No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL DON NEELY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Michael Neely is serving an illegal sentence after *Johnson v. United States*. However, the Tenth Circuit Court of Appeals held that he is not entitled to relief. The question is whether a district court can vacate an illegal sentence enhanced under the Armed Career Criminal Act (ACCA) if it finds that the record established that the sentencing court "may have" relied on the unconstitutional residual clause of the ACCA, as the Fourth and Ninth Circuit held; or, as the First, Sixth, Tenth and Eleventh Circuits have held, must the court find by a preponderance of the evidence that the residual clause served as the basis of the sentencing court's decision.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael Neely, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A) is available at *United States v. Neely,* No. 17-8087, 2019 WL 761556 (10th Cir. Feb. 20, 2019). The order of the district court denying Mr. Neely's motion to vacate is unreported and unavailable in electronic databases. It is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment on this case on February 20, 2019. No petition for rehearing was filed. This petition is being filed within 90 days after the entry of the judgment below, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

> (e)(1) In the case of a person who … has three previous convictions … for a violent felony …, such person shall be … imprisoned not less than fifteen years …. (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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).

The statutory subsection governing the filing of second or successive § 2255 motions provides as follows:

(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—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(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).

STATEMENT OF THE CASE

Procedural Background

In March of 2013, Mr. Neely pled guilty to felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). A presentence investigation report ("PSR") was prepared prior to sentencing. The PSR recognized Mr. Neely qualified for an Armed Career Criminal Act (ACCA) sentencing enhancement based on the following prior convictions:

1. A 1981 Tennessee conviction for escape from secured custody;

2. A 1983 Tennessee burglary conviction;

3. A 1990 Oregon first degree robbery with a firearm conviction;

4. A 1992 Nevada conviction for unlawfully possessing a short barrel shot-gun;

5. A 2007 Nevada conviction for attempted battery (substantial bodily harm); and

6. A 1980 Oregon conviction for unlawful delivery of marijuana

R. vol. III at 35-36. Mr. Neely was ultimately sentenced to 200 months and 5 days as an Armed Career Criminal on March 22, 2013.

Prior to the Supreme Court's holding in *Johnson v. United States*, there were three ways that a non-drug crime could qualify as an ACCA predicate. Specifically, the ACCA defined the term "violent felony" to mean

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or car-rying of a firearm, knife, or destructive device that would be punish-able by imprisonment for such term if committed by an adult, 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) (emphasis added).

In *Johnson*, the Supreme Court reversed earlier precedent and held that the phrase "otherwise involves conduct that presents a serious potential risk

of physical injury to another," was unconstitutionally vague. The Court explained that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," and therefore "[i]increasing a defendant's sentence under the clause denies due process of law." *Johnson*, 135 S. Ct. at 2557. After Johnson, then, un-like when Mr. Neely was originally sentenced, a prior predicate crime can qualify as a "violent felony" under the ACCA only if it "has as an element the use, at-tempted use, or threatened use of physical force against the person of another" under § 924(e)(2)(B)(i), the so-called "force clause," or if it is an "enumerated offense" under § 924(e)(2)(B)(ii).

After the Supreme Court decided *Johnson*, Mr. Neely filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, arguing that the sentencing court may have impermissibly relied on the residual clause at his sentencing. R. vol. I at 5. In the district court, Mr. Neely argued that his ACCA sentence was infected with *Johnson* error. Both the Government and the district court agreed that at least two of Mr. Neely's prior convictions no longer qualified under the ACCA after *Johnson*, which demonstrates that there was *Johnson* error below. The district court proceeded to analyze the merits of Mr. Neely's case, but erred in determining that Mr. Neely's prior convictions for Tennessee burglary, Oregon first degree robbery, and Nevada attempted battery are violent felonies under the ACCA.

In the district court, Mr. Neely argued that the Tennessee burglary statute is overbroad and indivisible. Under Tennessee law, a burglary conviction requires the state to prove four distinct elements: (1) the breach, (2) the entry, (3) of any house of another other than dwelling house, and (4) felonious intent. The "any house of another" element is a single element that can be satisfied by various locational alternatives, including an "outhouse," which takes the statute outside of the generic burglary definition. The locational alternatives are means and not elements; thus the statute is overbroad and indivisible and cannot be used as an ACCA predicate.

Mr. Neely also argued that his conviction for Oregon first degree robbery was not a violent felony under the ACCA. Both the Government and the district court agreed that Oregon third degree robbery is not a violent felony. Oregon first degree robbery requires only the additional element that the robber possessed a dangerous weapon while the robbery was taking place; it does not require the brandishing or use of the dangerous weapon. Under these circumstances, and because no additional violence is required, the prior conviction is not an ACCA-qualifier. Finally Mr. Neely argued that attempted battery in Nevada is not an ACCA predicate because it does not require the attempt to use physical force.

The Government conceded that, after *Johnson*, Mr. Neely's prior convictions for escape and possession of a short barreled shotgun no longer

qualified as ACCA predicates. R. vol. I at 140. The district court agreed, and further found that under this Court's precedent, *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), Mr. Neely's section 2255 motion was timely and was not barred by the doctrine of procedural default. R. vol. I at 138-140.

However, on the merits of Mr. Neely's claim, the district court found that his remaining convictions for Oregon robbery, Tennessee burglary, and Nevada attempted battery remained ACCA qualifiers pursuant to the other two ACCA clauses under today's applicable law. On appeal, Mr. Neely repeated the same arguments regarding his predicate offenses. The Tenth Circuit affirmed the decision of the district court, but on slightly different grounds. It held that both the record and "the relevant background legal environment" indicate the sentencing court relied on the enumerated-offenses clause to classify Neely's third-degree burglary conviction as an ACCA predicate. *See Snyder*, 871 F.3d at 1124. It also held that Mr. Neely's conviction for attempted battery was a violent felony. It did not reach the question of whether Mr. Neely's robbery conviction was an ACCA predicate.

REASONS FOR GRANTING CERTIORARI

The Court should grant review in this case because the circuits are divided over how a movant can show *Johnson* error. This Court's prompt review is also warranted because of the important liberty interests at stake. In many instances, *Johnson* movants are serving sentences far higher than the

statutory maximum for which they are eligible because subsequent clarifying case law makes clear that their prior convictions do not qualify under any clause of the ACCA.

I. The lower courts are in acknowledged conflict over how a § 2255 movant can demonstrate *Johnson* error.

The federal courts of appeal (and the district courts before them) have taken a variety of different approaches to resolving the question of how a movant can show *Johnson* error. The decision below is in direct conflict with the law in the Fourth Circuit. As noted, the Tenth Circuit has held that, based on the record and the "relevant background legal environment," a movant is not entitled to relief unless they can demonstrate by a preponderance of the evidence that the sentencing court relied on the residual clause. *See, e.g.*, *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017); *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018).

The Fourth Circuit's test flips the inquiry. The Fourth Circuit has held that a *Johnson* movant need only show that his sentence "may have been predicated on application of the now-void residual clause, and therefore may be an unlawful sentence" in order to demonstrate *Johnson* error. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). In other words, in the Fourth Circuit, an inconclusive record is sufficient to show error.

Acknowledging the common problem of ambiguous ACCA sentencing records, the *Winston* court noted that that "[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence." *Id*. (quoting In re *Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus 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*.

The Fourth Circuit further cautioned that requiring a movant to show affirmative reliance on the residual clause in order to demonstrate *Johnson* error would result in "'selective application' of the new rule of constitutional law announced in *Johnson*," in violation of "'the principle of treating similarly situated defendants the same.'" *Id*. (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error. In *Winston*, the court found that the *Johnson* error was not harmless because the movant's prior conviction for Virginia robbery was no longer a crime of violence under the remaining clauses of the ACCA. *Winston*, 850 F.3d at 682 n.4.

Other circuits have developed tests for determining Johnson error that further cement the split. Like the Tenth Circuit, a panel of the Eleventh Circuit ruled, over dissent, that "[t]o 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." *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). Whereas in *Winston*, a *Johnson* movant had to show only that his sentence "may have been predicated on application of the now-void residual clause," *Winston*, 850 F.3d at 682, the Eleventh Circuit places a higher burden on movants. Those in the Eleventh Circuit cannot meet their burden to demonstrate *Johnson* error 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." *Id*. at 1222.

The *Beeman* dissent disagreed, urging the court to adopt a rule that *Johnson* error is demonstrated if a movant's prior convictions could not possibly fall under any clause but the residual clause under the legal framework that exists today—making it "more likely than not" that the residual clause affected the original sentencing. *Beeman*, 871 F.3d at 1229–30. Such an approach "gives potentially eligible defendants the opportunity to prove that they are entitled to relief where, as here, the sentencing documents and record transcripts are silent." *Id*. at 1230. Under the rule proposed by the *Beeman* dissent, the demonstration of error and the demonstration of harmlessness "coalesce into a single inquiry," but movants must still demonstrate that their prior convictions do not fall under either of the remaining clauses in order to obtain relief. *Id.* The dissenting judge noted that this framework had been "part and parcel of many district court

determinations." *Id.* at 1226-27. And the dissent worried that "any alternative to this test—in other words, any standard under which an unclear sentencing record precludes relief under *Johnson*—would lead to unwarranted and inequitable results." *Id*. at 1228.

Likewise, the First Circuit, also over dissent, held that to prove a *Johnson* claim a movant must show by a preponderance of the evidence that the residual clause was used to enhance a sentence under the ACCA. "A mere possibility is insufficient." *Dimott v. United States*, 881 F.3d 232, 240 (1st Cir. 2018).

On the other side of the divide, the Ninth Circuit took yet a different approach, borrowing its rule from this Court's opinion in *Stromberg v. California*, 283 U.S. 359 (1931) – a rule that was expressly rejected by the panel in *Washington*. Applying the *Stromberg* principle, the Ninth Circuit held that "when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory," so an unclear record is sufficient for a movant to show *Johnson* error. *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). The *Geozos* panel ultimately decided that the *Johnson* error in that case was not harmless because the movant's prior conviction for Florida robbery was no longer a violent felony under the current legal framework in that circuit.

Recent cases from other circuits have added to the confusion. *United States v. Weise*, the Fifth Circuit held that courts 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. 896 F.3d 720, 724 (5th Cir. 2018). In dicta, the *Weise* court endorsed the "more likely than not" standard used by the Tenth Circuit over the "may have" standard articulated by the Fourth Circuit. But ultimately the *Weise* court refused to decide which standard is required, finding that the defendant could not even establish that the sentencing court "may have" relied upon the residual clause. Id. at 726.

In *United States v. Walker*, the Eighth Circuit announced its agreement with the First, Tenth, and Eleventh Circuits, requiring a movant to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the Armed Career Criminal Act enhancement. 900 F.3d 1012, 1015 (8th Cir. 2018). The Third Circuit joined the Fourth Circuit in looking to the factual record to determine procedural eligibility and then the Fourth and Ninth Circuits by looking to current law on the merits. *United States v. Peppers*, 899 F.3d 211, 221, 224, 230 (3rd Cir. 2018). The Sixth Circuit has done the same, though unlike the Fourth and Ninth it requires affirmative evidence in the sentencing record (rather than silence) to establish procedural eligibility before looking to current law to adjudicate the merits. *See Raines v. United States*, 898 F.3d 680, 868, 688-90 (6th Cir. 2018). To compound the

confusion, the Sixth Circuit relies on the sentencing record only to determine procedural eligibility for second or successive petitions under § 2255(h)(2), not to determine timeliness under § 2255(f)(3). Id. at 687. This Court should step in to resolve the circuit split on this issue.

II. This issue is one of exceptional importance and, as such, is deserving of this Court's review.

The Tenth Circuit's rule requires a movant to show *Johnson* error by demonstrating that, under the "relevant background legal environment" at the time of sentencing, neither of the remaining violent felony clauses—the enumerated offenses clause or the force clause—would have likely captured the movant's prior convictions. This approach is misguided and presents the very real potential to create arbitrary results.

First, the decision below does not reflect the reality of how ACCA sentencings were conducted in practice prior to *Johnson*. Before *Johnson*, the residual clause acted as a catch-all provision, encompassing all prior convictions that "involve[d] conduct that present[ed] a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). As a result, sentencing judges did not need to rely on the other two clauses at sentencing. The Tenth Circuit's rule is counterintuitive because it assumes that judges would have based ACCA sentencing determinations on narrower portions of the violent felony

definition, when relying on the residual clause would have been the easier and more available route.

Second, as many circuit and district judges have cautioned, the Tenth Circuit's rule will lead to arbitrary results: if a sentencing court happened to state on the record that it relied on the residual clause, a movant is granted relief, but if a sentencing judge was silent as to what clause it was relying on, a movant with identical prior convictions could remain incarcerated. Moreover, the "relevant legal background environment" standard is prone to inconsistent analysis. Such a rule is profoundly unfair.

Finally, the decision below means that movants whose prior convictions are no longer ACCA-qualifiers under today's law run the risk of spending years longer in prison than the law allows, in violation of due process.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Date: May 21, 2019.

Respectfully submitted,

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