NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Robert Wilson, Jr. - Petitioner,

v.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, where the record is unclear, a 28 U.S.C. § 2255 petitioner should be required to "affirmatively prove" that the sentencing court relied on the residual clause to determine that his prior offenses were violent felonies, before he is entitled to pursue a claim for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015).

(2) Whether a district court may rely on current law to evaluate whether a sentencing judge could have relied on the ACCA's enumerated offense or elements clauses to determine that a defendant's prior convictions qualified as violent felonies.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

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The petitioner, Robert Wilson, Jr., through counsel, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 18-3319, denying his application for a certificate of appealability (COA), entered on March 26, 2019. Mr. Wilson did not request rehearing by the panel or rehearing en banc.

OPINION BELOW

The order of the district court denying Mr. Wilson's § 2255 motion is provided in Appendix A. The Eighth Circuit Court of Appeals' denial of Mr. Wilson's application for a COA in Case No. 18-3319 is provided in Appendix B.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Mr. Wilson's case under 18 U.S.C. § 3231. The district court denied Mr. Wilson's 28 U.S.C. § 2255 motion on August 29, 2018. (Appendix A). Mr. Wilson timely filed a notice of appeal and application for a COA in the Eighth Circuit, which was denied on March 26, 2019. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

28 U.S.C. § 2255:

> (a) 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.
>
> (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. § 2244(b)(2):

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

18 U.S.C. § 924 (2011). Penalties. Subsection (e) . . .

(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 . . . .

STATEMENT OF THE CASE

On January 21, 2005, a jury convicted Mr. Wilson of interference with commerce by violence (robbery) in violation of the Hobbs Act, 18 U.S.C. § 1951(a) (count one); using or carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count two); and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (count three) (Crim. Doc. 160).[1] On June 30, 2005, the district court determined that Mr. Wilson was subject to 18 U.SC. § 3559(c) – the "three strikes" statute – and sentenced him to consecutive life sentences on counts one and two. (Crim. Doc. 228, pp. 1–2). On count three, it found that Mr. Wilson was subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on his 1988 Illinois conviction for residential burglary (Crim. Doc. 210, ¶¶ 45(C), 79); his 1992 Illinois conviction for armed robbery (Crim. Doc. 210, ¶¶ 45(D), 80); and his 2001 Iowa conviction for assault causing serious injury.[2] (Crim. Doc. 210, ¶ 45(G), ¶ 87)

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[1] In this brief, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. 2:04-cr-1004 and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. References to the § 2255 petition underlying the instant petition for writ of certiorari, N.D. Iowa Case No. 2:16-cv-1020 will be to "Civ. Doc.", followed by the docket entry number.

[2] The district court also relied on Wilson's 2000 Iowa conviction for domestic abuse assault with injury (Crim. Doc. 210, ¶¶ 45(F), 85). The government conceded during the § 2255 proceeding, however, that this conviction was not a qualifying ACCA predicate offense. (Civ. Doc. 14, p. 2, n.2).

(Crim. Doc. 234 at 48). Accordingly, the court imposed a life sentence on count three, to run concurrently with the life sentence imposed on count one. (Crim. Doc. 228, pp. 1–2).

On direct appeal, the Eighth Circuit Court of Appeals reversed Mr. Wilson's § 3559(c) conviction. *United States v. Dobbs*, 449 F.3d 904, 913 (8th Cir. 2006) (Civ. Doc. 14, pp. 2–3). On resentencing, the district court imposed a total sentence of 444 months' imprisonment, comprised of 360 months on the ACCA count, a concurrent sentence of 240 months on the Hobbs Act robbery count; and a consecutive term of 84 months on the 924(c) count. (Crim. Doc. 278, pp. 1–2; Civ. Doc. 14, p. 3). At the resentencing hearing, the parties did not address or discuss the district court's earlier determination that Mr. Wilson's prior convictions were predicate "violent felonies" for purposes of ACCA. (Civ. Doc. 14, p. 3).

The Eighth Circuit affirmed Mr. Wilson's new sentence. *United States v. Wilson*, 254 F. App'x 561, 562 (8th Cir. 2007). Certiorari was granted in light of *Gall v. United States*, 552 U.S. 38 (2007), but, on remand, the Eighth Circuit again affirmed Wilson's new sentence. *Wilson v. United States*, 555 U.S. 801 (2008); *United States v. Wilson*, 364 F. App'x 312, 313 (8th Cir. 2010) (Civ. Doc. 14, pp. 3–4).

On May 25, 2016, Mr. Wilson filed a motion in district court, requesting relief based on *Johnson v. United States*, 135 S. Ct. 2551. (Civ. Doc. 1). Two days later, he filed an application for authorization to file a successive motion under 28 U.S.C. § 2255. (8th Cir. Case No. 16-2435; Entry ID: 4404239). Although Mr. Wilson's

application for authorization to file a second or successive § 2255 motion was still pending before the Eighth Circuit, the district court denied his § 2255 motion, without prejudice. (Civ. Doc. 3). On November 1, 2017, the Eighth Circuit entered an order granting Mr. Wilson's application to file a successive § 2255 motion, "but only to the extent it challenges the Armed Career Criminal Act enhancements." (8th Cir. Case No. 16-2435; Entry ID: 4596065).

On August 30, 2018, the district court again denied Mr. Wilson's motion for relief under § 2255. (Civ. Doc. 14). It found that, under the preponderance of the evidence standard adopted by the Eighth Circuit in *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018), Mr. Wilson failed to prove that the sentencing court premised its conclusion that he was an armed career criminal on the residual clause in 18 U.S.C. § 924(e)(2)(B)(2). (Civ. Doc. 14, pp. 7–8). The district court also concluded that the law in effect at the time of Mr. Wilson's sentencing proceedings made it "apparent" that his Illinois burglary conviction would have qualified as a violent felony under the enumerated offense clause, and that his Illinois robbery conviction would have qualified as a violent felony under the elements clause. (Civ. Doc. 14, pp. 11–12). The district court declined to grant a COA. (Civ. Doc. 14, pp. 18–20).

On October 29, 2018, Mr. Wilson filed a timely notice of appeal with the Eighth Circuit Court of Appeals, which constitutes a request for a COA pursuant to Federal Rule of Appellate Procedure 22(b)(2) (Civ. Doc. 16). The Eighth Circuit

declined to grant a COA, stating simply that "[t]he court has carefully reviewed the original file of the district court, and the application for a certificate is of appealability is denied. The appeal is dismissed." (Appendix B). Mr. Wilson did not request rehearing by the panel or rehearing en banc.

REASONS FOR GRANTING THE WRIT[3]

Before a petitioner can appeal to the Court of Appeals from an order denying a § 2255 motion, either the district court or the Court of Appeals must grant a COA. 28 U.S.C. § 2253(c)(1)(B). A COA may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(1)(B), and indicates "which specific issue or issues satisfy the [substantial] showing" requirement. *Id.*

To satisfy the "substantial showing" requirement, the petitioner must demonstrate that a reasonable jurist would find the district court ruling on his constitutional claim debatable or wrong. *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (citing *Tennard v. Dretke*, 542 U.S. 274, 276 (2004)). The petitioner

[3] The appellant in the *Walker* case filed a petition for certiorari with this Court, which is docketed as U.S. Supreme Court Case No. 18-8125, and raised essentially the same issue Mr. Wilson now asserts. The petition was denied on June 17, 2019. The exact same question raised in *Walker* remains pending in a petition for certiorari filed in *United States v. Levert*, which is docketed as U.S. Supreme Court Case No. 18-1276. The government's response to Levert's petition for certiorari is due July 5, 2019. Should the Court find *Levert* a better vehicle for consideration of the issues raised, Mr. Wilson requests that the Court hold this petition and grant certiorari in *Levert*.

"must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1 (1983)). A substantial showing must be made for each issue presented. *Parkus v. Bowersox*, 157 F.3d 1136, 1148 (8th Cir. 1998). The petitioner does not have to show that the appeal is certain to succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003).

In the instant case, the district court rejected the petitioner's claim that he is entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), for two primary reasons: (1) Mr. Wilson failed to prove that the sentencing court relied on the residual clause in finding him subject to enhanced penalties under the ACCA; and (2) current law interpreting the elements clause of the ACCA may not be considered in determining whether Mr. Wilson's prior convictions qualified as violent felonies thereunder at the time of his sentencing proceedings. As the clear split of authority amongst the Courts of Appeals demonstrates, these issues are clearly debatable among jurists of reason.

I. TO BE ENTITLED TO *JOHNSON* RELIEF, IN THE FACE OF AN UNCLEAR RECORD, A § 2255 PETITIONER SHOULD NOT BE REQUIRED TO "AFFIRMATIVELY PROVE" THAT THE SENTENCING COURT RELIED ON THE RESIDUAL CLAUSE

In denying Mr. Wilson's claim for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the district court relied on the Eighth Circuit's decision in *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018). (App. A, pp. 7–8). It determined that under *Walker*, Mr. Wilson failed to establish that the sentencing court necessarily relied on the ACCA's residual clause to determine that his prior offenses qualified as violent felonies. (*Id.*). The court further determined that the law in effect at the time of Mr. Wilson's sentencing would have allowed it to determine that his prior robbery and burglary convictions qualified as violent felonies under either the enumerated or elements clauses of 18 U.S.C. § 924(e). (*Id.*, p. 18). The Eighth Circuit denied Mr. Wilson's request for a Certificate of Appealability ("COA") without any citation or discussion. (App. B).

In *Walker*, as in the instant case, the record was silent as to whether the district court relied on the ACCA's residual, enumerated, or elements clause to determine that prior convictions constituted qualifying predicate "violent felonies" under the ACCA. *Walker*, 900 F.3d at 1014. Noting that a defendant cannot bring a second or successive § 2255 petition unless he first demonstrates that his claim "relies on" a new rule of constitutional law, the Eighth Circuit observed that "[o]ur sister circuits disagree on how to analyze this issue." *Id.* In particular, the Third, Fourth, and Ninth Circuits hold that a claim "'relies on' *Johnson*'s new rule and

satisfies § 2255 if the sentencing court 'may have' relied on the residual clause." *Id.*; *see United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018) ("In our view, § 2255(h) only requires a petitioner to show that his sentence may be unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court. Peppers met that standard by demonstrating that he may have been sentenced under the residual clause of the ACCA.") *United States v. Geozos*, 870 F.3d 890, 8986 (9th Cir. 2017) (drawing an analogy to the rule in Stromberg v. California, 283 U.S. 359, (1931), that a conviction must be set aside if a jury verdict may have rested on an unconstitutional basis); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("We will not 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."). The First, Fifth, Sixth, Tenth, and Eleventh Circuits, by contrast, "require a movant to show that it is more likely than not that the residual clause provided the basis for an ACCA sentence." *Walker*, 900 F.3d at 1014 ("These courts emphasize that a § 2255 movant bears the burden of showing that he is entitled to relief and stress the importance of the finality of convictions[.]"); *see United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018); *United States v. Potter*, 887 F.3d 785, 788 (6th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017).

The *Walker* court opted to adopt the majority approach, which denies a §

2255 petitioner relief unless he first "show[s] by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Walker*, 900 F.3d at 1015. According to the Eighth Circuit, the "mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden and meet the strict requirements for a successive motion." *Id*.

Mr. Wilson submits that the majority approach adopted by the Eighth Circuit in *Walker* is flatly incorrect, and that the approach of the Third, Fourth, and Ninth Circuits is the only one that will adequately protect a § 2255 petitioner's entitlement to pursue successive § 2255 relief under this Court's decision in *Johnson*. In particular, the majority construction of the federal habeas statute improperly conflates the statutory gateway requirement for bringing a second or successive habeas claim with the question of whether a claim actually has substantive merit that warrants relief.

Before pursuing a successive § 2255 petition, an applicant must satisfy a "gateway" requirement. *Tyler v. Cain*, 533 U.S. 656, 662 (2001); *Peppers*, 899 F.3d at 221. In particular, he must prove 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); *see also id*. § 2255(h)(2). There can be no dispute that *Johnson* announced a new rule of constitutional law made retroactive to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016). Accordingly, the pertinent question is

whether Mr. Wilson's "claim" for habeas relief "relies on" the new constitutional rule in *Johnson* (i.e., that the residual clause in the ACCA is unconstitutionally vague). It does. Black's Law Dictionary (10th ed. 2014) defines a "claim" as a "demand for . . . a legal remedy." The term "relied on" means "to depend" or "to need (someone or something) for support." Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/rely%20on/upon. A litigant's claim therefore relies on a new rule of constitutional law whenever he requests relief based on that new rule. Contrary to the majority position, the gateway requirement does not additionally mandate that a litigant prove at the outset that his claim will ultimately succeed, or even that it is meritorious. *See Tyler*, 533 U.S. at 659, 662 (finding that a claim relied on a new rule without opining on the claim's merits); *Reno v. Flores*, 507 U.S. 292, 301—02 (1993) (finding that a claim relied on certain due process decisions, even though the claim was ultimately found without merit).

It must also be remembered that, at the time of Mr. Wilson's sentencing proceedings in 2005 and 2007, defendants had no incentive to challenge their prior convictions as being non-qualifying under the enumerated or elements clauses. Indeed, a successful challenge under one of those provisions would have been futile because the prior convictions would still have qualified as violent felonies under the residual clause. Because the residual clause swept so broadly, Mr. Wilson cannot be faulted for failing to request clarification as to which clause of the ACCA the district court relied upon; in fact, the district court had no obligation to elucidate the

reasons for its decision in any event. *See United States v. Taylor*, 873 F.3d 476, 481–82 (5th Cir. 2017) (rejecting a district court's criticism of a petitioner for failing to request clarification of which clause the district court relied on for its ACCA determination at the time of sentencing, emphasizing that nothing in the law required the sentencing court to make such a finding and, moreover, that petitioner had no incentive to request clarification at the time).

The record in this case does not establish whether the district court relied on the enumerated, elements, or residual clause to conclude that Mr. Wilson's prior burglary and robbery offenses qualified as violent felonies under the ACCA. Although Mr. Wilson objected to the PSR's assertion he was an armed career criminal, the PSR writer did not detail why any particular offense qualified, and the sentencing judge summarily concluded only that the past convictions "were all violent felonies." Crim. Doc. 234, p. 38; *see also id*. p. 48 (listing the convictions that qualified as ACCA predicates, but not specifying reliance on any particular clause of § 924(e)).

The uncertainty in Mr. Wilson's case, and in that of numerous other § 2255 petitioners, demonstrates why the position of the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits is unsustainable. A petitioner seeking collateral review should not be required to make an affirmative showing that the district court *actually relied* on the residual clause before being considered for *Johnson* relief. Indeed, such a showing will often be impossible where, as here, the record is silent

on the issue. Rather, if the evidence shows that the district court *may have* relied on the residual clause, the § 2255 gateway requirement is satisfied and fundamental fairness requires that the case be reviewed to determine if *Johnson* relief is warranted. This interest in fundamental fairness is part of why the Fourth Circuit held in *Winston* that it would not penalize a § 2255 petitioner for the sentencing court's "discretionary choice not to specify under which clause of § 924(e)(2)(B) an offense qualified as a violent felony." *Winston*, 850 F.3d at 682; *see also Taylor*, 873 F.3d at 481–82 (declining to adopt a specific position, but noting that "this court will not hold a defendant responsible for what may or may not have crossed a judge's mind during sentencing"). It also underlies the Ninth Circuit's decision in *Geozos*, that a claim "'relies on' the constitutional rule announced in *Johnson*" if the district court "may have" relied on the residual clause in its ACCA determination.

II. DISTRICT COURTS MAY RELY ON CURRENT LAW TO EVALUATE WHETHER A SENTENCING JUDGE COULD HAVE RELIED ON THE ACCA'S ENUMERATED OFFENSE CLAUSE TO DETERMINE THAT A DEFENDANT'S PRIOR CONVICTIONS QUALIFIED AS ACCA VIOLENT FELONIES.

To determine whether a prior conviction qualifies as a "violent felony" under the ACCA, sentencing courts apply the categorical approach, "look[ing] only to the statutory definitions – i.e., the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *Taylor v. United States*, 495 U.S. 575, 600–01 (1990). Courts

may look to a limited set of documents to determine the applicable elements of a prior conviction – applying the so-called "modified categorical approach" – only when the statute is divisible, i.e., when it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct. at 2284. Because the Illinois residential burglary statute under which Mr. Wilson was convicted in 1988 contains a single, indivisible set of elements that encompasses burglaries of more places than the generic definition, it cannot qualify as a "violent felony" under the ACCA's enumerated offense clause. *See* 38 Ill. Comp. Stat. Ann. § 19-3 (West 19998) ("A person commits residential burglary who knowingly and without authority enters the dwelling place of another with the intent to commit therein a felony or theft."); Ill Comp. Stat. Ann. § 2-6 (West 1988) (defining "dwelling" as "a house, apartment . . . *or other living quarters* in which at the time of the alleged offense the owners or occupants actually reside. . . ." (emphasis added)); *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) (holding that Iowa's burglary statute was categorically overbroad because it could be violated by burgling places that would not qualify under the generic burglary). Thus, because this conviction could only have qualified as an ACCA predicate offense under the residual clause, Mr. Wilson lacked the three necessary predicate offenses required under § 924(e).

While acknowledging the holding in *Mathis*, the government nonetheless argued to the district court that it was irrelevant that Mr. Wilson "would no longer be subject to the enhanced ACCA statutory range of punishment because *Descamps*

. . . and *Mathis* . . . do not provide an independent constitutional basis for attacking the movant's sentence." (App. A, p. 5). Apparently, the district court accepted the government's argument, because it held that it "makes no difference whether the movant's prior convictions would count as a predicate [sic] if the court sentenced the movant today." (*Id.*, p. 6).

To be clear, Mr. Wilson does not argue, and has never argued, that *Mathis* or *Descamps* provide an independent constitutional basis for granting relief. Nonetheless, *Mathis* is directly relevant in this case, given the fundamental principle of statutory construction articulated by the Supreme Court in *Rivers v. Roadway Express, Inc.*, that "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." 511 U.S. 298, 312–13, n.12 (1994) (emphasis added). To be sure, the *Mathis* Court emphasized that it was *not* creating a new rule or even interpreting categorical approach law in a new way:

> For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

Mathis, 136 S. Ct. at 2257. Accordingly, *Mathis* makes clear that had Mr. Wilson's sentencing judge conducted a proper categorical analysis of Illinois's residential

burglary statute, it could not have found it to be a qualifying ACCA predicate under the enumerated offense clause. Since Illinois burglary does not qualify as a violent felony under the ACCA's elements clause, this necessitates a conclusion that the district court *must have* relied on the residual clause to conclude that Mr. Wilson was an Armed Career Criminal, because that was the only legally accurate basis on which it could have done so.

The district court's conclusion that it could only consider the state of the law at the time of petitioner's sentencing in deciding whether he is entitled to relief under *Johnson* has been rejected by other appellate courts. In *Geozos*, the Ninth Circuit emphatically stated that, in determining whether a prior conviction qualified as an armed career criminal predicate under the elements clause, "we look to the substantive law concerning the force clause as it *currently* stands, not the law as it was at the time of sentencing." *Geozos*, 870 F.3d at 897 (citing *Rivers v. Roadway Express*, 511 U.S. at 312–13). Similarly, in *Winston*, the Fourth Circuit applied intervening case law to determine whether a petitioner had been prejudiced by the court's reliance on the residual clause in imposing sentence. *Winston*, 850 F.3d at 683–84; *see also In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) (rejecting the notion that the district court can "ignore decisions from the Supreme Court that were rendered since [the time of sentencing] in favor of a foray into a stale record"). A district judge in North Dakota may have stated the countervailing view to the district court's position in this case most succinctly: "The court's review

is not constrained to the law as it existed when the movant was sentenced, but should be made with the assistance of binding intervening precedent which clarifies the law." *Eaton v. United States*, No. 1:16-cv-135, 2017 WL 3037435, at *2 (D.N.D. July 18, 2017).

Consistent with precedent, Mr. Wilson maintains that intervening changes or interpretations of the law must also be considered in determining whether he was prejudiced by the constitutional violation that resulted from the district court's reliance on the residual clause to determine that his prior burglary offense qualified as a violent felony under the ACCA.[4] The Supreme Court recognized in *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993), that current law should be applied to determine prejudice in the habeas context. In *Fretwell*, the Supreme Court found that the petitioner was not prejudiced by counsel's failure to object to the use of a capital sentencing aggravating factor even though controlling case law at the time of sentencing would have supported such an objection, where the controlling case law

[4] Notably, there was no binding Eighth Circuit case law at the time of Mr. Wilson's sentencing that would require a conclusion that his 1992 Illinois robbery conviction was a violent felony under the ACCA's elements clause; this supports a finding that the district court must have actually relied on the residual clause in making its ACCA determination. *See* Civ. Doc. 12, pp. 27–35. This Court's recent decision in *Stokeling*, however, likely supports a finding that the 1992 Illinois robbery conviction would qualify as an ACCA predicate under the elements clause if Mr. Wilson were being sentenced today. *See Stokeling v. United States*, 139 S. Ct. 544 (2019). As such, it would be difficult for Mr. Wilson to show prejudice stemming from the district court's use of the robbery conviction to determine his ACCA status.

had been reversed by the time Fretwell filed his federal habeas corpus petition. *Id.* at 371. In other words, the Court found that case law decided after sentencing should be used when analyzing the prejudice component of an ineffective assistance of counsel claim.

Cases such as *United States v. Moreno*, No. 11-178 ADM/LIB, 2017 WL 811874, at *4–6 (D. Minn. Mar. 1, 2017), *In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016), and the others relied upon by the district court, stand in contrast to a series of well-reasoned cases recognizing that *Curtis Johnson v. United States*, 559 U.S. 133 (2010), *Descamps*, 133 S. Ct. 2276, and *Mathis*, 136 S. Ct. 2243, can and should be considered in deciding whether *Johnson* relief is available. *See, e.g.*, *United States v. Wilson*, 2017 WL 1383644, at *4 (D.D.C. Apr. 18, 2017); *United States v. Booker*, 2017 WL 829094, at *4 (D.D.C. Mar. 2, 2017); *Taylor v. United States*, 2016 WL 6995872, at *4 (E.D. Mo. Nov. 30, 2016); *see also In re Adams*, 825 F.3d 1283, 1286 (11th Cir. 2016) (granting SOS petition); *United States v. Christian*, 668 F. App'x. 820, 820–21 (9th Cir. Sept. 16, 2016); *Mitchell v. United States*, 2017 WL 1362040, at *2–3 (W.D. Mo. Apr. 11, 2017) (explaining relationship between Johnson and Mathis, finding that petitioner's claim relies on Johnson, and then applying Mathis to hold that Missouri burglary convictions are no longer violent felonies under the enumerated clause). Numerous courts have likewise recognized that "current precedent interpreting [the] ACCA and the elements clause" must be considered in assessing whether a § 2255 petitioner has shown prejudice. *United*

States v. Booker, 2017 WL 829094, at *4, (D.D.C. Mar. 2, 2017); *see also United States v. Brown*, 2017 WL 1383640, at *3 (D.D.C. Apr. 12, 2017) (citing *Booker* to hold that simply relying on current precedent, such as *Curtis Johnson*, to show that a predicate is not a violent felony under the force clause "does not convert [petitioner's *Johnson*] motion into a habeas motion based on older cases"); *Taylor*, 2016 WL 6995872, at *4 ("[B]y applying the teaching of Mathis to this case, this Court merely applies the law the Supreme Court articulated prior to the time movant was sentenced.")

CONCLUSION

For the foregoing reasons, Mr. Wilson respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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