No. 18-____

IN THE
SUPREME COURT OF THE UNITED STATES

Darrell D. Walker,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Tenth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether, or under what circumstances, a criminal defendant pursuing a second or successive motion under 28 U.S.C. § 2255 is entitled to relief under a retroactive constitutional decision invalidating a federal statutory provision, where the record is silent as to whether the district court based its original judgment on that provision or another provision of the same statute.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Darrell D. Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a–9a) is published at 900 F.3d 1012. The order of the United States District Court for the Western District of Missouri (Pet. App. 10a–11a) is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 20, 2018. Pet. App. 1a. Petitioner's request for rehearing and rehearing en banc was denied on November 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(b)(2) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

28 U.S.C. § 2255(a) provides: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that

the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

28 U.S.C. § 2255(h) provides: "A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—. . . (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

INTRODUCTION

Under 28 U.S.C. § 2255, a federal prisoner may file a motion analogous to a habeas petition challenging his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States" or that it "was in excess of the maximum authorized by law." *Id.* § 2255(a). But to file a successive motion for relief under this statute, the defendant must first demonstrate that his "claim . . . relies on" a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *Id.* § 2244(b)(2)(A); *see id.*§ 2255(h)(2).

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court struck down the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), explaining that it violated the Due Process Clause because it "both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S. Ct. at 2557. The next year, the Court held that *Johnson*'s invalidation of the residual clause was a constitutional rule "that has retroactive effect in cases on collateral

review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). This holding dictates that defendants whose ACCA sentences depended on the residual clause are entitled to habeas relief. *See, e.g. United States v. Rockwell*, 207 F. Supp. 3d 915 (W.D. Ark. 2016); *Robinson v. United States*, 2016 WL 11486311 (M.D. Ala. Oct. 21, 2016).

But this Court has never explained how courts should address post-conviction claims brought under Section 2255 where the record is silent as to whether the judgment rests on statutory clause that has been held unconstitutional or different clause of the same statute. And in the few years since *Welch*, the federal courts of appeals have plunged into disarray about what federal prisoners bringing *Johnson* claims must show to obtain relief under that frequently recurring circumstance.

The Third, Fourth, and Ninth Circuits have held that a defendant bringing a successive motion under Section 2255 is entitled to *Johnson* relief so long as he shows that his sentence *may have* relied on the residual clause—at least where there is currently no other statutory basis to support his sentence. But the Eighth Circuit in this case held—in line with the First, Sixth, Tenth, and Eleventh Circuits—that a defendant in this situation may obtain relief only if he somehow proves that the court *in fact* based his ACCA sentence on the residual clause.

This Court has denied certiorari in past cases presenting this issue, but the time to resolve it is now. The question presented has now fully percolated, and the courts of appeals are deeply and intractably divided. The stakes are also high.

Countless individuals serving enhanced sentences under ACCA—sentences that are at least five years and sometimes decades longer than could otherwise have been imposed—have potential *Johnson* claims. As things stand now, their ability to obtain relief varies dramatically according to the happenstance of geography.

Furthermore, the question presented is not at all limited to *Johnson* claims. It also applies to defendants now raising claims under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). And this Court is currently considering whether another federal statute very similar to the provisions at issue in *Johnson* and *Dimaya* is likewise unconstitutional. *See United States v. Davis*, No. 18-431. If the Court holds that it is, an entire new class of federal prisoners will bring successive habeas motions parallel to the current litigation over *Johnson* and *Dimaya*. And still other decisions in the future, invalidating federal or state laws, could lead to other groups of defendants bringing successive claims in the same basic posture. It would be far better to resolve the intractable split on the standard that governs such claims *before* that further litigation materializes.

STATEMENT OF THE CASE

1. In 2004, Petitioner Darrell Walker was found guilty of two counts of being a felon in possession of a firearm, and one count of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). That statute typically carries a maximum sentence of ten years' imprisonment. *Id.* § 924(a)(2). But under ACCA, a federal defendant's sentencing range is enhanced to fifteen-years-to-life if he has

certain qualifying prior convictions. *See id.* § 924(e)(1). At the time of Mr. Walker's sentencing, qualifying convictions included (i) specified enumerated offenses, among them "burglary" (as that term was generically defined in case law, *see, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990)); (ii) offenses involving the use of physical force against another person; and (iii) any other offense falling under the "residual clause," which covered offenses "involv[ing] conduct that present[ed] a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B).

Relying on Mr. Walker's prior Missouri burglary convictions, *see* Mo. Rev. Stat. § 569.170, the district court found Mr. Walker to be an ACCA offender. But the district court did not specify whether it believed those prior convictions constituted generic burglary under the enumerated offense clause or simply fell under ACCA's residual clause. The district court ultimately sentenced Mr. Walker to 293 months (over twenty-four years) of imprisonment.

Over the years that followed, Mr. Walker challenged his conviction and sentence in various ways, including by bringing a motion under 28 U.S.C. § 2255. But he never obtained any relief.

2. In 2016, after this Court invalidated the residual clause in *Johnson*, Mr. Walker sought leave to file a successive motion under Section 2255, asking for his sentence to be vacated and to be resentenced (to time served) under the ten-year statutory maximum that applies absent ACCA. Mr. Walker explained that *Johnson*

enabled him to bring a successive petition because it announced a new rule of constitutional law that this Court had made retroactive.

The Eighth Circuit authorized Mr. Walker to file his motion. Pet. App. 3a. But the district court denied relief on the ground that Mr. Walker's Missouri burglary convictions still "qualify as violent felonies under the enumerated offenses clause." *Id.* 11a.

3. A divided panel of the Eighth Circuit vacated and remanded. The panel first rejected the district court's analysis. Citing intervening authority, it held that Missouri burglary is broader than generic burglary, so Mr. Walker's convictions do not qualify as ACCA predicates under the enumerated offense clause. Pet. App. 2a (citing *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc)).

Turning to the residual clause, the Eighth Circuit noted that a defendant cannot bring a successive Section 2255 motion unless he first demonstrates that his claim "relies on" a new rule of constitutional law that this Court has made retroactive to cases on collateral review. 28 U.S.C. § 2244(b)(2)(A). The court of appeals then observed that "circuits disagree" over how to determine when a defendant who alleges in a successive Section 2255 motion that his sentence is infected with *Johnson* error is entitled to relief. Some circuits "have concluded that a claim for collateral relief 'relies on' *Johnson*'s new rule and satisfies § 2255 if the sentencing court 'may have' relied on the residual clause." Pet. App. 4a (citing

United States v. Winston, 850 F.3d 677 (4th Cir. 2017), and *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017)). Those circuits further hold that a defendant who makes that threshold showing is entitled to relief if he demonstrates that, applying ACCA as it currently stands, his prior convictions at issue do not fall under any other provision of the statute. *See Geozos*, 890 F.3d at 897–98; *United States v. Peppers*, 899 F.3d 211, 227–230 (3d Cir. 2018). But the Eighth Circuit sided with other circuits that take a different approach—namely, that a defendant cannot obtain relief unless he establishes "it is more likely than not that the residual clause provided the basis for an ACCA sentence." Pet. App. 4a (citing cases from the First, Tenth, and Eleventh Circuits). "The mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden." *Id.* 5a.

Instead of applying its test in the first instance, the court of appeals remanded. It stressed, however, that "if it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." Pet. App. 6a (quoting *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017)).

Judge Kelly dissented. She would have sided with the circuits holding that "a claim for collateral relief under *Johnson* should be granted so long as the movant has shown that his sentence may have relied on the residual clause." Pet. App. 7a.

Unlike the majority's test, that standard is met when, as here, "the record is silent" as to the sentencing court's basis for applying ACCA. *Id.* 8a.

4. Mr. Walker filed a petition for rehearing and rehearing en banc, but the Eighth Circuit denied that petition on November 26, 2018. Pet. App. 12a. Four judges—Chief Judge Smith, and Judges Colloton, Kelly, and Erickson—stated that they would have granted the petition. *Id.*

REASONS FOR GRANTING THE WRIT

The courts of appeals are in direct conflict over whether, or under what circumstances, a retroactive constitutional decision invalidating a federal statutory provision entitles a defendant pursuing a successive motion under 28 U.S.C. § 2255 to relief, where the record is silent as to whether the district court based its original judgment on that provision or different provision of the same statute. This Court should use this case, which both sides agree squarely presents this important legal issue, to resolve the conflict. And it should hold—consistent with a careful analysis of the plain text of the governing statutes—that relief must be granted at least where, as here, it is clear that the still-valid provision cannot support the judgment.

I. The courts of appeals are openly split over the question presented.

1. As the Eighth Circuit recognized, the circuits are split over whether a retroactive constitutional decision invalidating a federal statutory provision entitles a defendant pursuing a successive motion under 28 U.S.C. § 2255 to relief, where the record is silent as to whether the district court based its original judgment on

that provision or different provision of the same statute. *See* Pet. App. 4a. The Eighth Circuit adopted the same basic rule that the First, Sixth, Tenth, and Eleventh Circuits previously adopted, barring defendants in this situation from obtaining post-conviction whenever the record is silent. *See Dimott v. United States*, 881 F.3d 232, 242–43 (1st Cir.). *cert. denied*, 138 S. Ct. 2678 (2018); *Potter v. United States*, 887 F.3d 785, 787–88 (6th Cir. 2018); *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), *cert. denied*, 139 S. Ct. ___ (2019).

The Third, Fourth, and Ninth Circuits disagree. In those circuits, a defendant bringing a successive motion under Section 2255 is entitled to relief so long as he shows that his sentence "may have" rested on the invalid clause—at least where there is currently no other statutory basis to support his sentence. *Peppers*, 899 F.3d at 221; *Winston*, 850 F.3d at 682; *Geozos*, 870 F.3d at 897–98. Three different judges on the U.S. District Court for the District of Columbia have reached the same conclusion, as have other district courts. *See United States v. Wilson*, 249 F. Supp. 3d 305, 311–13 (D.D.C. 2017) (collecting cases).

2. In the past, the Government suggested that it would be premature to grant certiorari to resolve this conflict because the Fourth and Ninth Circuits might reconsider their views. Br. in Opp. at 17–18, *King v. United States*, No. 17-8280 ("*King* BIO"). But that suggestion no longer holds water. The Fourth Circuit has since reaffirmed its position that a defendant may bring a successive motion under

Section 2255 when his "ACCA-enhanced sentence 'may have been predicated on application of the now-void [] clause.'" *United States v. Hodge*, 902 F.3d 420, 426 (4th Cir. 2018) (quoting *Winston*, 850 F.3d at 682). And district courts throughout the Fourth Circuit are now granting relief on the basis of that "controlling law." *United States v. Westry*, 2017 WL 2221714, at *2 (E.D. Va. May 19, 2017); *see also, e.g.*, *Cade v. United States*, 276 F. Supp. 3d 502 (D.S.C. 2017); *United States v. Foster*, 2017 WL 2628887 (W.D. Va. June 19, 2017). District courts throughout the Ninth Circuit are likewise granting relief based on circuit law. *See, e.g.*, *Agtuca v. United States*, 2018 WL 2193134 (W.D. Wash. May 14, 2018); *United States v. Wilson*, 2018 WL 2049926 (D. Nev. May 2, 2018); *United States v. Fouche*, 2017 WL 4125133 (S.D. Cal. Sept. 18, 2017). It does not appear the Government is appealing any of these decisions.

In any event, the Third Circuit issued its decision in *Peppers* after the Government's suggestions for further percolation (and within a week of the Eighth Circuit's decision in this case). *Peppers* thoroughly considered and rejected the Government's position, thus cementing the split of authority. The conflict is now fully entrenched, and only this Court can resolve it.

II. The question presented is extremely important.

The question presented is one of exceptional importance because thousands of defendants over the past few decades received ACCA sentences where the district court did not specify whether the sentences rested on the residual clause or some

other provision of the statute. *See, e.g.*, *In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring) (noting that, in the Eleventh Circuit alone, over 2,000 defendants have filed successive motions raising *Johnson* claims); *Washington*, 890 F.3d at 896 (in "many cases" involving *Johnson* claims, "the record is often silent"); *Raines v. United States*, 898 F.3d 680, 691 (6th Cir. 2018) (Cole, C.J., concurring) ("silence is the norm, not the exception"). What is more, many of the alternative bases for invoking ACCA have been shown in recent years to be much narrower than courts thought in the past. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Johnson v. United States*, 559 U.S. 133 (2010). The question presented therefore determines whether a large number of federal prisoners can get relief.

And that relief is highly consequential. Stripped of the ACCA enhancement, many defendants (including Mr. Walker) would be eligible for immediate release because the time they have already served on their sentences far exceeds the ten-year maximum sentence allowed without ACCA.

It is also critical to understand that the question presented does not pertain merely to those with *Johnson* claims. It arises whenever a defendant was convicted or sentenced according to a judgment that did not specify on which of two alternative bases on which it rests, and this Court later rules one of those bases unconstitutional. Indeed, this question is now similarly arising in Section 2255 cases in which defendants are advancing claims based on *Sessions v. Dimaya*, 138

S. Ct. 1204 (2018). In *Dimaya*, this Court held that the residual clause of 18 U.S.C. § 16—one of two definitions under the statute—was unconstitutional. *Dimaya*, 138 S. Ct. at 1223. That provision applied not only in immigration cases like Dimaya's, but also was incorporated in several criminal statutes. *See. e.g.*, *Dade v. United States*, 2019 WL 361587, at *2 (D. Idaho Jan. 29, 2019) (analyzing whether defendant convicted of interstate domestic violence, 18 U.S.C. § 2261(a)(1), is entitled to post-conviction relief because predicate act was a "crime of violence" under Section 16(b)).

To take one more example: This Court is currently considering whether the residual clause of the federal statute forbidding using a firearm during a crime of violence, 18 U.S.C. § 924(c), is void for vagueness. *See United States v. Davis*, No. 18-431 (oral argument scheduled for April 17, 2019). If this Court so holds, that decision will also likely be retroactive under *Welch*, 136 S. Ct. at 1268. Yet, like ACCA, Section 924(c) contains alternatives besides the residual clause for satisfying the statute. *See* 18 U.S.C. § 924(c)(3). Consequently, if this Court holds that Section 924(c)'s residual clause is unconstitutional, another whole category of defendants will quickly file Section 2255 claims in the federal courts—many raising the exact question presented here. Indeed, many of these claims are already on file, awaiting this Court's decision in *Davis*. *See, e.g.*, *Taylor v. United States*, 8th Cir. No. 16-4192 (stayed pending the outcome in *Davis*).

The effect of the question presented is not even limited to federal prisoners. The same rules that govern successive habeas motions for federal prisoners also govern successive petitions by state prisoners. *See* 28 U.S.C. § 2244(b)(2). Accordingly, the Ninth Circuit recently applied its "may have been based on" rule to allow a state prisoner to pursue a successive petition arguing that *Johnson* entitles him to relief from a California conviction. *See Henry v. Spearman*, 899 F.3d 703, 705–06 (9th Cir. 2018).

In all events, the sooner this Court brings order to the rules that govern claims under the general circumstances presented here, the better. The lower courts should not have to expend resources in case after case sorting through the habeas statutes and competing arguments regarding such claims. And the many defendants in these cases should not be subjected to years of additional prison time based solely on geography.

III. The Eighth Circuit's ruling is incorrect.

The Eighth Circuit's construction of the federal habeas statute improperly conflates the statutory gateway for bringing a second or successive habeas claim with whether a claim has substantive merit and entitles the defendant to relief. Once those distinct aspects of federal habeas law are disentangled (something no prior petition on this issue of which we are aware has done), it becomes apparent that defendants in Mr. Walker's position are entitled to relief.

1. The federal habeas statute imposes a "prerequisite[]"—or "gateway" requirement—for bringing any second or successive motion for habeas relief. *Tyler v. Cain*, 533 U.S. 656, 662 (2001); *Peppers*, 899 F.3d at 221. Courts must dismiss any such motion unless, as relevant here, "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A); *see also id.* § 2255(h)(2).[1]

All agree that *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *See Welch*, 136 S. Ct. at 1268. The key threshold question, therefore, is whether Mr. Walker's "claim" for post-conviction relief "relies on" *Johnson*'s new rule of constitutional law (namely, that ACCA's residual clause is void for vagueness).

It obviously does. A "claim" is a movant's "demand for . . . a legal remedy." Black's Law Dictionary, *Claim* (10th ed. 2014). The phrase "relies on" means "to depend" or "to need (someone or something) for support." Merriam-Webster Dictionary, *Rely on*, https://www.merriam-webster.com/dictionary/rely%20on/upon. The plain text of Section 2244(b)(2)(A), therefore, dictates that a "claim . . . relies

[1] There is some disagreement over whether this requirement is "jurisdictional" or merely a mandatory claims-processing rule. *See, e.g.*, *Peppers*, 899 F.3d at 221 n.3. But that question is immaterial here. All that matters is that Section 2244(b)(2)(A) establishes a threshold showing a defendant must make before a court may consider his claim on the merits.

on" a new rule of constitutional law whenever the defendant asks for relief based on the new rule. The inquiry is *not* whether the request is meritorious; it is simply whether the claim marshals the new rule of constitutional law as a component of its argument for relief.

This Court's decision in *Tyler* is instructive. There, the petitioner sought habeas relief on the ground that the definition of "beyond a reasonable doubt" given to his jury contravened this Court's intervening decision in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). The Court did not opine on whether Tyler's claim was meritorious. Nor was it clear whether *Cage* was retroactive. But despite that uncertainty, neither this Court nor the State questioned that Tyler's claim *relied on Cage*; indeed, the Court called it a "*Cage* claim." *Tyler*, 533 U.S. at 659, 662; *see also Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (explaining that the respondents' claim "relie[d] upon" certain due process cases, even though the claim ultimately lacked merit).

The same analysis holds here. Mr. Walker asserts that his sentence is unconstitutional because it violates *Johnson*. Regardless of whether that claim has merit—that is, whether the now-invalid residual clause had a sufficient influence on his sentence to require that it be vacated—there can be no doubt that the claim relies on *Johnson*.

2. Once a defendant such as Mr. Walker passes through the gateway for bringing a successive motion for post-conviction relief, he must, of course, establish

that his claim is meritorious. "[I]f a court hears a second-or-successive [habeas motion] on the merits, the standards are no different than hearing a first [such motion] on the merits." *Case v. Hatch*, 731 F.3d 1015, 1038 n.12 (10th Cir. 2013). That means a defendant in Mr. Walker's position must demonstrate that his sentence actually violates *Johnson*.

Well-settled precedent points the way for analyzing that claim. "[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin v. United States*, 502 U.S. 46, 53 (1991). Thus, if a criminal judgment has two or more possible statutory grounds, one of the grounds has been held unconstitutional, and "it is impossible to say under which clause of the statute the conviction was obtained," then "the conviction cannot be upheld." *Id.* at 52 (quoting *Stromberg v. California*, 283 U.S. 359, 368 (1931)). That is exactly Mr. Walker's situation: When the district court imposed Mr. Walker ACCA sentence, it necessarily determined either that Mr. Walker's burglary convictions constituted generic burglary under the enumerated-offense clause or that they were offenses that carried a "serious potential risk of physical injury to another" under the residual clause. But as in *Stromberg*, one cannot say which. Consequently, Mr. Walker's sentence contravenes *Johnson*.

3. That leaves the question of remedy. The *Stromberg* rule—as is it sometimes called—does not entitle a defendant to habeas relief where the conviction

or enhanced sentence can be sustained on a still-valid clause of the statute at issue. *See, e.g.*, *Becht v. United States*, 403 F.3d 541, 548 (8th Cir. 2005). After all, a defendant is not entitled to the "extraordinary remedy" of post-conviction relief, *Bousley v. United States*, 523 U.S. 614, 621 (1998), unless he demonstrates that the constitutional violation in his case "had [a] substantial and injurious effect" on his judgment. *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

But, as the Third and Ninth Circuits (and the Seventh Circuit, in equivalent circumstances) have explained, this required showing is easily made in this situation. *Peppers*, 899 F.3d at 230–31; *Geozos*, 870 F.3d at 897–98; *see also Van Cannon v. United States*, 890 F.3d 656, 661–62 (7th Cir. 2018) (Sykes, J.). Current case law makes clear that Mr. Walker's prior convictions do *not* qualify as ACCA predicates under the enumerated offense clause. Pet. App. 2a (citing *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc)). And "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994). Accordingly, when this Court and the Eighth Circuit construed ACCA to exclude Missouri burglary from the reach of the enumerated offense clause, those decisions established "what the statute has meant continuously since the date when it became law," *id.* at 313 n.12—including when

Mr. Walker was originally sentenced. *See Bousley*, 523 U.S. at 620–21. Indeed, the Government itself has previously acknowledged that statutory decisions "narrow[ing] the scope" of ACCA are "new substantive rules that [a]re retroactive in ACCA cases on collateral review." Br. for United States at 32, *Welch v. United States*, No. 15-6418; *see also* Br. for United States at 12–13, *Bousley v. United States*, No. 96-8516 (acknowledging the *Rivers v. Roadway Express* principle applies in federal habeas proceedings); *Van Cannon*, 890 F.3d at 660 (noting Government's concession that *Mathis* applies in this context).[2]

Putting all of this together yields a straightforward result: (1) Mr. Walker's "claim . . . relies on" *Johnson*—and he thus passes through the second-or-successive gateway—because his assertion that his sentence is unconstitutional depends on that new precedent; (2) his claim is meritorious because the district court may have based his ACCA sentence on the residual clause; and (3) Mr. Walker is entitled to post-conviction relief because no other provision of ACCA can currently sustain his sentence.

4. None of the arguments the Eighth Circuit and the Government have advanced against this analysis withstands scrutiny.

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[2] The Eighth and Tenth Circuits also recognize that once a defendant passes through the second-or-successive gateway with a valid *Johnson* claim, "current law" construing ACCA determines whether he is entitled post-conviction relief. *Golinveaux v. United States*, ___ F.3d ___, 2019 WL 512175, at *3–*4 (8th Cir. Feb. 11, 2019); *United States v. Lewis*, 904 F.3d 867, 873 (10th Cir. 2018). The Eighth and Tenth Circuits simply disagree with the Third, Fourth, and Ninth Circuits over when a defendant gets to remedy stage.

a. Noting that successive claims for post-conviction relief must "rely on" new rules of constitutional law and that "a movant bears the burden of showing he is entitled to relief under § 2255," the Eighth Circuit reasoned that a defendant bringing a successive motion for habeas relief under *Johnson* cannot obtain relief unless he shows "by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." Pet. App. 5a. This reasoning mashes Section 2255's two distinct inquiries together, asking in a single "merits determination" whether the sentencing court relied on the residual clause. *Peppers*, 899 F.3d at 223.

This fusion—combining the "relies on" element of the second-or-successive gateway with the defendant's burden of proving that a constitutional violation occurred—is improper. Section 2244's "relies on" requirement has nothing to do with whether the defendant is entitled to relief; "it is a procedure for determining whether a court may hear a second-or-successive [habeas] petition on its merits." *Case*, 731 F.3d at 1038 n.12. And that procedure focuses the "relies on" inquiry solely on the defendant's "claim," not on whether the claim has merit. 28 U.S.C. § 2244(b)(2); *see Tyler*, 533 U.S. at 662; *In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017) ("[W]e do not address the merits at all in our gatekeeping function.").

If a defendant passes through Section 2244's second-or-successive gateway, the habeas court's attention should then turn to assessing the sentencing court's actions. The standards for judging those actions "are no different than hearing a

first [habeas] petition on its merits." *Case*, 731 F.3d at 1038 n.12. Those standards require the defendant to show, under the *Stromberg* rule, that the judgment is infected with constitutional error and, under *Brecht*, that the error had a substantial and injurious effect on the verdict. But, as explained above, those showings are readily made here. *See supra* Part III.2–3.

b. In its prior briefs opposing review of the question presented, the Government has made the same error as the Eighth Circuit, arguing that a defendant bringing a successive habeas motion "who fails to prove that his ACCA sentence actually depended on application of the residual clause fails to carry his burden of demonstrating a constitutional violation that would entitle him to collateral relief." *King* BIO 13. This argument makes no effort to separate Section 2244's gatekeeping requirement from the merits or to construe its language. Indeed, the Government entirely ignores both the word "claim" and the phrase "relies on," the critical statutory language. To repeat once more: applying the plain text of that provision here makes clear that Mr. Walker's "claim . . . relies on" *Johnson*. 28 U.S.C. § 2244(b)(2). The question whether that claim entitles him to relief is completely distinct.

On that latter question, the Government has argued that the *Stromberg* rule does not govern here because the rule does not apply "in the collateral-review context." *King* BIO 16. But that is plainly wrong. In *Hedgpeth*, this Court accepted that the *Stromberg* rule applies in habeas cases in which one possible basis for a

conviction has been declared invalid. The Court merely held that the rule is subject in that context to the additional *Brecht* inquiry whether the invalid basis had a "substantial and injurious effect" on the judgment, as opposed to requiring relief so long as an error was not "harmless beyond a reasonable doubt" under *Chapman v. California*, 386 U.S. 18, 23–24 (1967). *See Hedgpeth*, 555 U.S. at 61–62.

The Government has also drawn a contrast between general jury verdicts and judicial determinations such as the one here. *See King* BIO 16. The basis for a jury verdict that does not specify between alternative options "generally cannot be examined," the Government has reasoned, whereas "the basis for a district court's determination that a defendant's prior conviction qualifies as a violent felony under the ACCA can be determined after the fact by reference to the judge's own recollection, the record in the case, the relevant legal background, and an examination of the statute of conviction." *Id.* Much of that may be true. But all that follows is that defendants invoking *Stromberg* to obtain habeas relief based on judicial determinations will sometimes have a harder time satisfying the *Brecht* "substantial and injurious effect" test than defendants challenging jury verdicts. And the Government's argument cannot aid it in a case like this one, where it is now clear that there is *no* basis in ACCA for sustaining the sentence—and, therefore, the availability of the residual clause at the time of sentencing necessarily harmed the defendant.[3]

[3] By much the same token, the Government is mistaken that the rule Mr. Walker

IV. This case is an excellent vehicle to resolve the conflict.

In contrast to many of the previous cases presenting this issue to this Court, two aspects of this case make it an ideal vehicle for resolving the conflict over the question presented.

First, the record is undeniably silent as to whether the sentencing court determined that Mr. Walker's prior burglary convictions satisfied ACCA's residual clause or the statute's enumerated offense clause. The sentencing judge never indicated which clause he had in mind.

Second, the Eighth Circuit has made clear (and the Government concedes) that subsequent appellate decisions conclusively establish that Mr. Walker's prior convictions do not qualify "as generic burglary under the 'enumerated felonies clause.'" Gvt. Suggestions in Opp. to Appellant's Petition for Rehearing En Banc 4; *accord* Pet. App. 2a. That being so, the Government also has acknowledged that "[i]f

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seeks "would produce anomalous results." *King* BIO 18. According to the Government, Mr. Walker's rule would mean that defendants who did not press their sentencing courts to specify the basis for applying ACCA would be able to seek relief, whereas those who did and caused the courts to specify a basis other than the residual clause would not. *Id.*; *see Potter*, 887 F.3d at 788. But as just noted, defendants with silent records *cannot* obtain relief when their ACCA enhancements can be sustained based on another provision in the statute. That leaves only defendants such as Mr. Walker, whose sentences cannot be sustained on other grounds. As to those defendants, the Government neglects to mention that "[n]ine circuits" hold that federal prisoners *can* obtain relief under 28 U.S.C. § 2241—the habeas "savings clause"—when a subsequent decision makes clear that the statute under which they were convicted or sentenced does not apply to them. Pet. for Cert. at 23–24, *United States v. Wheeler*, No. 18-420 (citing cases). The Government itself used to agree, *see id.* at 13, but is now asking this Court to abrogate those rulings, at least insofar as they apply to mandatory-minimum statutes, *id.* at 21–22.

Walker's claim properly and accurately relies on the 'new rule' of *Johnson*, he would be entitled to relief." Gvt. Suggestions in Opp. to Appellant's Petition for Rehearing En Banc 5.

To be sure, the Eighth Circuit remanded this case to the district court with instructions to determine "whether Walker has shown by a preponderance of the evidence that his successive § 2255 claim relies on *Johnson*'s new rule invalidating the residual clause." Pet. App. 6a. But this procedural deflection provides no reason to deny or delay review; to the contrary, it only reinforces the need for prompt resolution of the question presented. If Mr. Walker prevails in this habeas proceeding, he must be released from prison immediately; the maximum possible sentence for his crime absent an ACCA enhancement is ten years' imprisonment, and he is now serving his fifteenth year behind bars. And when Mr. Walker sought rehearing en banc, asking the Eighth Circuit to adopt the approach of the Third, Fourth, and Ninth Circuits, the Government did not dispute that under that approach he would be entitled to relief *right now*. On the other hand, under the approach of the First, Sixth, Tenth, and Eleventh Circuits, which the Government endorses, "Walker would not be entitled to a remand at all." Gvt. Suggestions in Opp. to Appellant's Petition for Rehearing En Banc 9.

The Eighth Circuit's decision to slow-walk this case through a remand (something neither party requested) is thus the worst of all worlds. It delays the finality and certainty both parties seek. And for prolonged litigation over a

fundamentally misguided question: "the relevant background legal environment *at the time of . . . sentencing*." Pet. App. 5a (quotations omitted and emphasis added). As explained above, once one recognizes that Mr. Walker's "claim" obviously "relies on" *Johnson* and that his sentence may have rested on the residual clause, the only relevant question is whether the law, "as it *currently* stands," can sustain his sentence. *Geozos*, 870 F.3d at 897; *see also supra* Part III.1–2. Because that question has already been answered (in the negative), this Court should grant certiorari and instruct the lower courts to grant Mr. Walker the sentencing relief—indeed, the freedom—to which he is entitled.

* * *

It is sometimes important not to lose the forest for the trees. All agree that neither of the two possible bases for enhancing Mr. Walker's prison sentence from ten years to over twenty-four years is valid. Yet the Government insists upon keeping him incarcerated, where he is now serving the fifteenth year of his illegal sentence.

This is what habeas is for. And faithfully applying Sections 2244 and 2255 confirms there is no obstacle to relief. Because the Government refuses to release Mr. Walker from custody, this Court should ensure that justice is done—and that the law is set straight for all of the others also in Mr. Walker's position.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 16-4284

Darrell D. Walker

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: January 12, 2018
Filed: August 20, 2018

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

GRUENDER, Circuit Judge.

Darrell Walker appeals the district court's denial of his successive motion to vacate his sentence pursuant to 28 U.S.C. § 2255. In 2004, a jury found Walker guilty of two counts of being a felon in possession of a firearm and one count of being a felon in possession of ammunition. *See* 18 U.S.C. § 922(g)(1). The district court sentenced him to 293 months' imprisonment under the Armed Career Criminal

APPENDIX A

Act ("ACCA") due to his prior Missouri burglary convictions.[1] *See* 18 U.S.C. § 924(e). In 2009, the court denied his first motion to vacate, set aside, or correct his sentence under § 2255.

In 2015, the Supreme Court ruled that the ACCA's residual clause was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015). Subsequently, the Court held that *Johnson* announced a "new rule" that is retroactive on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). As a result, in June 2016, we granted Walker authorization for a successive § 2255 motion, in which he claimed that his prior Missouri convictions for burglary of an inhabitable structure no longer qualify him as an armed career criminal. The district court denied relief, reasoning that—as the law stood in 2016—Walker's burglary convictions still qualified as violent felonies under the enumerated-offenses clause. We granted a certificate of appealability.

On appeal, Walker now argues that his sentence should be vacated and the case remanded for resentencing without application of the ACCA. He maintains that his original sentence relied on the residual clause and points out that his Missouri burglary convictions are no longer valid ACCA predicates under the enumerated-offenses clause in light of recent decisions. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc). We

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[1]The ACCA applies to defendants convicted of being a felon in possession of a firearm or ammunition who have three or more prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). When Walker was sentenced in 2005, a violent felony included "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause or force clause); (2) "is burglary, arson, or extortion, [or] involves the use of explosives" (the enumerated-offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). *Id.* § 924(e)(2)(B) (2005).

review *de novo* the denial of a § 2255 motion. *Holloway v. United States*, 960 F.2d 1348, 1351 (8th Cir. 1992).

In authorizing Walker to bring a second motion, we necessarily determined that he had made a *prima facie* case that he satisfied the requirements of § 2255. *See, e.g.*, *Woods v. United States*, 805 F.3d 1152, 1153 (8th Cir. 2015) (per curiam) (explaining the requirements for authorizing a successive § 2255 motion). As relevant here, § 2255(h) precludes a movant from bringing a successive motion unless it contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In light of the Supreme Court's opinions in *Johnson* and *Welch*, we concluded that Walker satisfied this threshold requirement.

This determination was preliminary. *See Kamil Johnson v. United States*, 720 F.3d 720, 720-21 (8th Cir. 2013) (per curiam). We have "emphasize[d] that the district court must not defer to our preliminary determination in granting the authorization as our grant is tentative." *Id.* at 721 (alteration, citation, and internal quotation marks omitted). The movant also must satisfy the district court that his claim in fact "relies on" a new rule.[2] *Bennett v. United States*, 119 F.3d 468, 470 (7th

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[2]Though § 2255(h) refers directly only to the need for preliminary authorization before bringing a successive habeas petition, it references 28 U.S.C. § 2244. We have applied the requirements for state habeas claims set forth in § 2244(b) to federal prisoners bringing claims under § 2255. *United States v. Lee*, 792 F.3d 1021, 1023 (8th Cir. 2015). Section 2244(b)(2)(A) requires dismissal unless "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." We have interpreted § 2255(h) and § 2244(b)(2)(A) "similarly despite a modest difference in wording" and explained that the new rule must "recognize[] the right asserted in the motion." *Donnell v. United States*, 826 F.3d 1014, 1016 (8th Cir. 2016). We need not parse the modest difference in wording here. We use the "relies on" language for the sake of consistency with the other circuits whose opinions we discuss below.

Cir. 1997) ("The movant must get through two gates before the merits of the motion can be considered."). The Government argues that Walker did not make a sufficient showing that his claim relies on *Johnson*'s new rule that the residual clause is unconstitutional, and it maintains that his claim in fact relies on the Supreme Court's non-retroactive decision in *Mathis*.

The original sentencing court did not specify whether the residual clause or another provision of the ACCA, such as the enumerated-offenses clause, provided the basis for Walker's ACCA enhancement. Our sister circuits disagree on how to analyze this issue. Two circuits have concluded that a claim for collateral relief "relies on" *Johnson*'s new rule and satisfies § 2255 if the sentencing court "may have" relied on the residual clause. *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). To support this approach, the Ninth Circuit drew an analogy to the *Stromberg* rule, which requires a conviction to be set aside when a general jury verdict may rest on an unconstitutional ground. *Geozos*, 870 F.3d at 896 (citing *Stromberg v. California*, 283 U.S. 359 (1931)). For its part, the Fourth Circuit expressed concern about treating similarly situated defendants differently on the basis of the sentencing court's "discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Winston*, 850 F.3d at 682.

By contrast, several other circuits instead require a movant to show that it is more likely than not that the residual clause provided the basis for an ACCA sentence. *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018), *cert. denied*, No. 17-1251, 2018 WL 1243146 (June 25, 2018); *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017). These courts emphasize that a § 2255 movant bears the burden of showing that he is entitled to relief and stress the importance of the finality of convictions, one of Congress's motivations in passing the Antiterrorism and Effective

Death Penalty Act. *See Beeman*, 871 F.3d at 1222-24; *Washington*, 890 F.3d at 896; *Dimott*, 881 F.3d at 236, 241-42.

We agree with those circuits that require a movant to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement. *See Dimott*, 881 F.3d at 243; *Washington*, 890 F.3d at 896; *Beeman*, 871 F.3d at 1221-22. Under the longstanding law of this circuit, a movant bears the burden of showing that he is entitled to relief under § 2255. *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969) (per curiam). The mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden and meet the strict requirements for a successive motion. *See Washington*, 890 F.3d at 896 (explaining why *Stromberg* should be confined to general jury verdicts); *Dimott*, 881 F.3d at 241 (same). We also believe that applying this "uniform rule" reasonably addresses the Fourth Circuit's concerns about the "selective application" of *Johnson*'s new rule. *See Dimott*, 881 F.3d at 242. As the Eleventh Circuit has explained, "It is no more arbitrary to have a movant lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one. What would be arbitrary is to treat *Johnson* claimants differently than all other § 2255 movants claiming a constitutional violation." *Beeman*, 871 F.3d at 1224.

Whether the residual clause provided the basis for an ACCA enhancement is a factual question for the district court. *See id.* at 1224 n.5 (stating that the basis for an enhancement is "a historical fact"). 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. *Washington*, 890 F.3d at 896; *see also United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017) (explaining that "the relevant background legal environment is, so to speak, a 'snapshot' of what the controlling law was at the time of sentencing"), *cert. denied*, 138 S. Ct. 1696 (2018). In some cases, the legal background at the time of sentencing will establish that the

enhancement was necessarily based on the residual clause. *See, e.g.*, *United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017) (stating that precedent established that one of the requisite predicate convictions "could have applied only under the residual clause"). By contrast, "[i]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." *Beeman*, 871 F.3d at 1222. Moreover, as the Tenth Circuit emphasized in *Washington*, it is not enough for Walker to show that "the background legal environment at the time of Defendant's sentencing reveals 'the residual clause offered the path of least analytical resistance.'" *Washington*, 890 F.3d at 898-99.

In denying Walker's successive § 2255 claim, the district court did not determine whether the residual clause led the sentencing court to apply the ACCA enhancement. It also assumed—given the state of the law in 2016—that an evidentiary hearing was unnecessary because Walker's burglary convictions qualified as violent felonies even without the residual clause. Despite the sparse sentencing record that exists in this case, "it is the function of the District Court rather than the Court of Appeals to determine the facts." *See Murray v. United States*, 487 U.S. 533, 543 (1988). Thus, we vacate the order denying Walker's second motion and remand to the district court to determine in the first instance whether Walker has shown by a preponderance of the evidence that his successive § 2255 claim relies on *Johnson*'s new rule invalidating the residual clause. The district court should proceed to the merits only if Walker is able to carry his burden.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I agree that denial of Walker's successive § 2255 motion was not proper. As the court explains, the district court did not undertake to analyze whether Walker's sentence was based on the residual clause, because it relied instead on now-overruled precedents to conclude that Missouri burglary qualified as a violent felony under the enumerated offenses clause. But, as we recently held, Missouri burglary "covers more conduct than does generic burglary," so it "do[es] not qualify as [a] violent felon[y] under the ACCA." Naylor, 887 F.3d at 407. I concur in the part of the court's opinion reaching that necessary conclusion. However, I am unpersuaded that, between the two approaches it considers, the court adopts the correct one.

As to our assessment of claims purporting to rely on Johnson, I agree with the approach advanced by the Fourth and Ninth circuits (and numerous district courts, see United States v. Wilson, 249 F. Supp. 3d 305, 311–12 (D.D.C. 2017) (collecting cases from various district courts including the Eastern District of Missouri[3])). 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 on the residual clause, and the government is unable to demonstrate to the contrary. Geozos, 870 F.3d at 969. I think it is unwise to adopt an approach that would "penalize a movant for a [district] court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." Winston, 850 F.3d at 682. And further, I find the court's reliance on the movant's burden of proof as the reason for setting the bar higher to be unpersuasive. It is true—so far as it goes—that, a movant bears the

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[3]Bevly v. United States, No. 4:16-cv-965, 2016 WL 6893815, at *1 (E.D. Mo. Nov. 23, 2016) ("In a situation where the Court cannot determine under what clause the prior offenses were determined to be predicate offenses, the better approach is for the Court to find relief is available, because the Court may have relied on the unconstitutional residual clause."); Givens v. United States, No. 4:16-cv-1143, 2016 WL 7242162, at *4 (E.D. Mo. Dec. 15, 2016) (quoting Bevly); see also Diaz v. United States, No. 1:16-cv-323, 2016 WL 4524785, at *5 (W.D.N.Y. Aug. 30, 2016); United States v. Ladwig, 192 F. Supp. 3d 1153, 1159 (E.D. Wash. 2016).

burden of proving that she is entitled to relief under § 2255, Kress, 411 F.2d at 20, but *what* the movant has to prove is a different question. Under § 2255, a movant does not have to show that her claim is "resolved by" a new and retroactive rule of constitutional law, but rather that her claim "relies on" the same. See Winston, 850 F.3d at 682 (explaining that a claim for post-conviction relief "relied on" the rule in Johnson where the record was silent); Geozos, 870 F.3d at 897; see also Raines v. United States, ___ F.3d ___, 2018 WL 3629060, at *8–9 (6th Cir. July 31, 2018) (Cole, C.J., concurring) ("Since Welch turned on what a petitioner needed to do to allege the denial of a 'constitutional' right, it also applies to petitioners bringing second-or-successive petitions . . . . If a petition that pairs a new-rule-of-constitutional-law challenge and an old-rule-of-statutory-law challenge satisfies § 2253(c)'s 'constitutional' right requirement as Welch telegraphs, then such a petition also satisfies § 2255(h)."). Here, where the record is silent, Walker's claim "relies on" Johnson because his claim would not have been meritorious before the residual clause was held unconstitutional. See, e.g., Mitchell v. United States, No. 16-cv-3194, 2017 WL 1362040, at *3 (W.D. Mo. Apr. 11, 2017) ("Only with Johnson's invalidation of the residual clause can Movant reasonably argue that he is no longer eligible for the ACCA enhancement. Because Johnson provides Movant with an avenue of relief that was not previously available to him, his motion utilizes that decision and therefore relies on [it]." (cleaned up)).

Further—even under the more stringent standard that the court adopts—I believe it is unnecessary to remand the case for factfinding because "the relevant background legal environment at the time of [Walker's] sentencing," Washington, 890 F.3d at 896, is clear. In other words, I would conclude—like the court in United States v. Taylor, 873 F.3d 476, 481 (5th Cir. 2017)—that Walker's claim merits relief under either standard. Walker was initially sentenced on August 12, 2005. However, in February 2005, this court, in upholding an ACCA sentencing enhancement for second-degree burglary in Missouri had written that "[w]e have consistently held that burglary is a predicate offense under § 924(e) and U.S.S.G. § 4B1.2." United States

v. Nolan, 397 F.3d 665, 666 (8th Cir. 2005). Among the precedents we cited in support of this position was United States v. Blahowski, 324 F.3d 592, 594 (8th Cir. 2003) (concluding that burglary is a crime of violence because it "otherwise involves conduct that presents a serious potential risk of physical injury to another," i.e., because it satisfies the residual clause).[4] In other words, at the time Walker was sentenced, our case law had "consistently held" that burglary was a crime of violence, relying on the residual clause—or, in some other cases, relying on the breadth of the residual clause to avoid deciding which clause of the ACCA an offense satisfied, see, e.g., United States v. Cantrell, 530 F.3d 684, 695–96 (8th Cir. 2008) (concluding that "regardless of whether Cantrell's [Missouri] burglary conviction was a 'generic burglary,'" he was a career offender under the Guidelines "because Cantrell's [Missouri] second-degree burglary conviction constituted a 'crime of violence' under the 'otherwise involves conduct that presents a serious potential risk of physical injury to another' clause"). Because "the relevant background legal environment" is clear, I see no reason to remand this case to the district court. I respectfully concur in part and dissent in part from the court's opinion.

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[4]See also United States v. Mohr, 382 F.3d 857, 860 (8th Cir. 2004) ("Our court has reasoned that since burglary always creates a 'serious potential risk of physical injury to another,' it qualifies as a crime of violence."), cert. granted, judgment vacated, and case remanded on other grounds sub nom. Mohr v. United States, 542 U.S. 1181 (2005); United States v. Hascall, 76 F.3d 902, 906 (8th Cir. 1996) ("As we have said, second-degree burglary poses a 'serious potential risk for physical injury.'").

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DARRELL WALKER,	)	
	)	
Movant,	)	
	)	
v.	)	Civ. No. 16-00703-CV-W-DW
	)	Crim. No. 02-00161-01-CR-W-DW
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Movant, through counsel, has filed a Second or Successive Motion to Correct Sentence under 28 U.S.C. § 2255 (Doc. 1). He moves the Court to vacate, correct, or set aside his sentence based on Johnson v. United States, 135 S. Ct 2551 (2015), wherein the Supreme Court held that the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague.[1] The record shows that Movant has one prior conviction for sale of a controlled substance, which Movant concedes qualifies as a serious drug offense under the ACCA. See Presentence Investigation Report at *10. Movant also has at least three previous convictions for burglary in Missouri. Id. at *9-11. Movant argues that without the residual clause, his previous convictions for burglary no longer qualify as violent felonies under the ACCA.[2] Thus, according to Movant, he "does not have three prior convictions which qualify as violent felonies under the ACCA" and "is no longer subject to the enhanced sentencing range that statute mandates."

[1] The Supreme Court has since held that Johnson applies retroactively to cases on collateral review, such as this case. Welch v. United States, 136 S. Ct. 1257 (2016).

[2] Movant initially argued that Missouri's burglary statute is divisible. See Doc. 1. However, his reply brief argues that the statute is indivisible. See Doc. 8 at *2 n.1. Under the case law cited below, the Court rejects Movant's new argument that the "elements of Missouri burglary, because it is indivisible and includes burglary of an inhabitable structure, are broader than those of generic burglary, and therefore it cannot qualify as an ACCA enumerated predicate offense." Doc. 10 at *13.

However, subsequent to Johnson, this Court has held that Missouri burglary convictions qualify as violent felonies under the enumerated offenses clause of the ACCA. See Kastner v. United States, No. 16-CV-3163-DW at *3-6 (W.D. Mo. Aug. 15, 2016) (holding that "prior second-degree burglary convictions are considered enumerated offenses under the ACCA" and declining to retroactively apply Mathis v. United States, 136 S. Ct. 2243 (2016)); see also United States v. Phillips, 817 F.3d 567, 569-70 (8th Cir. 2016) (reaffirming that "the basic elements of the Missouri second-degree burglary statute are the same as those of the generic burglary offense under the categorical approach") (quotations and alterations omitted); Thornburgh v. United States, 2016 WL 3264462 at *2 (W.D. Mo. June 14, 2016). As a result, even without application of the residual clause, the record shows that Movant has at least three previous qualifying felony convictions under the ACCA.

Based on the foregoing, as well as for the additional reasons set forth by the Government, it is ORDERED that

1. The Second or Successive Motion to Correct Sentence under 28 U.S.C. § 2255 (Doc. 1) is DENIED;

2. No evidentiary hearing is necessary as Movant's claims are inadequate on their face; and

3. A certificate of appealability shall not issue.

IT IS SO ORDERED.

Date: September 7, 2016

/s/ Dean Whipple
Dean Whipple
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-4284

Darrell D. Walker

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:16-cv-00703-DW)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Chief Judge Smith, Judge Colloton, Judge Kelly, and Judge Erickson would grant the petition for rehearing en banc.

November 26, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C