No. _____

In the Supreme Court of the United States

October Term, 2018

JAMES ABRAHAM MATA, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

When seeking relief under a retroactive decision invalidating a federal statutory provision as unconstitutional, what must a federal prisoner show in a second or successive motion under 28 U.S.C. § 2255, when the record is silent as to whether the district court based its original judgment on the invalidated provision?

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

Petitioner James Abraham Mata asks that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Fifth Circuit on June 28, 2019.

PARTIES TO THE PROCEEDING

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

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The unpublished decision of the United States Court of Appeals for the Fifth Circuit, *United States v. Mata*, No. 18-50616 (June 28, 2019), is attached in the Appendix to this Petition ("App") at 1a–4a. The opinion of the district court is attached at App. 5a–29a. The decision of the court of appeals granting Mata leave to file a petition under 28 U.S.C. § 2255 is attached at App. 30a–32a.

JURISDICTION

The Court of Appeals entered the judgment in Mata's case on June 28, 2019, and Mata did not seek rehearing. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

FEDERAL STATUTORY PROVISIONS INVOLVED

The relevant statutes are attached at App. 37a–73a.

INTRODUCTION

Under 28 U.S.C. § 2255, a federal prisoner may challenge his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States" or that it "was in excess of the maximum authorized by law." *Id.* § 2255(a). If relief has been previously denied under § 2255, then a defendant must show in any successive motion that his "claim … relies on" a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *Id.* § 2244(b)(2)(A); *see id.* § 2255(h)(2).

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Court struck down the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), explaining that it violated the Due Process Clause because it "both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S. Ct. at 2557. In *Welch v. United States*, the Court held that *Johnson*'s invalidation of the residual clause was a constitutional rule "that has retroactive effect in cases on collateral review." 136 S. Ct. 1257, 1268 (2016). Defendants whose ACCA sentences depended on the residual clause are entitled to habeas relief.

The Court has never explained how courts should address second or successive, post-conviction claims brought under Section 2255, where the record is silent as to whether the sentence rests on the invalidated clause. A deep divide exists between the Circuits, and different standards are applied for how to determine whether a federal prisoner is entitled to relief. The disparity in relief is readily apparent in claims raised after *Johnson*. But, without guidance from the Court, the disparity will reoccur whenever a defendant files a second or successive habeas motion seeking relief after the Court invalidates a law. Most readily, the disparity

will continue for second or successive motions for relief under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019).

The Third, Fourth, and Ninth Circuits have held that a defendant bringing a successive motion under Section 2255 is entitled to *Johnson* relief so long as he shows that his sentence *may have* relied on the residual clause—at least where, as here, there is currently no other statutory basis to support his sentence. But the Fifth Circuit in this case held—in line with the First, Sixth, Eighth, Tenth, and Eleventh Circuits—that a defendant may obtain relief only if he proves that the court *in fact* based his ACCA sentence on the residual clause.

STATEMENT OF THE CASE

1. In 1997, a jury convicted James Abraham Mata of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), along with three other counts. The felon-in-possession statute typically carries a maximum penalty of ten years' imprisonment and three years' supervised release. *See* § 924(a)(2). But under ACCA, the penalty is enhanced to 15 years' to life imprisonment, and a minimum term of five years' supervised release, based on certain qualifying prior convictions. *See* § 924(e)(1). At the time of Mata's

sentencing, the qualifying convictions included specific enumerated offenses; offenses involving the use or threatened use of physical force against another person; and any other offense falling under the "residual clause," which covered offenses "involve[ing] conduct that present[ed] a serious potential risk of physical injury to another." § 924(e)(2)(B).

Relying on Mata's three prior convictions for Texas burglary of a habitation, the district court found Mata to be an ACCA offender. Neither the presentence report nor the district court specified whether it believed the prior convictions fell under ACCA's enumerated, use-of-force, or residual clause. On the felon-in-possession count, the district court sentenced Mata to 262 months, followed by five years' supervised release.

The Fifth Circuit affirmed Mata's conviction and sentence. *United States v. Mata*, No. 97-50290 (5th Cir. June 26, 1998).

In 2014, Mata filed a 28 U.S.C. § 2255 motion challenging his sentence, along with a supporting memorandum of points and authorities. The district court dismissed two of the three claims Mata raised, but ordered the Government to respond to the merits of his third claim—whether, under *Descamps*[1], the district court failed

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[1] *Descamps v. United States*, 570 U.S. 254 (2013).

to apply the modified categorical approach when it determined that his prior convictions for Texas burglary were "violent felonies" under ACCA.

In its response, the Government noted that the Texas burglary statute, Penal Code § 30.02, was divisible and that one of the alternatives would not have qualified as a "violent felony." The Government also pointed out that the record did not reflect which alternative underlay Mata's conviction, and there was no evidence that any *Shepard*[2] documents were relied on. App. 33a–36a. The district court dismissed Mata's § 2255 motion with prejudice because *Descamps* was not retroactive.

After this Court invalidated ACCA's residual clause in *Johnson*, the Fifth Circuit granted Mata's request for leave to file a second § 2255 motion. App. 31a–36a. In that motion, Mata argued that, without the residual clause, his Texas burglaries no longer qualified as ACCA predicates. That is because case law post-dating his conviction made clear that Texas burglary of a habitation is categorically broader than generic "burglary" under the ACCA's enumerated-offense clause, and that the offense lacks an element of physical force against another person.

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

The district court denied Mata's § 2255 motion, finding that his claim did not rely on *Johnson*. App. 27a. The court concluded that the three burglary convictions were all generic "burglary" under ACCA's enumerated-offense clause, App. 21a, even though the record is silent as to which clause the district court relied on when it sentenced Mata. The court cited an unpublished opinion from 2017 for the proposition that one of the alternative ways of committing Texas burglary fit the generic definition of that offense. App. 19a–21a. It then relied solely on the presentence report's description of Mata's burglaries—not *Shepard* documents—to conclude that they were for generic burglary. The district court also concluded that, while Mata would not qualify for an ACCA sentence under current law, that law could not be applied retroactively. App. 23a–25a. For the same reasons, the district court denied a certificate of appealability. App. 25a–26a.

Mata asked the Fifth Circuit to issue a certificate of appealability. The court denied Mata's request. App. 2a–4a. It concluded that Mata failed to establish jurisdiction in the district court because he did not show that "the sentencing court more likely than not relied on the residual clause in making its sentencing determination." App. 3a–4a. *See also United States v. Clay*, 921 F.3d 550,

558–59 (5th Cir. 2019) (holding that the correct standard is "more likely than not").

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are divided over what a defendant must show in a second or successive motion under 28 U.S.C. § 2255 to obtain relief under *Johnson*, where the record is silent as to whether the district court based its original judgment on the now-invalided residual clause in the ACCA. The Court should use this case to resolve the conflict, and hold that relief must be granted where, as here, it is clear that no still-valid provision of the statute can support the judgment.

I. Courts of appeals are split over the question presented.

Where the record is silent as to whether the district court based its original judgment on the invalided provision of a statute, the courts of appeals are split over how to determine whether the defendant is entitled to pursue relief in a second or successive § 2255 motion. The Fifth Circuit joins the First, Sixth, Eighth, Tenth, and Eleventh Circuits, adopting a rule that bars defendants in this situation from obtaining post-conviction relief where the record is silent. *See Dimott v. United States*, 881 F.3d 232, 242–43 (1st Cir.), *cert. denied*, 138 S. Ct. 2678 (2018); *Potter v. United States*, 887 F.3d 785, 787–88 (6th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), *cert. denied*, 139 S. Ct., 2019 WL 659904 (U.S. Feb. 19, 2019).

The Third, Fourth, and Ninth Circuits disagree. In those circuits, a defendant bringing a successive motion under § 2255 is entitled to relief so long as he shows that his sentence "may have" rested on the invalid clause—at least where there is currently no other statutory basis to support his sentence. *United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 897–98 (9th Cir. 2017). Three different judges on the U.S. District Court for the District of Columbia have reached the same conclusion, as have other district courts. *See United States v. Wilson*, 249 F. Supp. 3d 305, 311–13 (D.D.C. 2017) (collecting cases).

The circuit split over this question is mature and intractable. It results in inconsistent rulings affecting many prisoners who have raised *Johnson* claims in successive § 2255 motions. Indeed, the Fifth Circuit acknowledged, in *Clay*, that the defendant had "shown that the sentencing court 'may have' relied on the residual clause to enhance his sentence." 921 F.3d at 558. *Clay* recognized that, if it were to "adopt[ ] the standard articulated by the Fourth and Ninth Circuits, Clay will have sustained his burden of proof and the district court will have jurisdiction over his successive § 2255 petition." *Id.* But *Clay* instead adopted the "more likely than not" standard—a standard Clay could not meet. *Id.* at 559.

Without resolution of the circuit split, defendants receive relief from unconstitutional sentences based on their geography, regardless of the merits of their claims.

II. The question presented is extremely important.

1. Resolution of the question presented would allow many defendants to be eligible for immediate release from prison or other forms of custody because the time they have already served on their ACCA-enhanced sentences far exceeds the non-ACCA maximum. *See, e.g., In re Williams*, 898 F.3d 1098, 1108 (11th Cir. 2018) (Martin, J., concurring) (noting that, in the Eleventh Circuit alone, over 2,000 defendants have filed successive motions raising *Johnson* claims); *Washington*, 890 F.3d at 896 (in "many ACCA cases" involving *Johnson* claims, "the record is often silent"); *Raines v. United States*, 898 F.3d 680, 691 (6th Cir. 2018) (Cole, C.J., concurring) ("silence is the norm, not the exception"). What is more, many of the alternative bases for invoking ACCA have been shown in recent years to be much narrower than courts thought in the past. *See, e.g., Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Johnson v. United States*, 559 U.S. 133 (2010).

2. Resolution of the question presented extends beyond just those defendants eligible for relief under *Johnson*. This question,

left unresolved, will arise whenever a defendant was convicted or sentenced according to a judgment that did not specify which statutory alternative applied, and this Court later rules one of those alternatives unconstitutional. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding that the residual clause of 18 U.S.C. § 16(b) is unconstitutionally vague); *United States v. Davis*, 139 S. Ct. 2319 (2019) (invalidating the residual clause under § 924(c) as unconstitutionally vague); *see also United States v. Reece*, 2019 WL 4252238 (5th Cir. Sept. 9, 2019) (holding that *Davis* announced a new rule of constitutional law).

III. The Fifth Circuit's ruling is wrong.

1. Decisions requiring a defendant to show that the sentencing court may have relied on the residual clause—and certainly decisions requiring that it was more likely than not that the court did so—are untethered from the text of the applicable statutes. Among the circuits' approaches to this question, the Third, Fourth, and Ninth Circuits' approaches are the most faithful to the statutory text. But even those approaches may be asking the wrong question. Nothing in § 2244 or § 2255 suggests, much less compels, a conclusion that a defendant must show that he was sentenced under the

residual clause to have his *Johnson* claim considered on the merits. All the statutes require is that a defendant's claim "relies on" the retroactive new rule. *See* 28 U.S.C. §§ 2244(b), 2255(h)(2).

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

> [i]n a case like this, where a movant attempts to satisfy the first prong of the *Johnson* inquiry through circumstantial evidence by demonstrating that he could not have been properly sentenced under any other portion of the statute, the first and second prongs for success on the merits coalesce into a single inquiry. … [A defendant's] showing that he could not have been convicted under the elements clause of the ACCA is therefore proof of both requirements for success on the merits of a *Johnson* claim: first, that he was sentenced under the residual clause, and second, that his predicate offenses could not qualify under the ACCA absent that provision.

Id. at 1230.

Here, Mata asserts that his sentence is unconstitutional because it violates *Johnson*. Regardless of the claim's merit, there is no doubt that his claim relies on *Johnson*. He has passed through the "gateway" requirement for bringing a successive motion for habeas relief. *See Tyler v. Cain*, 533 U.S. 656, 662 (2001) (holding that defendant's claim relied on a new rule without opining on claim's merits).

2. Mata can also show that his sentence is unconstitutional after *Johnson*. "[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin v. United States*, 502 U.S. 46, 53 (1991). Thus, if a criminal judgment has two or more possible statutory grounds, one of the grounds has been held unconstitutional, and "it is impossible to say under which clause of the statute the conviction was obtained," then "the conviction cannot be upheld." *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 368 (1931)).

At the time of Mata's sentencing, the district court imposed an ACCA sentence based on a finding that either the Texas burglaries fell within the enumerated offense of burglary or because the offenses carried a "serious potential risk of physical injury to an-

other" under the unconstitutional residual clause. The record is silent as to which, and as the Government later clarified during Mata's first collateral attack on his sentence, there were not *Shepard* documents identifying what type of Texas burglary Mata was convicted of. App. 35a–36a. It is impossible to say which ACCA provision the district court relied on.

3. Mata is entitled to relief because the ACCA enhancement cannot be sustained on a still-valid clause of the statute. A defendant is not entitled to the "extraordinary remedy" of post-conviction relief, *Bousley v. United States*, 523 U.S. 614, 621 (1998), unless he demonstrates that the constitutional violation in his case "had [a] substantial and injurious effect" on his judgment. *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

But, as demonstrated by decisions of the Third and Ninth Circuits (and the Seventh Circuit, in equivalent circumstances), Mata can easily make this showing. *Peppers*, 899 F.3d at 230–31; *Geozos*, 870 F.3d at 897–98; *see also Van Cannon v. United States*, 890 F.3d 656, 661–62 (7th Cir. 2018). Current case law makes clear that Mata's prior convictions do not qualify as ACCA predicates under the enumerated offense clause. "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." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312–13 (1994). Indeed, the Government itself has previously acknowledged that statutory decisions "narrow[ing] the scope" of ACCA are "new substantive rules that [a]re retroactive in ACCA cases on collateral review." Brief for United States 32, *Welch v. United States*, No. 15-6418; *see also* Brief for United States 12–13, *Bousley v. United States*, No. 96-8516 (acknowledging the *Rivers v. Roadway Express* principle applies in federal habeas proceedings); *Van Cannon*, 890 F.3d at 660 (noting Government's concession that *Mathis* applies in this context).

At the time Mata was sentenced, a Texas burglary could have been a violent felony under the enumerated-offense clause, but it was not categorically so. In *Taylor v. United States*, decided in 1990, the Supreme Court held that "burglary," for purposes of the enumerated-offense clause in the ACCA, has "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. 575, 599 (1990). Two years later, in 1992, the Fifth Circuit held, in *United States v. Silva*, that "[s]ection 30.02 of the Texas Penal Code is a generic burglary statute, punishing nonconsensual entry into a building with intent to commit a crime." 957 F.2d 157, 162 (5th

Cir. 1992). But *Silva* was only referring to subsection (a)(1) of the statute. *United States v. Constante*, 544 F.3d 584, 585–86 (5th Cir. 2008) (per curiam). Another subsection of the statute—(a)(3)—is not generic burglary because it does not require intent to commit another crime at the time of entry. *Constante*, 544 F.3d at 585–86. Because the record is silent about which subsection of Texas's burglary statute Mata was convicted under, the district court could not have held that his burglaries fell within *Taylor*'s categorical definition of burglary.[3]

In contrast, Texas burglary categorically *was* a violent felony under the residual clause. *Taylor* itself expressly acknowledged this possibility: "Our present concern is only to determine what offenses should count as 'burglaries' for enhancement purposes. The

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[3] In *United States v. Herrold*, the en banc Fifth Circuit held that the Texas burglary statute is indivisible and categorically broader than ACCA's enumerated offense of burglary. 883 F.3d 517, 523 (2018). This Court vacated the judgment in *Herrold* and remanded the case to the Fifth Circuit for further consideration in light of *Quarles v. United States*, 139 S. Ct. 1872 (2019). *Quarles* held that generic burglary occurs when a person forms the intent to commit a crime at any time while unlawfully remaining in a building or structure. *Id.* at 1877. *Quarles* did not address whether the Texas statute is indivisible or whether subsection (a)(3) of the Texas statute remains overly broad.

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)." 495 U.S. at 600 n.9.

Indeed, burglary was long thought to fit comfortably within the residual clause, as illustrated by decisions involving the materially identical provision in 18 U.S.C. § 16(b)'s "crime of violence" definition. Like the ACCA, § 16(b) captured offenses that entailed certain types of risk: "a serious potential risk of injury to another" in the case of the ACCA, and "a substantial risk that physical force will be used against" persons or property in the case of § 16(b). Both definitions contain the same two features that ultimately led this Court to hold them unconstitutionally vague: an ordinary-case approach to assessing the necessary risk, as well a lack of clarity as to how much risk is enough. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213–16 (2018).

As early as 1994, the Fifth Circuit recognized that unlawfully entering someone's home, with or without intent to commit a crime therein, presented a serious risk of force and injury. *See United States v. Guardado*, 40 F.3d 102, 104–05 (5th Cir. 1994) (holding that Texas burglary of a habitation is always a crime of violence

under § 16(b) because "whenever a private residence is broken into, there is always a substantial risk that force will be used"); *United States v. Claiborne*, 132 F.3d 253, 256 (5th Cir. 1994) (per curiam) (holding, based on *Guardado*, that Louisiana unauthorized entry of an inhabited dwelling fit the residual clause in the Sentencing Guidelines crime-of-violence definition, which was identical to ACCA's, because "we do not agree that a home invader's nonfelonious mindset eliminates the risk of physical injury to his victims.").

This Court confirmed the Fifth Circuit's understanding in 2004, referring to burglary as "the classic example" of a § 16(b) residual clause offense 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). And three short years later, in 2007, the Court held that attempted burglary, just like completed burglary, is a violent felony under the ACCA's residual clause. *James v. United States*, 550 U.S. 192, 203 (2007) ("The main risk of burglary arises … from the possibility of a face-to-face confrontation between the burglary and a third party …. Attempted burglary poses the same kind of risk.").

The basis for the ACCA enhancement in Mata's case could have been either the enumerated-offense clause or the residual clause.

Given that the Texas burglary statute is broader than generic burglary, the residual clause would have been a stronger foundation for the ACCA enhancement, and more likely to stick.

Putting all of this together yields a straightforward result: (1) Mata's "claim … relies on" *Johnson*—and he thus passes through the second-or-successive gateway—because his assertion that his sentence is unconstitutional depends on that new precedent; (2) his claim is meritorious because the district court may have based his ACCA sentence on the residual clause; and (3) Mata is entitled to post-conviction relief because no other provision of ACCA can currently sustain his sentence. For these reasons, this case is an excellent vehicle for resolving the court of appeals' conflict.

CONCLUSION

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

Respectfully submitted.

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