No. _____

In the Supreme Court of the United States

October Term, 2018

TODD RICKS, *PETITIONER*,

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When a federal prisoner demonstrates that the Armed Career Criminal Act's residual clause was a basis for enhancing his sentence, but fails to show that the sentencing judge actually relied on the residual clause, does he satisfy the requirements for a successive motion to vacate under 28 U.S.C. § 2255?

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TODD RICKS, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Todd Ricks asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 12, 2019.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Ricks*, 756 F. App'x 488 (2019), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered the judgment in Petitioner's case on March 12, 2019. This petition is filed within 90 days after entry of the judgment. *See* SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

These statutes are reproduced in Appendix B:

- 18 U.S.C. § 922(g)(1)
- 18 U.S.C. § 924(a)(2)
- 18 U.S.C. § 924(e) (Armed Career Criminal Act)
- 28 U.S.C. § 2244
- 28 U.S.C. § 2255

STATEMENT

A. Statutory framework.

The Armed Career Criminal Act (ACCA) increases the penalties for certain felons who unlawfully possess firearms. The maximum penalty for being a felon in possession of a firearm is generally 10 years' imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2). But if the defendant has at least three prior convictions for a "violent felony," a "serious drug offense," or both, the ACCA increases the penalty to a minimum of 15 years in prison and a maximum of life. 18 U.S.C. § 924(e)(1). Also, the maximum term of supervised release increases from three years to five years. *See* 18 U.S.C. §§ 3559(a)(1), (3); 3583(b)(1), (2).

A violent felony is "any crime punishable by imprisonment for a term exceeding one year" that:

- "has as an element the use, attempted use, or threatened use of physical force against the person of another"—the force-element clause;
- "is burglary, arson, or extortion, [or] involves use of explosives"—the enumerated-offenses clause; or
- "otherwise involves conduct that presents a serious potential risk of physical injury to another"—the residual clause.

18 U.S.C. § 924(e)(2)(B). In *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015) (*Johnson* II), this Court held that the residual clause is unconstitutionally vague, and that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." In *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court made that rule retroactive to cases on collateral review.

B. Factual and procedural background.

In 2007, a jury found Todd Ricks guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c), and maintaining a drug involved premises, in violation of 21 U.S.C. § 856(a)(1). At sentencing, the district court found that Ricks was subject to enhanced punishment under the ACCA because of his prior Texas convictions for burglary of a habitation. The court sentenced him to two concurrent terms of 240 months and a consecutive term of 60 months, for a total sentence of 300 months' imprisonment. At the sentencing hearing, the court never mentioned its basis for finding that the prior Texas burglary convictions qualified as violent felonies under the ACCA.

On June 26, 2015, the Supreme Court held, in *Johnson v. United States*, 135 S. Ct. 2551, 2555–56 (2015), that the residual

clause in the ACCA's "violent felony" definition is unconstitutionally vague, and that imposing an enhanced sentence on that basis violates a defendant's Fifth Amendment right to due process. On April 18, 2016, the Supreme Court held, in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), that "Johnson announced a substantive rule that has retroactive effect in cases on collateral review."

Ricks filed a motion for authorization to file a successive motion under 28 U.S.C. § 2255, arguing that, under *Johnson*, his sentence was improperly enhanced under the ACCA because his Texas burglary convictions were violent felonies only under the now-unconstitutional residual clause. On August 5, 2016, the Fifth Circuit authorized the filing of a second or successive § 2255 motion based on *Johnson*.

Ricks filed a successive § 2255 motion and a memorandum in support in the district court. In the motion, Ricks argued that his sentence "was imposed in violation of the Constitution and laws of the United States," and exceeds the statutory maximum because the prior Texas burglary convictions on which the ACCA enhancement was based did not qualify as violent felonies post-*Johnson*. Absent the residual clause, Ricks contended, Texas burglary of a habitation no longer qualifies as an ACCA predicate because it

lacks an element of force and because the burglary statute is indivisible and encompasses some conduct that lies outside the generic definition of burglary, which is an enumerated violent felony.

The district court denied Ricks's § 2255 motion on the merits. The court concluded that Wiese's divisibility and overbreadth arguments on Texas burglary were foreclosed by Fifth Circuit precedent. Resorting to the modified categorical approach and an examination of *Shepard*[1] documents submitted by the Government, the court found that Ricks's burglary convictions were for the generic form of the offense and thus continue to qualify as ACCA predicates under the enumerated-offenses clause. This Court granted a certificate of appealability as to the issue whether Ricks should receive relief on his claim that he no longer qualifies for sentencing under the ACCA.

The Fifth Circuit granted Ricks a certificate of appealability on the issue whether he should receive relief on his claim that he no longer qualifies for sentencing under the ACCA. By that time, the Fifth Circuit had revisited its burglary precedent in light of this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

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[1] *Shepard v. United States*, 544 U.S. 13 (2005).

In *United States v. Herrold*, the en banc court held that Texas burglary categorically is not "burglary" under the ACCA. *United States v. Herrold*, 883 F.3d 517, 536–37 (2018), *petition for cert. filed*, No. 17-1445 (U.S. Apr. 19, 2018). That is because the statute, Texas Penal Code § 30.02, is indivisible and one of the alternative means of committing the offense involves conduct that lies outside the generic definition of burglary. *Id.* at 522–23, 529, 536–37.

Despite this change in case law, the Fifth Circuit held that the district court lacked jurisdiction to reach the merits of Ricks's claim. The court of appeals had recently addressed the identical issue in a second or successive § 2255 regarding prior Texas burglary convictions in *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), *cert. denied* 135 S. Ct. 1328 (2019). In *Wiese*, the Fifth Circuit had held that the district court lacked jurisdiction to reach the merits of the petitioner's *Johnson* claim. 896 F.3d at 721–22. In the Fifth Circuit's view, "[t]he dispositive question for jurisdictional purposes" was "whether the sentencing court [at the original sentencing hearing] relied on the residual clause in making its sentencing determination." *Id.* at 724.

The Fifth Circuit noted a circuit split on how to determine whether the original sentencing court relied on the residual clause, with some circuits applying a "more likely than not" standard. 896

F.3d at 724 (citing *United States v. Washington*, 890 F.3d 891, 897–98 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 789 (2019); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir.), *cert. denied sub nom. Casey v. United States*, 138 S. Ct. 2678 (2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019)). Other circuits require only that the sentencing court "may have" relied on the residual clause. *Id.* (citing *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017)).

The Fifth Circuit suggested that "more likely than not" is the correct standard, but declined to decide that question because it believed that Wiese could not satisfy the more lenient "may have" standard because Fifth Circuit precedent, at the time of his sentencing, held that his predicate burglary offense qualified as generic burglary, and thus, qualified under the ACCA's enumerated offense clause. *Id.* at 726. Under that analysis, the district court did not have jurisdiction to reach the merits of Wiese's or Ricks's claim. 896 F.3d at 724–25; *Ricks*, 756 F. App'x at 489–90. The Fifth Circuit has recently held that the correct standard is "more likely than not." *United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019).

REASON FOR GRANTING THE WRIT

The Court Should Grant Certiorari To Resolve a Circuit Split and Clarify the Standard by Which a Defendant Meets His Burden, in a Successive Motion Under 28 U.S.C. § 2255, To Prove His Claim Relies on the Rule in *Johnson*.

The federal courts of appeals are not in agreement on what a defendant must show in a second or successive motion under 28 U.S.C. § 2255 to prove error under *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, this Court held that the residual clause of the Armed Career Criminal Act (ACCA) is unconstitutionally vague. The Court made that rule retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

These decisions opened the door for prisoners to challenge their ACCA sentences under 28 U.S.C. § 2255(a) on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States … or that the sentence was in excess of the maximum authorized by law." A prisoner who wants to file a second or

successive motion under § 2255 must pass through two "gates" before a court may reach the merits of his claim. *Reyes-Requena v. United States*, 243 F.3d 893, 896–99 (5th Cir. 2001).[2]

First, the "motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain … 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); *Reyes-Requena*, 243 F.3d 897–99. To obtain this certification, a defendant must make "a 'prima facie showing' that his or her motion satisfies § 2255's requirements for a second or successive motion." *Id.* at 898–99 (holding that "prima facie" standard of 28 U.S.C. § 2244(b)(3)(C) has been incorporated into § 2255(h)). As relevant here, a defendant must "show[ ] that [his] claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" 28 U.S.C. § 2244(b)(2)(A) (emphasis added).

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[2] *Accord e.g., Darnell Moore v. United States*, 871 F.3d 72, 85 (1st Cir. 2017); *Massey v. United States*, 895 F.3d 248, 250–51 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1354 (2019); *United States v. Peppers*, 899 F.3d 211, 220 (3d Cir. 2018); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016); *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997); *Kamil Johnson v. United States*, 720 F.3d 720, 720–21 (8th Cir. 2013); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000); *United States v. Murphy*, 887 F.3d 1064, 1067–68 (10th Cir.), *cert. denied*, 139 S. Ct. 414 (2018); *In re Jasper Moore*, 830 F.3d 1268, 1271–72 (11th Cir. 2016).

Second, after the court of appeals authorizes the filing of a second or successive § 2255 motion, the district court must also determine whether the defendant's claim "relies on" the previously unavailable new retroactive rule. *See* 28 U.S.C. § 2244(b)(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."); *Reyes-Requena*, 243 F.3d at 899. "The district court then is the second 'gate' through which the petitioner must pass before the merits of his or her motion is heard." *Reyes-Requena*, 243 F.3d at 899.

The circuits are divided over what a defendant must show to pass through the "relies on" gate in § 2244(b)(2)(A). Some say that a defendant must show that it is "more likely than not" that the sentencing court based the ACCA enhancement on the residual clause. Others say that a defendant need only show that his sentence "may have" rested on the residual clause.

The Fifth Circuit recently held that a defendant must show that it is "more likely than not" the ACCA enhancement was based on the residual clause. *United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019). This approach conflicts with the "may-have re-

lied upon" approaches applied by the Third, Fourth, and Ninth Circuits in *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018), *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), and *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017).

In *Peppers*, the Third Circuit held that "when [a defendant] demonstrates that his sentence may be unconstitutional in light of the new rule of constitutional law[,]" he has satisfied the § 2244(b)(2)(A) relies-on gatekeeping requirement. 899 F.3d at 223. Peppers carried that burden by showing that he was sentenced under the ACCA "because the district court and the parties believed he had at least three prior convictions qualifying as violent felonies under that statute[,]" and the district court "did not specify the clauses under which those prior convictions qualified as violent felonies." *Id.* at 224. Under the may-have relied on standard as applied by the Third Circuit, Ricks's claim "relies on" *Johnson*'s new rule.

In *Winston*, the Fourth Circuit addressed a second or successive § 2255 motion denied by the district court. 850 F.3d 677, 681–82 (4th Cir. 2017). The sentencing record, like Ricks's, was silent as to whether the sentencing judge had relied on the residual clause in counting Winston's convictions under the ACCA. *Id.* at

682. The government argued that with this silent record, the defendant failed to overcome § 2255(h)(2)'s gatekeeping function to prove that his claim relied on *Johnson*. *Id.* 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.* "[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* II, the inmate has shown that he 'relied on' a new rule of constitutional law." *Id.*

In *Geozos*, the Ninth Circuit cited *Winston* 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 it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson* II." 870 F.3d 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).

Among the circuits' approaches to this question, the Third, Fourth, and Ninth Circuits' approaches are the most faithful to the statutory text. But even those approaches may be asking the wrong question. Decisions requiring a defendant to show that the

sentencing court may have relied on—and certainly decisions requiring that it was more likely than not that the district court relied on the residual clause—are untethered from the text of the applicable statutes. Nothing in § 2244 or § 2255 suggests, much less compels, a conclusion that a defendant must show that he was sentenced under the residual clause to have his *Johnson* claim considered on the merits. All the statutes require is that a defendant's claim "relies on" the retroactive new rule under which he claims relief. *See* 28 U.S.C. §§ 2244(b), 2255(h)(2).

Under an approach faithful to the texts of § 2244 or § 2255, Ricks should prevail. As the dissent in *Beeman* argued, "In the case of *Johnson*, the plain language of the decision makes clear that relief under the holding is not predicated upon a specific finding at sentencing, but rather the absence of a constitutional basis for the sentence imposed." 871 F.3d at 1229 n.5 (Williams, J., dissenting) (citing and quoting *Welch*, 136 S. Ct. at 1265: "*Johnson* establishes, in other words, that 'even the use of impeccable fact-finding procedures could not legitimate' a sentence based on that clause."). Thus,

> [i]n a case like this, where a movant attempts to satisfy the first prong of the *Johnson* inquiry through circumstantial evidence by demonstrating that he could not have been properly sentenced under any other portion of the statute, the first and second prongs for success on the merits coalesce into a single inquiry. … [A defendant's] showing 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.

Welch, 136 S. Ct. at 1230.

The circuit split over this question is mature and intractable. It results in inconsistent rulings affecting many prisoners who have raised *Johnson* claims in successive § 2255 motions. Indeed, the Fifth Circuit acknowledged, in *Clay*, that the defendant had "shown that the sentencing court 'may have' relied on the residual clause to enhance his sentence." 921 F.3d at 558. "Therefore, if this court adopts the standard articulated by the Fourth and Ninth Circuits, Clay will have sustained his burden of proof and the district court will have jurisdiction over his successive § 2255 petition." *Id.* Under the "more likely than not" standard, however, the Fifth Circuit found that Clay "failed to show by a preponderance of the evidence that he was sentenced under the residual clause." *Id.* at 559. This Court should resolve the circuit split.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

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