No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ZACHARY T. FREY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court declared the Armed Career Criminal Act's (ACCA) residual clause unconstitutionally vague. In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new substantive rule of constitutional law that applied retroactively on collateral review.

In *Beeman v. United States,* 871 F.3d 1215 (11th Cir. 2017), the Eleventh Circuit considered how a defendant could meet his burden to prove his ACCA-enhanced sentence was based upon the now unconstitutional residual clause. The court concluded the defendant could rely only on the "historical record," that is, the long-ago sentencing transcript and a snapshot of the then-current caselaw. Since then, a number of other circuits have diverged, holding instead that a court may consider the historical record, but when that record is silent, it may also rule out the alternative non-residual clauses by looking to more recent Supreme Court cases clarifying the law.

The question presented here is, whether a defendant, faced with a silent record below, can prove his ACCA-enhanced sentence was indeed based upon the residual clause through a process of elimination. And in doing so, can he rely on post-sentencing case law, including this Court's decisions clarifying the other ACCA clauses?[1]

[1] This same issue, and *Beeman* itself, are currently the subject of a petition for writ of certiorari pending before this Court. *Beeman v. United States,* No. 18-6385 (pending).

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

In this post-conviction proceeding under 28 U.S.C. § 2255, Petitioner Zachary Frey respectfully prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit Court of Appeals panel opinion in *Frey v. United States,* -- F. App'x --, 2018 WL 5255226 (11th Cir. Oct. 22, 2018), is reproduced here as Appendix A-1.

STATEMENT OF JURISDICTION

The Eleventh Circuit filed its opinion on October 22, 2018, affirming the district court's denial of Mr. Frey's § 2255 motion. This Court has jurisdiction under 29 U.S.C. § 1254(1), which permits the review of civil cases in the court of appeals.

STATUTORY PROVISIONS INVOLVED

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 in part:

> 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.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. The ACCA transforms a ten-year statutory maximum penalty into a fifteen-year mandatory minimum for certain defendants convicted of federal firearms offenses. 18 U.S.C. §§ 924(a)(2), 924(e). The ACCA enhancement applies when the defendant has three prior convictions for "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). For purposes of the ACCA, "violent felony" is defined as, among other things, any felony "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The italicized language is known as the "residual clause."

In *Johnson*, this Court held that the ACCA's residual clause was unconstitutionally vague. 135 S. Ct. at 2557. The Court explained: "Two features of the residual clause conspire to make it unconstitutionally vague." *Id*. First, the "ordinary-case" analysis - requiring courts to "picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents a serious risk of physical injury" - created "grave uncertainty about how to estimate the risk posed by a crime." *Id*. (citation omitted). And second, the residual clause created "uncertainty about how much risk it takes for a crime to qualify as a violent felony," because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes" preceding it, and those crimes were "far from clear in respect to the degree of risk each poses." *Id*. at 2558 (citation omitted). Those uncertainties led

the Court to conclude that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," "produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2557–58.

In *Welch*, this Court held that *Johnson* announced a new, substantive rule of constitutional law, and it therefore applied retroactively on collateral review. 136 S. Ct. at 1264-65. The Court reaffirmed that "a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes," and that determination is made "by considering the function of the rule." *Id.* (citation omitted). The Court concluded that, "[u]nder th[at] framework, the rule announced in *Johnson* is substantive," because it "changed the substantive reach" of the ACCA by "altering the range of conduct or the class of persons that the Act punishes." *Id.*

2. A person may challenge his sentence 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." The federal courts, including the Eleventh Circuit, uniformly hold that a § 2255 defendant bears the burden of proving a *Johnson* claim. *See Beeman,* 871 F.3d at 1222. It is unclear, however, what a defendant can rely upon to meet that burden.

The Eleventh Circuit was the first to craft the "historical record" rule in *Beeman,* 871 F.2d 1215. There the court held that a defendant can meet his § 2255 burden of proving that an ACCA enhancement was based upon the residual clause only by way of what it referred to as the "historical" record. *Id.* at 1224 n.5. A

defendant must show the sentencing record or clear precedent *from the time of sentencing* shows that a predicate offense fit within the residual clause, and only the residual clause. *Id.* The panel's opinion included a dissent. *Id.* at 1225.

The 2-1 majority opinion derided Beeman's attempt to prove his residual-clause claim by disproving the remaining ACCA alternatives through a review of post-sentencing case law:

> But even if such precedent had been announced since Beeman's sentencing hearing (in 2009), it would not answer the question before us. What we must determine is a historical fact: was Beeman in 2009 sentenced solely per the residual clause? … Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that Georgia aggravated assault no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact: whether in 2009 Beeman was, in fact, sentenced under the residual clause only.

Id. at 1224 n.5. In the end, under the panel's standard, a silent record must be construed against the defendant, and he may not rely upon current law to disprove the ACCA's alternative clauses in order prove that he was sentenced via the unlawful residual clause.

The dissent agreed that a defendant must prove his ACCA sentence was based upon the residual clause, but it objected to the majority's effort to tie the defendant's hands with the twine of its "historical" record. Wrote the dissent: "I do not believe that the merits of Beeman's timely *Johnson* claim can be properly assessed without reaching the question of whether his [prior] conviction … qualifies as a proper predicate offense under the *elements* clause of the ACCA." *Id.* at 1225 (Williams, D.J.,

dissenting) (emphasis added). A defendant's showing, via recent Supreme Court cases, "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.[2] This case addresses how a defendant can prove his sentence was based on the residual clause of the ACCA when the sentencing record is silent.

B. PROCEDURAL BACKGROUND

In August of 2011, Mr. Frey pled guilty to one count each of assault of a federal law enforcement officer (Count I), and possession of a firearm by a convicted felon (Count II). At sentencing, the district court concluded Mr. Frey qualified for an enhanced punishment based on the ACCA. He was sentenced to a total of 180 months' imprisonment. This consisted of a term of 168 months' imprisonment on Count I, and a concurrent term of 180 months' on Count II. In applying the ACCA enhancement the district court relied upon six prior Indiana burglary of a dwelling convictions. During the sentencing hearing the district court was silent as to which clause – elements, enumerated offenses, or residual – the Indiana burglary offenses fit into. The court simply counted the offenses without announcing why.

In 2016, Mr. Frey filed a § 2255 motion. He argued his ACCA sentence was unconstitutional in light of *Johnson,* 135 S. Ct. 2551 (2015). Mr. Frey claimed that

[2] The debate continued to blossom in the Eleventh Circuit's later order denying a petition for rehearing en banc, 899 F.3d at 1218, 1224, where judges on both sides of the question offered pointed, thoughtful expositions on the question presented here.

because after *Johnson,* the ACCA residual clause was void for vagueness, and his Indiana burglary convictions were no longer violent felonies. The district court denied the § 2255 and also denied a certificate of appealability. The Eleventh Circuit eventually granted a certificate of appealability on the issue of:

> Whether the district court erred in concluding that Indiana burglary qualified as a predicate offense under the Armed Career Criminal Act and denying Mr. Frey's claim that *Johnson v. United States,* 135 S. Ct. 2551 (2015), undermined his conviction and sentence under 18 U.S.C. § 924(e)?

See App. A-2.

Ultimately, after briefing, the Eleventh Circuit affirmed the district court's order denying the § 2255 motion. The court indicated it was bound by its previous decision in *Beeman,* 871 F.3d 1215. Therefore Mr. Frey was required to show it was more likely than not that his original sentence was predicated on the ACCA's residual clause. Because Mr. Frey could not "meet his burden under *Beeman* to show that it was more likely than not that his sentence was enhanced under the ACCA's residual clause," his appeal was denied. *Frey,* -- F. App'x --, 2018 WL 5255226.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

1) THE CIRCUITS ARE DIVIDED ON WHETHER A DEFENDANT, FACED WITH A SILENT RECORD BELOW, CAN PROVE HIS ACCA-ENHANCED SENTENCE WAS INDEED BASED UPON THE RESIDUAL CLAUSE THROUGH A PROCESS OF ELIMINATION.

The federal circuits grow more fractured by the day. A current reading of the relevant decisions reveals two separate schools of thought, with at least four circuits on each side of the issue. Meanwhile, at least thirteen (and counting) certiorari petitions have brought the question to this Court's attention, and at least one of those remains pending.[3]

a) The Third, Fourth, and Ninth Circuits require a defendant to prove that the sentencing court "may have" relied on the residual clause when imposing the enhanced sentence, and permit him to meet that burden by citing post-sentencing precedents of this Court

Three circuit courts mirror the dissenting opinions in *Beeman.* Indeed the Fourth Circuit was the first appeals court to declare that a silent record is a path toward, not an obstacle to, relief. In *United States v. Winston,* the court addressed a second or successive § 2255 motion denied by the district court. 850 F.3d 677 (4th Cir. 2017). The sentencing record, like Mr. Frey'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 a silent record the defendant failed to overcome a procedural hurdle unique to successive petitioners (the gatekeeping

[3] *See* footnote 1, *supra.*

function of 28 U.S.C. § 2255(h)) to prove that his claim "relie[d] 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: "[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*], the inmate has shown that he 'relied on' a new rule of constitutional law." *Id.*

Once it determined Winston had satisfied the procedural hurdle imposed upon successive petitioners, the Fourth Circuit "consider[ed] the merits of Winston's appeal." *Id.* at 683. The court measured Winston's prior convictions against the ACCA's alternative clauses. *Id.* at 685. Significantly here, it applied post-sentencing case law to conclude the robbery statute did not fit within the ACCA's elements, or any other, clause. *Id.* The court rejected the government's view that the court was bound to apply only pre-sentencing case law, even if that law was "no longer binding because it ha[d] been undermined by later Supreme Court precedent." *Id.* at 683.

The Ninth Circuit chose the same path in *United States v. Geozos*. 870 F.3d 890 (9th Cir. 2017). There the defendant also brought a successive motion seeking *Johnson* relief. The court cited *Winston* and held that the defendant had satisfied § 2255(h)'s threshold requirement: "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*]." *Id.* 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). The Ninth Circuit then addressed the merits of the *Johnson* claim by "look[ing] to the substantive law concerning the [alternative ACCA clauses] as it *currently* stands, not the law as it was at the time of sentencing." *Id.* at 898 (emphasis in original). The court studied and applied post-sentencing decisions, including this Court's interpretation of the ACCA's non-residual clauses. *Id.* at 897 & 898 n.7 (citing *Mathis v. United States,* 136 S. Ct. 2243 (2016)).

The Third Circuit is the most recent appeals court to announce a position in this burden-of-proof debate. *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). And, like the Fourth and Ninth Circuits before it, the court held that a defendant successfully crosses through the § 2255(h) gate when he proves with a silent sentencing record that he "*might have* been sentenced under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced under that clause." *Id.* at 216 (emphasis added). The court rejected the government's view that a defendant can only pass through the gate by producing evidence that his sentence was based "solely" on the residual clause. *Id.* at 221-22.

Once a defendant passes through the gate and on to the merits, the Third Circuit held, he may "rely on post-sentencing cases (i.e., the current state of the law) to support his *Johnson* claim." *Id.* at 216. The court remarked upon the widening circuit split—"[l]ower federal courts are decidedly split on whether current law,

including *Mathis*, *Descamps*,[4] and *Johnson 2010*[5] … may be used"—but sided with the *Beeman* dissenters. *Id.* at 228. A defendant "may use post-sentencing cases … to support his *Johnson* claim because they … ensure we correctly apply the ACCA's provisions." *Id.* at 230. "It makes perfect sense to allow a defendant to rely upon post-sentencing Supreme Court case law that explains the pre-sentencing law." *Id.* at 229-30.

Decisions like *Mathis*, *Descamps*, and *Curtis Johnson* "instruct courts on what has always been the proper interpretation of the ACCA's provisions. That is because when the Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 230 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). And this: "[T]hose decisions interpreting the ACCA are not new law at all … [They] are authoritative statement[s] of what the [ACCA] meant before as well as after [those] decision[s]." *Id.* (citing *Rivers*, 511 U.S. at 312-13). The Third Circuit ended with this: "[A] rule that requires judges to take a research trip back in time and recreate the then-existing state of the law—particularly in an area of law as muddy as this one — creates its own problems in fairness and justiciability." *Id.* at 231.

b) The First, Fifth, Eighth, and Tenth Circuits are aligned with the Eleventh.

The First Circuit, by a narrow 2-1 margin, joined the *Beeman* majority. In *Dimott v. United States*, the court rejected the argument that a defendant may rely

[4] *Descamps v. United States*, 133 S. Ct. 2276 (2013).

[5] *Curtis Johnson v. United States*, 559 U.S. 133 (2010).

upon post-sentencing case law to show his ACCA predicate offense never properly qualified under the elements or enumerated crimes clauses. 881 F.3d 232, 230, 243 (1st Cir.), *cert denied sub sum*, *Casey v. United States*, 138 S. Ct. 2678 (2018). The *Dimott* panel rejected the view that a defendant may prove through a process of elimination that the sentencing court could only have relied upon the then-valid, but now invalid under *Johnson*, residual clause. *Id.* at 243. The dissenting judge, however, endorsed the contrary view. Like the *Beeman* dissents and the Third, Fourth, and Ninth Circuits, the dissent argued that with a silent sentencing record, post-sentencing precedents could prove that the defendant was wrongly sentenced based upon the forbidden ACCA residual clause. *Id.* at 246 (Torruella, J., dissenting in part).

The Tenth Circuit crafted a rule similar to the Eleventh Circuit's in *Beeman*. In *United States v. Snyder*, it held that faced with a silent record, a district court may consider only the "relevant background legal environment" at the time of sentencing to ask whether a non-residual clause led to the ACCA enhancement. 871 F.3d 1122, 1129 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018). A "relevant background legal environment" is a "snapshot of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions."*Id.*at 1129.[6]

[6] In *Snyder,* the defendant's *Johnson* motion was his first § 2255 motion. The Tenth Circuit later extended the *Snyder* holding to second-or-successive § 2255 motions. *United States v. Washington,* 890 F.3d 891, 896-97 (10th Cir. 2018).

The Fifth Circuit, too, joined the *Beeman* cohort, at least for second-or-successive § 2255 motions. *United States v. Weise*, 896 F.3d 720, 724 (5th Cir. 2018). The court concluded that "we must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause, [the elements clause,] or the residual clause." *Id.* The panel explicitly rejected Weise's effort to prove that his ACCA sentence stemmed from the residual clause by using *Mathis* to disprove the enumerated crimes clause. *Id.*at 725-26.

The Eighth Circuit most recently joined this majority view. *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018). The court echoed, and quoted, the *Beeman* rule: "Where the record or an evidentiary hearing is inconclusive, the district court may consider 'the relevant background legal environment at the time of … sentencing' to ascertain whether the movant was sentenced under the residual clause." *Id.* at 1015. By drawing the borders around the snapshot of case law current at the long-ago sentencing hearing, of course, the Eighth Circuit too turns a blind eye to this Court's more recent opinions interpreting the scope of the ACCA's several provisions. But the view is not unanimous, even within the *Walker* panel. *Id.* at 1016-17 (Kelly, J, concurring in part and dissenting in part) ("I would hold that a claim for collateral relief under *Johnson* should be granted so long as the movant has shown that his sentence may have relied upon the residual clause, and the government is unable to demonstrate to the contrary.").

c) The Sixth Circuit straddles both sides of the debate by approving the use of post-sentencing case law to prove the merits of a first § 2255 motion, but not to support a second or successive § 2255 motion.

The Sixth Circuit has crafted a hybrid answer to the question presented here. Where a defendant raises a *Johnson* claim in a second-or-successive § 2255 motion, a silent historical record means he must lose and may not salvage the claim by citing post-sentencing case law. *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) (explicitly adopting views of the First and Eleventh Circuits). But later opinions of the Sixth Circuit have limited *Potter's* reach.

When it comes to a defendant's *first* § 2255 motion, the Sixth Circuit agrees with the Third, Fourth, and Ninth Circuits, and the dissenters in the Eleventh Circuit: With a silent sentencing record, a defendant may prove his *Johnson* claim by citing post-sentencing case law, including decisions of this Court. *Raines v. United State*s, 898 F.3d 680, 688-89 (6th Cir. 2018). The court explicitly limited the *Potter* rule to second or successive § 2255 *Johnson* motions by running his predicate offense through the filter of this Court's *Mathis* decision, a decision which arrived long after the original sentencing hearing. *Id.* at 688-89.

II. THE QUESTION IS RECURRING AND IMPORTANT

The Eleventh Circuit's historical record rule misapplies, or fails to apply at all, this Court's many recent ACCA precedents. In the Eleventh Circuit, a lower court must travel back in time in search of (1) factual findings that generally don't exist because they did not matter, and (2) outdated case law. All while turning a blind eye to this Court's decisions clarifying and correcting that very case law. Thus, in the

Eleventh Circuits and those circuits which have adopted *Beeman*, this Court's decisions carry no influence at all. But at least three circuit courts take the opposite view. These courts permit a judge to inform his understanding of a silent historical record through the later clarifications by this very Court. So as things now stand, a defendant's ACCA sentence depends not on the facts of his own case, but on the fluke of geography.

As this Court well knows, many thousands of defendants sentenced under the ACCA have filed *Johnson*-based § 2255 motions in district courts throughout the country. In the Eleventh Circuit alone, more than 2,000 defendants filed *Johnson*-based applications for permission to pursue a second or successive § 2255 motion. *In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring). The ACCA is everywhere, as is evidenced by the numerous cases filed in this Court regarding the enhancement. This sentencing statute is as close to a national crisis as one might find in the federal criminal code.

That is not all. There is much at stake for each defendant in these *Johnson*-related ACCA cases. An ACCA sentence carries a breathtakingly harsh prison sentence. And many of these harsh sentences, we now know, are unlawful. Wrote Judge Martin in dissent from the *Beeman* en banc denial: "[T]he *Beeman* panel … imposed administrative impediments, such that [a *Johnson* litigant] can get no review of his sentence. Those impediments are not derived from the statute or Eleventh Circuit or Supreme Court precedent, and they bar relief for prisoners serving sentences that could not properly be imposed under current law." 899 F.3d at

1224 (Martin, J., dissenting from denial of rehearing en banc). Without a prompt intervention by this Court, the divided paths of the circuit courts will create inconsistent and unfair sentences for countless similarly-situated defendants across the country.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CONFLICT

Mr. Frey's ACCA sentence depends entirely upon the fate of the Eleventh Circuit's invented rule. The appeals court resolved his case only upon that ground, and no other. If this Court rejects the Eleventh Circuit's path here, then Mr. Frey will likely gain *Johnson* relief from his harsh sentence because his predicate offenses do not qualify under the elements or enumerated offenses clauses.

At the time of Mr. Frey's Indiana convictions, the Indiana definition of burglary was both non-generic and indivisible. Burglary was defined as:

> A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony.

Ind. Code § 35-43-2-1 (2010). The location-element of Indiana burglary has been expansively interpreted by Indiana state courts such that a fence counts as a "structure" for purposes of the burglary statute. *Gray v. Indiana,* 797 N.E.2d 333, 335 (Ind. App. Ct. 2003) (fence surrounding a car lot was a "structure" for purposes of Indiana burglary statute); *McCovens v. Indiana*, 539 N.E.2d 26, 29 (Ind. 1989) ("The fence surrounding the business was a 'structure' as contemplated by Ind. Code § 35-43-2-1, its purpose being to protect the property on the premises."); *Joy v. State,* 460 N.E.2d 551, 558 (Ind. Ct. App. 1984) (fence surrounding a lumber yard was a

"structure" under the Indiana burglary statute). Because the elements of the Indiana statute include the entry into the area surrounding a structure, the statute is non-generic. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).

The statute is also indivisible. The jury instructions which applied at the time of Mr. Frey's offense required the state to prove:

> The Defendant
> 1. knowingly or intentionally
> 2. broke and entered
> 3. the building or structure of [*name*]
> 4. the intent to commit a felony [*specify*] in it, to-wit; [*set out elements of object felony*] …
>
> [If the State further proved beyond a reasonable doubt that the burglary … (the building or structure was a dwelling) … you should find the Defendant guilty of burglary, a Class B felony.]

See Ind. Pattern Jury Instructions 4.17 (2nd ed. 2002). The instructions allow a jury to find a defendant guilty if the state proves they entered a building or a structure. They are not required to identify, with any specificity if the location was a building or structure, and any structure can include a fenced in area. Because the statute lists various means, and not elements, the modified categorical approach "has no role to play" in this analysis. *Descamps*, 133 S. Ct. at 2285.

No Eleventh Circuit opinion has ever resolved the ACCA fate of the Indiana burglary statute, that is only because the court hid behind the silent-record shield. *But see United States v. Perry,* 862 F.3d 620, 624 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1545 (2018) (Concluding Indiana burglary qualifies as a violent felony after *Johnson,* based on the enumerated offenses clause). Once this Court removes that shield, the crime will likely evaporate under the sunlight of this Court's ACCA jurisprudence and Mr. Frey's ACCA sentence will likely be no more.

IV. THE ELEVENTH CIRCUIT'S RULE IS WRONG BECAUSE IT REQUIRES LOWER COURTS TO IGNORE THIS COURT'S DECISIONS CLARIFYING THE SCOPE OF THE ACCA AND LEADS TO TROUBLING PRACTICAL OUTCOMES.

Mr. Frey, like every § 2255 defendant, bears the burden of showing that his claim is based upon a new rule of constitutional law. And in a *Johnson* motion, that burden requires him to show that his sentence was based upon the red-lined residual clause. But what evidence may Mr. Frey, and every other *Johnson* claimant, offer to meet that burden? And especially what shall we make of a silent sentencing record in the district court?

The Eleventh Circuit gets it wrong. The court wrongly demands that Mr. Frey and all other *Johnson* hopefuls must prove, based only upon the "historical record," that a district judge relied on the now-defunct residual clause. The Eleventh Circuit blocks a defendant's effort to prove his case through a process of eliminating the alternative sources: the elements and enumerated crimes clauses. Once the court ties a defendant's elements-clause hand behind his back—the powerful circumstantial evidence that the district court could only have relied upon the residual clause—the court then blames him for that gap in his proof. The Eleventh Circuit's narrow path is flawed in two ways.

First, the rule betrays this Court's many decisions interpreting and clarifying various recidivist sentencing statutes. The *Beeman* rule immunizes unlawful sentences from this Court's own jurisprudence. In Mr. Frey's case, that list includes at least *Curtis Johnson*, *Descamps*, and *Mathis*. This blind spot ignores the fact that this Court's opinions there did not stake new territory, but merely clarified the law

as it always has been. *See Peppers*, 899 F.3d at 230. The *Beeman* rule, "implies that the district judge deciding [a] § 2255 motion can ignore decisions from the Supreme Court that were rendered since that time in favor of a foray into a stale record, … [and] that the sentencing court must ignore that precedent unless the sentencing judge uttered the magic words 'residual clause.'" *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). And as one judge in the Third Circuit points out, the Eleventh Circuit's practice also undercuts this Court's decision in *Welch*, the retroactive catalyst of all *Johnson* claims. *Raines*, 898 F.3d at 690 (Cole, C.J. concurring).

The *Beeman* rule demands that courts ignore the law of the land. Surely this rule cannot stand. As one Eleventh Circuit judge mused: "[T]he *Beeman* panel opinion binds all members of this Court to recreate and leave in place the misunderstandings of law that happened at sentencing. Ignoring for a moment that we must apply Supreme Court precedent, what is the value in binding ourselves to erroneous decisions?" 899 F.3d at 1228 (Martin, J., dissenting from the denial of rehearing en banc).

Second, the Eleventh Circuit rule smacks of unfairness. The problem with the *Beeman* command that a silent record must be construed against a defendant is this: "Nothing in the law requires a judge to specify which clause of [the ACCA] … it relied upon in imposing a sentence." *Beeman*, 899 F.3d at 1228 (Martin, J., dissenting from the denial of rehearing en banc). Before *Johnson*, with the residual clause's wide safety net firmly in place, judges and litigants had little incentive to choose one ACCA violent-felony prong over another. And with no practical reason to check any one of

the ACCA violent-felony boxes, judges rarely did so. Only now, after *Johnson*, does that question matter. For the same reason, the circuit courts rarely had an opportunity to pass judgment on the ACCA provenance of most potential predicates. And it is unfair to defendants, especially those whose predicate offenses fit under the residual clause only, to penalize them now with that silence.

For these reasons, the *Beeman* path leads to what the panel's dissent called "unwarranted and inequitable results," 871 F.3d at 1228 (Williams, D.J., dissenting), and the dissent from the en banc denial labeled "very real practical concerns." 899 F.3d at 1228-29 (Martin, J., dissenting from the denial of rehearing en banc).

In her *Beeman* dissent, Judge Martin noted "[t]he Supreme Court recently reminded us of our critical duty to exhibit regard for fundamental rights and respect for prisoners as people." *Id.* at 1230 (quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018)). She also criticized her own court for allowing the tainted *Beeman* panel opinion to betray these principles: "When considering claims [of defendants serving sentences no longer permitted by law], 'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'" *Id.* (quoting *Rosales-Mireles*, 138 S. Ct. at 1908).

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Zachary Frey, prays that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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