No. _____

In The Supreme Court of the United States

CALVIN FITZGERALD TANNEHILL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

ALLISON CASE
Assistant Federal Defender

TOBIE J. SMITH*
Research & Writing Attorney
**Counsel of Record*

505 20th Street North
Suite 1425
Birmingham, Alabama 35203
205-208-7170

Counsel for Petitioner

QUESTION PRESENTED

Denial of a certificate of appealability in a 28 U.S.C. § 2255 proceeding is appropriate only where "reasonable jurists would consider [it] to be beyond all debate" that a movant has "failed to show any entitlement to relief . . . ." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In this case, a reasonable jurist could conclude that Mr. Tannehill was sentenced under the now-void residual clause of the Armed Career Criminal Act ("ACCA") because, under the controlling law at the time of his sentencing, the residual clause was the only lawful basis for enhancing his sentence under the ACCA.

The question presented is whether the Eleventh Circuit misapplied this Court's precedents, and therefore should be summarily reversed, by denying a certificate of appealability on whether Mr. Tannehill's § 2255 claim relied on the Court's voiding of the residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal and State Cases **Page(s)**

United States Code **Page(s)**

State Statutes **Page(s)**

Constitutional Provisions **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Calvin Fitzgerald Tannehill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The district court's memorandum opinion and order denying Mr. Tannehill's 28 U.S.C. § 2255 motion are unpublished, and they are included in Appendix A.

The Eleventh Circuit's order denying Mr. Tannehill's motion for a certificate of appealability is unreported, and it is included in Appendix B.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit denied Mr. Tannehill a certificate of appealability on November 6, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The question presented involves the application of provisions in three statutes: 28 U.S.C. §§ 2244(b)(2)(A), 2253(c)(1)(B) and (c)(2), and 2255(f)(3).

Subsections (c)(1)(B) and (c)(2) of 28 U.S.C. § 2253 provide,

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

. . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Subsection (f)(3) of 28 U.S.C. § 2255 provides,

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

(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 . . . .

Subsection (b)(2)(A) of 28 U.S.C. § 2244 provides,

(b)(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 . . . .

INTRODUCTION

Calvin Tannehill can readily show that his enhanced sentence under the Armed Career Criminal Act ("ACCA") was lawful until this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and became unlawful once the Court decided *Johnson*. He also can show that the ACCA's "residual clause," which *Johnson* held to be void for vagueness, was the only legal basis for classifying his prior convictions as ACCA predicates at the time of his 2008 sentencing.

Under those circumstances, reasonable jurists could conclude without difficulty that *Johnson*'s new rule of constitutional law is the reason Mr. Tannehill's sentence is unlawful. The Eleventh Circuit and others have recognized the importance of the law at the time of sentencing in judging a claim's basis in *Johnson*'s holding. *See infra* pp. 8–9. But in denying relief under 28 U.S.C. § 2255, the district court disregarded those circumstances and relied instead on a probation officer's presentence report, which stated that Mr. Tannehill's prior convictions were predicates under ACCA provisions other than the residual clause. While those statements were contrary to the controlling law at the time, they went unchallenged at sentencing because the residual clause remained in force and supported the result. And Mr. Tannehill cannot appeal the district court's judgment because the district judge and a circuit judge denied him a certificate of appealability ("COA").

This was a clear misapplication of this Court's precedents holding that a COA should be denied only where "reasonable jurists would consider [it] to be beyond all debate" that a movant has "failed to show any entitlement to relief . . . ." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). A reasonable jurist could find that the sentencing court most likely applied binding precedent correctly even though the presentence report did not. Thus, a reasonable jurist could find that Mr. Tannehill's sentence was unlawful after *Johnson*, entitling him to relief under § 2255. The Eleventh Circuit misapplied that standard, and its denial of a COA should be summarily reversed.

STATEMENT OF THE CASE

1. Federal Criminal Conviction and Sentence. In 2007, Mr. Tannehill was convicted in the Northern District of Alabama for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), unlawful distribution of 5 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and unlawful possession of a firearm in connection with a drug-trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A)(i).

A Presentence Investigation Report ("PSR") recommended that Mr. Tannehill's sentence for the § 922(g)(1) count be enhanced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), identifying seven prior convictions as "violent felonies" under the ACCA:

- two counts of Pennsylvania escape, defined as "unlawfully remov[ing] himself from official detention or fail[ing] to return to official detention following temporary leave," 18 Pa. Cons. Stat. § 5121(a), in 1980 and 1982;

- four counts of Pennsylvania burglary, defined as entering a building or "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business," 18 Pa. Cons. Stat. § 3501 (1982), "or separately secured or occupied portion thereof, with intent to commit a crime therein," *Commonwealth v. Wagner*, 566 A.2d 1194, 1195 (Pa. 1989) (quoting 18 Pa. Cons. Stat. § 3502 (1989)), in 1982; and

- one count of Florida escape, defined as "escap[ing] or attempt[ing] to escape from . . . confinement," *Brown v. State*, 623 So. 2d 800, 801 (Fla. Dist. Ct. App. 1993) (quoting Fla. Stat. § 944.40 (1991)), in 1992.

The PSR asserted that the escape convictions were violent felonies because each "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). And it asserted that the burglary

convictions were violent felonies on that same basis, and because each "is burglary," 18 U.S.C. § 924(e)(2)(B)(ii).

Mr. Tannehill filed written objections to those paragraphs of the PSR. At his sentencing hearing in January 2008, though, the district court summarily overruled the objections, adopted the PSR, and sentenced him under the ACCA to 235 months' imprisonment for the felon-in-possession count. The court also imposed a concurrent 235-month sentence on the § 841 crack-distribution count and a consecutive 60-month sentence on the § 924(c) count, for a total prison sentence of 295 months.

2. Mr. Tannehill's 2016 Motion to Vacate under 28 U.S.C. § 2255. In June 2016, Mr. Tannehill sought, under 28 U.S.C. § 2244(b)(3), authorization from the United States Court of Appeals for the Eleventh Circuit to file a successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). He filed such a motion in district court on June 23, 2016, and the Eleventh Circuit thereafter issued an order authorizing the filing. The motion asked the district court to vacate both the ACCA sentence on the § 922(g)(1) count and the concurrent sentence on the § 841 count because they were imposed as a sentence package.

3. The District Court's Disposition of the § 2255 Motion. In April 2018, the district court dismissed Mr. Tannehill's § 2255 motion, holding that it was untimely. Citing the PSR, the court concluded that Mr. Tannehill "was sentenced as an armed career criminal based on the elements and enumerated offenses clauses of the ACCA, without a single mention of the ACCA's residual clause." Pet. App. 6a. The

court found that Mr. Tannehill's "claim is not a *Johnson* claim because there is no evidence (and, in fact, there is evidence to the contrary) that the sentencing court relied on the residual clause of the ACCA in enhancing his sentence." *Id.* Therefore, the court stated, the § 2255 motion would have been timely only if had been filed within one year of the date Mr. Tannehill's conviction became final, which it was not.[1]

The district court thereafter denied a certificate of appealability ("COA").

4. Application for a Certificate of Appealability from the Eleventh Circuit. In August 2018, Mr. Tannehill moved the Eleventh Circuit for a COA. His motion explained that under the law at the time he was sentenced, "the residual clause, and only the residual clause, was the proper legal basis for classifying each of his prior convictions as an ACCA violent felony." Mot. for COA 11. And, it showed, Mr. Tannehill continued to have three or more ACCA predicates "until the day *Johnson* voided the residual clause." *Id.* at 26.

A single-judge order from the Eleventh Circuit denied a COA. The order stated that Mr. Tannehill's § 2255 motion was not timely because it did not present "a *Johnson* claim" and was filed more than one year after the end of his direct appeal. Pet. App. 13a. The order concluded that because the PSR was adopted by the sentencing court and relied on ACCA provisions other than the residual clause, Mr.

[1] A single sentence in the district court's memorandum opinion states that the claim also was procedurally defaulted because Mr. Tannehill had not raised it on direct appeal from his conviction. Pet. App. 7a–8a. But the government had never asserted procedural default, which "is an affirmative defense for the [government]" that is waived if not raised. *Gray v. Netherland*, 518 U.S. 152, 165–66 (1996). And because the government never asserted procedural default, the district court heard no argument as to whether there were grounds to excuse any default.

Tannehill "did not make the requisite showing that it was more likely than not that the district court used the residual clause to enhance his sentence." *Id.*

REASONS FOR GRANTING THE PETITION

Jurists of reason could conclude that *Johnson* is retroactive precisely because of sentences like Mr. Tannehill's.

Mr. Tannehill received an enhanced sentence because of the residual clause of the Armed Career Criminal Act ("ACCA"), which this Court held unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551 (2015). If the residual clause had not been in effect when he was sentenced in 2008, there would have been no doubt that his prior convictions for escape and burglary were not ACCA violent felonies, and he could have successfully contested the probation officer's assertion that they were. But because the residual clause *was* in effect at the time, there was no reason even to try to contest the matter.

Denial of a COA is proper where "reasonable jurists would consider [it] to be beyond all debate" that a movant has "failed to show any entitlement to relief . . . ." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). But that is not so here. Reasonable jurists could disagree with the conclusion that the sentencing court's summary adoption of Mr. Tannehill's PSR in 2008 means that his § 2255 claim is not based on *Johnson*.

Indeed, reasonable jurists *do* disagree with the approach that the district court took in dismissing Mr. Tannehill's § 2255 motion:

- The Fourth Circuit has held that a § 2255 movant "has shown that he 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A)" if his "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* . . . ." *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). And that "is true regardless of any non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence." *Id.*

- The Ninth Circuit's standard is similar: "[W]hen it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson* . . . ." *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017).

- The Tenth Circuit has adopted a standard that differs from those circuits' but also does not treat attributions at the time of sentencing as dispositive. Even where "[t]he sentencing record is ambiguous as to whether the sentencing court relied on the residual clause," a § 2255 claim is based on *Johnson* where "a review of the relevant background legal environment" shows "that the sentencing court must have relied on the residual clause . . . ." *United States v. Driscoll*, 892 F.3d 1127, 1135 (10th Cir. 2018).

Under any of those standards, Mr. Tannehill's § 2255 motion presented a claim based on *Johnson*.

Reasonable jurists could reach the same conclusion under the Eleventh Circuit's standard, which requires a § 2255 movant seeking relief based on *Johnson* to "show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence." *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017). The Eleventh Circuit noted that "statements in the PSR" could provide "circumstantial evidence to show the specific basis of the enhancement." *Id.* at 1224 n.4. But even without such statements, "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. Consistent with that principle, the Fifth Circuit subsequently concluded that where a § 2255 movant's "third predicate conviction could have applied only under the residual clause," *Johnson* entitled him to relief "even using . . . the Eleventh Circuit's 'more likely than not' test," *United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017).

Questions about the proper standard by which to evaluate *Johnson* claims, and about how to apply those standards to specific cases, are still percolating in the courts of appeals. Under these circumstances, it is particularly clear that "jurists of reason could disagree with the district court's resolution of [Mr. Tannehill's] constitutional claims . . . [and] could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

A. Legal background: the ACCA, *Johnson v. United States*, and Mr. Tannehill's prior convictions.

1. Sentencing enhancements under the ACCA.

Ordinarily, the maximum term of imprisonment for a violation of 18 U.S.C. § 922(g)(1) is ten years. *See* 18 U.S.C. § 924(a)(2). But under the ACCA, the *minimum* sentence for a violation of § 922(g)(1) is 15 years' imprisonment if the defendant "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another . . . ." 18 U.S.C. § 924(e)(1). The maximum ACCA sentence is imprisonment for life. *Id.*

Mr. Tannehill did not have any prior felony drug convictions. But at his 2008 sentencing, the district court classified his four burglary convictions and three escape

convictions as violent felonies under § 924(e)(2)(B). In *Johnson*, the Court explained the ACCA's definition of that category:

> The [ACCA] defines "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 the person of another; or
> >
> > "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added).
>
> The closing words of this definition, italicized above, have come to be known as the Act's residual clause.

135 S. Ct. at 2555–56. Courts commonly refer to subsection (e)(2)(B)(i) as the "force clause" or the "elements clause"; this petition uses the latter term. The list of offenses that precedes the residual clause in subsection (e)(2)(B)(ii), including the phrase "involves use of explosives," is referred to as the "enumerated-offenses clause" or the "enumerated clause"; this petition uses the former term for that provision.

2. The Court voids the residual clause in *Johnson v. United States.*

In *Johnson*, the Court held the residual clause to be incompatible with the right, under the Fifth Amendment's Due Process Clause, not to be punished "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." 135 S. Ct. at 2556 (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). Concluding "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," *id.* at

2557, the Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process," *id.* at 2563. Reasonable jurists could conclude, without difficulty, that Mr. Tannehill is serving just such a sentence.

3. Mr. Tannehill's ACCA predicates.

Pennsylvania burglary. Mr. Tannehill has four prior convictions for burglaries committed in Pennsylvania in 1982. Pennsylvania burglary is defined in 18 Pa. Cons. Stat. § 3502. At the time of Mr. Tannehill's offenses, the statute provided, "A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." *Commonwealth v. Wagner*, 566 A.2d 1194, 1195 (Pa. 1989) (quoting 18 Pa. Cons. Stat. § 3502 (1989)). The term "occupied structure" is statutorily defined in 18 Pa. Cons. Stat. § 3501, today as in 1982, to mean "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present."

Pennsylvania escape. The sentencing court also classified Mr. Tannehill's Pennsylvania escape convictions as violent felonies. One of the offenses was committed in 1980, the other in 1982. Pennsylvania escape is defined in 18 Pa. Cons. Stat. § 5121(a), which stated at the time of both offenses, as today, "A person commits an offense if he unlawfully removes himself from official detention or fails to return

to official detention following temporary leave granted for a specific purpose or limited period."

Florida escape. Mr. Tannehill's final predicate conviction was Florida escape in 1992. That offense is defined in Fla. Stat. § 944.40. At the time of the offense, the statute provided,

> Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The punishment of imprisonment imposed under this section shall run consecutive to any former sentence imposed upon any prisoner.

Brown v. State, 623 So. 2d 800, 801 (Fla. Dist. Ct. App. 1993) (emphasis in *Brown* omitted) (quoting Fla. Stat. § 944.40 (1991)).

B. Mr. Tannehill's escape and burglary convictions were ACCA predicates because of the residual clause.

1. The residual clause was the only legal basis to classify Mr. Tannehill's escape convictions as ACCA violent felonies in 2008.

Mr. Tannehill's PSR asserted that his escape convictions from Pennsylvania and Florida were violent felonies under the ACCA's elements clause, but that contention does not withstand even passing scrutiny. It is self-evident that "unlawfully remov[ing] [one]self from official detention or fail[ing] to return to official detention following temporary leave," 18 Pa. Cons. Stat. § 5121(a), does not "[have] as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). Neither does "escap[ing] or attempt[ing] to escape from . . . confinement," *Brown*, 623 So. 2d at 801 (quoting Fla.

Stat. § 944.40 (1991)). Just as clearly, neither offense was a violent felony under the enumerated-offenses clause, even "independent of [its] label[ ]" under state law, *Taylor v. United States*, 495 U.S. 575, 592 (1990), because neither one accords with any conception of "burglary, arson, or extortion, [or] involves use of explosives," 18 U.S.C. § 924(e)(2)(B)(ii).

The PSR's classification of those offenses as elements-clause violent felonies did not have to withstand any scrutiny, though. At the time of Mr. Tannehill's 2008 sentencing, binding precedent clearly held that escape convictions—even for "so-called 'walkaway' escape," *United States v. Gay*, 251 F.3d 950, 954 (11th Cir. 2001)—were violent felonies under the ACCA's residual clause and an identical provision in the then-current Guidelines definition of "crime of violence."[2] *Id.* at 953–55. In *Gay*, "[t]he government . . . acknowledge[d] that the crime of escape for which Gay was convicted did not have the use of force or threatened use of force as an element of the offense." *Id.* at 953. But, the Eleventh Circuit noted, "every other circuit that has applied this analysis has determined that escape does involve conduct that 'presents a serious potential risk of physical injury to another.'" *Id.* The Eleventh Circuit agreed in *Gay*, holding that escape qualified as a crime of violence under the Guidelines residual clause because the offense "present[s] the potential risk of violence, even when it involves a 'walk-away' from unsecured correctional facilities . . . ." *Id.* at 955.

[2] The Eleventh Circuit, like others, consistently "read the definition of a 'violent felony' under § 924(e) of the Armed Career Criminal Act as 'virtually identical' to the definition of a 'crime of violence' under U.S.S.G. § 4B1.2." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

Soon after Mr. Tannehill's 2008 sentencing and this Court's decision in *Chambers v. United States*, 555 U.S. 122 (2009) (holding that Illinois offense of knowingly failing to report to a penal institution was not violent felony under residual or other ACCA clause), the Eleventh Circuit retreated from *Gay*'s holding in *United States v. Lee*, 586 F.3d 859 (11th Cir. 2009). The court held, as "a matter of first impression after the Supreme Court's decision in *Chambers*," that "Lee's prior conviction for a 'walkaway' escape is not a 'violent felony' under § 924(e)(2)(B)(ii) of the ACCA," *Lee*, 586 F.3d at 861.

Before *Lee*, Eleventh Circuit precedent clearly established that Mr. Tannehill's prior escape convictions were violent felonies under the ACCA's residual clause, and only the residual clause. After *Lee*, those offenses arguably no longer qualified as violent felonies under any ACCA clause.[3] But Mr. Tannehill's previously imposed ACCA-enhanced sentence still was unquestionably lawful after *Lee*, because under binding precedent his burglary convictions continued to be ACCA violent felonies until this Court decided *Johnson*.

[3] The Eleventh Circuit still classified some non-walkaway escape convictions as violent felonies under the residual clause after *Lee*, if the convictions involved conduct that "present[ed] a 'serious potential risk of physical injury' that is similar in kind and in risk to the enumerated offenses." *United States v. Proch*, 637 F.3d 1262, 1268 (11th Cir. 2011) (holding, based on "[t]he charging document in the instant case," that an escape conviction under Fla. Stat. § 944.40 was a residual-clause violent felony).

2. The residual clause was the only legal basis to classify Mr. Tannehill's Pennsylvania burglary convictions as ACCA violent felonies in 2008.

Mr. Tannehill's Pennsylvania burglary convictions also were not encompassed by either the elements clause or the enumerated-offenses clause when he was sentenced. The principles supporting that conclusion were clear and well established in 2008.

Like Mr. Tannehill's walkaway escape offenses, Pennsylvania burglary plainly is not a violent felony under the ACCA's elements clause—though the PSR at his sentencing asserted that it was—because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). *Unlike* escape, though, burglary is enumerated in § 924(e)(2)(B)(ii). But well before 2008, the law already was clear that not every burglary "is burglary" under the ACCA.

In *Taylor v. United States*, 495 U.S. 575, 599 (1990), the Court held that a conviction "is burglary" for purposes of § 924(e)(2)(B)(ii) if the offense conforms to a "generic" definition. The Court defined a generic burglary as one that "ha[s] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. at 599.

Not all offenses labeled "burglary" match that definition, the Court noted, because some "define burglary more broadly, *e.g.*, by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." *Id.* The offense at issue in *Taylor* was an example of

a nongeneric burglary; the Missouri statute under which Mr. Taylor had been convicted "included breaking and entering 'any booth or tent, or any boat or vessel, or railroad car.'" *Id.* at 599 (quoting Mo. Rev. Stat. § 560.070 (1969) (repealed)). Because "the sparse record" did not allow the Court to determine whether Mr. Taylor's offense was a generic burglary, the Court could not find that his conviction qualified as an ACCA violent felony. *Id.* at 602.

The Pennsylvania statute under which Mr. Tannehill was convicted is similarly broad. At the time of his convictions, the statute prohibited "enter[ing] a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein . . . ." *Wagner*, 566 A.2d at 1195 (quoting 18 Pa. Cons. Stat. § 3502 (1989)). And "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein" could be an "occupied structure." 18 Pa. Cons. Stat. § 3501. As the Third Circuit recognized in *United States v. Bennett*, 100 F.3d 1105 (3d Cir. 1996), "Pennsylvania's statute is broader than generic burglary" because it did not limit the offense to buildings and structures. 100 F.3d at 1109. Rather, it "includes . . . any vehicle adapted for overnight accommodations or for business" and "*any* place adapted for 'carrying on business.'" *Id.*[4]

[4] That conclusion is not called into doubt by the Court's recent holding that including "vehicles designed or adapted for overnight use" along with more conventional structures in a definition of burglary does not "take[] the statute outside the generic burglary definition." *United States v. Stitt*, 139 S. Ct. 399, 407 (2018). *Bennett*'s rationale appears not to have anticipated *Stitt*'s holding, as the Third Circuit cited the inclusion of "any vehicle adapted for overnight accommodations or for business" as one of "two ways" that "Pennsylvania's statute is broader than generic burglary,"

Nor could Mr. Tannehill's burglary convictions have been fitted into the enumerated-offenses clause by other means. At the time of his sentencing, the Eleventh Circuit, like some others, permitted nongeneric burglary convictions to be classified as violent felonies under the enumerated-offenses clause based on court documents from the conviction or undisputed offense details in a PSR. *See United States v. Beckles*, 565 F.3d 832, 843 (11th Cir. 2009). But the sentencing court could not resort to those sources, because the government did not present "*Shepard* documents"[5] from state proceedings, and Mr. Tannehill specifically objected to the paragraphs of his PSR that summarized the reported facts of his predicate convictions.

Without *Shepard* documents or undisputed PSR statements, the sentencing court had only one legal basis for classifying his prior burglaries as violent felonies, and it was a popular and accommodating basis at the time of his sentencing: the residual clause. The Eleventh Circuit had held that a nongeneric burglary may "present[] a serious risk of physical injury to another," § 924(e)(2)(B)(ii), that is more

---

Bennett, 100 F.3d at 1109. But *Bennett*'s other ground for finding Pennsylvania's definition to be nongeneric—that it encompasses "unlawful entry of *any* place adapted for 'carrying on business,'" *id.*—was not abrogated by *Stitt*. And under current Eleventh Circuit precedent, that remains a basis for removing a burglary definition from the ACCA's enumerated-offenses clause. *See United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014) (holding that Alabama burglary statute's inclusion of "any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein" made offense broader than generic burglary).

[5] In *Shepard v. United States*, 544 U.S. 13 (2005), this Court held that to determine whether a prior conviction was for generic burglary, a sentencing court may "examin[e] the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." 544 U.S. at 16.

or less equivalent to the risk presented by generic burglary. *See, e.g.*, *United States v. James*, 430 F.3d 1150, 1157 (11th Cir. 2005), *aff'd sub nom. James v. United States*, 550 U.S. 192 (2007), *overruled by Johnson*, 135 S. Ct. at 2563; *United States v. Matthews*, 466 F.3d 1271, 1275 (11th Cir. 2006). And this Court endorsed that approach in affirming the Eleventh Circuit, stating that a sentencing court "can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses—here, completed burglary." *James v. United States*, 550 U.S. at 203.

Therefore, a burglary, even if nongeneric, could be an ACCA violent felony under the residual clause. Indeed, the residual clause "once offered a catchall to sweep in otherwise uncovered convictions," *Stokeling v. United States*, 139 S. Ct. 544, 556 (2019) (Sotomayor, J., dissenting), and courts often used that very term to refer to it. *See, e.g.*, *United States v. Davis*, 16 F.3d 212, 217 (7th Cir. 1994) ("Congress plainly included [the residual clause] to serve as a catch-all provision."); *United States v. Mayer*, 560 F.3d 948, 960 n.4 (9th Cir. 2009) ("This circuit also refers to the 'residual' clause as the 'catchall' clause . . . ."); *United States v. Middleton*, 883 F.3d 485, 492 (4th Cir. 2018); *United States v. Whindleton*, 797 F.3d 105, 112 (1st Cir. 2015); *but see United States v. Stafford*, 721 F.3d 380, 398 (6th Cir. 2013) ("The ACCA's residual clause is not a catch-all provision.").

The sentencing court would have made an obvious legal error if it had classified Mr. Tannehill's Pennsylvania burglary convictions as violent felonies under either the elements clause or the enumerated-offenses clause of the ACCA. But those

offenses did fit neatly within the residual clause as applied in binding precedents at the time of his 2008 sentencing. Given the state of the law when Mr. Tannehill was sentenced, reasonable jurists could disagree with the district court's conclusion that his ACCA-enhanced sentenced was not based on the residual clause.

C. Mr. Tannehill's ACCA-enhanced sentence remained lawful until this Court decided *Johnson*.

The validity of Mr. Tannehill's sentence under the ACCA's residual clause was not affected by legal developments between his 2008 sentencing and this Court's 2015 decision in *Johnson*. That is important, because during that span this Court, not to mention the courts of appeals, decided several cases construing different provisions of the ACCA. *See, e.g.*, *Begay v. United States*, 553 U.S. 137 (2008); *Chambers*, 555 U.S. at 122; *Curtis Johnson v. United States*, 559 U.S. 133 (2010)[6]; *Sykes v. United States*, 564 U.S. 1 (2011); *Descamps v. United States*, 570 U.S. 254 (2013). And because of those decisions, a prior conviction that was an ACCA predicate in 2008 might not be today, but for reasons other than *Johnson*'s "new rule of constitutional law," 28 U.S.C. § 2244(b)(2)(A). So the standard the Eleventh Circuit propounded in *Beeman*, *see supra* pp. 8–9, is a tool for distinguishing, for example, a "*Descamps* claim"—which would not be timely if filed after *Johnson* and, accordingly, more than a year after *Descamps*—from a "*Johnson* claim." *See Beeman*, 871 F.3d at 1220 ("A *Johnson* claim and a *Descamps* claim make two very different assertions.").

[6] This petition uses Curtis Johnson's first name to distinguish this 2010 ACCA decision from the Court's 2015 decision in *Samuel Johnson v. United States*, referred to throughout the petition as "*Johnson*."

Mr. Tannehill's claim, however, is not the type that *Beeman* seeks to root out. In 2008, all of his predicate convictions were ACCA violent felonies under the residual clause alone. And even if his escape convictions could no longer qualify as predicates after *Chambers* or *Lee*, his four burglary convictions still did. *See United States v. Williams*, 603 F. App'x 919, 921–22 (11th Cir. 2015) (classifying nongeneric burglaries as violent felonies under residual clause approximately three months before *Johnson* (citing *Matthews*, 466 F.3d at 1272, 1275)), *vacated and remanded sub nom. Williams v. United States*, 136 S. Ct. 105 (2015) (citing *Johnson*, 135 S. Ct. at 2551), *sentence rev'd*, 691 F. App'x 905 (11th Cir. 2017). Reasonable jurists could conclude that the residual clause supported Mr. Tannehill's ACCA enhancement until this Court decided *Johnson*.

D. Mr. Tannehill's sentence became unlawful when the Court decided *Johnson*.

By holding the residual clause to be void for vagueness, *Johnson* eliminated the only legal basis for Mr. Tannehill's ACCA-enhanced sentence. It established that his sentence, like Samuel Johnson's, "does not comport with the Constitution's guarantee of due process," *Johnson*, 135 S. Ct. at 2560. And his § 2255 challenge to his sentence is meritorious because "[t]he residual clause . . . can no longer mandate or authorize any sentence." *Welch*, 136 S. Ct. at 1265.

Mr. Tannehill raises an unmistakable *Johnson* claim, precisely the type that *Welch* held to be cognizable on collateral review. Given the clear state of the law at the time of his sentencing, "jurists of reason could disagree with the district court's resolution of his constitutional claims . . . [and] could conclude the issues presented

are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. The Eleventh Circuit misapplied that standard by treating the ACCA grounds cited in Mr. Tannehill's PSR as controlling and denying him a certificate of appealability. This Court should grant certiorari and summarily reverse that ruling so that Mr. Tannehill may appeal the district court's denial of his § 2255 motion.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted this, the 4th day of February, 2019.

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

ALLISON CASE
Assistant Federal Public Defender

TOBIE J. SMITH
Research & Writing Attorney

Northern District of Alabama
505 20th Street North, Suite 1425
Birmingham, Alabama 35203
(205) 208-7170
Tobie_Smith@fd.org