NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

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TERRY LAMELL EZELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this case is as follows:

Where (1) the sentencing record is silent or does not clearly establish if the district court relied on the Armed Career Criminal Act's residual clause, which the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), found to be constitutionally infirm on vagueness grounds, (2) the Supreme Court in *Welch v. United States*, 136 S. Ct. 1257 (2016), determined to make *Johnson* retroactive to cases on collateral review, and (3) prior to *Johnson* district courts imposing sentences routinely did not specify on which clause or clauses of the Armed Career Criminal Act (ACCA) they relied because they were not legally required to do so, do individuals asserting a claim under *Johnson* in either an initial or successive motion to vacate sentence under 28 U.S.C. § 2255 bear the burden to prove as a matter of historical fact that it is more probable than not that the sentencing court relied solely on the residual clause, or are the procedural and substantive requirements for review and relief met under 28 U.S.C. § 2255(a), 28 U.S.C. § 2255(h)(2), and 28 U.S.C. § 2244(b)(2)(A), if the ACCA enhancement *may have* been predicated on the ACCA's constitutionally infirm residual clause?

PARTIES TO THE PROCEEDING

The petitioner is Terry Lamell Ezell. He is presently incarcerated by the United States Bureau of Prisons at FCI Sheridan, located in Sheridan, Oregon. The named respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Terry Lamell Ezell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished. *See United States v. Ezell*, 2018 WL 3615883, No. 17-35685 (9th Cir. July 30, 2018). *See also* Pet. App. 3a-6a. The district court's order denying relief under 28 U.S.C. § 2255 is unpublished. Pet. App. 7a-18a.

JURISDICTION

The judgment of the court of appeals denying a panel rehearing and en banc review was entered on October 25, 2018. Pet. App. 1a. This petition is timely pursuant to Rule 13.1, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit Court of Appeals entered its memorandum decision on July 30, 2018. Pet. App. 3a-6a. The Ninth Circuit granted petitioner's motion to extend time to file the en banc petition to October 5, 2018. Pet. App. 2a. On October 2, 2018, the petitioner filed before the Ninth Circuit his petition for rehearing with suggestion for rehearing en banc. *See* Ninth Cir. Dkt. #43 (Ninth Cir. No. 17-35685). In its October 25, 2018 order, the Ninth Circuit denied Ezell's petition for rehearing with suggestion for rehearing en banc. Pet. App. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

18 U.S.C. § 924(e)(1), known as the Armed Career Criminal Act, states 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 serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned for not less than fifteen years[.]

18 U.S.C. § 924(e)(2)(B), also part of the ACCA, provides:

[T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

28 U.S.C. § 2255(a) provides:

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.

28 U.S.C. § 2255(f)(3), the statute of limitations provision, states:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(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[.]

28 U.S.C. § 2244(b)(2)(A), concerning second or successive motions, states:

(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[.]

28 U.S.C. § 2255(h)(2), addressing second or successive motions, provides:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

A. The Conviction And Sentence Under The Armed Career Criminal Act.

In a bench trial, the court found Terry Ezell guilty of one count of possession of cocaine base in the form of crack cocaine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii), and one count of being a felon-in-possession of a firearm (Armed Career Criminal), in violation of 18 U.S.C. § 922(g)(1). Pet. App. 36a.

1. The Presentence Report.

Citing 18 U.S.C. § 924(e)(2)(B), Probation set forth the definition of a "violent felony," including the language of the residual clause of the Armed Career Criminal Act (ACCA). PSR ¶42.[1] Probation concluded that Ezell qualified as an armed career criminal under the ACCA for the gun count, and that Ezell qualified as a career offender under the Sentencing Guidelines for the drug count. PSR ¶¶40-46, 172. Probation relied on the following four Washington State predicate convictions: (1) 1994 Conviction for Second Degree Assault (Count One), and First Degree Burglary (Count Two); (2) 1991 Conviction for Second Degree Assault; (3) 1987 Conviction for Second Degree Burglary; and (4) 1987 Conviction for Second Degree Burglary. PSR ¶¶43, 74, 78, 102, 106.

[1] Citation to "ER__" refers to the excerpts of record Ezell filed before the Ninth Circuit in his appeal of the denial of relief under 28 U.S.C. § 2255. Citation to "CR__" refers to the clerk's record of the proceedings before the district court in the underlying § 2255 proceedings. Citation to "PSR__" refers to Probation's presentence report. In light of the voluminous nature of the record in the multiple proceedings, Ezell's Appendix to the certiorari petition contains only select portions of the record.

Probation provided that courts may examine charging papers and jury instructions in applying the "categorical approach" and "modified categorical approach" pursuant to *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). PSR ¶¶44-45. Again invoking the language of the residual clause, Probation stated:

> A review of court documents reflect that *each incident* listed above involved conduct that included the use, attempted use, or threatened use of physical force against another person, or *presented a serious risk of physical injury to another*. Additionally, the Supreme Court's opinion in *Taylor* held that for a burglary to be a violent felony, it must have the elements of generic burglary - an unlawful or unprivileged entry, or remaining in, a building or other structure, with intent to commit a crime. The act is not limited to common-law burglaries, but include [sic] commercial burglaries. Thus, a burglary that meets the "generic" definition counts as a "violent felony."

PSR ¶45 (emphasis added).

2. The Government's Sentencing Memorandum.

In arguing that Ezell should be punished as an armed career criminal, the government quoted 18 U.S.C. § 924(e)(2)(B), defining the term "violent felony," as follows:

> any crime punishable by imprisonment for a term exceeding one year that (i) has as an element the use, attempted use, or threatened use of physical force against another person or (ii) is burglary, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that presents a serious risk of injury to another . . .*

Pet. App. 127a (emphasis added). Citing *Taylor* and *Shepard*, the government argued that Ezell qualified under the ACCA by applying the categorical approach or the modified categorical approach. Pet. App. 128a-139a. The government argued that the ACCA's residual clause applied to the same four predicate offenses cited by Probation because they involved "conduct that presents a serious risk of injury to another." Pet. App. 130a, 132a-137a. In arguing that Ezell is a "career offender," the government relied on the identically-worded residual clause in Guideline 4B1.2(a). Pet. App. 138a.

3. The Defense's Sentencing Memoranda.

Defense counsel, addressing the ACCA's residual clause, argued that under *Begay v. United States*, 128 S. Ct. 1581, 1583 (2008),[2] an offense does not constitute a "violent felony" unless the conduct involved "purposeful, violent and aggressive behavior." Pet. App. 86a-87a, 98a-99a, 103a-104a.

4. The Sentencing Hearing.

At the July 11, 2008 sentencing hearing, the government relied on the ACCA's residual clause. Pet. App. 45a, 48a-51a. Relying on *Begay v. United States*, 128 S. Ct. 1581, 1583 (2008), defense counsel argued that the burglary convictions did not fall under the residual clause. 61a-63a.

The court recognized that the two-count 1994 conviction for assault and burglary qualified as a single predicate. Pet. App. 70a. As to the 1987 burglary offenses, the court found that the Washington statute is broader than the generic offense set forth in *Taylor v. United States*, 495 U.S. 575 (1990). Pet. App. 70a-71a. Citing *United States v. Kilgore*, 7 F.3d 854, 856 (9th Cir. 1993), and applying the modified categorical approach, the court found that because the state court documents referred to common street addresses, the two 1987 burglaries offenses satisfy the federal generic definition of burglary. Pet. App. 70a-73a.

Following its reasoning for applying the ACCA enhancement, the court concluded that Ezell is a career offender under the Guidelines. Pet. App. 73a-74a. In addition, the court found that "for the reasons basically set out in the probation officer's presentence report, and the

[2] The Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2561-63 (2015), abrogated *Begay*.

government's memorandum," Ezell qualifies as an armed career criminal and career offender. Pet. App. 74a.

Recognizing that the court cannot impose a sentence below the ACCA's 15-year mandatory minimum, and that the Criminal History Category VI automatically applied, the court found the Guidelines range to be 262 to 327 months. Pet. App. 74a, 79a. The court sentenced Ezell to two concurrent 262-month terms of imprisonment, with credit for time served. Pet. App. 79a, 36a-37a. By January 24, 2019, Ezell will have been incarcerated approximately thirteen years, seven months since the time of his June 24, 2005 arrest. PSR ¶4. The Bureau of Prisons lists Ezell's release date as August 23, 2024.

B. The Direct Appeal.

In rejecting Ezell's claim that his 1987 burglary convictions were not valid ACCA predicates, the Ninth Circuit stated that Washington State's statutory definition of "building" is broader than the generic definition of burglary. Pet. App. 33a-35a. *See United States v. Ezell*, 337 F. App'x 623, 624 (9th Cir. June 15, 2009) (unpublished). However, the panel held that the presence of a street address in each information sufficed to establish that Ezell's convictions were generic burglaries of "buildings" under the ACCA. Pet. App. 34a-35a. The Supreme Court denied Ezell's certiorari petition. *Ezell v. United States*, 559 U.S. 917 (2010) (No. 08-30265).

C. Collateral Challenges.

The district court denied Ezell's first motion for relief under 28 U.S.C. § 2255. ER 291-296. *See Ezell v. United States*, USDC No. CV10-00467-RSM. The Ninth Circuit denied a certificate of appealability. Pet. App. 32a. *See Terry Lamell Ezell v. United States*, Ninth Circuit No. 11-35607. The Supreme Court denied Ezell's petition for a writ of certiorari. *See Terry Lamell Ezell v. United States*, 132 S. Ct. 1955 (2012).

The Ninth Circuit denied Ezell's first application for leave to file a second or successive § 2255 motion. Pet. App. 31a. *See Ezell v. United States*, No. 12-73464 (9th Cir. Jan. 25, 2013). Holding that *Descamps v. United States*, 570 U.S. 254 (2013), did not announce a new rule of constitutional law, the Ninth Circuit denied Ezell's second request for leave to file a successive § 2255 motion. Pet. App. 20a-30a. *See Ezell v. United States*, 778 F.3d 762, 766-66 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 256 (2015).

Ezell filed in the District of Oregon a motion for habeas corpus relief under 28 U.S.C. § 2241. *See Terry Lamell Ezell v. Thomas Short, Acting Warden FCI Sheridan*, USDC No. CV15-02063. Ezell claimed that based on the intervening Supreme Court decisions in *Descamps v. United States*, 570 U.S. 254 (2013), *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*),[3] and *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), he is actually innocent of the ACCA sentence. *See* CR 8, pp. 17-30, 35-45. This matter remains pending.

D. <u>The Ninth Circuit's Order Granting Leave To File A Second Or Successive 28 U.S.C. § 2255 Motion</u>.

On February 16, 2017, the Ninth Circuit granted Ezell's motion for leave to file a second or successive § 2255 motion. Pet. App. 19a. *See Terry Lamell Ezell v. United States*, Ninth Cir. No. 16-72054. The Ninth Circuit held that Ezell made a prima facie showing for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because the Supreme Court in *Welch v. United States*, 136 S. Ct. 1257, 1264-68 (2016), held that *Johnson II* announced a new substantive rule that has retroactive effect in cases on collateral review. Pet. App. 19a.

[3] In *Johnson v. United States*, 559 U.S. 133, 136-38, 140 (2010), cited herein as *Johnson I*, this Court held that that Florida's battery statute, which was satisfied "by any intentional physical contact, no matter how slight," does not qualify under the ACCA's force clause. This Court defined "physical force" as "violent force ... capable of causing physical pain or injury to another person." *Id.* at 140.

E. The District Court's Denial of § 2255 Relief And Grant Of A Certificate Of Appealability.

In moving for relief under 28 U.S.C. § 2255, Ezell relied on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), to challenge his sentence under the ACCA and the Guidelines. CR 1; CR 3. In light of *Beckles v. United States*, 137 S. Ct. 886 (2017), Ezell later declined to argue for relief from his career offender enhancement. CR12.

The government argued that Ezell's challenge is "academic" because even if Ezell's claim is successful, he would still face the concurrent 262-month sentence imposed for his narcotics conviction under Count 1. CR 12, p. 1. In arguing that Washington's second degree assault statute is divisible and not overbroad, the government relied on the *Shepard* documents to provide that Ezell was separately charged and convicted of committing two particular types of second degree assault: intentional assault resulting in substantial bodily harm, in violation of RCW 9A.36.021(1)(a); and, assault with a deadly weapon, in violation of RCW 9A.36.021(1)(c). CR 8, p. 35. The government asserted that even if Ezell can show the district court relied on the residual clause, any such error is harmless because Ezell cannot show that the convictions do not independently qualify as violent felonies under the ACCA's other clauses. CR 8, pp. 26-37.

In denying relief, the court noted that the government's sentencing memorandum identified four prior assault and burglary convictions which qualify as "violent felonies," and that the government relied on the ACCA's residual clause. Pet. App. 9a-10a. The court detailed that the government also relied on the ACCA's elements clause to establish that the assault convictions are "violent felonies," and the modified categorical approach to establish that the burglary convictions matched the ACCA's generic definition. Pet. App. 9a-10a.

The district court provided that at sentencing it determined Ezell's second-degree assault convictions were categorically "violent felonies" under the ACCA, and that Ezell's second-

degree burglary convictions qualified under the modified categorical approach. ER 4. The court further stated:

> While the Court made these rulings "for the reasons basically set out in the probation officer's presentence report, and the government's memorandum," *id.* at 33, the Court did not explicitly rely on the residual clause, nor did the Court make any findings about Ezell's first-degree burglary conviction, *see id.* at 29-33.

Pet. App. 10a.

The district court rejected the government's argument that because Ezell did not assert at sentencing or on direct review that the residual clause was unconstitutionally vague, Ezell's *Johnson II* claim is procedurally barred. Pet. App. 14a-16a. The court stated that Ezell can show cause and prejudice to overcome the first procedural bar cited by the government based on the court's reading of *Bousley* and *Reed*."[4] Pet. App. 16a.

The district court further provided:

> However, the Government is also correct that Mr. Ezell must still show that the ACCA's residual clause played a prejudicial role at his sentencing, and that he has failed to do. *See Simmons, supra*. Although the Court has applied the *Brecht/O'Neal* standard in prior cases where it was unclear if the Government relied on the now-unconstitutional residual clause, *see Kilgore supra*, this case is factually distinct. The record is silent on whether the Court explicitly considered the residual clause at sentencing. Although the Court agrees with Petitioner that the benefit of the doubt should accrue to the Petitioner, unlike in *Kilgore*, there is no doubt that the Court could have reached the guidelines range conclusion that it did without reliance on the now unconstitutional residual clause for the reasons stated by the Government. Mr. Ezell's actual-innocence-without-factual-innocence argument is not supported by Ninth Circuit precedence and will not serve to overcome the lack of prejudice above.[5]

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[4] *Bousley v. United States*, 523 U.S. 614 (1998); *Reed v. Ross*, 468 U.S. 1 (1984).

[5] The authority upon which the district court relied is fully cited as follows: *Simmons v. Blodgett*, 110 F.3d 39, 42 (9th Cir. 1997); *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995); and, *Kilgore v. United States*, 2016 WL 7180306, at *4-*5 (W.D. Wash. Dec. 9, 2016). Pet. App. 16a.

Pet. App. 16a-17a. The court did not expressly cite the Ninth Circuit authority allegedly foreclosing Ezell's actual-innocence-without-factual-innocence argument. The district court granted a certificate of appealability. Pet. App. 17a.

F. The Ninth Circuit Panel's Memorandum Decision Affirming The Denial Of Collateral Relief.

The Ninth Circuit panel held that there was "cause" excusing Ezell from the procedural default because at the time of Ezell's sentencing and direct appeal Supreme Court precedent foreclosed the argument that the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) was unconstitutionally vague. Pet. App. 3a-4a.

The Ninth Circuit panel held that Ezell's claim does not meet the threshold requirement under 28 U.S.C. § 2255(h)(2) because the claim does not "rely on" *Johnson v. United States*, 135 S. Ct. 2551 (2015). Pet. App. 4a-5a. The panel interpreted *United States v. Geozos*, 870 F.3d 890, 895-96 (9th Cir. 2017), to specify that if the record is unclear whether the district court relied on the residual or another clause, courts must look to whether there is any controlling law to infer that the district court relied on something other than the residual clause. Pet. App. 4a.

The panel concluded that "the record is clear" that the district court relied on the enumerated offense clause of 18 U.S.C. § 924(e)(2)(B)(ii) to find that Ezell's two Washington convictions for second-degree burglary qualified as predicate offenses under the ACCA. *See* Pet. App. 4a. Regarding the two Washington second-degree assault convictions, the panel concluded that the record is unclear regarding on which ACCA clause the sentencing court relied. *Id.* However, citing *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1088-89 (9th Cir. 2005), the panel concluded that the relevant legal background "indicates" that Ezell's conviction for intentional assault resulting in substantial bodily harm under RCW 9A.36.021(1)(a) qualified as a predicate offense under the ACCA's elements clause. Pet. App. 5a.

G. <u>The Ninth Circuit's Denial Of The Petition For Rehearing With Suggestion For Rehearing En Banc</u>.

On October 2, 2018, Ezell filed a timely petition for rehearing with suggestion for rehearing en banc. Ninth Cir. No. 17-35685, Dkt. #43. Ezell argued that denying review subverts the Supreme Court's clear directive in *Welch v. United States*, 136 S. Ct. 1257 (2016), to apply *Johnson* retroactively to cases on collateral review. On October 25, 2018, the Ninth Circuit denied the petition for rehearing with suggestion for rehearing en banc. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

A. Review Is Warranted Because In Cases Where The Record Is Silent Or Unclear Regarding On Which ACCA Clause Or Clauses The Sentencing Court Relied, The Lower Courts Have Taken Disparate Approaches In Determining If The Antiterrorism And Effective Death Penalty Act (AEDPA) Permits Review, Based On Whether The Movant's § 2255 Claim "Relies On" The Supreme Court's Decision In *Johnson*, Made Retroactive To Cases On Collateral Review In *Welch*.

In *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (*Johnson II*), the Supreme Court held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution's guarantee of due process. In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court determined to apply *Johnson II* retroactively to cases on collateral review. Rather than follow this Court's clear directive to retroactively apply *Johnson II*, the lower courts have formulated divergent and arbitrary standards to address the procedural and substantive requirements for relief under 28 U.S.C. § 2255, in cases where the district court did not clearly specify on which ACCA clause it relied.

This matter impacts thousands of cases because prior to *Johnson II*, district courts routinely failed to specify the ACCA clause or clauses upon which they relied. Indeed, the law does not require district courts to specify the ACCA clause upon which they rely.[6] Further,

[6] *See United States v. Geozos*, 870 F.3d 890, 894 n.4 (9th Cir. 2017).

because the constitutionally infirm residual clause is so broad and amorphous, courts often presumed, without comment, that the residual clause applied.

In addressing cases in which the record is silent or does not clearly establish whether the district court relied on the ACCA's residual clause, the circuits have divided into two general camps. In one camp, the circuits place the burden on the § 2255 movant to prove that it is more likely than not that the sentencing court relied solely on the ACCA's residual clause. The circuits occupying the other camp find jurisdiction to review *Johnson* claims if the district court "may have" relied on the residual clause. The phrase "split in the circuits" does not adequately describe the positions of the circuits because, as detailed below, the circuits occupying the same general camp have taken divergent and inconsistent approaches, and their positions have been questioned by compelling dissenting and concurring opinions.

1. The Third Circuit, Fourth Circuit, And Ninth Circuit Grant Review Of *Johnson* Claims If The District Court "May Have" Relied On The ACCA's Residual Clause, And Consider Post-Sentencing Law In Making Their Procedural Determinations And Decisions On The Merits.

The Fourth Circuit:

The Fourth Circuit is the first circuit to hold that AEDPA does not deny jurisdiction for review of *Johnson* claims in successive § 2255 motions merely because the sentencing court was silent or unclear regarding on which ACCA clause or clauses it relied. The Fourth Circuit held that "when an inmate's sentence *may have* been predicated on application of the now-void residual clause and, therefore, *may* be an unlawful sentence under the holding in *Johnson II*," the claim "relies on" a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A). *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (emphasis added). The Fourth Circuit had good reason to reach this holding. Explaining that nothing in the law requires a court to specify on which ACCA clause it relied, the Fourth Circuit in *Winston*

rightfully concluded that it "will not penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.*

The Fourth Circuit's conclusions in *Winston* are well-reasoned because it leads to inconsistent, inequitable, and arbitrary results to base jurisdiction on the chance that the district court uttered the phrase, "residual clause." Relying on the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288, 304 (1989), the Fourth Circuit explained that "imposing the burden on movants urged by the government in the present case would result in 'selective application' of the new rule of constitutional law announced in *Johnson II*, violating 'the principle of treating similarly situated defendants the same.'" *Winston*, 850 F.3d at 682. Further, the Fourth Circuit did not close the courthouse doors merely because the movant presented a claim which relied on the interplay between *Johnson II* and *Johnson I* (defining the scope of the force clause). *Winston*, 850 F.3d at 682 & n.4. The Fourth Circuit concluded that the movant "relied to a sufficient degree on *Johnson II* to permit" review. *Id.* at 682.

In addressing the *Johnson II* claim's merits, the Fourth Circuit considered current law, including the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*), and the application of the categorical approach this Court prescribed in *Descamps v. United States*, 133 S.Ct. 2276 (2013). *See Winston*, 850 F.3d at 683-85. The Fourth Circuit's reliance on current law is well-founded because to do otherwise would require turning a blind eye to Supreme Court precedent.

The Ninth Circuit:

In *United States v. Geozos*, 870 F.3d 890, 892-93 (9th Cir. 2017), addressing a successive § 2255 motion, the Ninth Circuit followed the path forged by the Fourth Circuit by holding that the *Johnson II* claim met the jurisdictional requirements of 28 U.S.C. § 2255(h), even though the

sentencing record is silent regarding on which ACCA clause the sentencing court relied. Like the Fourth Circuit,[7] the Ninth Circuit in *Geozos* separated the procedural or jurisdictional inquiry from the merits inquiry. The Ninth Circuit described the procedural inquiry as a "threshold question." *Geozos*, 870 F.3d at 894.

Citing *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017), the Ninth Circuit adopted the Fourth Circuit's "may have" test. *United States v. Geozos*, 870 F.3d 890, 896 & n.6 (9th Cir. 2017). The Ninth Circuit stated:

> 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 II*.

Id. at 896 (emphasis added). In reaching this holding, the Ninth Circuit applied the Supreme Court's "*Stromberg* principle," providing that the Constitution forbids conviction in a general verdict by a jury that was instructed on two theories of liability, one of which turns out to have been unconstitutional.[8] *Id.* at 895-96. The Ninth Circuit explained that "when it is unclear from the record whether the sentencing court relied on the residual clause, it *necessarily* is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id.* at 895 (emphasis added).

The Ninth Circuit instructed that when the sentencing record alone is unclear, it may be determined that the sentencing court did not rely on the residual clause by looking to "the record before the sentencing court." *Geozos*, 870 F.3d at 896. Unlike the Fourth Circuit, the Ninth Circuit provided that courts may also look to "the relevant background legal environment at the

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[7] *See Winston*, 850 F.3d at 682 n.4 (any argument that the movant's "claim did not 'rely on' *Johnson II*, because that claim would not be successful, does not present a procedural bar").

[8] *Stromberg v. California*, 283 U.S. 359 (1931). *See also Zant v. Stephens*, 462 U.S. 862, 881 (1983).

time of sentencing." *Id.* at 896. However, the Ninth Circuit provided that courts may look to the record and the relevant background legal environment at the time of sentencing only to establish whether the "sentencing court did not rely on the residual clause." *Id.* The Ninth Circuit in *Geozos* held that the movant's claim relied on *Johnson II* because, looking to the record and legal environment at the time of sentencing, it is not possible to conclude that the sentencing court did not rest on the residual clause. *Geozos*, 870 F.3d at 896-97.

In addressing the claim's merits, the Ninth Circuit applied current law, including the Supreme Court's interpretation of the force clause in *Johnson I*, because in general, judicial interpretations of substantive statutes receive retroactive effect. *Geozos*, 870 F.3d at 897-98. The Ninth Circuit reasoned that decisions which narrow the scope of a criminal statute by interpreting its terms necessarily raise the risk that people may be illegally convicted and punished. *Id.* at 898.

The Third Circuit:

Like the Fourth Circuit and Ninth Circuit, the Third Circuit in *United States v. Peppers*, 899 F.3d 211, 217-20, 222-23 (3d Cir. 2018), adopted the "may have" test for defendants seeking to cross the § 2255(h) threshold where the record is silent concerning on which ACCA clause(s) the sentencing court relied.[9] The Third Circuit provided that AEDPA "was not meant to conflate jurisdictional inquiries with analyses of the merits of a defendant's claims." *Peppers*, 899 F.3d at 222. Analyzing the text of § 2255(h) and § 2244(b)(2)(A), and rejecting the government's contention that a movant "relies" on a new rule of constitutional law only if he can prove that the sentence was based "solely" on the residual clause, the Third Circuit explained that interpreting

[9] *See also United States v. Mayo*, 901 F.3d 218, 224 (3d Cir. 2018).

"the language as the government suggests would effectively turn the gatekeeping analysis into a merits determination, which defeats the purpose of the jurisdictional review." *Id.* at 222–23.

Citing the Fourth Circuit's reasoning in *Winston*, the Third Circuit explained that nothing in the law requires a court to specify on which ACCA clause it relied in imposing a sentence. *Peppers*, 899 F.3d at 223-24. The Third Circuit provided that a defendant's *Johnson* claim should not be unfairly tethered to the sentencing court's discretionary decision to specify the ACCA clause(s) on which it relied, because it would result "in randomly unequal treatment of § 2255 claims." *Id.* at 224. Like the Ninth Circuit, the Third Circuit merely requires a showing that it was possible the sentencing court relied on the residual clause, and that such a showing may be overcome only upon clear proof. *See Peppers*, 899 F.3d at 224 & n.4.

In addressing the *Johnson* claim's merits, the Third Circuit allows consideration of post-sentencing cases such as *Descamps*, *Johnson I*, and *Mathis*[10] "because they are Supreme Court cases that ensure we correctly apply the ACCA's provisions." *Peppers*, 899 F.3d 211, 227-30. Declining to limit the analysis to the law at the time of sentencing, the Third Circuit explained that requiring 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 terms of fairness and justiciability." *Id.* at 230 (quoting *United States v. Carrion*, 236 F. Supp.3d 1280, 1287 (D. Nev. 2017)).

2. Petitioner Ezell Would Have Been Entitled To Review Of His *Johnson* Claim Under The Procedural Review Standards Of The Fourth Circuit And Third Circuit, Which, Unlike The Ninth Circuit, Do Not Require Courts To Attempt To Recreate The Legal Landscape Which Existed At The Time Of Sentencing.

Unlike the Ninth Circuit, in conducing procedural review, the Fourth Circuit and Third Circuit do not require consideration of the legal landscape at the time of sentencing. Ezell's case

[10] *Mathis v. United States*, 136 S. Ct. 2243 (2016).

presents an excellent vehicle for review because it would allow this Court to determine whether procedural review of claims asserting *Johnson* should entail consideration of the legal landscape at the time of sentencing. Ezell would have been entitled to collateral relief, but for the Ninth Circuit panel's reliance on *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1088-89 (9th Cir. 2005), in recreating the legal landscape at the time of sentencing. *See* Pet. App. 5a. The Ninth Circuit relied on *Hermoso-Garcia* even though the government never cited that case during Ezell's sentencing proceedings.

3. The First Circuit, Fifth Circuit, Eighth Circuit, Tenth Circuit, And Eleventh Circuit Place The Burden Of Proof On The Movant To Establish As A Matter Of Historical Fact That The Sentencing Court Relied On The ACCA's Residual Clause.

The Tenth Circuit:

The Tenth Circuit applies different standards, according to whether the case involves an initial or successive § 2255 motion. In *United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018), the Tenth Circuit held that it may review an initial § 2255 motion which asserts or invokes a *Johnson* claim, regardless of whether the record ultimately supports the movant's claim.[11] The Tenth Circuit explained that by "its plain language," 28 U.S.C. § 2255(f)(3) "allows a § 2255 motion to be filed within one year of 'the date on which the right *asserted* was initially recognized by the Supreme Court.'" *Snyder*, 871 F.3d at 1126 (emphasis supplied). Following the Ninth Circuit in *Geozos*, the Tenth Circuit reviewed the claim's merits by considering the "snapshot" of the relevant legal background at the

[11] Concurring, Judge McHugh parted with the majority by concluding that a *Johnson* claim is untimely pursuant to § 2255(f)(3) where the sentencing record reveals on which ACCA clause(s) the sentencing court relied. *Snyder*, 871 F.3d at 1130-32 (McHugh, J, concurring).

time of sentencing. *Id.* at 1129-30. The Tenth Circuit rejected consideration of post-sentencing case law.[12] *Id.* at 1129-30.

Addressing a successive § 2255 motion, the Tenth Circuit in *United States v. Washington*, 890 F.3d 891, 895-96 (10th Cir. 2018), *cert. denied*, ___ S. Ct. ___, 2019 WL 113224 (2019), determined to close the courtroom doors in silent record cases by providing that in light of the presumption of finality, the movant bears the burden of proof. *Id.* at 895-96. Rejecting the Ninth Circuit's application of the *Stromberg* rule, the Tenth Circuit explained that unlike general verdicts, reliance on the ACCA's residual clause in sentencing can often be determined by looking at the legal background at the time of sentencing, the presentence report, and other relevant materials. *Washington*, 890 F.3d at 896. The *Washington* panel provided that it is not enough for the movant to show that the background legal environment at the time sentencing reveals "the residual clause offered the path of least analytical resistance." *Id.* at 898-99.

The Eleventh Circuit:

In addressing cases in which the sentencing record is silent regarding on which ACCA clause the court relied, the Eleventh Circuit has been inconsistent and divided in its approach. Initially, two Eleventh Circuit panels suggested in dicta that defendants bear the burden of demonstrating definitively that the court relied upon the residual clause. *In re Moore*, 830 F.3d 1268, 1271-72 (11th Cir. 2016). *See also In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016). The panel deciding *In Re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016), criticized the *Moore* panel for suggesting that "unless the sentencing judge uttered the magic words 'residual clause,'" the sentencing court must ignore such Supreme Court precedents as *Descamps* and *Mathis*. The

[12] In a later case, the Tenth Circuit clarified that *Mathis* and other current, post-sentence cases are only applicable at the harmless error stage of review. *See United States v. Lewis*, 904 F.3d 867, 873 (10th Cir. 2018).

Chance panel provided that the movant "must simply show that § 924(c) may no longer authorize his sentence as that statute stands after *Johnson* – not proof of what the judge said or thought at a decades-old sentencing." *Id.* at 1341. The panel deciding *In re Chance* set forth the example of two defendants with the same prior convictions sentenced on the same day for the same offense by the same judge, but in only one case did the judge think to specify that the sentence rested on the ACCA's residual clause. *Id.*

Subsequently, the Eleventh Circuit majority in *Beeman v. United States*, 871 F.3d 1215, 1218-21 (11th Cir. 2017), *petition for cert. filed*, (Sup. Ct. No. 18-6385, Oct 18, 2018), addressing an initial § 2255 motion, held that even though the movant heavily relied on *Descamps*, AEDPA's statute of limitations did not bar review because the motion also advanced a *Johnson* claim. The Eleventh Circuit merely required that the § 2255 motion allege a *Johnson* claim to overcome a procedural bar. *Id.*

However, in addressing the merits, the majority in *Beeman v. United States*, 871 F.3d 1215, 1221-25 (11th Cir. 2017), over a strong dissent,[13] placed the burden on the defendant to prove that it is more likely than not that the sentencing court relied only on the residual clause. Rejecting the argument that its standard would "make the outcome depend on the 'fluke' of a district court having expressly stated which clause it was relying on," the *Beeman* majority explained that it "is no more arbitrary to have the movant lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one." *Id.* at 1222-24. Nevertheless,

[13] In his dissenting opinion in *Beeman v. United States*, 871 F.3d 1215, 1228-29 (11th Cir. 2017) (Williams, D.J., dissenting), Judge Williams favored the "'clear/unclear' test" adopted by other courts providing that *Johnson* is implicated when the sentencing record is silent and there is no precedent establishing that the predicates would qualify under one of the remaining ACCA clauses. He asserted that the majority "set up a straw man" to knock down the movant's *Johnson* claim by refusing to consider *Descamps* and other binding Supreme Court precedent. *Id.* at 1228. Judge Williams maintained that precluding relief where the record is uncertain "would lead to unwarranted and inequitable results." *Id.* at 1228-29.

the panel provided that "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." *Id.* at 1224 n.5. The Eleventh Circuit panel introduced the "historical fact" test, providing that the "key question of historical fact" is whether the court imposed the ACCA sentence solely under the residual clause. *Id.*

Reflecting the division within the Eleventh Circuit is that in support of the ruling denying en banc review in *Beeman*, Judge Carnes felt the need to defend her earlier majority opinion in *Beeman*. *See Beeman v. United States*, 899 F.3d 1218 (11th Cir. 2018) (Carnes, J., respecting the denial of rehearing en banc). In asserting that *Beeman* does not create too narrow a path, Judge Carnes provided that the movant may rely on "comments or findings by the sentencing judge, statements in the PSR, colloquy by counsel, concessions by the prosecutor, and caselaw in existence at the time of sentencing." *Id.* at 1222.

Dissenting from the denial of en banc review, Judge Martin, joined by Judge Pryor, agreed with the Fourth Circuit and Ninth Circuit in *Winston* and *Geozos*, holding that the movant's burden of proof can be met by reliance on subsequent Supreme Court precedent, such as *Descamps*. *See Beeman v. United States*, 899 F.3d 1218, 1225-27 (11th Cir. 2018) (Martin, J., dissenting). Noting that the Supreme Court recognized that *Descamps* applies retroactively on collateral review, Judge Martin asserted that lower courts are not at liberty to ignore Supreme Court precedent. *Id.* at 1227-28. Judge Martin criticized *Beeman*'s "historical fact" test because it "turns on whether the sentencing court happened to utter superfluous commentary at sentencing," even though the law does not require sentencing courts to specify on which ACCA clause they rely. *Id.* at 1228.

Judge Martin's criticism did not end with *Beeman*. In *Ovalles v. United States*, 905 F.3d 1231, 1262 (11th Cir. 2018) (en banc), the en banc majority held that the residual clause of 18 U.S.C. § 924(c)(3) is not void for vagueness because the categorical analysis applied. Judge Martin penned an impassioned dissent which decried the Eleventh Circuit's extended campaign to limit *Johnson* by narrowing the path to relief by means not mandated by the Supreme Court or Congress. *Ovalles v. United States*, 905 F.3d 1231, 1262-77 (11th Cir. 2018) (en banc) (Martin, J., dissenting). Judge Martin charged the Eleventh Circuit with improperly taking measures to limit relief "as a work-load management tool" to effect "a quick end to the flood of applications filed by prisoners raising *Johnson* claims." *Id.* at 1273, 1275.

In her stinging dissenting opinion in *Ovalles*, Judge Martin criticized the *Beeman* majority's "historical fact" test as unfairly and improperly limiting the ways for *Johnson* claimants to prove reliance on the ACCA's residual clause. *Ovalles v. United States*, 905 F.3d 1231, 1275 (11th Cir. 2018) (en banc) (Martin, J., dissenting). Judge Martin pointed out that before *Johnson*, district courts "did not say at sentencing which ACCA clause they relied on because nothing in the law required them to." *Id.* Judge Martin also asserted that because prior to *Johnson* the Supreme Court had twice rejected suggestions by dissenting Justices that the residual clause was constitutionally infirm, "few defendants had reason to suspect the unconstitutionality of the residual clause, so they had no reason to ask about the source of their enhanced sentence." *Id.* (citing *Sykes v. United States*, 564 U.S. 1 (2011), and *James v. United States*, 550 U.S. 192 (2007)). Justifying reliance on current law, Judge Martin noted that the Supreme Court in *Descamps v. United States*, 570 U.S. 254, 260 (2013), specified that "the rules for evaluating predicate offenses under the enumerated offenses and elements clauses are 'the same today as they have always been.'" *Id.* at 1276.

The First Circuit:

Reviewing three consolidated cases addressing successive § 2255 motions, the First Circuit in *Dimott v. United States*, 881 F.3d 232, 236-37 (1st Cir.), *cert. denied sub nom.*, 138 S. Ct. 2678 (2018), broadened the concept of "the record" by holding in two of the cases that even though the sentencing court was silent, weight may be given to the district courts' retrospective findings on collateral review regarding on which ACCA clause(s) they had relied. *Id.* at 237. The First Circuit concluded that allowing the movants to present a *Johnson II* claim under the guise of a claim based on *Mathis v. United States*, 136 S. Ct. 2243 (2016), would "create an end run around AEDPA's statute of limitations." *Dimott*, 881 F.3d at 237. Addressing the silent sentencing record regarding defendant Casey, the First Circuit rejected the Ninth Circuit and Fourth Circuit's "may have" standard, and required petitioners to prove reliance on the residual clause because "they were certainly present at sentencing and knowledgeable about the conditions under which they were sentenced," and because any other rule would undercut AEDPA's presumption of finality. *Id.* at 240-43.

Dissenting, in part, Judge Torruelea recognized that there is an emerging split amongst the circuit courts as to the burden of proof in silent record cases. *Dimott v. United States*, 881 F.3d 232, 243, 246 n.9 (1st Cir. 2018) (J. Torruelea, dissenting in part). Judge Torreulea found that under any of the circuits' tests, the sentencing court in § 2255 proceedings made retrospective findings sufficient to establish reliance on the residual clause. *Id.* at 245-46.

The Eighth Circuit:

In addressing a successive motion and a silent sentencing record, the Eighth Circuit majority in *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018), agreed with its sister circuits which require movants to show by a preponderance of the evidence that the sentencing

court relied solely on the residual clause. The Eighth Circuit adopted the Eleventh Circuit's explanation that it "is no more arbitrary to have a movant lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one." *Id.* (citing *Beeman v. United States*, 871 F.3d 1215, 1224 & n.5 (11th Cir. 2017)). The Eighth Circuit instructed that where the record is inconclusive, courts may consider the relevant background legal environment at the time of sentencing to ascertain reliance on the residual clause. *Walker*, 900 F.3d at 1015.

Concurring in part, and dissenting in part, Judge Kelly sided with the Ninth Circuit and Fourth Circuit in concluding that a claim for collateral relief under *Johnson* should be granted if the movant shows that the sentence "may have" relied on the residual clause, and the government is unable to demonstrate to the contrary. *Walker v. United States*, 900 F.3d 1012, 1016 (8th Cir. 2018) (Kelly, J., concurring in part and dissenting in part). Judge Kelly agreed that it is unwise to adopt an approach that would penalize movants for the sentencing court's discretionary choice not to specify which ACCA clause applied. *Id.* Judge Kelly further reasoned that where the record is silent, the claim "relies on" *Johnson* because the claim would not have been meritorious before the residual clause was held unconstitutional. *Id.* at 1016-17.

4. The Other Circuits Remain Undecided, Or Straddle The Fence Between The Circuit Split Regarding The Procedural And Substantive Burden Of Proof For *Johnson* Claims.

The Undecided – The Seventh Circuit, D.C. Circuit, and Second Circuit:

The Seventh Circuit and the D.C. Circuit have yet to address in a published opinion the jurisdictional standard to apply for *Johnson* claims under § 2255 where the record is silent or unclear regarding whether the sentencing court relied on the ACCA's residual clause.

Similarly, the Second Circuit has yet to determine whether the § 2255 movant bears the burden where the record is silent or unclear. In *Massey v. United States*, 895 F.3d 248, 251-53 &

n.10 (2d Cir. 2018), addressing a successive § 2255 motion, the Second Circuit relied on both the Ninth Circuit's decision in *Geozos*, and the First Circuit's opinion in *Dimott*, but determined it not need decide on which side of the circuit split to settle because the record clearly established that the sentencing court relied on the ACCA's force clause. In concluding that the movant cannot "bootstrap" his *Johnson I* claim into a *Johnson II* claim, the Second Circuit rejected the defendant's argument the residual clause would be the only basis of the sentence if he succeeded on the merits under *Johnson I*, concerning the ACCA's force clause. *Id.* at 251-53.

The Sixth Circuit and the Fifth Circuit – Straddling the Fence:

The Sixth Circuit straddles the fence between the two camps occupied by the opposing circuits. In addressing successive § 2255 cases, the Sixth Circuit in *Potter v. United States*, 887 F.3d 785, 787-88 (6th Cir. 2018), rejected the "may have" standard and staked its place within the camp requiring movants to establish reliance on the residual clause. The Sixth Circuit in *Potter* provided that the movant may not rely on "old rule statutory law" such as *Mathis* to obtain review. *Id.* at 788. In determining that the movant failed to meet his burden, the Sixth Circuit looked to the fact that the judge who reviewed his § 2255 motion is the same judge who imposed the sentence. *Id.* at 788-89.

Carving a different path in considering an initial § 2255 motion, the Sixth Circuit in *Raines v. United States*, 898 F.3d 680, 684-86 (6th Cir. 2018), granted review based on the movant's assertion of a *Johnson* claim. The Sixth Circuit noted that unlike the movant in *Potter*, who had to overcome the 28 U.S.C. § 2255(h) successive petitions hurdle based on "a new rule of constitutional law," the movant in *Raines* presented an initial § 2255 motion which may, pursuant to 28 U.S.C. § 2255(a), rest "upon the ground that the sentence was imposed in violation of the Constitution *or laws* of the United States[.]" *Raines*, 898 F.3d at 685 (emphasis

supplied). In granting relief on the merits, the Sixth Circuit applied post-sentencing case law, including *Mathis*. *Id.* at 688-89.

In *United States v. Wiese*, 896 F.3d 720, 724-26 (5th Cir. 2018), the Fifth Circuit, addressing a successive § 2255 motion, joined the First Circuit, Sixth Circuit, Tenth Circuit, and Eleventh Circuit in looking only to the law at the time of sentencing rather than new precedent, such as *Mathis*. However, in addressing the burden of proof, the Fifth Circuit declined to decide whether to side with the "more likely than not" camp or mark its territory within the "may have" camp, because under either standard, the defendant failed to establish the claim rested on *Johnson*. *Id.* at 724-26. In dicta, the Fifth Circuit provided that the "more likely than not" standard appears to be the more appropriate standard. *Id.* at 724. The *Wiese* panel provided that in determining the sentencing court's potential reliance on the residual clause, it may look to the sentencing record, including the presentence report and other relevant sentencing materials, and the relevant background legal environment that existed at the time of sentencing. *Id.* at 725.

5. There Is An Urgent Need For Supreme Court Review Because The Current State Of The Law Concerning The Jurisdictional And Substantive Standards For Review Of *Johnson* Claims Does Not Provide A Clear, Consistent Or Workable Framework, And Because The Stakes Are High For Thousands Of Defendants Serving Lengthy ACCA Sentences.

Supreme Court review is necessary because the issue presented is clearly one of national importance. Indeed, the holding in *Johnson II* calls into question the sentences of thousands of federal prisoners sentenced under ACCA and other, similarly worded statutes. *See Ovalles v. United States*, 905 F.3d 1231, 1263 (11th Cir. 2018) (en banc) (Martin, J., dissenting). Further, the stakes are extraordinarily high because thousands of prisoners may be serving sentences which are constitutionally impermissible or contrary to the laws passed by Congress. There is a

pressing need for review also because the state of the law concerning the jurisdictional and substantive standards for review of *Johnson II* claims is in disarray and unworkable.

Review of Initial § 2255 Motions. There is a compelling need for this Court to resolve the uncertainty regarding whether or how jurisdictional and substantive review standards for initial § 2255 motions should differ from the review standards for successive § 2255 motions. The Tenth Circuit, Sixth Circuit, and Eleventh Circuit have set forth holdings determining the differing standards for initial and successive § 2255 motions. These circuits merely require initial § 2255 movants to assert a *Johnson* claim, without requiring proof of reliance on the residual clause to establish jurisdiction. But they do so for different reasons. The Tenth Circuit looked to the text of 28 U.S.C. § 2255(f)(3), which requires § 2255 motions to be filed within one year of "the date on which the right *asserted* was initially recognized by the Supreme Court." *See United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018) (emphasis supplied). The Eleventh Circuit also relied on 28 U.S.C. § 2255(f)(3). *See Beeman v. United States*, 871 F.3d 1215, 1220-21 (11th Cir. 2017). In contrast, the Sixth Circuit relied on 28 U.S.C. § 2255(a), which allows for relief "upon the ground that the sentence was imposed in violation of the Constitution *or laws* of the United States . . . ." *Raines v. United States*, 898 F.3d 680, 685 (6th Cir. 2018).

In initial § 2255 cases, the Tenth Circuit limits review of the merits to the snapshot of the relevant background legal environment at the time of sentencing. *See Raines*, 898 F.3d at 685. In contrast, the Sixth Circuit allows merits review to be based on post-sentencing law, such as *Mathis*. *See Snyder*, 871 F.3d at 1129. The Eleventh Circuit in dicta indicated that as to initial § 2255 motions, current law "casts very little light, if any, on the key question of historical fact" of whether the district court relied solely on the residual clause. *Beeman*, 871 F.3d at 1224 n.5.

Successive § 2255 Motions – Consideration of Current Law or Limiting Review to the Law at the Time of Sentencing. In conducting procedural review to determine jurisdiction, and in reviewing the merits of *Johnson II* claims, the circuits addressing successive § 2255 motions have forged diverging paths regarding whether to consider current case law, such as *Johnson I* and *Mathis*, or to limit consideration to the law at the time of sentencing. In determining jurisdiction based on reliance on *Johnson II*, the Fourth Circuit allows for consideration of post-sentencing case law to establish that the ACCA enhancement could not be imposed but for the constitutionally infirm residual clause. *See United States v. Winston*, 850 F.3d 677, 682 & n.4 (4th Cir. 2017). While the Ninth Circuit allows for consideration of post-sentencing case law in its merits determination, unlike the Fourth Circuit, the Ninth Circuit limits consideration to the law at the time of sentencing in conducting its procedural analysis. *United States v. Geozos*, 870 F.3d 890, 896-98 (9th Cir. 2017). Although the Third Circuit did not address whether current law may be considered in its procedural inquiry, it specified that post-sentencing case law may be considered in the merits review. *United States v. Peppers*, 899 F.3d 211, 217-20, 227-30 (3d Cir. 2018). The First Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, and Tenth Circuit limit analysis to the legal landscape at the time of sentencing.[14]

Reliance on a Snapshot of the Legal Landscape at Sentencing Is Unworkable and Unjust. There are compelling practical reasons not to limit review to a fuzzy "snapshot" of the legal landscape at the time of sentencing. As the Third Circuit explained, requiring judges to recreate the state of the law, which is already "muddy," creates problems of "fairness and

[14] *See Dimott v. United States*, 881 F.3d 232, 237 (1st Cir.), *cert. denied sub nom.*, 138 S. Ct. 2678 (2018); *United States v. Wiese*, 896 F.3d 720, 725-26 (5th Cir. 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018); and *United States v. Washington*, 890 F.3d 891, 896, 898-99 (10th Cir. 2018).

justiciability." *Peppers*, 899 F.3d at 230. Research trips to the time of sentencing lead to a legal landscape which is not only muddy, but often barren. Indeed, the relevant case law at the time of sentencing is likely to be limited or non-existent because (1) sentencing courts were not obliged to specify on which ACCA clause they relied, (2) there are a multitude of offenses from fifty states, and (3) the broad and amorphous nature of the residual clause gave courts little reason to analyze and apply distinctions between the residual clause and the ACCA's enumerated and force clauses. *See Ovalles v. United States*, 905 F.3d 1231, 1275 (11th Cir. 2018) (en banc) (Martin, J., dissenting). Moreover, limiting review to the snapshot of the legal landscape at the time of sentencing leads to the arbitrary and inconsistent administration of justice, and ignores current Supreme Court precedent.

Even if limiting review to a legal "snapshot" at the time of sentencing is proper, it is unclear what such a snapshot should include. Supreme Court review is necessary to clarify whether consideration of the legal landscape should include all case law which a theoretical sentencing court may have found and reasonably relied upon after a diligent search, or be limited to the case law which Probation or the parties actually presented to the district court during the sentencing proceedings. It would lead to inconsistent and arbitrary results to determine *Johnson* claims based on speculation regarding what was in the legal landscape at the time of sentencing, and speculation regarding on what portion of the landscape the sentencing court actually considered and applied. Further, review is warranted to answer whether consideration of case law at the time of sentencing should be limited only to "binding" Supreme Court and circuit precedent, or whether courts may consider state case law, and case law of other federal circuits or districts. Looking to "binding" circuit precedent creates obvious problems because § 2255

relief would hinge upon arbitrary geographical boundaries, and because what constitutes "binding" precedent may be unclear.

Petitioner asserts that in considering the legal environment at the time of sentencing to determine whether the court relied on the ACCA's enumerated or elements clauses, courts should consider only the authority which was actually presented to the sentencing court, as established by the record. To do otherwise would invite speculation, and arbitrary and inconsistent results. The case at bar presents an excellent vehicle to consider this matter. Ezell would have been entitled to collateral relief, but for the Ninth Circuit panel's reliance on *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1088-89 (9th Cir. 2005). Resting on *Hermoso-Garcia*, the panel concluded that that "the relevant legal background indicates" that Ezell's intentional assault conviction qualified as an ACCA predicate. *See* Pet. App. 5a. But there was no mention of *Hermoso-Garcia* in the sentencing memoranda, the presentence report, or at the sentencing hearing. Pet. App. 42a-140a; PSR. Accordingly, there can be no reasonable basis to conclude that the district court actually considered and relied on *Hermoso-Garcia* when sentencing Ezell. Because the government did not cite *Hermoso-Garcia* during sentencing proceedings, Ezell had no opportunity to dispute its applicability. By relying on *Hermoso-Garcia*, even though the parties at sentencing never cited *Hermoso-Garcia*, the Ninth Circuit panel in Ezell's case effectively rested its determination on "the relevant legal background" that could have been before a theoretical sentencing judge, rather than on the authority which the district court actually considered.

Supreme Court review is warranted to determine whether waiver rules should apply. Because the government in Ezell's case failed to cite *Hermoso-Garcia* during sentencing, the procedural and merits determination should not hinge on authority which the government failed

to present before the sentencing court. In fact, the government did not cite *Hermoso-Garcia* in the § 2255 proceedings before the district court. *See* CR 8 (C17-255RSM). Nor did the district court cite *Hermoso-Garcia* in its order denying § 2255 relief. Pet. App. 7a-18a. As habeas relief and relief under § 2255 are equitable in nature,[15] it would be improper, and violate the Due Process Clause, to hinge jurisdictional and merits review on authority that the government failed to present. This conclusion rings true because in cases on direct review the government routinely relies on waiver, plain error, and forfeiture standards, and because on collateral review the government takes advantage of the complex and draconian system of procedural bars.

Unlike the government, the defendant should not be held to account for failing at sentencing to cite case law establishing sole reliance on the residual clause. Indeed, the law did not require district courts to specify on which ACCA clause they relied, and prior to *Johnson II* the broad and amorphous nature of the residual clause gave little reason for district courts to specify the basis for an ACCA enhancement. Further, in light of the Supreme Court's rejection of vagueness challenges in *Sykes v. United States*, 564 U.S. 1 (2011), and *James v. United States*, 550 U.S. 192 (2007), defendants prior to *Johnson II* had little reason to seek clarification from the sentencing court regarding whether the ACCA determination rested on the residual clause.

Significantly, at sentencing, the prosecution bears the burden of proving that an ACCA enhancement is warranted. *E.g.*, *United States v. Lee*, 586 F.3d 859, 866 (11th Cir. 2009). Defendants facing sentencing did not have the burden, or incentive, to cite case law establishing that the residual clause served as the sole basis for the imposition of the ACCA enhancement. Moreover, there is no reason to penalize defendants for not possessing the clairvoyance to predict that this Court would issue *Johnson II* after twice rejecting vagueness challenges in *Sykes*

[15] *See Schlup v. Delo*, 513 U.S. 298, 319 (1995) (habeas corpus is an equitable remedy to be administered with flexibility).

and *James*. In contrast, because it is the government which sought the ACCA enhancement, it was incumbent on the prosecution, and not the defendant, to have sought clarification at sentencing regarding which ACCA clause or clauses applied.

There Is A Compelling Need To Establish A Clear And Consistent Standard Regarding Review Of The Factual Record In Addressing Johnson Claims. The lower courts have not taken a clear and consistent approach regarding whether, or how, the factual record applies in reviewing *Johnson* claims. Although most of the circuit courts have looked to the sentencing record in conducting procedural review to determine whether the claim "relies on" *Johnson*, the Eleventh Circuit looked to the sentencing record in conducting its merits analysis. *See Snyder*, 871 F.3d at 1128-30. Review is warranted to establish which portions of the record should be reviewed, and how the review is to be conducted. There is a need to address whether Probation's presentence report, the sentencing memoranda, the arguments of counsel, and the judge's comments during the sentencing hearings, may be used to *infer* on which ACCA clause or clauses the district court relied.[16]

Further, this Court should resolve whether it is proper to rely on the district court's retrospective findings when the same judge presides over the sentencing and § 2255 proceedings. The First Circuit and Sixth Circuit give weight to the judge's retrospective findings on collateral review where the same judge presided over the sentencing. *See Dimott v. United States*, 881 F.3d 232, 235, 237 (1st Cir. 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018). There is good reason to question whether a district court can accurately recall on which ACCA clause or clauses it relied after the passage of a significant period of time during which the court

[16] The Fifth Circuit looks to the record for "direct evidence." *See United States v. Wiese*, 896 F.3d 720, 725 (5th Cir. 2018). In contrast, the Eleventh Circuit accepted that direct and circumstantial evidence may establish the basis of the ACCA enhancement. *See Beeman v. United States*, 871 F.3d 1215, 1224 n.4 (11th Cir. 2017).

had conducted hundreds of sentencing hearings. The court's recollection may be further tainted by the conscious or unconscious temptation to "fill in the blanks" of an imperfect memory in order to preserve the prior ACCA sentencing determination.

B. Review Is Warranted To Ensure That The Lower Courts Do Not Continue To Subvert Or Ignore Supreme Court Precedent.

The Supreme Court in *Welch v. United States*, 136 S. Ct. 1257 (2016), determined to make *Johnson II* retroactive to cases on collateral review. Yet, the First Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Tenth Circuit, and Eleventh Circuit have established analytical constructs which render *Johnson II* and *Welch* meaningless in all but a small number of cases. The subversion of Supreme Court precedent has not escaped notice. For example, Judge Williams, sitting by designation, lamented that the majority's decision "would nullify the retroactive effect of a change in the law pronounced by the Supreme Court." *Beeman v. United States*, 871 F.3d 1215, 1225, 1229 (11th Cir. 2017) (Williams, J., dissenting). Similarly, Eleventh Circuit Judge Martin criticized her brethren for "relentlessly" limiting review of sentences, and narrowing the path to relief "even when precedent counsels otherwise." *Ovalles*, 905 F.3d at 1263 (Martin, J., dissenting). Also raising the alarm is Sixth Circuit Chief Judge Cole, who exclaimed:

> 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 for an unconstitutional sentence. Yet if *Potter* were read to require a petitioner to show that an Armed Career Criminal Act ("ACCA") enhancement was imposed solely under the residual clause, then for many habeas petitioners in this circuit, tantalize is all that *Johnson* and *Welch* will do.

Raines v. United States, 898 F.3d 680, 690 (6th Cir. 2018) (Cole, J., concurring). Chief Judge Cole recognized that 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. He asserted that *Welch* "forecloses such a myopic understanding" of what is necessary to present a "constitutional" claim to clear AEDPA's gate-keeping hurdles. *Id.* at 691.

Chief Judge Cole explained that the Supreme Court in *Welch* found that the petitioner had shown "the denial of a 'constitutional' right even though he challenged an ACCA enhancement as invalid for both constitutional and statutory reasons." *Raines*, 898 F.3d 680, 691 (6th Cir. 2018) (Cole, J., concurring). He concluded that "it would be inconsistent with *Welch* to say that a petitioner must show a sentence was only under the residual clause," because a petition pairing a new-rule-of-constitutional-law challenge with an old-rule-of-statutory-law challenge satisfies § 2253(c)'s "constitutional" right requirement, and thus satisfies § 2255(h). *Id.* at 692. Chief Judge Cole detailed that this Court in *Welch*, addressing a single-judge order denying a certificate of appealability, held that the petitioner had made a substantial showing of the denial of a constitutional right, even though the district court sentenced the petitioner under both the residual clause and elements clause. *Id.* at 691-92 (citing *Welch*, 136 S. Ct. at 1263). Sadly, many of the lower courts have paid no notice to these underlying facts in *Welch*, and subverted this Court's determination to apply *Johnson II* retroactively to cases on collateral review. The lower courts' efforts to neuter *Johnson II* and *Welch* is all the more alarming because the Supreme Court does not often determine to make its decisions retroactive to cases on collateral review. Had the justices authoring and joining in *Welch* meant to dramatically circumscribe the reach of their decision, they would have so stated.

The Ninth Circuit recognized that determining whether a claim "relies on" *Johnson* constitutes a "threshold question," rather than an inquiry regarding the merits. *United States v. Geozos*, 870 F.3d 890, 894 (9th Cir. 2017). *See also Raines*, 898 F.3d at 691 (Cole, J.,

concurring) (the second gate "is a threshold"). This threshold inquiry is simply to determine whether the defendant raised a claim based on a new rule of constitutional law which the Supreme Court made retroactive to cases on collateral review. *See* 28 U.S.C. §§ 2255(h)(1), 2244(b)(2). Yet, in cases in which the sentencing record is silent or unclear regarding the basis for imposing an ACCA enhancement, the First Circuit, Sixth Circuit, Eighth Circuit, Tenth Circuit, and Eleventh Circuit have undermined Supreme Court precedent, and subverted Congressional intent, by ignoring the fact that procedural or jurisdictional review constitutes a "threshold inquiry. Similarly, these lower courts have subverted *Johnson* and *Welch* by conflating the threshold procedural inquiry under § 2255(h) with the merits inquiry, and by holding that only the law at the time of sentencing may be considered in procedural and merits review. These courts arbitrarily deny relief by concluding that the petitioner's new-rule-of-constitution-law *Johnson II* claim is really a veiled old-rule-of-statutory-law challenge based on such Supreme Court decisions as *Johnson I*, *Mathis*, or *Descamps*. *E.g.*, *Dimott*, 881 F.3d at 237-38. The "reasoning" of these circuits is deeply flawed. They ignore that procedural review merely constitutes a threshold inquiry, rather than a review on the merits. Further, they ignore the plain language of § 2255(h), which does not require that claims *solely* rely on retroactive Supreme Court precedent, but rather merely "contain" a new rule of constitutional law, made retroactive to cases on collateral review. Similarly, by its plain terms, § 2255(f)(3) merely requires that the movant "assert" the violation of a newly recognized and retroactive right.

Further, these circuits effectively ignore Supreme Court opinions, such as *Descamps*, *Mathis* and *Johnson I*, by overlooking the fact that the Supreme Court's interpretation of ACCA and AEDPA provisions apply today, just as they applied at the time of the defendants' sentencing. This Court's decisions merely clarified the law as it always has been, rather than

creating "new law" contemplated by this Court in *Teague*. *See United States v. Peppers*, 899 F.3d 211, 230 (3d Cir. 2018). Criticizing the Eleventh Circuit for ignoring *Descamps*, Judge Martin asserted that this Court in *Descamps* explained that "the rules for evaluating predicate offenses – other than under the residual clause – are the same today as they always have been." *Beeman*, 899 F.3d at 1228 (Martin, J., dissenting) (citing *Descamps*, 570 U.S. at 260, 263). Notably, this Court in *Descamps* specified that the modified categorical approach "is the only way we have ever allowed." *Descamps*, 570 U.S. at 263. Driving home the point, this Court later stated in *Mathis* that "*Descamps* made clear that when the Court had earlier said (and said and said) 'elements,' it meant just that and nothing else." *Mathis*, 136 S. Ct. at 2255. Sounding a similar note, Judge Williams, in her strong dissent in *Beeman*, provided that in the context of second or successive petitions, when an applicant's claim implicates *Johnson*, courts are bound to apply Supreme Court precedent such as *Descamps*, even if the precedent does not on its own establish an independent claim that is itself subject to the gatekeeping requirements of § 2255(h). *Beeman*, 871 F.3d at 1226 (Williams, J., dissenting).

No doubt, the interest of finality is reflected in AEDPA's provisions. However, by allowing review of claims presented within one year of the date that the Supreme Court makes a new rule of constitutional law retroactive to cases on collateral review, Congress necessarily intended that finality concerns give way in such circumstances. *See* 28 U.S.C. §§ 2255(h)(2), 2244(b)(2)(A), 2244(d)(1)(C). The Supreme Court weighed the conflicting interests of finality and the vindication of constitutional rights when it held in *Welch* that *Johnson II* applies retroactively to cases on collateral review. *See Beeman*, 871 F.3d at1231 (Williams, J., dissenting). Indeed, this Court declared in *Welch* that "where the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest." *Welch v. United*

States, 136 S. Ct. 1257, 1266 (2016). Yet, flouting *Welch* and the text of AEDPA, a number of the circuits improperly defer to the interests of finality over the vindication of the rights of thousands of defendants who were sentenced under a statute which this Court has found to be constitutionally infirm.

Lower courts have effectively ignored not just *Welch*, but other Supreme Court precedent, such as *Johnson I*, *Descamps*, and *Mathis*, by the fiat of limiting review to the legal landscape at the time of the defendant's sentencing, even though these Supreme Court decisions interpreted the ACCA as it should always have been applied. *See United States v. Geozos*, 870 F.3d 890, 897 (9th Cir. 2017) ("in general, judicial interpretations of substantive statutes receive retroactive effect"). Notably, in *Bousley v. United States*, 523 U.S. 614, 618-21 (1998), this court applied a judicial construction of a statute that post-dated the habeas petitioner's conviction. Further, this Court specified that new substantive rules generally apply retroactively, even "to convictions that are already final." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

Lower courts have also ignored the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288, 304 (1989), which prohibits the "selective application of new rules" because it would violate "the principle of treating similarly situated defendants the same." Contrary to *Teague*, the lower courts have imposed analytical structures which result in the selective, inconsistent, inequitable, and arbitrary application of *Johnson II*, *Welch*, and AEDPA. They have done so by placing an impossible burden on movants to prove reliance on the ACCA's residual clause where the sentencing record is silent or unclear regarding on which clause(s) the ACCA enhancement rested. It contravenes *Teague* to hinge review on whether the sentencing court uttered the phrase, "residual clause," when the law did not require courts to specify the ACCA clause on which they relied.

By placing an impossible burden on movants facing a silent or unclear sentencing record, the lower courts also failed to recognize and apply this Court's decision in *O'Neal v. McAninch*, 513 U.S. 432, 436, (1995), which held that an error is not harmless, and habeas relief must be granted, when a court finds a constitutional trial error, but is in "grave doubt" about whether that error had a "substantial and injurious effect or influence in determining the jury's verdict." Placing the risk of doubt on the respondent, this Court in *O'Neal* instructed that the error is not harmless "if, in the judge's mind, the matter is so evenly balanced that he or she feels in virtual equipoise as to the error's harmlessness." *Id.* at 435-36, 439, 444.

The lower courts are also obliged to consider this Court's recent opinion in *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), which tips the balance in favor of granting relief. This Court in *Rosales-Mireles* clarified that "in the ordinary case," a plain error or miscalculation of a guideline sentencing range that affects a defendant's substantial rights will call for a court of appeals to vacate the sentence for recalculation, even if the claim was not previously raised. *Id.* at 1903, 1911. Although *Rosales-Mireles* does not address the ACCA, this Court emphasized the necessity to preserve "substantial rights" and "the fairness, integrity, or public reputation of the [sentencing] proceedings." *Id.* at 1910-11. These interests clearly are subverted by the unjust and arbitrary nature in which lower courts deny review to persons serving ACCA sentences which are patently illegal under current law.

C. This Case Presents An Ideal Vehicle To Resolve The Conflict Between The Circuits In Addressing The Pressing Issues Related To The Application Of *Johnson II* And *Welch*.

Ezell's case presents the ideal vehicle to resolve the conflict between the circuits because it involves a successive motion requiring the application of § 2255(h). Ezell's case is the ideal vehicle also because it presents a sentencing record which is both silent and ambiguous regarding

on which ACCA clause or clauses the district court relied. As the district court concedes, the "record is silent on whether the Court explicitly considered the residual clause at sentencing." Pet. App. 16a. In imposing the ACCA enhancement, the district court did not specifically invoke any of the ACCA clauses. Pet. App. 42a-82a. However, in its discussion of Ezell's Washington State second-degree burglary convictions, the district court cited *Taylor v. United States*, 495 U.S. 575 (1990), and *United States v. Kilgore*, 7 F.3d 854 (9th Cir. 1993) (per curium), which, according to the Ninth Circuit panel affirming the denial of § 2255 relief, involved enumerated offense cases. Pet. App. 70a-71a. But the Ninth Circuit conceded that the record is unclear as to which ACCA clause the district court relied on for Ezell's two second-degree assault convictions. Pet. App. 5a. In fact, the sentencing court never specified that Ezell's assault convictions fell within the ACCA's force or enumerated clauses. Pet. App. 42a-82a.

The record in Ezell's case presents the ideal vehicle for review also because it allows this Court to address whether, or how, courts may consider presentence reports and sentencing memoranda to indicate on which ACCA clause or clauses the district court may have relied. Strongly indicating reliance on the residual clause is that the district court found that Ezell qualified as an armed career criminal and career offender "for the reasons basically set out in the probation officer's presentence report, and the government's memorandum. . . ." Pet. App. 74a. The presentence report sets forth the text of 18 U.S.C. § 924(e)(2)(B), including the residual clause. PSR ¶42. At least seven times in its memorandum, the government cited the ACCA's residual clause and its language, or argued that the residual clause applied to the alleged predicate offenses. Pet. App. 127a, 130a, 132a-136a. In his sentencing memorandum, defense counsel referred to the ACCA's residual clause's language, "risk of physical injury," seven times, and the "otherwise clause" four times. Pet. App. 98a-99a, 103a-104a. These

circumstances compel the conclusion that the district court relied on the ACCA's residual clause. Further, this case raises the question of whether the government on direct appeal and in collateral proceedings may argue that the district court did not apply the ACCA's residual clause, even though the government repeatedly urged the district court at sentencing to apply the residual clause to support the ACCA enhancement.

The record in Ezell's case is ideal for Supreme Court review also because in affirming the denial of § 2255 relief, the Ninth Circuit relied on *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1088-89 (9th Cir. 2005), as "relevant legal background" indicating that Ezell's intentional assault conviction qualified as an ACCA predicate, even though there was no mention of *Hermoso-Garcia* in the sentencing proceedings or in the § 2255 proceedings. *See* Pet. App. 5a; 7a-18a, 42a-140a; CR 1; CR 3; CR 8; CR 12. Ezell's case presents the ideal vehicle to resolve whether courts reviewing *Johnson II* claims may hinge the denial of relief on case law which was uncited during the sentencing proceedings. The Ninth Circuit's reliance on *Hermoso-Garcia* also raises other questions regarding what part of the legal landscape at the time of sentencing courts may consider in reviewing *Johnson II* claims. Petitioner asserts that *Hermoso-Garcia* may not constitute "binding circuit precedent" at the time of sentencing because it concerns USSG § 2L1.2, rather than the ACCA. Significantly, at the time of Ezell's sentencing, no Ninth Circuit published opinion applied *Hermoso-Garcia* to ACCA cases, or specifically relied on § 2L1.2(b)(1)(A)(ii)'s elements clause to justify an enhancement under the ACCA's elements clause for a Washington conviction for intentional assault resulting in substantial bodily harm under RCW 9A.36.021(1)(a).

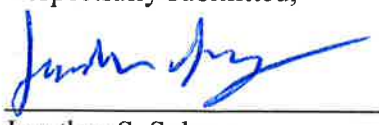
Ezell's case serves as the ideal vehicle for review because, as the government conceded, if Ezell were sentenced today none of his predicate convictions would qualify as violent felonies.

(Ninth Cir. No. 17-35685, Dkt. #16, pp. 32-34). Accordingly, this Court may review Ezell's case to resolve whether § 2255 movants asserting *Johnson* claims are entitled to relief based on current law, or whether lower courts conducting procedural and substantive review may ignore current Supreme Court precedent by limiting review to the law at the time of sentencing.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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