jr., also known as Eddie Ray Weise, Jr., Defendant-Appellant

No. 17-50445

United States Court of Appeals, Fifth Circuit.

FILED July 23, 2018

REVISED August 14, 2018

Background: Defendant filed successive motion to vacate sentence, alleging that at sentencing for being a felon in possession of firearm, he should not have received an enhanced sentence under Armed Career Criminal Act (ACCA), in light of Supreme Court's decision in *Johnson v. United States* that the definition of violent felony in the ACCA was unconstitutionally vague under due process principles. The United States District Court for the Western District of Texas, Robert L. Pitman, J., denied the motion. Defendant appealed.

Holdings: The Court of Appeals, Haynes, Circuit Judge, held that:

(1) as a matter of first impression, to determine whether jurisdictional bar to successive motion can be avoided because the claim is based on *Johnson v. United States*, court must look to law at time of sentencing to determine whether sentence was imposed under residual clause of the ACCA's definition of violent felony, and

(2) defendant did not show that his sentence potentially was imposed under the ACCA's residual clause.

Judgment vacated; motion dismissed.

1. Criminal Law ⚿1434

In absence of Government's invocation of appeal waiver and enforcement of appeal waiver, defendant's plea agreement, in which he voluntarily and knowingly waived his right to contest his sentence in a post-conviction proceeding, did not preclude him from bringing a motion to vacate sentence, alleging that his sentence for being a felon in possession of firearm should not have been enhanced under Armed Career Criminal Act (ACCA). 18 U.S.C.A. §§ 922(g)(1), 924(a)(2), (e)(2)(B)(ii); 28 U.S.C.A. § 2255.

2. Criminal Law ⚿1026.10(1)

The Government must invoke an appeal waiver, to enforce it.

3. Criminal Law ⚿1139, 1158.36

District court's ultimate decision whether to grant a second or successive motion to vacate sentence is reviewed de novo as a question of law, and factual findings are reviewed for clear error. 28 U.S.C.A. §§ 2244(b), 2255(h).

4. Criminal Law ⚿1668(3)

To determine whether defendant can avoid jurisdictional bar to successive motion to vacate sentence because defendant's sentence was imposed under residual clause in definition of violent felony in Armed Career Criminal Act (ACCA), which clause was found unconstitutionally vague in new and retroactive constitutional rule of law announced by Supreme Court in *Johnson v. United States*, the court must look to the law at the time of sentencing to determine whether the sentence was imposed under the definition's enumerated offenses clause or the residual clause. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(B)(ii); 28 U.S.C.A. §§ 2244(b)(2)(A), (b)(4), 2255(h)(2).

5. Criminal Law ⚿1668(3)

Assuming that the "may have" standard was appropriate standard when determining whether defendant could avoid jurisdictional bar to successive motion to vacate sentence, defendant did not show that sentencing court may have relied on

residual clause in definition of violent felony in Armed Career Criminal Act (ACCA), which clause was found unconstitutionally vague in new and retroactive constitutional rule of law announced by Supreme Court in *Johnson v. United States*; at time of federal conviction, all of the statute of conviction for defendant's prior Texas burglary convictions had been considered generic burglary, so absolutely nothing put residual clause on sentencing court's radar, and presentence report (PSR) and other documents before sentencing court clearly indicated that sentencing judge would have relied on enumerated offenses clause. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(B)(ii); 28 U.S.C.A. §§ 2244(b)(2)(A), (b)(4), 2255(h)(2); Tex. Penal Code Ann. § 30.02(a).

6. Criminal Law ⚿1668(3)

To determine whether defendant can avoid jurisdictional bar to successive motion to vacate sentence because defendant's sentence potentially was imposed under residual clause in definition of violent felony in Armed Career Criminal Act (ACCA), which clause was found unconstitutionally vague in new and retroactive constitutional rule of law announced by Supreme Court in *Johnson v. United States*, the court may look to: (1) the sentencing record for direct evidence of the sentence, and (2) the relevant background legal environment that existed at time of defendant's sentencing and the presentence report (PSR) and other relevant materials before the sentencing court. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(B)(ii); 28 U.S.C.A. §§ 2244(b)(2)(A), (b)(4), 2255(h)(2).

7. Criminal Law ⚿1668(3)

Supreme Court's decision in *Mathis v. U.S.*, 136 S.Ct. 2243, addressing when a prior conviction qualified as the generic form of a predicate violent felony offense enumerated in the Armed Career Criminal Act (ACCA), did not state a new rule of constitutional law that the Supreme Court has made retroactive to cases on collateral review, for purposes of avoiding jurisdictional bar to successive motion to vacate sentence. 28 U.S.C.A. §§ 2244(b)(2)(A), 2255(h)(2).

8. Constitutional Law ⚿4729
Sentencing and Punishment ⚿1210

Supreme Court's decision in *Johnson v. United States*, that the definition of violent felony in the Armed Career Criminal Act (ACCA) is unconstitutionally vague under due process principles, applies only to the definition's residual clause, and not to the definition's enumerated offenses clause. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(B)(ii).

Appeal from the United States District Court for the Western District of Texas, Robert L. Pitman, U.S. District Judge

Joseph H. Gay, Jr., Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, San Antonio, TX, Zachary Carl Richter, Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, Austin, TX, for Plaintiff-Appellee.

Bradford W. Bogan, Assistant Federal Public Defender, Maureen Scott Franco, Federal Public Defender, Federal Public Defender's Office, Western District of Texas, San Antonio, TX, for Defendant-Appellant.

Before DAVIS, HAYNES, and DUNCAN, Circuit Judges.

HAYNES, Circuit Judge:

We granted Eddie Ray Wiese, Jr. a certificate of appealability on his successive habeas corpus motion. He argues that his sentence should not have been enhanced under the Armed Career Criminal Act ("ACCA"). Because Wiese had not established a jurisdictional predicate for his successive habeas motion at the district court level, we VACATE the district

court's judgment and DISMISS Wiese's motion for lack of jurisdiction.

I. Background

[1, 2] In 2003, Wiese was charged under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) with being a felon in possession of a firearm following a 1988 Texas burglary of a habitation conviction. Wiese pleaded guilty pursuant to a written plea agreement.[1] At his rearraignment, Wiese pleaded true to the fact that he had four prior violent felony or serious drug offense convictions, subjecting him to a statutory mandatory minimum sentence of fifteen years in prison and up to five years of supervised release. His guidelines range was 188 to 235 months in prison. The district court sentenced Wiese to 235 months in prison and a five-year term of supervised release.

Wiese filed his initial habeas application in 2004, arguing that his sentence was unconstitutional under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The district court denied relief. He filed the current, second motion in June 2016, following the Supreme Court's decision in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). In *Johnson*, the Court determined that ACCA's residual clause defining a "violent felony" was unconstitutionally vague. 135 S.Ct. at 2555–57. In *Welch v. United States*, —— U.S. ——, 136 S.Ct. 1257, 1268, 194 L.Ed.2d 387 (2016), the Court held that *Johnson* retroactively applied to cases on collateral review. Wiese sought and received authorization from this court to file his second 28 U.S.C. § 2255 motion. *See* § 2255(h). In the authorization, we cautioned that it was "tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Wiese has failed to make the showing required to file such a motion." *See* 28 U.S.C. § 2244(b)(4).

The district court denied Wiese's motion. It first determined that it had jurisdiction to reach the merits. The argument forming the basis for Wiese's motion—that the Texas burglary statute was not divisible—was based on statutory interpretation following *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), a case which we had held did not apply retroactively. *See In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016) (per curiam). Nonetheless, the district court held that because *Johnson* applied retroactively, it was inconsequential that *Mathis* did not. It reasoned that Wiese could have been convicted under a non-generic form of Texas burglary, Texas Penal Code § 30.02(a)(3), which only qualified for ACCA purposes under the residual clause. *See United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (per curiam).

After finding jurisdiction, the district court denied relief based upon our decision in *United States v. Uribe* to hold that any argument that the Texas burglary statute was indivisible was foreclosed, because we held in *Uribe* that the Texas burglary statute was divisible. 838 F.3d 667 (5th Cir. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 1359, 197 L.Ed.2d 542 (2017), *overruled by United States v. Herrold*, 883 F.3d 517, 529 (5th Cir. 2018) (en banc), *pets. for cert. filed* (U.S. April 18, 2018) (No. 17-1445), *and* (U.S. May 21, 2018) (No. 17-9127). The district court looked to the *Shepard*[2] documents provided by the

1. In his plea agreement, Wiese voluntarily and knowingly waived his right to contest his sentence in a post-conviction proceeding, including under 28 U.S.C. § 2255. However, because the Government must invoke an appeal waiver to enforce it and has not done so here, Wiese's action is proper. *See United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006).

2. *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

Government to determine under which subsection of the Texas burglary statute Wiese had been convicted. The documents indicated that all of the ten burglaries submitted to the court had been committed with the intent required for generic burglary. Thus, the district court denied Wiese's § 2255 motion and further denied him a certificate of appealability, because "Wiese ha[d] failed to make a substantial showing of the denial of a constitutional right."

Wiese appealed the district court's decision and requested a certificate of appealability from this court. While his request was pending, we decided *Herrold* and held that the Texas burglary statute is indivisible, overruling *Uribe*. *Herrold*, 883 F.3d at 529, 541. We subsequently granted Wiese's certificate of appealability "as to the issue [of] whether he should receive relief on his claim that he no longer qualifies for sentencing under [ ] ACCA."

II. Discussion

[3] We must initially determine whether the district court properly reached the merits of Wiese's motion.[3] The Government argues that the district court improperly ruled on the merits of Wiese's § 2255 motion, because it lacked jurisdiction to do so. If the district court did not have jurisdiction to reach the merits, naturally, we cannot reach the merits on appeal. *See United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (per curiam) ("If the district court lacked jurisdiction, '[o]ur jurisdiction extends not to the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' " (alteration in original) (quoting *N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873, 882 (5th Cir. 1998))).

A second or successive habeas application must meet strict procedural requirements before a district court can properly reach the merits of the application. *See* §§ 2244(b), 2255(h); *Reyes-Requena v. United States*, 243 F.3d 893, 896–900 (5th Cir. 2001). There are two requirements, or "gates," which a prisoner making a second or successive habeas motion must pass to have it heard on the merits. *Reyes-Requena*, 243 F.3d at 899. First, we must grant the prisoner permission to file a second or successive motion, which requires the prisoner to make a "prima facie showing" that the motion relies on a new claim resulting from either (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) newly discovered, clear and convincing evidence that but for the error no reasonable fact finder would have found the defendant guilty. *See* §§ 2244(b)(2), (3)(A), (3)(C), 2255(h). We granted such permission here, and the Government does not contest that Wiese made a prima facie showing as to a new, retroactive rule of constitutional law based on *Johnson*.[4]

Second, the prisoner must actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence. *See* §§ 2244(b)(2), (4). If the motion does not, the district court must dismiss without reaching the merits. *See id.* We noted as much when we granted Wiese

3. We have appellate jurisdiction over the case under 28 U.S.C. § 2253, as a final order in a § 2255 proceeding on which Wiese was granted a certificate of appealability. We review a district court's ultimate decision whether to grant a second or successive habeas motion de novo as a question of law and factual findings for clear error. *See Hardemon v. Quarterman*, 516 F.3d 272, 274 (5th Cir. 2008).

4. Wiese did not argue that his motion arises from new evidence, and thus, we did not grant permission to file a second or successive habeas motion on that basis and do not look to evidentiary considerations here.

permission to file his second habeas motion, stating that the grant was "tentative in that the district court *must dismiss the § 2255 motion without reaching the merits* if it determines that Wiese has failed to make the showing required to file such a motion" (emphasis added) (citing § 2244(b)(4) and *Reyes-Requena*, 243 F.3d at 899). The Government argues that Wiese did not meet this requirement because his claim does not rely on a new, retroactive rule of constitutional law.

[4] The dispositive question for jurisdictional purposes here is whether the sentencing court relied on the residual clause in making its sentencing determination—if it did, then *Johnson* creates a jurisdictional predicate for the district court, and for our court on appeal, to reach the merits of Wiese's motion. We join the majority of our sister circuits in concluding that we 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. *See United States v. Washington*, 890 F.3d 891, 897–98 (10th Cir. 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018), *cert. denied sub nom. Casey v. United States*, (No. 17-1251) —— U.S. ——, 138 S.Ct. 2678, —— L.Ed.2d ——, 2018 WL 1243146 (U.S. June 25, 2018)); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017).

That said, the circuits are not in accord on how we decide whether the original sentencing court relied on the residual clause, and we previously have not established a standard to determine whether the sentencing court relied on the residual clause for *Johnson* purposes. *See United States v. Taylor*, 873 F.3d 476, 481 (5th Cir. 2017); *compare Washington*, 890 F.3d at 896 (applying a "more likely than not" standard and collecting cases that have determined the burden of proof), *Potter*, 887 F.3d at 788, *Dimott*, 881 F.3d at 240, *and Beeman*, 871 F.3d at 1221–22,[5] *with United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) ("We therefore hold that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in [*Johnson*]."), *and United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (articulating that the same "may have" standard applies "regardless of any non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence"). We note that the "more likely than not" standard appears to be the more appropriate standard since it comports with the general civil standard for review and with the stringent and limited approach of AEDPA to successive habeas applications.

[5] But we need not conclusively decide that here because even under the standard Wiese argues is most favorable to him—the Fourth Circuit's standard requiring a defendant to show that the sentencing court "may have" relied on the residual clause for a court to consider a collateral

5. As Wiese notes in his reply brief, *Dimott* and *Beeman* both were original habeas claims under § 2255, as opposed to second or successive applications under § 2244. *See Dimott*, 881 F.3d at 233–34; *Beeman*, 871 F.3d at 1218–19. Other courts have used some of the analysis from those cases to illuminate the successive issue. *See Washington*, 890 F.3d at 896. Moreover, as the standard to grant relief under a second or successive habeas application is even more limited than that of an original habeas application, this distinction does not aid Wiese. *Cf. Gonzalez v. Crosby*, 545 U.S. 524, 529–30, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005) (noting the restrictions placed on second or successive habeas petitions due to AEDPA).

challenge based on *Johnson*, as articulated in *Winston*, 850 F.3d at 682—Wiese has not shown that the sentencing court "may have" relied on the residual clause.

[6] In determining potential reliance on the residual clause by the sentencing court, we may look to (1) the sentencing record for direct evidence of a sentence, *Beeman*, 871 F.3d at 1224 n.4, *see also Massey v. United States*, No. 17-1676, 895 F.3d 248, 251–52, 2018 WL 3370584, at *3 (2d Cir. July 11, 2018), and (2) " 'the relevant background legal environment that existed at the time of [the defendant's] sentencing' and the [presentence report ("PSR")] and other relevant materials before the district court," *Washington*, 890 F.3d at 896 (citing *United States v. Snyder*, 871 F.3d 1122, 1128–30 (10th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 1696, 200 L.Ed.2d 956 (2018)). Here, although the sentencing judge did not make any statement as to which clause was used for the sentencing enhancement, it is not "more likely than not" that the residual clause came into play. As well, there is nothing to indicate that the sentencing judge "may have" relied on the residual clause.

In 2003, when Wiese was convicted of being a felon in possession, all of § 30.02(a) was considered generic burglary under the enumerated offenses clause of ACCA. *See United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992); *see also United States v. Stone*, 72 F. App'x 149, 150 (5th Cir. 2003) (per curiam) (citing *Silva*, 957 F.2d at 161–62).[6] That we held five years later that § 30.02(a)(3) is not generic burglary, *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (per curiam), or that we held earlier this year that § 30.02(a) is indivisible, *Herrold*, 883 F.3d at 529, is of no consequence to determining the mindset of a sentencing judge in 2003. Indeed, *Herrold*'s state law analysis that undergirded the divisibility determination was largely based upon a Texas Court of Appeals case decided five years after the sentencing in this case. *See Herrold*, 883 F.3d at 523, 525 (citing *Martinez v. State*, 269 S.W.3d 777 (Tex. App.—Austin 2008, no pet.)). Thus, at the time of sentencing, there was absolutely nothing to put the residual clause on the sentencing court's radar in this case.

What is more, the PSR and other documents before the sentencing court clearly indicate that the sentencing judge would have relied on the enumerated offenses clause in sentencing Wiese. The PSR identifies "Burglary of a Habitation" as the offense which led to Wiese's sentence enhancement, and the charges against Wiese in all ten instances for which the Government provided *Shepard* documents reflect that he was convicted with the requisite intent under Texas Penal Code § 30.02(a)(1). We have never held that subsection (a)(1), alone, does not constitute generic burglary; *Herrold* declined to reach that issue. *Herrold*, 883 F.3d at 541. Thus, the actual charges that Wiese was convicted of did not present a situation where the residual clause would have, in any way, been considered as a basis for ACCA sentencing enhancement.

[7, 8] Neither *Mathis* nor *Herrold* can save Wiese's motion. *Mathis* did not state a new rule of constitutional law that has been made retroactive to cases on collateral review by the Supreme Court, *In re Lott*, 838 F.3d at 523, and neither did *Herrold*, a decision of this court. To the extent that Wiese attempts to use *Mathis* and *Herrold* to argue that, in light of *Johnson*, convictions under the enumerated offenses clause must also be reconsid-

6. Although *Stone* is not "controlling precedent," it "may be [cited as] persuasive authority." *Ballard v. Burton,* 444 F.3d 391, 401 n.7 (5th Cir. 2006) (citing 5th Cir. R. 47.5.4).

ered, numerous circuit courts have expressly rejected that contention. *See Perez v. United States*, No. 16-17751, 730 F. App'x 804, 810–11, 2018 WL 1750555, at *5 (11th Cir. Apr. 12, 2018) (per curiam), *pet. for cert. filed* (U.S. Jul. 10, 2018) (No. 18-5217); *Dimott*, 881 F.3d at 237; *United States v. Safford*, 707 F. App'x 571, 573 (10th Cir. 2017) ("What Defendant is attempting is to leverage the irrelevant *Johnson* decision to enable him to apply *Mathis* retroactively. We can admire the effort, but we cannot permit such a circumvention of habeas law."), *pet. for cert. filed* (U.S. May 25, 2018) (No. 17-9170); *Holt v. United States*, 843 F.3d 720, 723–24 (7th Cir. 2016); *cf. Massey*, 895 F.3d at 252–53, 2018 WL 3370584, at *4 (analogizing to *Dimott* to hold that similarly bootstrapping *Curtis Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), to *Johnson* to support a successive habeas motion "cannot be right" (quoting *Dimott*, 881 F.3d at 238)). Although we have not addressed this precise argument before today, we have implicitly rejected the contention as well. *See In re Lott*, 838 F.3d at 522–23 (rejecting the contentions that (1) *Johnson* applied to a sentencing enhancement based on the enumerated offenses clause, and (2) *Mathis* could apply to set forth a new, retroactive rule of constitutional law). We expressly reject it here. *Johnson* only applied to the residual clause and cannot be used to attack sentences under the enumerated offenses clause. If the district court did not rely on the residual clause, *Johnson* cannot be a jurisdictional predicate, regardless of subsequent changes in the law, if they are not new, retroactive rules of constitutional law by the Supreme Court.

In sum, Wiese has not established that the sentencing court "more likely than not" relied upon the residual clause. Even if we apply the less demanding "may have relied" standard, there is no evidence that the sentencing court "may have" relied on the residual clause in sentencing Wiese. Merely a theoretical possibility cannot satisfy this standard. *Cf. United States v. Jeffries*, 822 F.3d 192, 193–94 (5th Cir. 2016) (holding that even if *Johnson* applied to the residual clause of United States Sentencing Guidelines ("U.S.S.G.") § 4B1.2, a defendant sentenced as a career offender under U.S.S.G. § 4B1.1 would not have an arguable claim for relief because his crime was a specifically enumerated crime of violence in the Application Note), *cert. denied*, —— U.S. ——, 137 S.Ct. 1328, 197 L.Ed.2d 524 (2017). Therefore, the district court erred in reaching the merits of Wiese's motion, and we likewise lack jurisdiction to do so.

III. Conclusion

Because *Johnson* is not a jurisdictional predicate for Wiese's § 2255 motion, the district court did not have jurisdiction to reach the merits of the motion. Consequently, we VACATE the district court's judgment and DISMISS Wiese's § 2255 motion for lack of jurisdiction.

UNITED STATES of America, Plaintiff-Appellee

v.

Jose Carmen Solis PONCE, also known as Jose Carmen Solis-Ponce, also known as Igancio Solis, also known as Jose Ponce Solis, also known as Jose Carmen Ponce Solis, also known as Jose Carmen Solis, also known as Jose S. Carmen, also known as Jose C. Solis, also known as Jose C. Ponce, Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50445

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

EDDIE RAY WIESE, JR., also known as Eddie Ray Weise, Jr.,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

Before DAVIS, HAYNES, and DUNCAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied.

ENTERED FOR THE COURT: 9-21-2018

/s/ Catharina Haynes

UNITED STATES CIRCUIT JUDGE

18 U.S.C. § 922(g)(1)

It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2)

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)

(1) 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C.

802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

28 U.S.C. § 2244—Finality of determination.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(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; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(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.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals

has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2255—Federal custody; remedies on motion attacking sentence.

(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.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(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.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(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.