No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY SWATZIE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

***MEGAN SAILLANT**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 0042092
101 SE 2nd Place, Suite 112
Gainesville, Florida 32601
Telephone: (352) 373-5823
FAX: (352) 373-7644
Attorney for Petitioner
* Counsel of Record

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.[1]

[1] This same issue is currently the subject of at least three petitions for writ of certiorari pending before this Court. *Harris v. United States,* No. 18-6936 (pending); *Ezell v. United States,* No. 18-7426 (pending); *Walker v. United States,* No. 18-8125 (pending).

PARTIES INVOLVED

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

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES - *cont'd*

Statutes

PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Swatzie respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit Court of Appeals panel opinion in *Swatzie v. United States,* -- F. App'x --, 2019 WL 141062 (11th Cir. Jan. 9, 2019), is reproduced here as Appendix A-1.

STATEMENT OF JURISDICTION

The Eleventh Circuit filed its opinion on January 9, 2019, affirming the district court's denial of Mr. Swatzie's § 2255 motion. This Court has jurisdiction under 29 U.S.C. § 1254(1) and 28 U.S.C. § 2253, which permits the review of civil cases in the court of appeals.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(b)(2) provides:

A claim presented in a second or successive habeas 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)(2) 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.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. 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).

This Court, however, has never explained how courts should address post-conviction claims brought under § 2255 where the record is silent as to whether the judgment rests on the statutory clause that has been held unconstitutional or a

different clause of the same statute. In the few years since *Welch,* the federal courts of appeals have divided over what federal prisoners bringing *Johnson* claims must show to obtain relief under that frequently recurring circumstance.

The Eleventh Circuit was the first to construct the "historical record" rule in *Beeman v. United States,* 871 F.2d 1215 (11th Cir. 2017), *cert. denied,* No. 18-6385, 2019 WL 659904 (U.S. Feb. 19, 2019). There the court held that a defendant can only meet his § 2255 burden of proving that an ACCA enhancement was based upon the residual clause by way of what it referred to as the "historical" record. *Id.* at 1224 n.5. A defendant must show the sentencing record, or clear precedent *from the time of sentencing,* shows that a predicate offense fit within the residual clause, and only the residual clause. *Id.* The panel's opinion included a dissent. *Id.* at 1225.

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

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

Id. at 1224 n.5. In the end, under the panel's standard, a silent record must be construed against the defendant, and he may not rely upon current law to disprove

the ACCA's alternative clauses in order prove that he was sentenced via the unlawful residual clause.

The dissent agreed that a defendant must prove his ACCA sentence was based upon the residual clause, but it objected to the majority's effort to tie the defendant's hands with the twine of its "historical" record. Wrote the dissent: "I do not believe that the merits of Beeman's timely *Johnson* claim can be properly assessed without reaching the question of whether his [prior] conviction … qualifies as a proper predicate offense under the elements clause of the ACCA." *Id.* at 1225 (Williams, D.J., dissenting). A defendant's showing, via recent Supreme Court cases, "that he could not have been convicted under the elements clause of the ACCA is therefore proof of both requirements for success on the merits of a *Johnson* claim: first, that he was sentenced under the residual clause, and, second, that his predicate offenses could not qualify under the ACCA absent that provision." *Id.* at 1230.[2] This case addresses how a defendant can prove his sentence was based on the residual clause of the ACCA when the sentencing record is silent.

2. Notably, the question presented here is not limited to Johnson claims. It also applies to defendants currently 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

[2] The debate continued to blossom in the Eleventh Circuit's later order denying a petition for rehearing en banc, where judges on both sides of the question offered pointed, thoughtful expositions on the question presented here. *Beeman v. United States,* 899 F.3d 1218, 1224 (11th Cir. 2018).

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.

B. PROCEDURAL BACKGROUND

In February of 2000, Mr. Swatzie was adjudicated guilty of possession with intent to distribute cocaine (Count I) and possession of a firearm by a convicted felon (Count II). At sentencing, the district court concluded Mr. Swatzie qualified for an enhanced punishment based on the ACCA. He was sentenced to life imprisonment on both counts. In applying the ACCA enhancement, the district court relied on four prior Florida burglary convictions. During the sentencing hearing the district court was silent as to which clause – elements, enumerated offenses, or residual – the burglary offenses fit into. The court simply counted the offenses without announcing why.

In 2016, Mr. Swatzie filed a § 2255 motion. He argued his ACCA sentence was unconstitutional in light of *Johnson,* 135 S. Ct. 2551. Mr. Swatzie claimed that Florida's burglary statute was non-generic and therefore not the burglary offense contemplated by the enumerated offenses clause, 18 U.S.C. § 924(e)(2)(B)(ii). Moreover, because after *Johnson,* the ACCA residual clause was void for vagueness,

his Florida burglary convictions could no longer qualify under that clause. Therefore, his prior offenses were no longer ACCA predicates. The district court denied the § 2255 but granted his request for a certificate of appealability.

After briefing, the Eleventh Circuit affirmed the district court's order denying the § 2255 motion. The court indicated it was bound by its previous decision in *Beeman,* 871 F.3d 1215. Therefore, Mr. Swatzie was required to show it was more likely than not that his original sentence was predicated on the ACCA's residual clause. Because Mr. Swatzie could not meet this burden, his appeal was denied.

REASONS FOR GRANTING THE PETITION

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 judgement on that provision or a different provision of the same statute. This Court should use this case to resolve the conflict. And it should hold – consistent with 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 CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

a) The Third, Fourth, and Ninth Circuits require a defendant to prove the sentencing court "may have" relied on the residual clause.

Three circuit courts mirror the dissenting opinions in *Beeman.* Indeed, the Fourth Circuit was the first appeals court to declare that a silent record is a path

toward, not an obstacle to, relief. In *United States v. Winston,* the court addressed a second or successive § 2255 motion denied by the district court. 850 F.3d 677 (4th Cir. 2017). The sentencing record, like Mr. Swatzie's, was silent as to whether the sentencing judge had relied on the residual clause in counting Winston's convictions under the ACCA. The government argued that with a silent record the defendant failed to overcome a procedural hurdle unique to successive petitioners (the gatekeeping function of 28 U.S.C. § 2255 (h)) to prove that his claim "relie[d] on" *Johnson.* The Fourth Circuit disagreed because "[n]othing in the law requires a [court] to specify which clause … it relied upon in imposing a sentence." *Id.* at 682. It held: "[W]hen an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in [*Johnson*], the inmate has shown that he 'relied on' a new rule of constitutional law." *Id.*

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

The Ninth Circuit chose the same path in *United States v. Geozos*. 870 F.3d 890 (9th Cir. 2017). There the defendant also brought a successive motion seeking *Johnson* relief. The court cited *Winston* and held that the defendant had satisfied § 2255(h)'s threshold requirement: "We therefore hold that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in [*Johnson*]." *Id.* at 896 & n.6 (noting that the ACCA provenance is "unclear" when the sentencing record is silent and there is no binding circuit precedent at the time of sentencing). The Ninth Circuit then addressed the merits of the *Johnson* claim by "look[ing] to the substantive law concerning the [alternative ACCA clauses] as it *currently* stands, not the law as it was at the time of sentencing." *Id.* at 898 (emphasis in original). The court studied and applied post-sentencing decisions, including this Court's interpretation of the ACCA's non-residual clauses. *Id.* at 897 & 898 n.7 (citing *Mathis v. United States,* 136 S. Ct. 2243, 2249 (2016)).

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

that a defendant can only pass through the gate by producing evidence that his sentence was based "solely" on the residual clause. *Id.* at 221-22.

Once a defendant passes through the gate and on to the merits, the Third Circuit held, he may "rely on post-sentencing cases (i.e., the current state of the law) to support his *Johnson* claim." *Id.* at 216. The court remarked upon the widening circuit split—"[l]ower federal courts are decidedly split on whether current law, including *Mathis*, *Descamps*,[3] and *Johnson 2010*[4] … may be used"—but sided with the *Beeman* dissenters. *Id.* at 228. A defendant "may use post-sentencing cases … to support his *Johnson* claim because they … ensure we correctly apply the ACCA's provisions." *Id.* at 230. "It makes perfect sense to allow a defendant to rely upon post-sentencing Supreme Court case law that explains the pre-sentencing law." *Id.* at 229-30.

Decisions like *Mathis*, *Descamps*, and *Curtis Johnson* "instruct courts on what has always been the proper interpretation of the ACCA's provisions. That is because when the Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 230 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). And this: "[T]hose decisions interpreting the ACCA are not new law at all … [They] are authoritative statement[s] of what the [ACCA] meant before as well as after [those] decision[s]." *Id.* (citing *Rivers*, 511 U.S. at 312-13). The Third Circuit ended with this:

---

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

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

"[A] rule that requires judges to take a research trip back in time and recreate the then-existing state of the law—particularly in an area of law as muddy as this one — creates its own problems in fairness and justiciability." *Id.* at 231.

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

The First Circuit, by a narrow 2-1 margin, joined the *Beeman* majority. In *Dimott v. United States*, the court rejected the argument that a defendant may rely upon post-sentencing caselaw to show his ACCA predicate offense never properly qualified under the elements or enumerated crimes clauses. 881 F.3d 232, 230, 243 (1st Cir.), *cert denied sub sum, Casey v. United States*, 138 S. Ct. 2678 (2018). The *Dimott* panel rejected the view that a defendant may prove through a process of elimination that the sentencing court could only have relied upon the then-valid, but now invalid under *Johnson*, residual clause. *Id*. at 243. The dissenting judge, however, endorsed the contrary view. Like the *Beeman* dissents and the Third, Fourth, and Ninth Circuits, the dissent argued that with a silent sentencing record, post-sentencing precedents could prove that the defendant was wrongly sentenced based upon the forbidden ACCA residual clause. *Id.* at 246 (Torruella, J., dissenting in part).

The Tenth Circuit crafted a rule similar to the Eleventh Circuit's in *Beeman*. In *United States v. Snyder*, it held that faced with a silent record, a district court may consider only the "relevant background legal environment" at the time of sentencing to ask whether a non-residual clause led to the ACCA enhancement. 871 F.3d 1122, 1129 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018). A "relevant background

legal environment" is a "snapshot of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions." *Id.* at 1129.[5]

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

The Eighth Circuit has also joined this view. *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018), *petition for cert. filed* (U.S. Feb. 25, 2019) (No. 18-8125). The court echoed, and quoted, the *Beeman* rule: "Where the record or an evidentiary hearing is inconclusive, the district court may consider 'the relevant background legal environment at the time of … sentencing' to ascertain whether the movant was sentenced under the residual clause." *Id.* at 1015. By drawing the borders around the snapshot of caselaw current at the long-ago sentencing hearing, of course, the Eighth Circuit too turns a blind eye to this Court's more recent opinions interpreting the scope of the ACCA's several provisions. But the view is not unanimous, even within the *Walker* panel. *Id.* at 1016-17 (Kelly, J, concurring in part and dissenting in part)

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

("I would hold that a claim for collateral relief under *Johnson* should be granted so long as the movant has shown that his sentence may have relied upon the residual clause, and the government is unable to demonstrate to the contrary.").

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

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

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

II. THE QUESTION IS RECURRING AND IMPORTANT

The Eleventh Circuit's historical record rule misapplies, or fails to apply at all, this Court's many recent ACCA precedents. In the Eleventh Circuit, a lower court must travel back in time in search of (1) factual findings that generally don't exist

because they did not matter, and (2) outdated case law. All while turning a blind eye to this Court's decisions clarifying and correcting that very caselaw. Thus, in the Eleventh Circuit, and those circuits which have adopted *Beeman*, this Court's decisions carry no influence at all. But at least three circuit courts take the opposite view. These courts permit a judge to inform his understanding of a silent historical record through the later clarifications by this very Court. So as things now stand, a defendant's ACCA sentence depends not on the facts of his own case, but on the fluke of geography.

As this Court well knows, many thousands of defendants sentenced under the ACCA have filed *Johnson*-based § 2255 motions in district courts throughout the country. In the Eleventh Circuit alone, more than 2,000 defendants filed *Johnson*-based applications for permission to pursue a second or successive § 2255 motion. *In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring). The ACCA is everywhere. Late last year the Court heard arguments in two more ACCA-related cases.[6] This sentencing statute is as close to a national crisis as one might find in the federal criminal code.

That is not all. There is much at stake for each defendant in these *Johnson*-related ACCA cases. An ACCA sentence carries a breathtakingly harsh prison sentence. And many of these harsh sentences, we now know, are unlawful. Wrote Judge Martin in dissent from the *Beeman* en banc denial: "[T]he *Beeman* panel …

[6] *Stokeling v. United States,* 139 S. Ct. 544 (2019); *United States v. Stitt,* 139 S. Ct. 399 (2018).

imposed administrative impediments, such that [a *Johnson* litigant] can get no review of his sentence. Those impediments are not derived from the statute or Eleventh Circuit or Supreme Court precedent, and they bar relief for prisoners serving sentences that could not properly be imposed under current law." 899 F.3d at 1224 (Martin, J., dissenting from denial of rehearing en banc). Without a prompt intervention by this Court, the divided paths of the circuit courts will create inconsistent and unfair sentences for countless similarly-situated defendants across the country.

III. THE ELEVENTH CIRCUIT'S RULE IS WRONG BECAUSE IT IGNORES THIS COURT'S DECISIONS CLARIFYING THE SCOPE OF THE ACCA AND LEADS TO TROUBLING PRACTICAL OUTCOMES

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

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

residual clause—the court then blames him for that gap in his proof. The Eleventh Circuit's narrow path is flawed in two ways.

First, the rule betrays this Court's many decisions interpreting and clarifying various recidivist sentencing statutes. The *Beeman* rule immunizes unlawful sentences from this Court's own jurisprudence. In Mr. Swatzie's case, that list includes at least *Curtis Johnson*, *Descamps*, and *Mathis*. This blind spot ignores the fact that this Court's opinions there did not stake new territory but merely clarified the law as it always has been. *See Peppers*, 899 F.3d at 230. The *Beeman* rule, "implies that the district judge deciding [a] § 2255 motion can ignore decisions from the Supreme Court that were rendered since that time in favor of a foray into a stale record, … [and] that the sentencing court must ignore that precedent unless the sentencing judge uttered the magic words 'residual clause.'" *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). And as one judge in the Third Circuit points out, the Eleventh Circuit's practice also undercuts this Court's decision in *Welch*, the retroactive catalyst of all *Johnson* claims. *Raines*, 898 F.3d at 690 (Cole, C.J. concurring).

The *Beeman* rule demands that courts ignore the law of the land. Surely this rule cannot stand. As one Eleventh Circuit judge mused: "[T]he *Beeman* panel opinion binds all members of this Court to recreate and leave in place the misunderstandings of law that happened at sentencing. Ignoring for a moment that we must apply Supreme Court precedent, what is the value in binding ourselves to erroneous

decisions?" 899 F.3d at 1228 (Martin, J., dissenting from the denial of rehearing en banc).

Second, the Eleventh Circuit rule smacks of unfairness. The problem with the *Beeman* command that a silent record must be construed against a defendant is this: "Nothing in the law requires a judge to specify which clause of [the ACCA] … it relied upon in imposing a sentence." *Beeman*, 899 F.3d at 1228 (Martin, J., dissenting from the denial of rehearing en banc). Before *Johnson*, with the residual clause's wide safety net firmly in place, judges and litigants had little incentive to choose one ACCA violent-felony prong over another. And, with no practical reason to check any one of the ACCA violent-felony boxes, judges rarely did so. Only now, after *Johnson*, does that question matter. For the same reason, the circuit courts rarely had an opportunity to pass judgment on the ACCA provenance of most potential predicates. And it is unfair to defendants, especially those whose predicate offenses fit under the residual clause only, to penalize them now with that silence. For these reasons, the *Beeman* path leads to what the panel's dissent called "unwarranted and inequitable results," 871 F.3d at 1228 (Williams, D.J., dissenting), and the dissent from the en banc denial labeled "very real practical concerns." 899 F.3d at 1228-29 (Martin, J., dissenting from the denial of rehearing en banc).

In her *Beeman* dissent, Judge Martin noted "[t]he Supreme Court recently reminded us of our critical duty to exhibit regard for fundamental rights and respect for prisoners as people." *Id.* at 1230 (quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018)). She also criticized her own court for allowing the tainted

Beeman panel opinion to betray these principles: "When considering claims [of defendants serving sentences no longer permitted by law], 'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'" *Id.* (quoting *Rosales-Mireles*, 138 S. Ct. at 1908).

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

In contrast to many of the previous cases presenting this issue to the 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. Swatzie's prior burglary convictions satisfied ACCA's residual clause or the enumerated offenses clause. The sentencing judge never indicated which clause he had in mind.

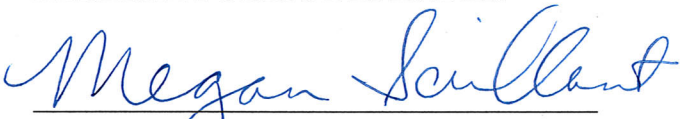
Second, the Eleventh Circuit has made clear that subsequent appellate decisions conclusively establish that Mr. Swatzie's prior convictions do not qualify as violent felonies under any other provisions of the ACCA. (App. A-1 at *1). That being so, if Mr. Swatzie had been sentenced today, "his convictions would not qualify as violent felonies, and he would not have been sentenced under the ACCA." *Id.* (citations omitted). Said another way, Mr. Swatzie would have been sentenced to, at most, ten years' imprisonment, rather than the life sentence he now serves.

CONCLUSION

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

Respectfully submitted,

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER



*MEGAN SAILLANT
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 0042092
101 SE 2nd Street, Suite 112
Gainesville, Florida 32601
Telephone: (352) 373-5823
FAX: (352) 373-7644
Attorney for Mr. Swatzie

* Counsel of Record