No. _____

In the Supreme Court of the United States

ANTHONY EUGENE HARDEMAN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

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QUESTION PRESENTED FOR REVIEW

When a federal prisoner demonstrates that the Armed Career Criminal Act's residual clause was the only lawful basis to enhance his sentence, but fails to show that the sentencing judge relied on the residual clause, does he satisfy the requirements for a successive motion to vacate under 28 U.S.C. § 2255(h)(2)?

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Petitioner, Anthony Eugene Hardeman asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 23, 2018.

PARTIES TO THE PROCEEDING

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

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OPINION BELOW

The Fifth Circuit's order denying a certificate of appealability and its order denying reconsideration were unpublished and are attached at Pet. App. 2a–3a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit denied a certificate of appealability on August 31, 2018. Pet. App. 1a–2a. Hardeman filed a timely motion for reconsideration, which was denied on October 23, 2018. Pet. App. 3a; *see* Fed. R. App. P. 40(a)(1)(A) & 5th Cir. R. 27.2 (providing for panel reconsideration of single-judge orders). This petition is filed within 90 days after the denial of Hardeman's motion for reconsideration. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

FEDERAL STATUTORY PROVISIONS INVOLVED

These statutes are reproduced at Pet. App. 4a–10a:

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

STATEMENT

A. Statutory framework.

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

In *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015), this Court held that the residual clause is unconstitutionally vague, and that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." In *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court made that rule retroactive to cases on collateral review.

These decisions opened the door for prisoners to challenge their ACCA sentences under 28 U.S.C. § 2255(a) on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States … or that the sentence was in excess of the maximum authorized by law." A prisoner who wants to file a second or successive motion under § 2255 must pass through two "gates" before a court may reach the merits of his claim. *Reyes-Requena v. United States*, 243 F.3d 893, 896–99 (5th Cir. 2001).[1] First, the motion must be certified as provided in section 2244 by the court of appeals to contain "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2); *Reyes-Requena*,

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

243 F.3d 897–99. To obtain this certification, a defendant must make a "prima facie showing" that his or her motion satisfies § 2255's requirements for a second or successive motion.[2] *Reyes-Requena*, 243 F.3d at 898–99 ("prima facie" standard of 28 U.S.C. § 2244(b)(3)(C) has been incorporated into § 2255(h)). As relevant here, a defendant must "show[ ] that [his] claim *relies on* a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" 28 U.S.C. § 2244(b)(2)(A) (emphasis added).[3]

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

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

[3] Hardeman filed a motion for authorization to file a successive petition under § 2255 with the Fifth Circuit, in light of *Johnson* and *Welch v. United States*, 136 S. Ct. 1257 (2016). The court granted authorization to file a successive petition and transferred proceedings to the district court. Thus, Hardeman passed the first jurisdictional hurdle to having his § 2255 motion heard on the merits. *United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018), as revised (Aug. 14, 2018) (discussing jurisdictional requirements of § 2255(h)(2)).

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

In this petition, Hardeman asks the Court to resolve a circuit split and clarify the standard under which a defendant meets his "second-gate" burden to show that his claim "relies on" a previously unavailable new rule of constitutional law.

B. Factual and procedural background.

In 2010, Hardeman was sentenced under the ACCA, based on three prior convictions in Texas: two convictions for second degree robbery and one for delivery of a controlled substance. In June 2016, after he received authorization from the Fifth Circuit to file a successive petition, he filed a motion challenging his sentence under 28 U.S.C. § 2255, arguing that, in light of the Court's decision in *Johnson*, he was improperly sentenced under the ACCA. He argued that his two second degree robbery convictions did not qualify as "violent felonies" under the ACCA's force-elements

clause or its enumerated offense clause. Because the robbery convictions only satisfied the ACCA's now-void residual clause, Hardeman argued his 210-month sentence was unconstitutional. The district court denied the motion, concluding that, under the force-elements clause in the violent felony definition, Hardeman's prior second degree robbery convictions still qualified as ACCA predicates post-*Johnson*. The court also denied a certificate of appealability. The district court's ruling was on the merits of Hardeman's constitutional claim. The court did not address § 2255(h)(2)'s second-gate jurisdictional requirement.

Hardeman moved the Fifth Circuit for a certificate of appealability, arguing reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 338 (2003) (discussing standard for certificate of appealability). The court denied the motion on the previously unaddressed jurisdictional ground: it noted that "at a minimum, the defendant must show that the residual clause "may have" been used in his original sentencing." Pet. App. 2a-3a (citing *Wiese*, 896 F.3d at 723–26). The court found it dispositive that the Government's notice of penalty enhancement cited only the ACCA's force-elements clause. Pet. App. 3a. Thus, the court concluded that "jurists of reason could not debate that the district

court 'may have' relied on the residual clause in applying the ACCA." Pet. App. 3a.[4]

Hardeman filed a motion for panel reconsideration of the single-judge order denying the certificate of appealability. He argued the sentencing record did not show that the district court relied on the force-elements clause, as opposed to the residual clause, in sentencing him. The presentence report did not specify a specific

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[4] In *Wiese*, the Fifth Circuit noted a circuit split on how to determine whether the original sentencing court relied on the residual clause, with some circuits applying a "more likely than not" standard. 896 F.3d at 724. (citing *United States v. Washington*, 890 F.3d 891, 897–98 (10th Cir. 2018), *petition for cert. filed*, No. 18-5594 (Aug. 13, 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018), *cert. denied sub nom. Casey v. United States*, 138 S. Ct. 2678 (2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017), *petition for cert. filed*, No. 18-6385 (Oct. 16, 2018)). Other circuits require only that the sentencing court "may have" relied on the residual clause. *Id.* (citing *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017)).

The Fifth Circuit suggested that "more likely than not" is the correct standard, but declined to decide that question because it believed that Wiese could not satisfy the more lenient "may have" standard because Fifth Circuit precedent, at the time of his sentencing, held that his predicate burglary offense qualified as generic burglary, and thus, qualified under the ACCA's enumerated offense clause. *Id* at 726.

ACCA violent felony clause. Likewise, the district court did not specify under which clause it sentenced Hardeman.

Hardeman argued that he could satisfy his burden to show that the court relied on the residual clause at sentencing because at the time of his 2010 sentencing the Fifth Circuit had unequivocally held that the Texas simple robbery offense qualified as a violent felony under the ACCA's residual clause. *See United States v. Davis*, 487 F.3d 282 (5th Cir. 2007). While, at the same time, the court questioned whether the robbery offense would qualify under the force-elements clause. *See United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541, 547–63 (5th Cir. 2013) (en banc) (suggesting that the robbery offense would not satisfy the identically-worded force clause in sentencing guideline §2L1.2).

Given this precedent, the record is silent as to which of the violent felony clauses the district court actually relied on in sentencing Hardeman—the one supported by existing precedent or the one referenced in the Government's notice. Thus, Hardeman showed, at a minimum, that the court may have relied on the residual clause in sentencing him.

Hardeman also argued another basis upon which to conclude that he satisfied the "relies-on" second-gate requirement. He argued that, regardless of which of the ACCA's clauses the court relied on at sentencing, he could satisfy the second-gate requirement because he could demonstrate that, under current law, his sentence may be unconstitutional in light of *Johnson*. Simply put, Hardeman's claim depends on the new rule in *Johnson*, and, under that new rule, he can demonstrate that he is serving an unconstitutional sentence.

The Fifth Circuit denied Hardeman's motion for panel reconsideration of the denial of a certificate of appealability. Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari to Resolve a Circuit Split and Clarify the Standard by Which a Defendant Meets His Burden, In a Successive Motion Under 28 U.S.C. § 2255, To Prove His Claim Relies on the Rule in *Johnson*.

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

The circuits are divided over what a prisoner must show to pass through the "relies on" gate in § 2244(b)(2)(A). Some say that a defendant must show that it is "more likely than not" that the sentencing court based the ACCA enhancement on the residual clause. Others say that a defendant need only show that his sentence "may have" rested on the residual clause. The Fifth Circuit has declined to pick a side in that split, but it reasoned that Hardeman could not satisfy even the minimal may-have relied on standard because the Government only cited the force-elements clause in its notice of penalty enhancement. Pet. App. A-1 at 2. The record, however, is silent as to which clause the district actually relied on in sentencing Hardeman. The Fifth Circuit's approach

conflicts with the "may-have relied upon" approaches applied by the Third, Fourth, and Ninth Circuits in *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); and *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017).

In *Peppers*, the Third Circuit held that "when [a defendant] demonstrates that his sentence may be unconstitutional in light of the new rule of constitutional law[,]" he has satisfied the § 2244(b)(2)(A) relies-on gatekeeping requirement. 899 F.3d at 223. Peppers carried that burden by showing that he was sentenced under the ACCA "because the district court and the parties believed he had at least three prior convictions qualifying as violent felonies under that statute[,]" and the district court "did not specify the clauses under which those prior convictions qualified as violent felonies." *Id.* at 224. Under the may-have relied on standard as applied by the Third Circuit, Hardeman's claim "relies on" *Johnson*'s new rule.

Under the Fourth Circuit's approach, in *Winston*, Hardeman could satisfy his burden to show the district court may have relied on the residual clause at his sentencing. In *Winston*, that court addressed a second or successive § 2255 motion denied by the district court. 850 F.3d 677 (4th Cir. 2017). The sentencing record, like

Hardeman's, was silent as to whether the sentencing judge had relied on the residual clause in counting Winston's convictions under the ACCA. The government argued that with this silent record, the defendant failed to overcome § 2255(h)(2)'s gatekeeping function to prove that his claim relied on *Johnson*. The Fourth Circuit disagreed because "[n]othing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence." *Id.* at 682. It held this: "[W]hen 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 inmate has shown that he 'relied on' a new rule of constitutional law." *Id.* Given the district court's silence, Hardeman has shown that his 210-month sentence *may have* been predicated on the application of the now-void residual clause.

Likewise, under the Ninth Circuit's approach, in *Geozos*, Hardeman could satisfy his burden to show the district court may have relied on the residual clause. The court cited *Winston* and held "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*." 870 F.3d at 896 & n.6 (noting that the ACCA provenance is "unclear" when

the sentencing record is silent and there is no binding circuit precedent at the time of sentencing).

Among the circuits' approaches to this question, the Third, Fourth, and Ninth Circuits' approaches are the most faithful to the statutory text. But even those approaches may be asking the wrong question. Decisions requiring a defendant to show that the sentencing court may have relied on—and certainly decisions requiring that it was more likely than not that the district court relied on the residual clause—are untethered from the text of the applicable statutes. Nothing in § 2244 or § 2255 suggests, much less compels, a conclusion that a defendant must show that he was sentenced under the residual clause to have his *Johnson* claim considered on the merits. All the statutes require is that a defendant's *claim* "relies on" the retroactive new rule under which he claims relief. *See* 28 U.S.C. §§ 2244(b), 2255(h)(2).

Under an approach faithful to the texts of § 2244 or § 2255, Hardeman should prevail. As the dissent in *Beeman* argued, "In the case of *Johnson*, the plain language of the decision makes clear that relief under the holding is not predicated upon a specific finding at sentencing, but rather the absence of a constitutional basis for the sentence imposed." 871 F.3d at 1229 n.5 (Williams, J., dissenting) (citing and quoting *Welch*, 136 S. Ct. at 1265: "*Johnson*

establishes, in other words, that 'even the use of impeccable fact-finding procedures could not legitimate' a sentence based on that clause.").Thus,

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

Id. at 1230.

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

CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted.

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