NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20____

James Alton Turner, 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 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 elements clause 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.

DIRECTLY RELATED PROCEEDINGS

United States v. Turner, 6:2004-cr-02012, (N.D. Iowa) (criminal proceedings), judgment entered January 28, 2005.

United States v. Turner, 05-1347 (8th Cir.) (direct criminal appeal), judgment entered December 15, 2005, rehearing denied January 31, 2006.

Turner v. United States, 6:07-cv-2041 (28 U.S.C. § 2255 proceeding), judgment entered July 15, 2010.

Turner v. United States, 10-3660 (8th Cir.) (appeal from denial of § 2255 petition), judgment entered March 8, 2011.

Turner v. United States, 16-2274 (8th Cir.) (request for leave to pursue second or supplemental § 2255 petition), judgment entered December 7, 2017.

Turner v. United States, 6:16-cv-02050 (N.D. Iowa) (second or successive 28 U.S.C. § 2255 proceeding), judgment entered May 11, 2018.

Turner v. United States, 18-2478 (8th Cir.) (appeal from denial of second or successive § 2255 petition), judgment entered July 23, 2019.

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IN THE SUPREME COURT OF THE UNITED STATES

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James Alton Turner, Jr. - Petitioner,

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

PETITION FOR WRIT OF CERTIORARI

The petitioner, James Alton Turner, Jr. ("Mr. Turner "), 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. 18-2478, which affirmed the district court's denial of Mr. Turner's 28 U.S.C. § 2255 petition challenging his Armed Career Criminal status. Mr. Turner did not request rehearing by the panel or rehearing en banc.

OPINION BELOW

The order of the district court denying Mr. Turner's § 2255 petition is provided in Appendix A. The Eighth Circuit Court of Appeals' order affirming the judgment of the district court is provided in Appendix B.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Mr. Turner's case under 18 U.S.C. § 3231. The district court denied Mr. Turner's 28 U.S.C. § 2255 petition on May 11, 2018, and granted a certificate of appealability. (Appendix A). Mr. Turner timely filed a notice of appeal in the Eighth Circuit, which affirmed the district court's judgment on July 23, 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 (2004). 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 June 14, 2004, Mr. Turner entered a plea of guilty to the following charges: (1) possession with intent to distribute marijuana within 1000 feet of a school after a prior drug offense, in violation of 18 U.S.C. §§ 841(a)(1), (b)(1)(D), 851, and 860 (Count One); and (2) possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count Two). (Crim. Doc. 45, 46).[1] On Count Two, Mr. Turner was found to be an Armed Career Criminal, pursuant to 18 U.S.C. § 924(e) (the "ACCA") based on his prior Iowa convictions for second degree burglary, a controlled substance offense, and two instances of second degree robbery. (PSR ¶ 44). Mr. Turner's penalties on Count Two were thus increased from a statutory maximum term of ten years' incarceration under 18 U.S.C. § 924(a)(2) to a mandatory minimum term of fifteen years to a maximum of life under 18 U.S.C. § 924(e). The district court sentenced Mr. Turner to 210 months imprisonment on each of Counts One and Two, run concurrently. (Crim. Doc. 80).

Mr. Turner filed a 28 U.S.C. § 2255 petition on May 19, 2016, requesting relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). On May

[1] In this brief, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. 6:04-cr-02012-LTS 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-02050-LTS will be to "Civ. Doc.", followed by the docket entry number.

23, 2016, because he had previously sought and been denied § 2255 relief on an unrelated issue, he also filed a petition for permission to bring a second or successive § 2255 petition in the Eighth Circuit Court of Appeals. (Eighth Cir. Case No. 16-2274, Entry ID: 4401388). On December 7, 2017, a panel of the Eighth Circuit granted Mr. Turner authorization to pursue his second or successive motion *only* with respect to his ACCA sentence in Count Two. (*Id.* Entry ID: 4608309).

On May 11, 2018, after the issues were briefed by the parties, the district court denied Mr. Turner's § 2255 petition, but granted a certificate of appealability. (App. A, p. 12). Mr. Turner filed a timely notice of appeal with the Eighth Circuit Court of Appeals. (Civ. Doc. 14). A panel of the Eighth Circuit affirmed the district court's decision on July 23, 2019. (App. B).

The Eighth Circuit affirmed the district court's denial of Mr. Turner's § 2255 petition, finding that *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018), controlled. (App. B). In *Walker*, a panel decision issued just a few months after the district court's denial of Mr. Turner's § 2255 petition, the Eighth Circuit held that a § 2255 movant must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Id.* According to the Eighth Circuit, "[t]he 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 [§ 2255] motion."[2] *Id.* Mr. Turner did not request rehearing by the panel or rehearing en banc.

REASONS FOR GRANTING THE WRIT

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. Turner failed to prove that he was sentenced using the residual clause of the ACCA; and (2) current law interpreting the elements clause of the ACCA may not be considered in determining whether Mr. Turner's Iowa second degree robbery convictions qualified as violent felonies thereunder at the time of his sentencing. As the clear split of authority amongst the Courts of Appeals demonstrates, these issues are clearly debatable among jurists of reason.

[2] The Eighth Circuit denied panel and en banc rehearing of its *Walker* decision on November 26, 2018. (Eighth Cir. Case No. 16-4284, Entry ID: 4728863). The Supreme Court denied Walker's petition for certiorari on June 17, 2019. (U.S. Supreme Court Case No. 18-8125).

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. Turner's claim for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the district court held that "movant's sentence is not called into question by *Johnson* because the court did not need to rely on the residual clause to determine that movant qualified as an armed career criminal." (App. A, p. 9). On appeal, the Eighth Circuit affirmed, relying on a recently decided panel decision in *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018). (App. B, p. 3).

In *Walker*, as in the instant case, the record was silent as to which clause of the ACCA the district court relied upon to determine that Mr. Turner's prior Iowa second degree robbery convictions constituted qualifying predicate "violent felonies." *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. Turner 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. Turner'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. Turner's sentencing proceeding in 2005, defendants had no incentive to challenge their prior convictions as being non-qualifying under the elements clause. 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. Turner 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 elements or residual clause to conclude that Mr. Turner's prior second degree robbery offenses qualified as violent felonies under the ACCA. The uncertainty in Mr. Turner'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 ELEMENTS 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.

Mr. Turner was twice convicted in 1987 of second degree robbery. While the PSR states his conviction was for "Robbery 2nd Degree While Armed with a Dangerous Weapon," the Iowa Code in effect at the time does not list such an offense. Rather, the statutes in effect at the time provide:

> A person commits a robbery when having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property: 1. Commits an assault upon another. 2. Threatens another with or purposely puts another in fear of immediate serious injury. 3. Threatens to commit immediately any forcible felony. It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

Iowa Code 711.1 (1987). Pursuant to § 711.2, a "robbery" will be deemed to be in the first degree if, in the course of the robbery, "the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." Pursuant to § 711.3, "[a]ll robbery which is not robbery in the first degree is robbery in the second degree."

Mr. Turner's conviction records demonstrate that he was convicted of "Robbery in the Second Degree," in violation of Iowa Code § 711.3. The addition of the language "While Armed with a Dangerous Weapon" in Mr. Turner's conviction documents and the PSR is clearly surplusage. Indeed, based on the plain statutory language of Iowa Code §§ 711.1–711.3, the fact that Mr. Turner may have *actually* possessed a firearm during the course of his offense is entirely irrelevant to his second degree robbery convictions. More significantly, it is wholly irrelevant to an analysis of whether Iowa second degree robbery is a crime of violence under the ACCA's elements clause because the Iowa Supreme Court has repeatedly recognized that the numbered components of § 711.1 are alternative *means* of committing Iowa robbery, meaning the Iowa robbery statute is indivisible. *See State v. Heard*, 636 N.W.2d 227, 232 (Iowa 2001) (finding sufficient evidence for the defendant's "conviction for robbery under the assault alternative in section 711.1(1)" (emphasis added)); *State v. Hickman*, 623 N.W.2d 847, 850–51 (Iowa 2001) (reviewing a trial instruction that listed the three numbered components as alternative means on the second element of proof for robbery); *State v. Watkins*, 463 N.W.2d 15, 16 (Iowa

1990) (finding that the district court erred by changing a jury instruction on robbery to include the "alternative means" of assault where the jury had already begun deliberating). Because the Iowa robbery statute is indivisible, the categorical approach – which "looks only to the statutory definition of the prior offenses, and *not to the particular facts underlying those convictions*" – must be employed to determine if Mr. Turner's second degree robbery conviction is a violent felony under the ACCA's elements clause. *Taylor*, 495 U.S. at 600 (emphasis added); *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (finding that the categorical approach must be applied when a "statute sets out a single (or 'indivisible') set of elements to define a single crime").

To satisfy the ACCA's elements clause, the prior offense must have as an element the use, attempted use, or threatened use of "physical force" against another person. 18 U.S.C. § 924(e)(2)(B)(i). In *Curtis Johnson v United States*, 559 U.S. 133 (2010), the Supreme court held that "physical force" means "*violent* force" – that is, "strong physical force," which is "capable of causing physical pain or injury to another person." 559 U.S. at 140; *see also United States v. Williams*, 690 F.3d 1056, 1067 (8th Cir. 2012). In its more recent decision in *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019), the Supreme Court held that "'physical force' or 'force capable of causing physical pain or injury' includes the amount of force necessary to overcome a victim's resistance." Accordingly, if there existed a "realistic probability" that Mr. Turner could have been convicted under the 1987 Iowa second

degree robbery statute based upon a means that did not necessarily require the requisite use of physical force, the statute cannot qualify as an ACCA predicate. *See United States v. Peppers*, 899 F.3d at 232-33 (when applying the categorical approach the court must "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense.'") (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)).

Pursuant to Iowa Code §§ 711.1 and 711.3, Mr. Turner need only have satisfied two elements to be convicted of second degree robbery: (1) he must have acted with intent to commit a theft; and (2) in the course of carrying out his intent, he must have committed assault *or* threatened to put another in fear of immediate serious injury *or* threatened to commit a forcible felony. *See* Iowa Crim. Jury Inst. No. 1100.2. Clearly the first element does not require "the use, attempted use, or threatened use of physical force against the person of another," as required by the ACCA's elements clause. Thus, if any of the alternative *means* of committing the second element do not satisfy the elements clause, Mr. Turner's second degree robbery convictions cannot qualify as ACCA predicates under the elements clause. Here, the "committed assault" alternative of the second element does not require the "use, attempted use, or threatened use of physical force."

At the time of Mr. Turner's conviction, "assault" was defined the same as it is today: A person commits an assault when, without justification, the person does any of the following:

> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
>
> 3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1 (1987). Like § 711.1, Iowa's assault statute is indivisible because Iowa does not require jury unanimity as to the particular manner in which an act violates the statute. *See State v. Beck*, 854 N.W.2d 56, 66 (Iowa Ct. App. 2014) (referring to §§ 708.1(1) and (2) as "modes" of committing assault); *State v. Shiltz*, No. 02-1908, 2004 WL 136375, at *2 (Iowa Ct. App. 2004) (finding that the Iowa assault statute defines alternative means of committing the same crime and unanimity as to the specific means employed is not required). Accordingly, the "commits assault" alternative of Iowa's robbery statute can be satisfied if a defendant engages in an "insulting or offensive" touching, or even if he merely places someone in fear of an insulting or offensive touching. Under Supreme Court and Eighth Circuit case law, this is insufficient to meet the element clause's requirement of "physical force." *See, e.g.*, *Curtis Johnson*, 559 U.S. at 140–42

(finding Florida battery to be overbroad because it prohibits "actually and intentionally touching" another person, which could be achieved simply by an unwanted touching); *United States v. Ossana*, 638 F.3d 895, 900 (8th Cir. 2011) (finding Arizona's assault statute overbroad because it could be violated "with any degree of contact"); *see also United States v. Jones*, No. 04-362, 2016 WL 4186929, at *4 (D. Minn. Aug. 8, 2016) (finding that Iowa simple assault lacks an element of use, attempted use, or threatened use of force).

The government argued to the district court that Mr. Turner cannot rely on *Mathis* or *Descamps* because those decisions do not provide an independent constitutional basis for attacking movant's sentence. (App. A., p. 4). To be clear, Mr. Turner does not argue, and has never argued, that *Mathis* or *Descamps* provide an independent constitutional basis for granting relief. Nonetheless, those decisions are 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. Turner's sentencing judge conducted a proper categorical analysis of Iowa's 1987 second degree robbery statute, it could not have found a conviction thereunder to be a qualifying ACCA predicate under the ACCA's elements clause. Since 1987 Iowa robbery 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. Turner was an Armed Career Criminal, because that was the only legally accurate basis on which it could have done so.

The district court's reliance only on the state of the law "at the time of sentencing," (App. A, p. 6), in deciding whether Mr. Turner 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 elements 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. Turner 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 second degree robbery offenses qualified as a violent felonies under the ACCA.[3] 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

[3] There does not appear to have been any binding Eighth Circuit case law at the time of Mr. Turner's sentencing that would require a conclusion that his 1987 Iowa second degree robbery convictions were violent felonies 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.

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 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 elements 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. Turner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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