NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Michael Franklin Einfeldt - 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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QUESTION PRESENTED FOR REVIEW

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).

PARTIES TO THE PROCEEDINGS

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

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The petitioner, Michael Franklin Einfeldt ("Einfeldt"), 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. 18-3344, denying his application for a certificate of appealability ("COA"), entered on April 3, 2019. Mr. Einfeldt did not request rehearing by the panel or rehearing en banc.

OPINION BELOW

The order of the district court denying Mr. Einfeldt's § 2255 motion is provided in Appendix A. The Eighth Circuit Court of Appeals' denial of Mr. Einfeldt's application for a COA in Case No. 18-3344 is provided in Appendix B.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Mr. Einfeldt's case under 18 U.S.C. § 3231. The district court denied Mr. Einfeldt's 28 U.S.C. § 2255 motion on September 10, 2018. (Appendix A). Mr. Einfeldt timely filed a notice of appeal and application for a COA in the Eighth Circuit, which was denied on April 3, 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 September 11, 1996, a jury convicted Mr. Einfeldt of the following charges: (1) attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count 1); (2) conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count 2); (3) using or carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count 3); and (4) possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (count 4). (Crim. Doc. 168).[1] On March 5, 1997, Mr. Einfeldt was sentenced to a total term of incarceration of 336 months, comprised of 240 months on count 1, a consecutive term of 36 months on count 2, a term of 276 months on count 4 run concurrently with counts 1 and 2, and a consecutive term of 60 months on count 3. *Id*. In imposing this sentence, the district court determined that Mr. Einfeldt was an Armed Career Criminal pursuant to 18 U.S.C. § 924(e) (the "ACCA") based on: (1) a 1968 conviction for Arkansas burglary (PSR ¶ 68); (2) a 1971 conviction for Iowa robbery without aggravation (PSR ¶ 74); and (3) a 1974 federal bank robbery conviction (PSR ¶ 76).

[1] In this brief, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. 6:94-cr-2019 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. 6:16-CV-2051, will be to "Civ. Doc.", followed by the docket entry number.

Mr. Einfeldt filed a 28 U.S.C. § 2255 petition on May 27, 2016, requesting relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). Because he had previously sought relief pursuant to § 2255, he also filed an application with the Court of Appeals for permission to file a successive § 2255 petition. (Eighth Cir. Case No. 16-2439, Entry ID 4404330). On October 2, 2017, the district court denied the § 2255 petition without prejudice. (Civ. Doc. 4). On November 1, 2017, the Eighth Circuit Court of Appeals granted authorization for Mr. Einfeldt to pursue a successive § 2255 petition "as to Argument I-E 'Iowa Robbery Without Aggravation,' as set out in his 'Supplemental Brief in Support of SOS Petition' filed with the Eighth Circuit Court of Appeals on January 31, 2017." (Eighth Cir. Case No. 16-2439, Entry ID 4594868). On December 5, 2017, the district court reopened the § 2255 case and set a briefing schedule. (Civ. Doc. 8).

The district court denied Mr. Einfeldt's § 2255 motion on September 10, 2018. (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. Einfeldt 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. Einfeldt's sentencing proceeding would have supported a conclusion that Mr. Einfeldt's Iowa robbery conviction qualified as a

violent felony under the elements clause. (Civ. Doc. 14, pp. 10–11). The district court declined to grant a COA. (Civ. Doc. 14, pp. 14–15).

On October 31, 2018, Mr. Einfeldt 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. Einfeldt did not request rehearing by the panel or rehearing en banc.

REASONS FOR GRANTING THE WRIT[2]

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. §

[2] 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. Einfeldt 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. Einfeldt requests that the Court hold this petition and grant certiorari in *Levert*.

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 "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), because Mr. Einfeldt failed to prove that the sentencing court relied on the residual clause in finding him subject to enhanced penalties under the ACCA. As the clear split of authority amongst the Courts of Appeals demonstrates, this issue is 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. Einfeldt'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. Einfeldt failed to establish that the sentencing court necessarily relied on the ACCA's residual clause to determine that his prior Iowa robbery offense qualified as a violent felony. (*Id.*). The court further determined that the law in effect at the time of Mr. Einfeldt's sentencing would have allowed it to determine that the prior conviction qualified as a violent felony under the elements clause of 18 U.S.C. § 924(e). (*Id.*, p. 18). The Eighth Circuit denied Mr. Einfeldt'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 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. Einfeldt 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. Einfeldt'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. Einfeldt's sentencing proceeding in 1997, defendants had no incentive to challenge their prior convictions as being non-qualifying under the elements clause. Indeed, a successful challenge under that provision would have been futile because the prior conviction would still have been deemed a violent felony under the residual clause. Because the residual clause swept so broadly, Mr. Einfeldt 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, particularly because the question was not in dispute between the parties. *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 uncertainty in Mr. Einfeldt'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.[3]

CONCLUSION

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

[3] There was no binding Eighth Circuit case law at the time of Mr. Einfeldt's sentencing that would have required the sentencing judge to conclude that Mr. Einfeldt's 1971 Iowa 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, supports a conclusion that the 1971 Iowa robbery conviction would qualify as an ACCA predicate under the elements clause if Mr. Einfeldt were being sentenced today. *See Stokeling v. United States*, 139 S. Ct. 544 (2019). Although it did not rely on *Stokeling*, the Eighth Circuit also recently held that Iowa robbery convictions are violent felonies under the ACCA's elements clause. *See Golinveaux v. United States*, 915 F.3d 564, 570 (8th Cir. 2019). In light of these decisions, it is admittedly difficult for Mr. Einfeldt to show prejudice stemming from the district court's use of the robbery conviction to determine his ACCA status.

RESPECTFULLY SUBMITTED,

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