No. _____

IN THE

Supreme Court of the United States

_____

EDWARD BRUNO GARCIA,
***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*, 135 S. Ct. 2551 (2015) (*Johnson*), this Court declared unconstitutional the residual clause of the Armed Career Criminal Act (ACCA). Thereafter, Mr. Garcia filed a 28 U.S.C. § 2255 motion challenging the enhanced sentence he received under the ACCA. The lower courts denied relief because Mr. Garcia failed to show, more likely than not, that the use of the residual clause led to the sentence enhancement.

The question presented here is whether a § 2255 movant raising a *Johnson* claim can satisfy his burden of proof by showing his ACCA sentence "may have" been based on the residual clause, as the Third, Fourth and Ninth Circuits hold, or whether movant must show that it was "more likely than not" his sentence was based on the residual clause, as the First, Sixth, Eighth, Tenth, and Eleventh Circuits hold.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Edward Bruno Garcia, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion is not published but may be found in the attached appendix, Pet. App. 1a-3a, and at *Garcia v. United States*, 739 F. App'x 601 (11th Cir. 2018).

JURISDICTION

The Eleventh Circuit issued its opinion on October 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U. S. Const. amend. V.

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), provides, in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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 . . . .
>
> (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 . . . .

18 U.S.C. § 924(e).

STATEMENT OF THE CASE

1. In 2006, Mr. Garcia pled guilty to conspiracy to possess with intent to distribute 500 grams or more of cocaine and a quantity of MDMA (Count One), and possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§

922(g)(1) and 924(e) (Count Three). Crim. Doc. 17.[1]

Count Three of the indictment listed 20 prior convictions for Mr. Garcia. Crim. Doc. 17 at 2-5. Most of the convictions stemmed from multiple charges in two separate cases. *Id*. His convictions included burglary of a structure, carrying a concealed firearm, being a felon in possession of a firearm, simple possession of heroin, and simple possession of a controlled substance. At the change of plea hearing, the government relied upon the felony convictions referred to on pages two to five of the indictment as the basis for the enhanced penalties Mr. Garcia faced. Crim. Doc. 94 at 31. Mr. Garcia acknowledged that the indictment accurately reflected his prior convictions. *Id*. at 32. He also agreed with the magistrate judge that "the underlying acts for which [he was] charged and convicted occurred on at least three separate occasions." *Id*. The "underlying acts" were not specified, so it is unclear whether the "three separate occasions" he was referring to included the burglary of a structure, carrying a concealed firearm, possession of a firearm, possession of heroin, possession of a controlled substance convictions, or some other prior convictions.

The Presentence Investigation Report ("PSR"), prepared prior to the district

[1] References to Mr. Garcia's 28 U.S.C. § 2255 proceedings (Middle District of Florida case number 8:16-cv-1620-T-30TGW) are cited as "Civ. Doc." References to Mr. Garcia's underlying criminal proceedings (Middle District of Florida case number 8:06-cr-111-T-30TGW) are cited as "Crim. Doc."

court sentencing proceeding, recommended that Mr. Garcia be subject to an enhanced sentence as both an armed career criminal and a career offender. PSR ¶ 48. The PSR does not list the prior convictions used to support the ACCA enhancement, but it described the convictions used to establish the career offender enhancement: "[T]he defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense. These offenses consist of convictions for felony controlled substance offenses on April 10, 1995 (94-CF-9859); and September 16, 1997 (96-CF-7437 and CRC96-15940CFAWS)." PSR ¶ 48.

Relevant to the instant case, Mr. Garcia's criminal history at the time of sentencing included the following prior Florida convictions:

PSR ¶	**Description**	**Date of Offense**	**Hillsborough County Case No.**
¶ 54	Burglary of a Structure	Feb. 1, 1994	94-CF-1406
¶ 55	Carrying a Concealed Firearm	May 19, 1994	94-CF-6517
¶ 56	Possession of Cocaine[2]	August 1, 1994	94-CF-9859

[2] The district court mistakenly believed this conviction was for possession of cocaine *with intent to sell/deliver*. Civ. Doc. 24 at 2. However, the conviction was merely for possession of cocaine. PSR ¶ 56. The difference is significant because possession with intent to distribute qualifies as an ACCA predicate, *see United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), while a conviction for mere possession does not. *See United States v. Hansley*, 54 F.3d 709, 718 (11th Cir. 1995) ("the definition of 'serious drug offense' excludes state convictions for simple possession"); *see also Salinas v. United States*, 547 U.S. 364 (2006)

¶ 57	RICO (Count One) Conspiracy to Commit RICO (Count Two) Conspiracy to Traffic in Cocaine (Count Three) Conspiracy to Traffic in Cannabis (Count Four) Possession of MDMA with Intent to Sell or Deliver (Count Twelve)[3]	1/1/1995 - 7/1/1996 1/1/1995 - 7/1/1996 1/1/1995 - 7/1/1996 1/1/1995 - 7/1/1996 6/26/1996	96-CF-7437
¶ 58	Trafficking in Cocaine	10/18/1996	CRC96-15940CFAWS

PSR ¶¶ 54–58.

At sentencing, there were no objections to the probation officer's application of the guidelines. Crim. Doc. 92 at 4. The district court adopted the guidelines as determined in the PSR. *Id*. at 4-5. There was no discussion by the court as to which prior convictions were used to find that Mr. Garcia qualified as an armed career criminal. The record is thus silent as to whether the district court relied upon prior

(holding that it was error to treat a conviction for simple possession as a "controlled substance offense" under the guidelines).

[3] Mr. Garcia does not challenge that his conviction for possession of MDMA with intent to sell or deliver qualifies as a "serious drug offense" under the ACCA. He contends, however, that the other offenses were not shown to have been committed on occasions different from one another, and so they should qualify as only one ACCA predicate offense. 18 U.S.C. § 924(e)(1).

convictions that constituted a "serious drug offense" or a "violent felony." If a prior violent felony conviction was relied upon, there was no discussion of whether the court found the offense(s) to qualify under the elements clause, or the enumerated felonies clause, or the residual clause. Crim. Doc. 92. The district court sentenced Mr. Garcia to concurrent terms of 200 months' imprisonment. Crim. Doc. 79.

On June 26, 2015, this Court rendered its decision in *Johnson* finding the ACCA's residual clause unconstitutional. The *Johnson* decision was made retroactive by *Welch v. United States*, 136 S. Ct. 1257 (2016). On June 17, 2016, within one year of the decision in *Johnson*, Mr. Garcia filed a counseled motion pursuant to § 2255 raising one claim, that his sentence under the ACCA's residual clause on Count Three was unconstitutional. Crim. Doc. 90; Civ. Docs. 1, 12. This was Mr. Garcia's first and only § 2255 motion.

The government opposed the motion, asserting procedural default and arguing on the merits that the record showed Mr. Garcia had committed three or more prior serious drug offenses on occasions different from one another. Civ. Doc. 16. Mr. Garcia replied that, assuming *arguendo* he had procedurally defaulted his claim, he could show cause and prejudice to excuse the procedural default. Civ. Doc. 19. at 1-5. Mr. Garcia further contended that the government's default argument:

> conflates the threshold determination that must be made here (whether his *alleged* error, if proven, establishes prejudice) with the very merits determination that the government argues should not be reached (whether Mr. Garcia's ACCA enhancement *is* erroneous). Holding that the merits of Mr. Garcia's claim should not be reached *because* his claim is meritless would be illogically circular.

Id. at 4 (citation omitted). On the merits, Mr. Garcia disputed whether the government had shown the convictions in Case No. 96-CF-7437 occurred on separate occasions. *Id*. at 5-10. He also argued that neither the RICO and conspiracy offenses in case number 96-7437 nor the drug trafficking offenses under Fla. Stat. § 893.135 were ACCA predicates. *Id*. at 11-27.

The district court denied Mr. Garcia's motion. Civ. Doc. 24. The court found that Mr. Garcia had procedurally defaulted his claim, and that he could not show his armed career criminal designation was based on convictions relying on the ACCA's residual clause. *Id*. at 3-5. The court stated that "the PSR was silent as to what convictions formed the basis of the armed career criminal enhancement," and thus Mr. Garcia could not "show that his armed career criminal designation was based on convictions relying on the now-invalid residual clause." *Id*. at 5-6. Since Mr. Garcia "cannot show that his sentence is unconstitutional under *Johnson*," he was not entitled to bring his claim. *Id*. In conclusion, the court stated that Mr. Garcia could not challenge whether he had three "serious drug offenses" "without first establishing that his armed career criminal designation resulted from reliance on the now invalidated residual clause of the 'violent felony' definition, a burden

which [movant] has not met." *Id*. at 7.

Mr. Garcia sought relief from the court's order in the form of a motion for an indicative ruling (because a notice of appeal had already been filed). Civ. Doc. 27. The motion pointed out that the court had erroneously listed a prior conviction, case number 94-CF-9859, as being for possession of cocaine with intent to sell/deliver when, in fact, the conviction had only been for possession of cocaine, which is not a serious drug offense. *Id*; *see* PSI ¶56; Civ. Doc. 24 at 2-3.

The district court denied the motion, stating that "regardless of any alleged error . . . Petitioner's ACCA enhancement was not based on the residual clause invalidated by *Johnson v. United States*, 135 S. Ct. 2551 (2015). Instead, Petitioner's ACCA enhancement was based on his conviction for serious drug offenses in cases 94-CF-009859, 96-CF-007437, and 96-CF-015940." Civ. Doc. 28.

Mr. Garcia then sought a certificate of appealability. Civ. Doc. 30. The district court granted a COA on one issue: "[W]hether Petitioner has the burden to show his armed career criminal sentence may have relied on the invalidated ACCA residual clause or whether Petitioner must show his sentence actually relied on the ACCA residual clause." Civ. Doc. 31.[4] The court noted that if "the Eleventh

[4] Mr. Garcia also sought a COA on two other issues – whether he could show cause and prejudice for his procedurally defaulted *Johnson* claim, and

Circuit disapproves of this Court's conclusion as to [movant's] burden," then Mr. Garcia would have a basis to challenge whether his previous drug convictions qualified as serious drug offenses. *Id*. at 6 n.4.

Mr. Garcia appealed, arguing that, to have his *Johnson*-based § 2255 motion considered on its merits, he need only show his armed career criminal sentence *may* have relied on the invalidated ACCA residual clause, not to show his sentence *actually* relied on the ACCA residual clause. On the same day as his initial brief was filed, the Eleventh Circuit issued its decision in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), holding that "[t]o prove a *Johnson* claim, the movant must show that – more likely than not – it was use of the residual clause that led to the sentencing court's enhancement of his sentence." *Id*. at 1221-22.

The Eleventh Circuit then applied the *Beeman* standard to affirm Mr. Garcia's sentence:

> Here, Garcia failed to carry his burden of showing that it was more likely than not that the residual clause led to his ACCA-enhanced sentence. The record shows nothing about whether the sentencing court relied on the ACCA's residual clause, and it shows that Garcia had at least three prior convictions that qualified as violent felonies or serious drug offenses.

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whether he qualified for an ACCA sentence after *Johnson*. Civ. Doc. 30 at 10-32. The court declined to issue a COA on either ground. Civ. Doc. 31 at 5-6.

REASONS FOR GRANTING THE WRIT

I. There is an entrenched circuit split over what a § 2255 movant must show in order to have a court consider his *Johnson*-based claim of relief from an ACCA enhanced sentence.

A. The Third, Fourth, and Ninth Circuits construe a silent or ambiguous record in favor of a § 2255 movant.

To potentially obtain *Johnson* relief in the Fourth Circuit, a movant need show only that his sentence "*may* have been predicated on application of the now-void residual clause, and therefore *may* be an unlawful sentence." *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (emphasis added). Under the Fourth Circuit's standard, then, a silent or ambiguous record is construed in the movant's favor.

The Ninth Circuit has reached a similar conclusion. Citing favorably to *Winston*, the Ninth Circuit has concluded "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*." *United States v. Geozos*, 870 F.3d 890, 896 & n.6 (9th Cir. 2017). The Ninth Circuit thus also construes a silent or ambiguous record in the movant's favor.

So does the Third Circuit. There, to potentially obtain *Johnson* relief "requires only that a defendant prove he might have been sentenced under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced

under that clause." *United States v. Peppers*, 899 F.3d 211, 216 (3d Cir. 2018). In other words, a movant must "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. The court, though, cautioned: "Under the rule we announce today, simply mentioning *Johnson* in a § 2255 motion is not enough. The movant must still show that it is possible he was sentenced under the now-unconstitutional residual clause of the ACCA." *Id*. at 224.

B. The First, Sixth, Eighth, Tenth, and Eleventh Circuits construe a silent or ambiguous record against a § 2255 movant.

The First Circuit, in a 2-1 decision, agreed with the Eleventh Circuit's *Beeman* majority "that to successfully advance a *Johnson* [ ] 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." *Dimott v. United States*, 881 F.3d 232, 240, 243 (1st Cir. 2018), cert. denied sub nom. *Casey v. U.S.*, 138 S. Ct. 2678 (2018). The court said this approach "makes sense" because any other rule would undercut the "presumption of finality" that is an "animating principle of AEDPA" and because "[p]etitioners . . . were certainly present at sentencing and knowledgeable about the conditions under which they were sentenced." *Id*. at 240.

In a successive § 2255 motion, the Sixth Circuit places on movant the "burden of showing that the court used the residual clause to increase his

sentence." *Potter v. United States*, 887 F.3d 785, 786 (6th Cir. 2018). But, distinguishing *Potter*, the same court has held that in a first § 2255 motion (like here), the district court can consider the motion on its merits even though the district court "did not state for the factual record what clause it had used at Raines's sentencing to treat Raines's extortionate-collection conviction as a violent felony." *Raines v. United States*, 898 F. 3d 680, 686 (6th Cir. 2018). Applying post-sentencing law, *Raines* "reverse[d] the district court's judgment denying his § 2255 motion, and remand[ed] to the district court so that Raines may be resentenced without the ACCA enhancement." *Id*. at 690.

A successive § 2255 motion was at issue in *Walker v. United States*, 900 F.3d 1012, 1013 (8th Cir. 2018). There, "[t]he original sentencing court did not specify whether the residual clause or another provision of the ACCA, such as the enumerated-offenses clause, provided the basis for Walker's ACCA enhancement." *Id*. at 1014. The Eighth Circuit held that a movant must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Id*. at 1015. The court reasoned that "a movant bears the burden of showing that he is entitled to relief under § 2255," and the "mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden and meet the strict requirements for a successive motion." *Id*.

The Tenth Circuit, in *United States v. Snyder*, affirmed the denial of a first 2255 motion in which "the district court found, as a matter of historical fact, that it did not apply the ACCA's residual clause in sentencing [movant] under the ACCA." 871 F.3d 1122, 1128 (10th Cir. 2017), *cert. denied* 138 S. Ct. 1696 (2018). The Tenth Circuit instructed lower courts, in the face of a silent sentencing record, to look to the "relevant background legal environment" at the time of sentencing to determine whether an alternative clause, as opposed to the residual clause, may have been used to enhance the sentence. And "the relevant background legal environment is, so to speak, 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. As a result, movants in the Tenth Circuit may not rely on current law to prove they were sentenced under the residual clause.

II. The decision below is wrong.

First, *Winston*, *Geozos*, and the *Beeman* dissent convincingly explain why the position adopted in *Beeman* (as well as *Dimott* and *Snyder*) is unworkable and unfair.

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. *See, e.g., In re Chance*, 831 F.3d

1335, 1340 (11th Cir. 2016) ("Nothing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence."). And to the extent a court stated which clause it was relying on, before *Johnson*, most courts simply relied on the expansive residual clause. 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, here, Mr. Garcia has satisfied his burden of proof since his ACCA sentence *may* have been based on his prior conviction for burglary or for carrying a concealed firearm. When sentenced in 2006, Mr. Garcia's convictions for burglary and carrying a concealed firearm were both considered violent felonies under the residual clause. *See United States v. Matthews*, 466 F.3d 1271, 1275-76 (11th Cir. 2006) (holding that "a Florida conviction for burglary of a structure's curtilage is a conviction for a violent crime because it 'involves conduct that presents a serious potential risk of physical injury to another'"); *United States v. Hall*, 77 F.3d 398, 401 (11th Cir. 1996) ("Carrying a concealed weapon is conduct that poses serious potential risk of physical injury and, so, falls under the definition of violent felony."). After *Johnson*, though, neither conviction qualifies as a violent felony.

See United States v. Esprit, 841 F.3d 1235, 1241 (11th Cir. 2016) ("[A]s a categorical matter, a Florida burglary conviction is not a 'violent felony' under ACCA."); *United States v. Canty*, 570 F.3d 1251, 1255 (11th Cir. 2009) ("[C]arrying a concealed weapon is not a violent felony . . . under the ACCA.").

CONCLUSION

The issue presented by this petition divides the circuits and affects scores of prisoners across the nation, including Mr. Garcia. Mr. Garcia respectfully requests that this Court grant his petition and resolve the divisions.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12266
Non-Argument Calendar

D.C. Docket Nos. 8:16-cv-01620-JSM-TGW,
8:06-cr-00111-JSM-TGW-2

EDWARD BRUNO GARCIA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(October 11, 2018)

Before ED CARNES, Chief Judge, JILL PRYOR, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Edward Bruno Garcia appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Garcia contends that the sentence enhancement he received under the Armed Career Criminal Act for knowingly possessing ammunition as a convicted felon was unconstitutional in light of the Supreme Court's decision in Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551 (2015). The district court found that Garcia failed to show that his armed career criminal designation was based on the ACCA's residual clause, which the Supreme Court in Johnson struck down as unconstitutionally vague. 135 S. Ct. at 2557. But the district court granted Garcia a certificate of appealability on the issue of "whether [he] has the burden to show [that] his armed career criminal sentence may have relied on the invalidated ACCA residual clause or whether [he] must show [that] his sentence actually relied on the ACCA residual clause."[1]

While this issue may have been debatable when the district court granted the COA, it no longer is. We have since held that a "movant must show that — more likely than not — it was use of the residual clause that led to the sentencing court's enhancement of his sentence." Beeman v. United States, 871 F.3d 1215, 1221–22

[1] We have emphasized that a COA, "whether issued by this Court or a district court, must specify what constitutional issue jurists of reason would find debatable." Spencer v. United States, 773 F.3d 1132, 1138 (11th Cir. 2014) (en banc). The COA here arguably fails to sufficiently specify the link between the sentencing enhancement question and the underlying constitutional issue: Garcia's Fifth Amendment right to due process. Regardless, because defects in a COA are not jurisdictional, and because the parties' briefs to this Court focus on that underlying constitutional issue, we will exercise our discretion to consider Garcia's claim. See id. at 1137–38.

(11th Cir. 2017). The district court applied that standard, and we must do the same. And Garcia does not argue that he can meet this standard, only that it is wrong. But "[u]nder our prior precedent rule, a panel cannot overrule a prior one's holding." United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc). Here, Garcia failed to carry his burden of showing that it was more likely than not that the residual clause led to his ACCA-enhanced sentence. The record shows nothing about whether the sentencing court relied on the ACCA's residual clause, and it shows that Garcia had at least three prior convictions that qualified as violent felonies or serious drug offenses.

AFFIRMED.