No. _____

In the

Supreme Court of the United States

MICHAEL RENEE HERNANDEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Once a federal prisoner secures appellate-court authorization to file a successive motion under 28 U.S.C. § 2255(h), must the prisoner satisfy a second jurisdictional hurdle under 28 U.S.C. § 2244(b)(4)?

(2) Where an authorized successive § 2255 motion argues that an Armed Career Criminal Act sentence should be set aside under *Johnson v. United States*, 135 S. Ct. 2551 (2015), what more must the movant show to obtain a ruling on the merits?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Michael Renee Hernandez was the defendant and movant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

DIRECTLY RELATED PROCEEDINGS

The underlying criminal prosecution was *United States v. Hernandez*, No. 4:07-CR-150, in the Northern District of Texas. Petitioner's previous motions to vacate were docketed as *Hernandez v. United States*, No. 4:14-CV-415 (N.D. Tex.), cert. of appealability denied, No. 14-10689 (5th Cir. Dec. 8, 2014), and *Hernandez v. United States*, No. 4:16-CV-001 (N.D. Tex.), appeal dismissed, No. 16-10120 (5th Cir. July 15, 2016). The Motion for Authorization was docketed as *In re Hernandez*, No.16-10735, in the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Renee Hernandez asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

Imagine four defendants who together committed a felony their state calls "burglary" on three separate occasions. After they are convicted and finish serving their state-prison sentences, federal authorities find all four of them in possession of a firearm on the same day. All four of them are charged by separate indictments with possessing a firearm after felony conviction, all four plead guilty, and (as luck would have it) all four are sentenced under the Armed Career Criminal Act in the same federal courthouse on March 28, 2008—the same day Petitioner was sentenced—but by four different district judges.

- In Albert's case, the judge announces that the burglary offense is the generic, enumerated offense of "burglary," so it is a violent felony.
- In Bob's case, the judge announces that the burglary offense is a residual-clause violent felony.
- In Carl's case, the judge—gravely mistaken or confused—declares that the burglary offense satisfies ACCA's elements clause.
- In David's case, the judge applies ACCA but says nothing about the legal analysis.

Now, fast forward 2016. We now know that this state's burglary offense is non-generic, and we know (thanks to *Johnson*) that "increasing a defendant's sentence under" ACCA's residual "clause denies due process of law." 135 S. Ct. at 2557. The four compatriots file motions to vacate their ACCA sentences under 28 U.S.C. § 2255.

What result? In any *sensible* system, the result for all four defendants would be *the same*. They have identical criminal records. The substantive *meaning* of ACCA never changed, even if courts were oblivious of some aspects of the statute's reach in the past. Either the four defendants are entitled to collateral relief on the merits, or they are not. None of this should depend on what their sentencing judge said or didn't say.

Unfortunately, we do not operate within a sensible system. The lower courts have adopted a crazy quilt of approaches to this kind of case, leading to absurdly inconsistent outcomes. This Court has to step in, either in this case or another. The current confusion cannot continue.

OPINIONS BELOW

The Fifth Circuit's opinion was not selected for publication in the Federal Reporter. It is available at *United States v. Hernandez*, 2019 WL 2570906 (5th Cir. June 21, 2019), and is reprinted in the Appendix, 1a–8a. The Appendix also contains copies of the Fifth Circuit's June 21, 2016 order authorizing a successive motion to vacate (App. 10a–11a); the district court's June 23, 2016 order dismissing the case as untimely (App. 12a–19a); the district court's July 6, 2016 order denying reconsideration (App. 20a–24a); and the Fifth Circuit's order granting a certificate of appealability. App. 25a–26a.

JURISDICTION

The Fifth Circuit dismissed the case on June 21, 2019. App. 9a. This Court has jurisdiction to review the final judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interaction of 28 U.S.C. §§ 2244 & 2255. The case also involves the Armed Career Criminal Act, 18 U.S.C. § 924(e), and in particular how that statute applies to Texas burglary, Texas Penal Code § 30.01 & 30.02(a). Those provisions are reprinted verbatim on pages 34a–38a of the Appendix.

STATEMENT OF THE CASE

Michael Renee Hernandez pled guilty to possessing a firearm after felony conviction in violation of 18 U.S.C. § 922(g)(1). App. 2a. That offense normally carries a maximum possible punishment of ten years in prison, 18 U.S.C. § 924(a)(2), but the district court applied the Armed Career Criminal Act after concluding that at least three of his prior Texas burglary convictions were violent felonies. App. 2a; *see* 18 U.S.C. § 924(e). The court sentenced him to 188 months in prison. App. 2a.

At the original sentencing hearing in March 2008, the district court did not specify which portion of the "violent felony" definition applied to Petitioner's burglaries, probably because it did not make one whit of difference at the time. If a burglary is generic, it is a violent felony under the enumerated offense clause. But—as far as anyone knew at the time—offenses "similar to generic burglary" were also deemed violent felonies under ACCA's residual clause. *See Taylor v. United States*, 495 U.S. 575, 600 n.9 (1990) ("The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii).").

This Court had repeatedly characterized residential burglary as the quintessential residual-clause offense. For example, in 2004, the Court said burglary was the "classic example" of a crime satisfying the related residual clause in 18 U.S.C. § 16(b):

> A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, *but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime*.

Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) (emphasis added). The Court picked up that same thread in *James v. United States*, 550 U.S. 192 (2007). *James* held that Florida *attempted* burglary was a violent felony under ACCA's residual clause because it presented a risk of confrontation similar to generic burglary. The enumerated offense of generic burglary provided the "baseline from which to measure whether other similar conduct" satisfied that clause. *Id.* at 203. Because attempted burglary presented the exact same risks as generic burglary, it was a residual-clause violent felony. The Fifth Circuit later proved willing to affirm an ACCA-enhanced sentence under the residual clause specifically for Texas burglary. *See United States v. Ramirez*, 507 F. App'x 353, 354 (5th Cir. 2013).

But that all changed once this Court struck down ACCA's residual clause in *Johnson*. After the Court recognized *Johnson*'s rule was retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016), *Taylor*'s distinction between "generic" burglaries and non-generic offenses "similar to generic burglary" became very important. This was "the rare case in which this Court announces a new rule of

constitutional law and makes it retroactive within one year." *Dodd v. United States*, 545 U.S. 353, 359 (2005).

Petitioner—who had previously moved, unsuccessfully,[1] to vacate his conviction and sentence—sought and received authorization from the Fifth Circuit to file a successive application for collateral relief under 28 U.S.C. § 2255(h)(2). Pet. App. 10a–11a. In granting authorization, the Fifth Circuit recognized that *Johnson* might provide relief to a defendant whose ACCA sentence depends upon Texas burglary:

> He contends that his enhanced sentence under the ACCA appears to be based upon Johnson error because nothing in the district court record indicates that his prior Texas burglary convictions were under any particular subsection of Tex. Penal Code § 30.02, and convictions under at least one subsection of that statute could only be violent felonies under the residual clause.
>
> * * * *
>
> Our assessment of Hernandez's motion is limited by the records available to us, and we express no view of the ultimate merit of his claim. We have sufficient information, however, to conclude that Hernandez has made the requisite prima facie showing for authorization to proceed further under § 2255(h)(2).

App. 11a.

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[1] The district court's prior orders denying post-conviction relief are reprinted in the Appendix. Pet. App. 27a–29a & 30a–33a. Petitioner has never disputed the district court's determination that the dismissal of the 2014 motion as untimely counted as his *first* § 2255 motion, and thus his current motion was "second or successive" for purposes of § 2255(h). There may be some dispute about that. *See* e.g. U.S. Br. 10–13 & Pet. Reply 6–8, *Levert v. United States*, Case No. 18-1276 (U.S. filed July 2019). If this motion was not "second or successive," that would provide an additional reason to reverse the jurisdictional holding below. But it doesn't matter. As explained below, Petitioner satisfied all the criteria necessary to file (and obtain a merits ruling on) a successive § 2255 motion.

Two days after the Fifth Circuit granted authorization, the district court dismissed the case and denied COA. App. 79a–86a. The district court acknowledged that—at the time of sentencing—

> The law was clear that to qualify as generic "burglary" under § 924(e), the crime must have included as a basic element intent to commit a crime. *Taylor v. United States*, 495 U.S. 575 (1990). Under *Taylor*, a conviction under Texas Penal Code § 30.02(a) (1) would count as generic burglary, i.e., a violent felony under § 924(e), but a conviction under Texas Penal Code§ 30.02(a)(3) would not.

App. 17a–18a. In the district court's view, the Presentence Report "implicitly" relied on the enumerated offense clause, and not the residual clause, and Petitioner failed to object to that unspoken assertion. The court went on to assert that

> At the time movant's sentence was imposed, neither the court nor anyone else would have thought or understood that movant was being sentenced based on the residual clause. The record would certainly not support such a contention.

App. 18a. The district court then *sua sponte* invoked the statute of limitations defense for the Government and dismissed the authorized motion. App. 18a. In response to Petitioner's motion for reconsideration, the court reiterated that

> movant and his counsel knew by reason of the Supreme Court's decision in *Taylor v. United States,* 495 U.S. 575, 598 & 602 (1990), before the presentence report ("PSR") was issued in movant's criminal case in February 2008 that the element of intent was essential to the existence of a conviction for a generic burglary to be counted as a prior felony conviction in the context of § 924(e), movant did not object to the PSR or either of its addenda on that ground.

App. 22a.

The Fifth Circuit granted a certificate of appealability on two issues: "(1) whether his § 2255 motion was timely filed, and (2) if so, whether he should

receive relief on his claim that he no longer qualifies for sentencing under the ACCA." App. 26a.

Petitioner argued that there were many reasons to believe the residual clause played a role in authorizing his ACCA sentence (and in deterring any objection or appeal thereof). First, the Fifth Circuit had already held that a Tennessee statute *identical to* Texas Penal Code § 30.02(a)(3) was non-generic in *United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007). As the district court found, anyone who studied the issue at the time would know that some forms of Texas burglary were non-generic.

Second, well before sentencing, the Fifth Circuit held that the "district court was not permitted to rely on the PSR's characterization of the offense" alone when applying prior-conviction enhancements. *United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005). To classify the Texas burglaries as generic ones, the district court would need to consult state-court conviction documents. *See Shepard v. United States*, 544 U.S. 13, 16 (2005). The district court *never* consulted the relevant documents—not at sentencing in March 2008, and not after the Fifth Circuit authorized the successive motion. The Government first submitted the relevant documents when the case was on appeal.

Third, it was clear at the time of sentencing that residential burglary counted as a violent felony *under the residual clause*. *Leocal*, 543 U.S. at 10; *James*, 550 U.S. at 203; *Taylor* 495 U.S. at 60. Even if the district court *erroneously* believed these burglaries satisfied the enumerated offense of burglary, the elements clause, or or

even the "serious drug offense" definition, there would be no reason for the defendant to object to or appeal that finding. The residual clause would reach even non-generic residential burglaries.

Faced with these arguments, the merits panel took the case in a completely different direction. Despite repeated findings from the district court that—at the time of sentencing—the court itself and the parties knew that Texas burglary could be committed without the necessary intent to count as generic burglary, the Fifth Circuit denied that fact. Instead of taking the district court at its word, the Fifth Circuit re-wrote history:

> Although that court did not specify which definitional clause of the ACCA it used to find that Hernandez had been convicted of at least three "violent felonies," *all of Texas Penal Code § 30.02(a) was considered "generic burglary" at the time of Hernandez's sentencing in March 2008*, which means that his prior convictions for Texas burglary would have qualified as "violent felonies" under the enumerated offenses clause—and reliance on the residual clause would have been unnecessary.

App. 5a (emphasis added).

The Fifth Circuit also rejected Petitioner's argument that he could rely on intervening substantive decisions to show that the residual clause and only the residual clause supported his sentence. Relying on *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019), the Fifth Circuit held:

> (1) after authorization, Petitioner must clear a second "jurisdictional hurdle" before receiving a ruling on the merits: "the prisoner must actually prove at the district court level" that the "sentencing court relied on the residual clause in making its sentencing determination";

> (2) that Petitioner "must show that it was more likely than not that he was sentenced under the residual clause"; and
>
> (3) that Petitioner had "[a]t most" shown "that the sentencing court *might have* relied on the residual clause."

App. 2a–3a, 6a.

This timely petition follows.

REASONS TO GRANT THE PETITION

Petitioner's application for post-conviction relief under § 2255 should be simple to resolve in his favor: he was an Armed Career Criminal under ACCA's residual clause, but is not an Armed Career Criminal without that clause. His claim for post-conviction relief thus both "contains" and "relies on" the new substantive constitutional rule announced in *Johnson*. *Compare* 28 U.S.C. § 2255(h)(2) *with* § 2244(b)(2)(A). Moreover, this Court "made" the rule in *Johnson* retroactive, either in *Johnson* itself or shortly thereafter in *Welch*. Section 2255(h)(2) requires no more.

To reach the opposite outcome, the Fifth Circuit embraced several dubious assumptions: (1) that, even after Petitioner obtained authorization to file a successive motion, he had to satisfy a second "jurisdictional" hurdle in district court; (2) that this hurdle involved an *evidentiary* question about the sentencing court's historic mindset; (3) that his failure to satisfy that hurdle was *jurisdictional* (and thus the courts could invoke the issue *sua sponte*). Granting review in this case would likely resolve several subsidiary legal disputes that have bedeviled the lower courts.

I. WHEN ASKED TO APPLY THE STRAIGHTFORWARD TEXT OF 28 U.S.C. § 2255(h)(2) TO APPLICATIONS LIKE PETITIONER'S, THE LOWER COURTS ARE FLOUNDERING.

Before filing a "second or successive motion" for collateral relief under 28 U.S.C. § 2255, a federal prisoner's proposed 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). Everyone agrees that *Johnson* was the right kind of rule: it was *new*; this Court "made" the rule retroactive in *Johnson* itself or in *Welch*; and it was "previously unavailable" to prisoners sentenced before *Johnson*. If a proposed motion "contains" the rule in *Johnson*, and particularly if a Court of Appeals "certifie[s]" that proposition, then a prisoner has satisfied all of the threshold requirements for a successive motion and is entitled to a ruling on the merits.

Unfortunately, the lower courts have transmogrified this straightforward inquiry into multiple complex theoretical questions, and then have divided multiple ways on how to approach those theoretical questions. Rather than a coherent nationwide framework for analyzing successive *Johnson* motions, the lower courts have created "a riddle, wrapped in a mystery, inside an enigma." Absent prompt intervention from this Court, the disaster will only grow worse.

A. Lower courts disagree about whether the gatekeeping standard for state prisoners—28 U.S.C. § 2244(b)(2)(A)—applies to federal prisoners' motions under § 2255(h)(2).

A federal prisoner who wishes to file a successive motion to vacate must convince the court of appeals to "certify" his proposed motion "as provided in section 2244." 28 U.S.C. § 2255(h). This is sometimes described as obtaining "prefiling authorization." E.g. *United States v. McRae*, 793 F.3d 392, 397 (4th Cir. 2015).

Section 2244 provides both *substantive* standards and *procedural* requirements for *state* prisoners who wish to file successive petitions for habeas corpus. The procedural rules for state prisoners are set out in § 2244(b)(3):

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244(b)(3). Of those procedural rules, § 2244(b)(3)(A) clearly applies to successive motions under § 2255(h), and § 2244(b)(3)(B) and (D) can be applied without controversy.

Lower courts appear to agree that appellate courts should evaluate proposed § 2255 motions under § 2244(b)(3)(C)'s *prima facie* standard. *See, e.g.*, *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997) ("We take the phrase 'as provided in section 2244,' which appears in section 2255, to mean that in considering an application under section 2255 for permission to file a second or successive motion we should use the section 2244 standard, and thus insist only on a prima facie showing of the motion's adequacy.")

But the courts disagree about whether *federal* prisoners must satisfy the *substantive* standard for state prisoners articulated in § 2244(b)(2), or if it is sufficient to satisfy the substantive standards in § 2255(h). Those two substantive standards are "quite similar" but not identical. *United States v. MacDonald*, 641 F.3d 596 (4th Cir. 2011). Under the "new rule" prong for *state* prisoners, § 2244(b)(2)(A) provides:

> (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.

(Emphasis added). Under the "new rule" prong for *federal* prisoners:

> (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) (emphasis added).

Comparing these parallel provisions, "there is a slight difference between the two sections." *In re Hoffner*, 870 F.3d 301, 307 n.9 (3d Cir. 2017). "Section 2244(b)(2)(A) asks whether a claim 'relies on' a qualifying new rule. Section 2255(h) asks whether the motion 'contain[s]' a qualifying new rule." *Id.* (citations omitted).

Under the plain reading of the statutory text, "§ 2244(b)(2) sets forth the controlling standard for state prisoners, and § 2255(h) spells out the standard applicable to those in federal custody." *MacDonald*, 641 F.3d at 609. "The limitations imposed by § 2244(b) apply only to a 'habeas corpus application under § 2254,' that is, an 'application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court.'" *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (emphasis shifted).

Section 2244(b)(2)'s "statutory language makes clear that it does not apply to federal prisoners like [Petitioner] who are seeking relief under § 2255—a reading that is underscored by the fact that Congress clearly knew how to refer to federal prisoners (or all applicants) when it wanted to do so." *Williams v. United States*, 927 F.3d 427, 435 (6th Cir. 2019). Under this reading, a successive § 2255 motion need only "contain" the new rule announced in *Johnson*. 28 U.S.C. § 2255(h); *see also In re Bradford*, 830 F.3d 1273, 1276 n.1 (11th Cir. 2016) (Section 2255(h) "cannot incorporate § 2244(b)(2) because § 2255(h) and § 2244(b)(2) provide different requirements for the prima facie case that an applicant must make to file a successive habeas petition or motion."); *Raines v. United States*, 898 F.3d 680, 692 (6th Cir. 2018)

(Cole, C.J., concurring) (Section 2244(b)(4) "focuses on what a 'claim' requires, while § 2255(h) focuses on what a 'motion must . . . contain.' This 'difference in language'—in one section, what a claim requires; in the other, what a motion requires—'demands a difference in meaning.'").

Even so, several appellate courts have stated that a federal prisoner in Petitioner's shoes must show that his claim "relies on" the new rule in *Johnson* to satisfy the gatekeeping standard. *See*, *e.g.*, *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017) ("The threshold question is whether Defendant's claim relies on the rule announced in *Johnson II* such that he may bring that claim in a second or successive § 2255 motion."); *In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017) ("We now hold that whether a claim 'relies' on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis."); *Donnell v. United States*, 826 F.3d 1014, 1016 (8th Cir. 2016) ("Section 2244(b)(2)(A) requires certification that a claim 'relies on' a new rule, and it makes sense to interpret § 2255(h)(2) similarly despite a modest difference in wording."); *c.f. Massey v. United States*, 895 F.3d 248, 249–50 (2d Cir. 2018) (the motion must "*contain[ ]* a claim that *relies on* a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.").

B. Most circuits have held that a *district court* must conduct its own "gatekeeping" analysis, even after the circuit court grants authorization under § 2255(h).

For a state prisoner's successive petition for habeas corpus, appellate authorization is only the first threshold requirement. After the Court of Appeals

authorizes the filing of a successive "application," the prisoner must "show[ ]" "the district court" that each claim within that application "satisfies the requirements of this section." § 2244(b)(4). Section 2255 has no parallel procedure. *C.f.* 28 U.S.C. § 2255(h).

Yet most circuit courts—including the Fifth Circuit—have held that a *federal* prisoner must also surmount a second "gatekeeping" step in district court. Judge Posner's opinion in *Bennett v. United States* was early and influential:

> The [Court of Appeals's] grant [of authorization] is, however, it is important to note, tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion. 28 U.S.C. § 2244(b)(4). The movant must get through two gates before the merits of the motion can be considered

Bennett, 119 F.3d 468, 470 (7th Cir. 1997). Almost all of the regional courts agree. *See United States v. Peppers*, 899 F.3d 211, 220 (3d Cir. 2018) ("But, even after we authorize a second or successive petition, § 2244 still requires the district court to 'dismiss any claim presented in a second or successive application . . . unless the applicant shows that the claim satisfies the [gatekeeping] requirements[.]"); *United States v. Murphy*, 887 F.3d 1064, 1067–1068 (10th Cir.), *cert. denied*, 139 S. Ct. 414 (2018); *Massey v. United States*, 895 F.3d 248, 250–251 (2d Cir. 2018) (holding that the district court should have dismissed the authorized successive motion without reaching the merits); (*Darnell) Moore v. United States*, 871 F.3d 72, 85 (1st Cir. 2017) ("We have left much work for the district court. That is by necessity, as the district court is required to redo the very analysis performed in this opinion before

entertaining a successive § 2255 motion."); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016) ("[T]he district court is free to decide for itself whether Embry's claim relies on a new rule made retroactive by the Supreme Court, see 28 U.S.C. § 2244(b)(4)."); *In re (Jasper) Moore*, 830 F.3d 1268, 1271–1272 (11th Cir. 2016); *(Kamil) Johnson v. United States*, 720 F.3d 720, 720–721 (8th Cir. 2013); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000).

Even though there is nearly unanimous agreement that the district court plays this gatekeeping role in § 2255 cases, that view is *not* supported by the text of either § 2255(h) or § 2244. Section 2255(h) only asks for *appellate court* authorization as provided in § 2244. Importing *district court* review goes further. It also requires—in every case—duplication of effort. Given that there are no *federalism* concerns in a § 2255 proceeding, it makes sense that Congress would allow federal courts to proceed directly to the merits of a § 2255 claim once the prisoner secured authorization. This Court should grant the petition to clarify that § 2244(b)(4) does not apply in § 2255 proceedings.

C. The circuits are divided over whether this district-court gatekeeping constitutes a *jurisdictional* prerequisite.

Many courts—including the Fifth Circuit—assume that the district-court gatekeeping inquiry is a *jurisdictional* prerequisite to resolving the merits. *See*, *e.g.*, *Wiese*, 896 F.3d at 724. Respondent disagrees with this view, and has argued elsewhere that the district-court gatekeeping function is not jurisdictional. The Sixth

Circuit recently agreed with Petitioner and Respondent, and held that the gatekeeping standards are non-jurisdictional:

> It would thus run afoul of the text's focus on the issuing panel, impose substantial added delay contrary to Congress's purpose, and risk unfair prejudice to movants who had fully complied with their own obligations to require each later panel to recommence review of the § 2255(h) threshold conditions. We therefore hold, consistent with *Gonzalez v. Thaler*, that "[a] defective [authorization] is not [jurisdictionally] equivalent to the lack of any [authorization]."

Williams v. United States, 927 F.3d 427, 438 (6th Cir. 2019).

If the Sixth Circuit, Petitioner, and Respondent are right, that would require reversal of the decision below. "[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood v. Milyard*, 566 U.S. 463, 472 (2012) (discussing *Greenlaw v. United States*, 554 U.S. 237, 243–244 (2008)). Neither the district court nor the Fifth Circuit would have the authority to invoke the gatekeeping standards for the Government if those rules are non-jurisdictional. If the district court had jurisdiction to consider the authorized motion, then Petitioner is entitled to a ruling on the merits.

D. When describing what the district court must decide during the gatekeeping stage, the lower courts are bitterly divided.

Under the most straightforward reading of the relevant statutes, a federal prisoner is entitled to a ruling on the merits if he argues (a) he was an Armed Career Criminal under the residual clause, but (b) he is not an Armed Career Criminal under the elements or enumerated offense clauses, as they are properly interpreted. His motion would "contain" the new rule announced in *Johnson*, and that satisfies § 2255(h)(2).

The circuit courts have taken two different approaches to this question. They have focused on the sentencing judge's mindset or "reliance." In some circuits, it is enough to show that the sentencing court *might have* relied on the residual clause. In other circuits, the prisoner must show it is *more likely than not* that the sentencing court relied on the residual clause. The split is entrenched and acknowledged. *See Clay*, 921 F.3d at 554 ("The circuits are split on this issue.")

1. In some courts, it is enough to show that the sentencing court *might have* relied on the residual clause.

Because the residual clause was always a backstop preventing prisoners from challenging mistaken conclusions about "generic" burglaries, many courts have held that a prisoner may use *Johnson* to challenge an ACCA sentence predicated on non-generic burglaries. The Third, Fourth, and Ninth Circuits have all adopted a *permissive* approach: if a defendant shows that the sentencing court *might have* relied on the residual clause, then the defendant satisfies the gatekeeping standard and is entitled to a ruling on the merits. *Peppers*, 899 F.3d at 216; *Geozos*, 870 F.3d at 896; *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Once the case proceeds to the merits in these circuits, the defendant may utilize intervening precedent to show that the enumerated offense and elements clauses do not justify the sentence.

The "vast majority" of district judges—who best understood how sentencing decisions were made prior to *Johnson*—were also willing to grant relief under the theory that they might have relied on ACCA's residual clause. *Thrower v. United States*, No. 04-CR-0903, 2017 WL 1102871, at *4 (E.D.N.Y. Feb. 13, 2017), and cases cited therein ("[T]he vast majority of the district courts that have considered the issue

have decided that a petitioner meets his burden of proving constitutional error if the record is unclear and the petitioner shows that the sentencing court may have relied on the residual clause in calculating his sentence."), *rev'd on other grounds*, 914 F.3d 770 (2d Cir. 2019). As another district judge explained:

> Prior to *Johnson*, regardless of *Descamps* and the alleged invalidity of utilizing the modified categorical approach concerning the Washington State residential burglary statute, Defendant's 1996 residential burglary conviction could have been a predicate "violent felony" under the residual clause. . . . As such, until *Johnson*, Defendant's 1996 residential burglary conviction remained a "violent felony" through the ACCA residual clause.

United States v. Gomez, 2:04-CR-2126-RMP, 2016 WL 1254014, at *3 (E.D. Wash. Mar. 10, 2016) (citing *James* and *Taylor*); *see also Hardeman v. United States*, 1:96-CR-192 & 1:16-CV-703, 2016 WL 6157433, at *2–4 (W.D. Tex. Oct. 21, 2016) (explaining that the Government "continued" to argue that non-generic Texas burglaries were still violent felonies under the residual clause "until *Johnson* was decided," and rejecting Government's attempt to ignore *Johnson*'s impact on the analysis of non-generic burglaries). *In re Adams*, 825 F.3d 1283, 1284 (11th Cir. 2016) (allowing a defendant to challenge the classification of a prior burglary offense under *Johnson* and *Descamps* in a successive § 2255 motion).

2. Other courts—including the Fifth Circuit—require the defendant to present *evidence* that the district court was *probably* thinking about the residual clause at sentencing.

The First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have all embraced a *stricter* approach to the gatekeeping standard. In these circuits, a successive movant has to *prove*, by a preponderance of the evidence, that the sentencing court was *actually thinking about* ACCA's residual clause when imposing the sentence. *See, e.g.,*

Dimott v. United States, 881 F.3d 232, 240, 243 (1st Cir. 2018); *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018); *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018); and *Snyder v. United States*, 871 F.3d 1122, 1128 (10th Cir. 2018). The Eleventh Circuit holds that the residual clause must have been the *sole* basis for the enhancement:

> 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.

Beeman v. United States, 871 F.3d 1215, 1221–1222 (11th Cir. 2017) (emphasis added).

The approach adopted below is quite extraordinary, because it would prevent Petitioner from *ever* obtaining relief from his illegal sentence. His pre-*Johnson* direct appeal would be doomed from the start, because the residual clause would suffice, and his post-*Johnson* § 2255 motion would be doomed because he could not show that the residual clause was the sole subjective basis of the enhancement. That approach has to be wrong.

The Fifth Circuit acknowledged that, on this record, Petitioner could show that the district court *might have* relied on the residual clause. App. 6a. Reviewing the same record, the district court decided that it must have implicitly (and unlawfully) "narrowed" the prior convictions to § 30.02(a)(1), which the court incorrectly believed to be a divisible, generic burglary. Pet. App. 18a. The district court thus did not believe that it had "relied on" the residual clause. In other words, the questions

presented are outcome determinative here. If the Petitioner did not have to clear a second "jurisdictional" hurdle under § 2244(b)(4)—or if that burden is satisfied by proving that the court *might have* relied on the residual clause—then the decision below should be reversed.

II. THIS COURT SHOULD ISSUE A COURSE CORRECTION.

"Increasing a defendant's sentence under the [ACCA residual] clause denies due process of law." *Johnson*, 135 S. Ct. at 2557. That much is known. But what does it mean to say that a defendant's sentence was increased "*under*" ACCA's residual clause?

Most appellate courts seem to assume that this is a *historical* inquiry, susceptible of proof by *evidence*. Under this view, it matters what the sentencing court was actually *thinking about*. If the court was *thinking about* the residual clause—and the defendant can prove that "fact" many years later—then the defendant is entitled to a ruling on whether he is an Armed Career Criminal. But if the sentencing court was not *thinking about* the residual clause—either because it was thinking of another clause, or wasn't thinking at all—then *Johnson* provides no relief. So, in the introductory hypothetical, the four former burglars would be treated *differently*, even though their prior records were *identical*.

This is wrong, for multiple reasons.

1. In *Welch*, the sentencing court explicitly overruled the objection to ACCA relying on *multiple* clauses of the violent felony definition: "It concluded that the Florida offense of strong-arm robbery qualified as a violent felony both under the elements clause . . . and the residual clause." 136 S. Ct. at 1262. That did not end the

inquiry. This Court remanded the case for a ruling on the merits, demonstrating that historical reliance on *another* clause does not defeat a *Johnson* claim.

2. The excessive focus on reconstructing a sentencing court's actual or hypothetical mindset ignores the many other players involved in dispute of a sentence. Even if the district court mistakenly relied upon the enumerated offense clause, the defense attorney would know (or should know) that ACCA's residual clause would serve as an alternative ground to affirm the sentence. The same is true of appellate courts.

3. The application of ACCA was an act of "statutory interpretation, not judicial factfinding." *James*, 550 U.S. at 214. There is no reason to pretend otherwise on post-conviction review. An illegally sentenced defendant shouldn't have to prove the sentencing court's mental state; the illegality of the sentence is all that matters.

4. This Court has held that a federal prisoner *may* rely on post-conviction intervening substantive decisions during collateral review. *See Bousley v. United States*, 523 U.S. 614, 620–621 (1998). If so, there is no reason to limit the inquiry to law that was "known" at the time of sentencing.

Many of the stricter circuits demand that a prisoner rely *only* on the law that existed at the moment of sentencing. See, *e.g.*, *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017) (limiting consideration to a "'snapshot' of what the controlling law was at the time of sentencing" without taking "into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions."); *accord*

Wiese, 896 F.3d at 715 (post-sentencing decisions are "of no consequence to determining the mindset of a sentencing judge in 2003").

As this Court explained in *Bousley*, "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on" decisions that interpret the substantive scope of a federal criminal statute. 523 U.S. at 620–621. Bousley was permitted to rely on a *subsequent* decision—*Bailey v. United States*, 516 U.S. 137 (1995)—to prove that he suffered constitutional error during an *earlier* guilty plea. By the same logic, Petitioner is permitted to use intervening substantive decisions to show that the enumerated offense and elements clauses were not enough to justify his ACCA sentence.

ACCA's enumerated offense of "burglary" has always meant the same thing. If—as Petitioner will contend on the merits—his prior crimes do not satisfy that unchanging meaning, then the enumerated offense *never* justified his sentence. At some point, the Court must reconcile the crazy-quilt approaches below with *Welch* and *Bousley*.

CONCLUSION

Petitioner respectfully asks that this Court grant certiorari and to reverse the decision below.

Respectfully submitted,

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SEPTEMBER 19, 2018