NO. _____

In The
Supreme Court of the United States

JOE CARROLL ZIGLAR,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Johnson v. United States*, this Court invalidated the residual clause of the Armed Career Criminal Act, but left intact the two remaining definitions of a "violent felony." In Mr. Ziglar's case, the sentencing court did not specifically indicate whether his prior convictions qualified as "violent felonies" under the residual clause, the enumerated offenses clause, or some combination of the two. To prove that his claim falls within the scope of the new constitutional rule announced in *Johnson*, a § 2255 movant must prove that his sentence was based upon the now-defunct residual clause.

The question presented is: when the record is silent as to which enhancement clause applied, what showing is a § 2255 movant required to make to satisfy the requirements of § 2255(h)(2) and prove he is entitled to relief on the merits of his *Johnson* claim?

As the Third, Fourth, and Ninth Circuits have held, may he satisfy the requirements of § 2255(h)(2) by showing that his sentence "may have" been based on the residual clause? Once the § 2255 movant passes through the gatekeeping requirement in § 2255(h)(2), may the court consider modern, existing precedent when ruling on the merits of the *Johnson* claim?

Or, as a majority of Circuits have held, must the § 2255 movant bear the burden of showing by a preponderance of the evidence that he was sentenced solely upon the residual clause at the time of his sentencing hearing?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Mr. Joe Carroll Ziglar respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision is unpublished. *Ziglar v. United States*, 757 F. App'x 886 (11th Cir. 2018) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's opinion and order denying Mr. Ziglar's 28 U.S.C. § 2255 motion is published. *Ziglar v. United States*, 201 F. Supp. 3d 1315 (M.D. Ala. 2016). The opinion and order is included in Petitioner's Appendix. Pet. App. 1b.

The Eleventh Circuit's order granting Mr. Ziglar leave to file an authorized successive 28 U.SC. § 2255 motion is unreported, but reproduced in the Petitioner's Appendix. Pet. App. 1c.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on December 11, 2018. *See* Pet. App. 1a. No rehearing was sought, rendering the petition for writ of certiorari due on or before March 11, 2019. Mr. Ziglar requested and received an extension of time to file the petition until May 10, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

Section 2255(h)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides:

> (h) 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.

28 U.S.C. § 2255(h).

28 U.S.C. 2244(b)(4) provides:

> (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. § 2244(b)(4).

STATEMENT OF THE CASE

A. Legal Background.

Ordinarily, a defendant convicted of possession of a firearm by a convicted felon is subject to a statutory maximum penalty of 10 years' imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2). However, under the ACCA, a defendant convicted under 18 U.S.C. § 922(g) is subject to a mandatory minimum sentence of 15 years' imprisonment if he has three prior convictions for a "violent felony" or "serious drug offense." 18 U.S.C. § 924(e)(1). A "violent felony" is any offense punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is referred to as the "elements clause," while the second prong contains the "enumerated" offenses and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

In *Johnson v. United States,* 135 S. Ct. 2551, 2558-63 (2015), this Court held that the residual clause of the ACCA is unconstitutionally vague because of the combined two-fold indeterminacy surrounding how to estimate the risk posed by a crime, and how much risk was required for a crime to qualify as a violent felony. This Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated offenses of the ACCA's definition of a violent felony. *Id.* The following term, this Court held that *Johnson* announced a new, substantive rule of constitutional law that has retroactive effect to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

28 U.S.C. § 2255 expressly authorizes a federal prisoner to file a motion collaterally attacking 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." 28 U.S.C. § 2255(a). However, a federal prisoner who wishes to file a second or successive § 2255 motion is required, first, to move the court of appeals for an order authorizing the district court to consider such a motion. *See* 28 U.S.C. § 2255(h), *cross-referencing* 28 U.S.C. § 2244. The appellate court will grant such authorization only if the prisoner makes a *prima facie* showing that his proposed claim satisfies the requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C). Section 2255(h) provides, in relevant part, that:

> (h) 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.

28 U.S.C. § 2255(h)(2). However, the appellate court's threshold determination that an applicant has made a prima facie showing that he has met the statutory criteria of § 2255(h) does not conclusively resolve that issue. *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357 (11th Cir. 2007) (involving the functionally equivalent § 2244(b)(2) successive application standard applicable to state prisoners). Once the prisoner has filed his authorized § 2255 motion, "the district court not only can, but must, determine for itself whether those requirements are met." *Id.*

However, this Court has yet to address what showing a § 2255 movant is required to make to satisfy the requirements of § 2255(h)(2) and prove his *Johnson* claim. This silence has led the federal Courts of Appeals to fall into a state of disarray when, as is often the case, the sentencing court did not specifically discuss whether a prior conviction qualified as a violent felony under the residual clause, the enumerated offenses clause, the elements clause, or some combination of the three. Accordingly, there is now an open, entrenched circuit split concerning the issue presented by these "silent record" cases.

B. Facts and Procedural History.

In September 2005, a federal grand jury returned an indictment against Mr. Joe Carroll Ziglar, charging him with a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Shortly thereafter, Mr. Ziglar pled guilty to the indictment without the benefit of a written agreement.

The Presentence Investigation Report ("PSI") determined that Mr. Ziglar qualified as an armed career criminal under the ACCA and U.S.S.G. § 4B1.4(a), because he "has four prior 'violent felonies' as that term is defined in 18 U.S.C. § 924(e)(2)." In reaching this conclusion, the PSI did not identify which of Mr. Ziglar's prior convictions qualified as ACCA predicate offenses, or which enhancement clause applied. However, according to the probation officer's description of Mr. Ziglar's criminal history, Mr. Ziglar had accrued the following felony convictions:

(1) first degree theft of property, in Montgomery County Case No. CC-00-1330;

(2) third degree burglary and first degree theft of property, in Montgomery County Case No. CC-00-1333;

(3) first degree theft of property, in Montgomery County Case No. CC-00-1332;

(4) third degree burglary and first degree theft of property, in Montgomery County Case No. CC-00-1334;

(5) third degree burglary and first degree theft of property, in Montgomery County Case No. CC-00-1335;

(6) first degree theft of property, in Montgomery County Case No. CC-00-1331; and

(7) third degree burglary and first degree theft of property, in Montgomery County Case No. CC-00-1336.

Accordingly, the probation officer apparently considered Mr. Ziglar's four prior convictions for Alabama third degree burglary to be the "four prior violent felonies" triggering the ACCA enhancement. All of Mr. Ziglar's burglary and theft offenses were committed in a 13-day window spanning April 10, 2000 and April 23, 2000. Mr. Ziglar was sentenced for each of them on the same date in December 2000.

At sentencing, neither party articulated any objection to the PSI, so the district court adopted the factual findings and guideline calculations contained therein. Mr. Ziglar acknowledged the applicability of the ACCA enhancement, but pointed out that the 15-year mandatory minimum was unusually harsh given that all of his prior felony convictions occurred in a two-week period spanning April 10 and April 23 of 2000. Although there were seven separate case numbers, Mr. Ziglar was sentenced for each of them on the same day, and he received effectively a single split sentence covering all seven cases. Given these circumstances, Mr. Ziglar asked the court to consider whether he was truly the "armed career criminal" Congress had in mind when it enacted the ACCA.

The sentencing court adopted the probation officer's determination that Mr. Ziglar qualified as an armed career criminal, and noted that the statutory mandatory minimum was 180 months' imprisonment. There was no further discussion concerning the ACCA, or which enhancement clause applied. As a

result, the district court did not state whether Mr. Ziglar's four prior convictions for Alabama third degree burglary constituted generic burglaries within the meaning of the ACCA's enumerated offenses clause, or simply fell within the scope of the catchall residual clause.

The district court sentenced Mr. Ziglar to 180 months' imprisonment, to be followed by five years' supervised release. Without the ACCA enhancement, the statutory maximum penalty applicable to Mr. Ziglar's § 922(g) offense would have been 120 months under § 924(a).

The district court entered judgment in December 2006. Mr. Ziglar did not file a direct appeal.

In July 2007, Mr. Ziglar filed an initial 28 U.S.C. § 2255 motion, seeking to vacate his conviction and sentence based on allegations of ineffective assistance of counsel. The district court denied Mr. Ziglar's § 2255 motion on the merits in October 2009, and the Eleventh Circuit declined to issue a certificate of appealability. Mr. Ziglar mounted several other collateral challenges to his conviction and sentence, but was unsuccessful in obtaining relief.

Subsequently, on June 26, 2015, this Court decided *Johnson v. United States*, and held that the residual clause of the ACCA was unconstitutionally vague because of the combined two-fold indeterminacy surrounding how to estimate the risk posed by a crime, and how much risk was required for a crime to qualify as a violent felony. 135 S. Ct. 2551, 2558-63 (2015).

On January 25, 2016, Mr. Ziglar filed, in the Eleventh Circuit, an application for leave to file a second or successive § 2255 motion based on *Johnson*. The Eleventh Circuit determined that Mr. Ziglar had made the required *prima facie* showing that his *Johnson* claim satisfied the requirements of § 2255(h), and it granted his application. The court explained that:

> Ziglar's ACCA sentence appears to have been based on his four prior convictions for third-degree burglary under Alabama law. Prior to *Johnson*, the Supreme Court interpreted ACCA's "residual clause" to cover state burglary offenses. *See James v. United States*, 550 U.S. 192, 195, 127 S. Ct. 1586, 1590 (2007), *overruled by Johnson*, 135 S. Ct. 2551. Without the "residual clause," ACCA doesn't cover Ziglar's Alabama burglary convictions. *See United States v. Howard*, 742 F.3d 1334, 1349 (11th Cir. 2014) (holding that Alabama burglary does not fall under ACCA's "enumerated crimes clause"). *Howard* applies retroactively on collateral review, so it appears to govern Ziglar's § 2255 proceedings. *See Mays v. United States*, No. 14-13477, 2016 WL 1211420, at *5 (11th Cir. Mar. 29, 2016). This means Ziglar has made a *prima facie* showing that *Johnson* makes his ACCA sentence unlawful because his state convictions no longer count under any of ACCA's definitions of "violent felony." Of course, our "limited determination" here does not bind the District Court, which must decide the case "fresh, or in the legal vernacular, *de novo*."

On June 21, 2016—within one year of *Johnson* for purposes of § 2255(f)(3)—Mr. Ziglar filed an authorized, successive § 2255 motion, seeking to vacate his ACCA-enhanced, 180-month sentence based on *Johnson*. Mr. Ziglar pointed out that the only convictions that could have supported application of the ACCA enhancement were his four prior convictions for Alabama third degree burglary. Mr. Ziglar argued that, following *Johnson*,

these convictions no longer qualified as "violent felonies" for purposes of § 924(e)(2)(B). Absent these convictions, Mr. Ziglar did not have the requisite three predicate felonies necessary to trigger the ACCA enhancement, and his 180-month sentence exceeded the 10-year statutory maximum penalty in § 924(a).

The government filed a response to Mr. Ziglar's § 2255 motion, conceding that he was entitled to relief under *Johnson* and should therefore be resentenced without the ACCA enhancement. The government explained that Mr. Ziglar's prior convictions for Alabama third degree burglary no longer qualified as "violent felonies" because *Johnson* invalidated the residual clause in § 924(e)(2)(B)(ii). Additionally, these convictions could not alternatively qualify as "violent felonies" under the enumerated offenses clause, because the relevant Alabama statute was both non-generic and indivisible. (citing *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014)).

The district court determined that Mr. Ziglar failed to satisfy the gatekeeping requirements of 28 U.S.C. § 2255(h)(2), and it denied his § 2255 motion without an evidentiary hearing and without further briefing from the parties. The district court explained that it had conducted a review of competing Eleventh Circuit dicta,[1] and determined that Mr. Ziglar could not

[1] In *In re Moore*, 830 F.3d 1268 (11th Cir. 2016), a panel of the Eleventh Circuit suggested, in dicta, that a movant can only satisfy his burden under § 2255(h) by "prov[ing] that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence." *Moore*, 830 F.3d at 1273. Under the *Moore* interpretation of § 2255(h)(2), a proposed claim does

prove that he fell within the scope of the new substantive rule announced in *Johnson*—and satisfy the requirements of § 2255(h)(2)—unless he could show that he was sentenced *solely* upon the residual clause, as opposed to also or potentially upon the enumerated offenses clause. Mr. Ziglar could not meet this burden, because "the sentencing court did not state expressly whether it 'relied on the residual clause or the other ACCA clauses not implicated by *Johnson*.'" (quoting *Moore*, 830 F.3d at 1271).

The district expressly acknowledged that applying this Court's precedent in *Descamps v. United States,* 570 U.S. 254 (2013), would mandate the conclusion that Mr. Ziglar's underlying predicate convictions could not qualify as violent felonies under the ACCA's enumerated offenses clause,

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not fall within the scope of *Johnson* unless, at the time of the original sentencing hearing, the challenged prior conviction only qualified as a "violent felony" under the residual clause. *See id.* at 1271; *see also In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016) ("[W]hat matters here is whether, at sentencing, Hires's prior convictions qualified pursuant to the residual clause, which would render his sentence subject to successive § 2255 challenge under Johnson, or pursuant to the elements clause, which would not. . . Hires cannot use *Johnson* as a portal to challenge his ACCA predicates . . . based on *Descamps*").

Notably, however, a different panel of the Eleventh Circuit described *Moore* as "quite wrong," and noted that a § 2255 movant need only show that his ACCA-enhanced sentence *may* no longer be authorized following *Johnson*. *In re Chance*, 831 F.3d 1335, 1341 (11th Cir. 2016). Under this interpretation of § 2255(h)(2), "it makes no difference whether the sentencing judge used the words 'residual clause' or 'elements clause' or some similar phrase." *Id.* Moreover, once the court of appeals has authorized a *Johnson* claim under § 2255(h)(2), "it would make no sense for a district court to have to ignore precedent such as *Descamps* and *Mathis*" when it evaluates whether a prior conviction qualifies as a "violent felony." *Id.* at 1340.

because Alabama's third-degree burglary statute was both non-generic and indivisible. (citing *Descamps,* 570 U.S. 254 and *Howard*, 742 F.3d 1334). Thus, "if sentenced today, Ziglar would not be ACCA eligible based upon the combined holdings of *Johnson* and *Descamps* because he would not have three qualifying violent felonies under any clause of the ACCA." However, the court determined that it would not consider *Descamps* in ruling on Mr. Ziglar's *Johnson* claim, because a freestanding *Descamps* claim would not satisfy the requirements of § 2255(h)(2). The court determined that allowing Mr. Ziglar to invoke *Descamps's* holding as part of his *Johnson* claim would allow him to use *Johnson* as a portal to retroactive application of *Descamps*, in contravention of the requirements of § 2255(h)(2).

Mr. Ziglar appealed, challenging the district court's interpretation of § 2255(h)(2), and its determination that he failed to prove his *Johnson* claim.

While Mr. Ziglar's appeal was pending, a divided panel of the Eleventh Circuit decided *Beeman v. United States*, 871 F.3d 1215, 1221-25 (11th Cir. 2017), and held that, to prove a *Johnson* claim, the movant must show that—more likely than not—he was sentenced based *solely* on the residual clause. (emphasis added). As a result, if it was just as likely that the sentencing court relied on the elements clause or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant failed to show that the application of the ACCA was due to use of the residual clause. *Id.*

The *Beeman* panel determined that the key question was one of "historical fact"—that is, was the movant sentenced "solely per the residual clause" at the time of his sentencing hearing. *Id.* at 1224 n.5. Under the *Beeman* rule, cases decided after the movant's sentencing hearing—including cases that categorically exclude a conviction as a valid ACCA predicate offense under the enumerated offenses or elements clause—"cast[] very little light, if any, on the key question of historical fact[.]" *Id.* Thus, according to the *Beeman* panel, this Court's decision in *Descamps*, is unavailable to those seeking relief based on *Johnson* if they happened to be sentenced before *Descamps* was decided. *See id.*

The Eleventh Circuit affirmed the district court's denial of Mr. Ziglar's § 2255 motion. The Court of Appeals acknowledged that, "if Ziglar were sentenced today, he would be ineligible for an ACCA-enhanced sentence because his Alabama third-degree burglary convictions would not qualify under either of ACCA's remaining clauses." (citing *Johnson*, 135 S.Ct. at 2563 and *Howard*, 742 F.3d at 1348-49 (holding that, in light of *Descamps*, a conviction for Alabama third degree burglary does not qualify as an ACCA predicate under the enumerated crimes clause)). However, the court found that it was required to ignore binding intervening precedent, because it was not relevant to *Beeman*'s residual clause analysis and its focus on what occurred as a matter of historical fact at Mr. Ziglar's 2006 sentencing hearing.

Accordingly, because Mr. Ziglar was sentenced pre-*Descamps*, it was possible that the sentencing court might have applied the modified categorical approach to Alabama's indivisible burglary statute—a practice that this Court explicitly disallowed in *Descamps*—and then relied upon the undisputed facts contained in the PSI to determine that Mr. Ziglar was convicted of a generic burglary satisfying the requirements of the enumerated offenses clause. The court acknowledged that it was "possible the district court may have skipped this analysis and deemed Ziglar's convictions to qualify as ACCA predicates under the catchall residual clause," but determined that Mr. Ziglar "cannot show that the district court more likely than not sentenced him under ACCA's residual clause given the silent record[.]" In short, the panel found itself "bound to follow *Beeman* unless or until it is overruled or undermined to the point of abrogation by this Court sitting en banc or by the Supreme Court."

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The decisions of the federal Courts of Appeals are in conflict with one another concerning the question presented.

This Court has not yet addressed what showing a § 2255 movant is required to make to satisfy the requirements of § 2255(h)(2) and prove his *Johnson* claim. This silence has led the federal Courts of Appeals to fall into a state of disarray when, as is often the case, the sentencing court did not specifically discuss whether a prior conviction qualified as a violent felony under the residual clause, the enumerated offenses clause, the elements

clause, or some combination of the three. Accordingly, there is now an open, entrenched circuit split concerning the issue presented by these "silent record" cases.

As already discussed, the Eleventh Circuit held in *Beeman*[2] that a § 2255 movant bears the burden of showing by a preponderance of the evidence that he was sentenced solely upon the residual clause, and he may only meet this burden by establishing what occurred as a matter of historical fact at his sentencing hearing. *Beeman*, 871 F.3d at 1221-22.[3] In determining whether the § 2255 movant has met this burden and proven his *Johnson* claim, Eleventh Circuit courts must ignore this Court's intervening precedent establishing that his prior convictions do not qualify as "violent felonies" under any other enhancement provision. *See id.* at 1224 n.5.[4] Thus, a silent record is

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[2] It is worth noting that the *Beeman* rule has already proved deeply divisive, even amongst the judges of the Eleventh Circuit. *See Beeman*, 871 F.3d at 1225 (Williams, J., dissenting); *Beeman v. United States*, 899 F.3d 1218, 1224 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing *en banc*); *Chance*, 831 F.3d at 1341 (describing the precursor to *Beeman*, *In re Moore*, as "quite wrong").

[3] "To prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence. 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."

[4] "[A] sentencing court's decision today that [a prior conviction] 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

ordinarily fatal to the § 2255 movant's *Johnson* claim in the Eleventh Circuit. *Id.* at 1224.[5]

The First, Fifth, Sixth, Eighth, and Tenth Circuits have each followed suit, adopting their own variations of the *Beeman* approach. *See Dimott v. United States,* 881 F.3d 232, 243 (1st Cir. 2018) (noting that the *Beeman* approach "makes sense"; holding that "to successfully advance a *Johnson II* claim on collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause"; and determining that the petitioners' § 2255 motions were untimely because they relied upon intervening, non-retroactive decisions such as *Mathis v. United States*, 136 S. Ct. 2243 (2016)); *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018) (expressly joining the *Beeman* approach to silent record cases, and holding that "we must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause or the residual clause."); *United States v. Washington* 890 F.3d 891, 896 (10th Cir. 2018) ("we hold the burden is on the defendant to show by a preponderance of the evidence—i.e., that it is more likely than not—his claim relies on *Johnson"*); *Walker v. United States,* 900

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here: whether in 2009 Beeman was, in fact, sentenced under the residual clause only."

[5] "It is no more arbitrary to have the movant lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one."

F.3d 1012 (8th Cir. 2018) ("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. . . 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."); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) ("As the proponent of a § 2255 motion, and a second motion at that, Potter has the burden to show he deserves relief. . . Nor does Johnson open the door for prisoners to file successive collateral attacks any time the sentencing court may have relied on the residual clause.").

However, the Third, Fourth, and Ninth Circuits have all reached a contrary conclusion, both with respect to the gatekeeping requirements in § 2255(h)(2), and the relevance of modern existing precedent.

For instance, in the Fourth Circuit, a *Johnson* claimant faced with a silent record satisfies the requirements of § 2255(h)(2) if he "may have" been sentenced based on the residual clause. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Noting that "nothing in the law requires a court to specify which clause [] it relied upon in imposing a sentence," the Fourth Circuit declined to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.* To hold otherwise would result in arbitrary "selective

application" of the new substantive rule of constitutional law announced in *Johnson*. *Id.* Accordingly, the Court held that "when 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.*

The *Winston* Court further held that, once a § 2255 movant passes through the gatekeeping requirement in § 2255(h)(2)—by showing only that he may have been sentenced based upon the residual clause—the court may consider modern, existing precedent when ruling on the merits of a *Johnson* claim. *Id.* at 684 ("we now must consider under the current legal landscape whether Virginia common law robbery qualifies as a violent felony under the ACCA's force clause"). The *Winston* Court then conducted a review of post-sentencing caselaw, and determined that the petitioner's prior convictions no longer qualified as "violent" felonies without regard to the residual clause. *Id.* at 686. Thus, unlike in the Eleventh Circuit, a silent record is not necessarily, or even ordinarily, fatal to an otherwise meritorious *Johnson* claim in the Fourth Circuit.

The Ninth and Third Circuits have followed the Fourth Circuit's lead. In *Geozos*, the Ninth Circuit addressed the requirements of § 2255(h)(2) in the context of a silent record case, and held that "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but may have, the defendant's § 2255

claim 'relies on" the constitutional law announced in *Johnson*[.] *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017). The Court explained that in silent record cases, it was "necessarily unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id.* Therefore, the rule in such a situation is clear: "[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." *Id.* (relying upon the "*Stromberg* principle" announced in *Stromberg v. California*, 283 U.S. 359 (1931)). Finding the § 2255(h)(2) gatekeeping requirements satisfied, the Ninth Circuit proceeded to the merits, and addressed whether the petitioner could prove his claim by reference "to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing." *Id.* at 897.

The Third Circuit reached the same conclusion as the Fourth and Ninth Circuits. *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). In *Peppers,* the Third Circuit cited approvingly from *Geozos* and *Winston*, and held that "the jurisdictional gatekeeping inquiry for second or successive § 2255 motions based on Johnson requires only that a defendant prove 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. The Court further held that "a defendant seeking a sentence correction in a second or successive § 2255 motion based on Johnson, and who has used Johnson to satisfy the

gatekeeping requirements of § 2255(h), may rely on post-sentencing cases (i.e., the current state of the law) to support his Johnson claim." *Id.* So, as in the Fourth Circuit and Ninth Circuits, a silent record does not prevent a § 2255 movant in Mr. Ziglar's position from proving his *Johnson* claim.

II. The question presented is of exceptional importance and arises frequently in the lower courts.

The question presented is one of exceptional importance, because thousands of prisoners filed § 2255 motions challenging their ACCA-enhanced sentences in the wake of *Johnson*. In many of these cases, the sentencing court had no reason to state that it was sentencing the defendant "solely upon the residual clause," as opposed to also or solely upon either the enumerated offenses clause or elements clause. In many of these silent record cases—such as Mr. Ziglar's—the inmate has already served more than the 10-year statutory maximum penalty in § 924(a), and would therefore be entitled to immediate release based on current precedent. Nevertheless, inmates in the Eleventh Circuit will be unable to obtain relief on their *Johnson* claim, while identically situated inmates in the Third, Fourth, and Ninth Circuits will prevail, and be released from custody as a result of the sentencing court's discretionary—and often arbitrary—decision not to specify which enhancement clause applied.

Imagine two identically situated federal inmates who are housed together at the same federal correctional institute. Both inmates are serving time for felon in possession of a firearm, and each received an ACCA-enhanced,

15-year sentence. One inmate was sentenced in the Central District of California, while the other was sentenced in the Middle District of Florida. While shooting the breeze, they learn that they each grew up in Alabama, and were each sentenced as an armed career criminal as a result of three prior convictions for Alabama third degree burglary.

Imagine further that, after *Johnson* was decided, they each received permission to file second or successive § 2255 motions challenging their ACCA classification based on *Johnson*. The first inmate gets the benefit of the Ninth Circuit's case law, and leaves prison after serving the non-ACCA statutory maximum of 10 years. The second inmate is stuck with the Eleventh Circuit's contrary case law, and will spend an additional five years in prison. [6]

Unless this Court grants certiorari and resolves the intractable circuit split, this scenario will continue to occur. Regardless of which side of the split this Court takes, permitting the split to fester undermines confidence in the federal courts and criminal justice system. For this reason alone, this Court should grant certiorari and finally resolve the circuit split.

III. The Eleventh Circuit's rule is incorrect.

This Court's intervening precedent is not irrelevant to determining whether a § 2255 movant has established his *Johnson* claim. As the Eleventh

[6] The hypothetical is not far-fetched. Counsel for Mr. Ziglar has spoken with clients who have watched their fellow prisoners receive *Johnson* relief, while her clients are denied such relief solely based on the happenstance of geography.

Circuit explained, in *Mays* and then in *Beeman* itself, "*Descamps* does not announce a new rule—*its holding merely clarified existing precedent*." *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016). As a result, "the rules for evaluating predicate offenses—other than under the residual clause—are the same today as they always have been." *Beeman v. United States*, 2018 WL 3853960 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing *en banc*). Therefore, if the sentencing court applied the modified categorical approach to the indivisible Alabama burglary statute, it was just as incorrect for it do so then as it would be now, and Mr. Ziglar's prior conviction for Alabama third degree burglary cannot be considered a *valid* ACCA predicate under the enumerated offenses clause. *See id.* ("As *Descamps* explains, if the sentencing court analyzed the elements clause in a different way, the court was wrong. And the *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?").

Moreover, despite *Beeman*'s insistence that it "would be arbitrary [] to treat *Johnson* claimants differently than all other § 2255 movants claiming a constitutional violation," the practical effect of its historical fact inquiry is to impose a higher burden of proof upon a *Johnson* claimant than upon any other § 2255 movant. *See Beeman*, 871 F.3d at 1224. This is so because, in order to prevail on a *Johnson* claim, a § 2255 movant must show: first, that he was

sentenced under the now-invalidated residual clause of the ACCA; and, second that he could not have been sentenced under the elements clause or the enumerated offenses clause. *See, e.g., Beeman v. United States*, 871 F.3d at 1225-26 (11th Cir. 2017) (Williams, J., dissenting). When a *Johnson* claimant invokes the holding of *Descamps*, he is not doing so as part of a freestanding claim that he was erroneously sentenced as an armed career criminal under the enumerated offenses or elements clause. Rather, his contention is that he has proved the second prong of his *Johnson* claim, because the offense that qualified under the residual clause could not have alternatively have qualified under a different enhancement provision. *Id.* at 1226 ("the [*Beeman*] majority conflates Beeman's argument that he *could not have been sentenced* under the elements clause—made in the context of establishing his *Johnson* claim—with the argument that he *was improperly sentenced* under the elements clause—which would be an untimely *Descamps* claim"). By precluding a *Johnson* claimant from invoking *Descamps*, *Beeman* effectively prevents a § 2255 movant from offering what will usually be the only circumstantial evidence available with respect to the second part of his *Johnson* claim. *Id.* ("By artificially delineating what constitutes a *Johnson* argument—and by disposing of Beeman's petition without reaching the second required showing for success on a Johnson claim—the majority elides all of Beeman's elements-clause arguments from their Johnson analysis, leaving Beeman with 'insufficient' assertions regarding the sentencing court's reliance on the

residual clause, which the majority peremptorily rejects. In so doing, the majority has set up a straw man regarding Beeman's *Johnson* arguments that they then proceed to knock down.").

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

Mr. Ziglar's case presents an ideal vehicle to resolve the circuit split, because it is pellucidly clear from the record that none of his prior convictions qualify as "violent felonies" under this Court's current precedent. As Mr. Ziglar argued in the district court, the *only* convictions that could have supported application of the ACCA enhancement were his four prior convictions for Alabama third degree burglary. And, as both the district court and the Eleventh Circuit acknowledged, applying this Court's precedent in *Descamps* mandates the conclusion that Alabama's third-degree burglary statute is both non-generic and indivisible. *See Descamps*, 570 U.S. 254; *Howard*, 742 F.3d 1334. Therefore since the residual clause is unconstitutionally vague, Mr. Ziglar does not have the requisite three predicate felonies necessary to trigger the ACCA enhancement, and his 180-month sentence exceeds the ten-year statutory maximum penalty in § 924(a). Accordingly, Mr. Ziglar is serving an illegal sentence. Since Mr. Ziglar was sentenced in 2006, he has already served several years in excess of the statutory maximum penalty.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

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