No. 19-

IN THE

Supreme Court of the United States

GLEN B. CLAY AKA GLENN B. CLAY,
Petitioner,

v.

UNITED STATES,
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

LINDSAY N. WALTER
SIDLEY AUSTIN LLP
555 W 5TH STREET
Los Angeles, CA 90013
(213) 896-6000

JEFFREY T. GREEN *
SIDLEY AUSTIN LLP
1501 K STREET, NW
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

Counsel for Petitioner

* Counsel of Record

December 5, 2019

QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's decision that it could not consider on the merits Mr. Clay's successive motion based upon *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), because Mr. Clay was unable to demonstrate on a silent record that it was more likely than not that he had been sentenced under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Glen B. Clay, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

The underlying criminal prosecution was *United States* v. *Clay*, Criminal No. 3:07-CR-73TSL-LRA, in the Southern District of Mississippi. Petitioner appealed his conviction and sentence with the Fifth Circuit, docketed as *United States* v. *Clay*, No. 08-60554. The Fifth Circuit affirmed the District Court's judgment on June 4, 2009. Petitioner sought writ of certiorari, docketed as *Clay* v. *United States*, No. 09-6232. This Court denied Mr. Clay's petition on October 13, 2009. Petitioner moved to vacate his sentence under § 2255 on October 20, 2010, docketed as *Clay* v. *United States*, Criminal No. 3:07-CR-73TSL-LRA/Civil Action No. 3:10-CV-589TSL. Petitioner moved to proceed *in forma pauperis* on appeal, Criminal No. 3:07-CR-73TSL-LRA/Civil Action No. 3:10-CV-589TSL, and appeal was denied, No. 13-60112 (5th Cir. April 19, 2013). Petitioner's request for a certificate of appealability, Criminal No. 3:07-CR-73TSL-LRA/Civil Action No. 3:10-CV-589TSL, was denied. The motion for authorization was docketed as *In re: Glen B. Clay*, No. 16-60244, in the Fifth Circuit.

This petition is directly related to the following proceedings: Petitioner again moved to vacate his sentence under § 2255 on June 28, 2016, docketed as Criminal No. 3:07-CR-73TSL-LRA/Civil Action No. 3:16-CV-523. The Southern District of Mississippi denied Petitioner's motion on July 11, 2017. Petitioner moved to appeal the denial of the § 2255 motion and requested a certificate of appealability on July 31, 2017. The appeal was docketed as No. 17-60538 (5th Cir. Aug. 23, 2017). The Fifth Circuit entered judgment on April 18, 2019 and the opinion was issued on April 25, 2019. Petitioner petitioned for re-

hearing en banc on June 17, 2019, and the petition was denied on July 8, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Glen B. Clay respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The related opinion of the United States Court of Appeals for the Fifth Circuit is reported at 921 F.3d 550 (5th Cir. 2019) and is reproduced in the appendix to this petition at 1a–12a ("Pet. App."). The order of the Fifth Circuit denying rehearing en banc is unreported and reproduced at Pet. App. 57a–58a. The judgment of the United States District Court for the Southern District of Mississippi is reprinted at Pet. App. 51a–56a.

JURISDICTION

The Fifth Circuit entered judgment on April 18, 2019, and issued an opinion on April 25, 2019. The court denied Mr. Clay's petition for rehearing en banc on July 8, 2019. On September 20, 2019, Justice Alito extended the time to file the petition until December 5, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This case involves the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). This case also involves 28 U.S.C. §§ 2244 and 2255. These provisions are reprinted at Pet. App. 60a–64a.

INTRODUCTION

The ACCA's residual clause is unconstitutionally vague, *Johnson* v. *United States*, 135 S. Ct. 2551

(2015), and this Court's holding in *Johnson* applies retroactively. *Welch* v. *United States*, 136 S. Ct. 1257 (2016). At issue here is the level of proof a federal prisoner must provide to the district court in order to bring a retroactive, successive *Johnson* motion.

Following this Court's decisions in *Johnson* and *Welch*, Mr. Clay sought to challenge his ACCA-enhanced sentence. If Mr. Clay's enhanced sentence was imposed based upon the ACCA's residual clause, then Mr. Clay's sentence is unconstitutional under *Johnson*. But complicating Mr. Clay's challenge is a predicament facing many movants bringing successive motions under *Johnson*: Mr. Clay's sentencing record is silent as to which ACCA clause the sentencing court employed to enhance his sentence. Further complicating his challenge is the fact that his sentencing record is ambiguous as to the specific underlying crimes qualifying him for a substantially enhanced sentence.

As the Fifth Circuit recognized, Mr. Clay showed that the sentencing court may have relied upon the residual clause. Pet. App. at 10a–11a. Upon this showing, he would be entitled to a favorable ruling on the merits in the Second, Third, Fourth, and Ninth Circuits. The Fifth Circuit, however, deemed this showing insufficient and agreed with the district court that it precluded consideration of the merits of Mr. Clay's *pro se* motion, Pet. App. 10a, which argued that his sentence was imposed in reliance upon the residual clause and was unconstitutional under *Johnson*, and that the Mississippi burglary statute did not qualify as an enumerated offense under the ACCA.[1] Pet. App. 66a–68a.

---

[1] The Fifth Circuit articulates these issues slightly differently than Mr. Clay: (1) "whether a prisoner seeking the district

The Fifth Circuit's affirmance of the district court's decision that it lacked jurisdiction exacerbates an entrenched division among the approaches taken by the circuit courts to a review of a successive § 2255 motion under *Johnson*, in at least two ways.

First, the Fifth Circuit granted Mr. Clay "tentative" authorization to file a successive § 2255 motion. The Fifth Circuit instructed the district court to "dismiss the § 2255 motion without reaching the merits if it determine[d] that Clay ha[d] failed to make the showing required to file such a motion," Pet. App. 30a, and in doing so interpreted the generally accepted, though non-textual, gatekeeping role of the district court as jurisdictional hurdle. This "gatekeeping" approach, however, does not exist in the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") text relating to federal prisoners. Were the circuit courts to adhere to the statute, federal prisoners' successive motions need only contain a new constitutional rule, like that in *Johnson*.

Second, the Fifth Circuit's insistence that Mr. Clay prove during the gatekeeping stage that his sentence was "more likely than not" based upon the residual clause is an adoption of the most stringent of the standards other circuit courts apply in similar contexts. This standard required Mr. Clay to prove the impossible. Even the Fifth Circuit admits that this barrier is irreconcilable with Fourth and Ninth Circuit precedent. It is also at odds with the standards

---

court's authorization to file a successive § 2255 motion raising a *Johnson* claim must establish that he was sentenced under the residual clause to show that the claim relies on *Johnson*"; and (2) "whether any *Johnson* error at sentencing was harmless because Clay's 1982 house burglaries constituted enumerated burglary under the ACCA." Pet. App. 3a–4a.

applied by the Second Circuit and Third Circuit, and with recent Sixth Circuit precedent.

The Fifth Circuit also acknowledged that its application of the stricter standard was outcome determinative. Mr. Clay's claim contains, or relies upon, the new constitutional rule in *Johnson*, and Mr. Clay satisfied the burden of proof imposed by a subset of circuit courts.

STATEMENT OF THE CASE

Prior to *Johnson* and *Welch*, on December 10, 2007, Mr. Clay was convicted of being a felon in possession of a firearm. Pet. App. 51a, 121a. On June 5, 2008, Mr. Clay was given an enhanced sentence under the ACCA of 235 months (19 years and 7 months) imprisonment, 3 years supervised release, and was issued a $100 special assessment. *Id* at 115a–16a. On June 11, 2008, the court entered judgment in Mr. Clay's case. *Id* at 51a.

The ACCA applies if a felon-in-possession has three or more convictions for "violent felonies" committed on separate occasions. 18 U.S.C. § 924(e). Before his current offense, Mr. Clay had been convicted of nine felonies in Mississippi state court. Three of those convictions—for armed robbery and aggravated assault—arose from a single "occasion[]" and thus could count only as one of the necessary predicates. § 924(e)(1). The remaining felonies were all described as "burglaries" under Mississippi law: two for "business burglary" and four for "house burglary." Pet App. at 6a–7a. At the time Mr. Clay was sentenced, there were at least six Mississippi statutes criminalizing some form of "burglary": Miss. Code Ann. § 97-17-19 (1972) ("Burglary; breaking and entering dwelling); § 97-17-21 (1972) ("Burglary: inhabited dwelling"); § 97-17-23 (1972) ("Burglary; inhabited dwell-

ing—breaking in at night while armed with deadly weapon"); § 97-17-25 (1972) ("Burglary; breaking out of dwelling"); § 97-17-27 (1972) ("Burglary; breaking inner door of dwelling at night"); § 97-17-29 (1972) ("Burglary; breaking inner door of dwelling by one lawfully in house"). As the Fifth Circuit recognized, "[n]ot all of these statutes comport with the definition of 'generic burglary' in the enumerated offenses clause." Pet. App. 10a. Even so, the probation officer, defense counsel, prosecutor, and the sentencing court all apparently agreed that at least two of those convictions counted as violent felonies, as then defined. *Id.* at 6a–7a ("[B]ecause Clay's counsel conceded at his hearing that the ACCA applied, there was no occasion for the sentencing court to clarify how the requisite 'violent felonies' were tabulated.").

Accepting this concession, the sentencing court applied the ACCA without specifying exactly which prior convictions it classified as "violent felonies," nor did it identify the specific ACCA clause or clauses it relied upon to make that determination. At that time, the ACCA defined "violent felony" in three ways: (1) as a crime containing "an element the use, attempted use, or threatened use of physical force against the person of another" (the "elements clause" or "force clause"); (2) "burglary, arson, or extortion, [or] involves use of explosives" (the "enumerated offenses clause"); or (3) as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B). If the defendant had at least three violent felony convictions committed on separate occasions, the default statutory penalty of 0–10 years was replaced with a mandatory minimum of "no less than fifteen years."

Even though the parties and the court did not identify which part of the "violent felony" definition applied, a well-informed practitioner (or sentencing court) would have reason to believe the residual clause played a role. First, this Court had already held that a federal sentencing court "determining the character of an admitted burglary" must consider only "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard* v. *United States*, 544 U.S. 13, 16 (2005); *accord United States* v. *Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005) (recognizing that the district court must consult these documents before applying a prior conviction enhancement: the sentencing "court was not permitted to rely on the [presentence report's] characterization of the offense" alone). The sentencing court seemed to rely entirely upon Mr. Clay's presentence report at sentencing; it thus could not lawfully have applied the elements clause. See Pet. App. 115a ("But the situation here is, yes, some older crimes, but the magnitude of this criminal history that causes Mr. Clay to be in this guideline range, four house burglary convictions, three business burglaries, armed robbery, aggravated assault, escape; and the court is not convinced that a sentence below the guideline range is in order.").

Second, this Court has described residential burglary as the prototypical residual-clause crime in multiple cases. In *Taylor* v. *United States*, 495 U.S. 575, 600 n.9 (1990), this Court noted that offenses "similar to generic burglary" could count as violent felonies under that catch-all provision, even if they failed to satisfy the enumerated-offense clause. In *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004), the Court noted the "substantial risk that the burglar will use

force", and in *James* v. *United States*, 550 U.S. 192, 203 (2007), the Court held that even *attempted* residential burglary was a residual-clause violent felony. In the absence of state-court conviction records necessary to apply the enumerated offense of "burglary," then there is a strong possibility that someone was thinking about the residual clause.

However, sentencing courts are not required—and many elect not—to specify which clause of § 924(e)(2)(B) they rely on to impose the additional sentence. *United States* v. *Taylor*, 873 F.3d 476, 481–82 (5th Cir. 2017). Thus, when Mr. Clay appealed his conviction and sentence, he had no basis to challenge the district court's application of the ACCA. Pet. App. 48a–50a. Instead, Mr. Clay's direct appeal raised a number of other challenges, including the calculation of his criminal history points for his burglary convictions from 1983, the reasonableness of his minimum sentence, the admission of the ATF agent's testimony, the sufficiency of the evidence, and the jury instructions. *Id*.

Mr. Clay's previous attempt at collateral attack similarly did not include a challenge to the court's invocation of the ACCA, and it similarly failed. His initial § 2255 motion set forth a number of grounds for relief, and asserted that "defense and appellate counsel failed to argue and raise each and every ground [set forth in his motion] [. . .] thus, she was constitutionally ineffective at all critical stages of the court's proceedings." Pet. App. 34a, 104a. The court reviewed Mr. Clay's grounds in his § 2255 motion as "being brought within the context of an ineffective assistance of counsel claim," and denied his motion. *Id.* at 36a, 46a. The Fifth Circuit dismissed his appeal for want of prosecution because he failed to comply with

the certificate of appealability requirements. *Id.* at 72a.

On May 26, 2016, the Fifth Circuit authorized Mr. Clay to file a successive 28 U.S.C. § 2255 motion challenging his ACCA conviction. The grant of authorization noted that the record "contains no documentation of Clay's predicate offenses and does not rule out the possibility that he was sentenced under the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii)." Pet. App. 29a. Mr. Clays' proposed § 2255 motion "contain[ed]" and "relied on" the new constitutional rule of *Johnson*, which was previously unavailable to Mr. Clay and which this Court made retroactive in *Welch*. Mr. Clay thus satisfied all the requirements of § 2255(h)(2), as well as any requirement imposed by § 2244(b)(2)(A).

But the district court disagreed. The Fifth Circuit described its authorization as "tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Clay has failed to make the showing required to file such a motion." *Id.* at 30a. The district court decided that it had no jurisdiction, because Mr. Clay could not prove on a silent record that the sentencing judge "more likely than not" imposed the enhanced sentence based upon the residual clause. Mr. Clay "asked the district court to obtain 'appropriate adjudicative records' during the process of evaluating his petition . . . [but,] [t]he district court denied Clay's successive petition without obtaining the requisite documents." *Id.* at 3a. In the alternative, the district court decided that Mr. Clay's residential burglary convictions were equivalent to generic, enumerated burglary.

The Fifth Circuit affirmed the district court's determination that it lacked jurisdiction, and did not consider the district court's alternative merits ruling.

Even though Mr. Clay's successive motion was "certified as provided in section 2244 by a panel of the appropriate court of appeals"—the only statutory prerequisite under § 2255(h)—the court nonetheless again imposed a jurisdictional gatekeeping requirement for the district court. *Id.* at 30a (citing *Reyes-Requena* v. *United States*, 243 F.3d 893, 899) (5th Cir. 2001). The Fifth Circuit also endorsed the harshest extant standard for successive movants, and required Mr. Clay to prove that the sentencing court "more likely than not" enhanced his sentence under the residual clause. Not for lack of trying, Mr. Clay was unable to meet that burden. Even though the court "may have" enhanced his sentence under the residual clause, Mr. Clay's silent record has foreclosed his relief.

Accordingly, on April 25, 2019, the Fifth Circuit affirmed the district court's decision to dismiss Mr. Clay's motion for lack of jurisdiction. *Id.* at 12a. On June 19, 2019, Mr. Clay petitioned the Fifth Circuit for rehearing. The Fifth Circuit denied the petition on July 8, 2019.

Mr. Clay has served approximately 153 months of his ACCA-enhanced, 235-month sentence.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURTS ARE DIVIDED OVER THE STANDARD A MOVANT MUST MEET TO SHOW A SUCCESSIVE § 2255 MOTION CONTAINS THE NEW CONSTITUTIONAL RULE ANNOUNCED IN *JOHNSON*

A. Courts are imposing a second gatekeeping inquiry that is absent in AEDPA's text.

Mr. Clay's § 2255 motion contained a rule asserted under *Johnson*, a new constitutional rule made retroactive by the Supreme Court in *Welch*, that was previously unavailable, and, therefore, Mr. Clay satisfied the gatekeeping requirements in § 2255(h)(2). See *Belk* v. *United States*, No. 01-CR-180-LTS, 2017 WL 3614446, at *4 (S.D.N.Y. Aug. 22, 2017), *aff'd*, 743 F. App'x 481 (2d Cir. 2018) ("It took *2015 Johnson*'s vitiation of the residual clause as unconstitutionally vague to provide the necessary grounds for this Petition, and the constitutional determination in *2015 Johnson* is a linchpin of his merits argument.").

Section 2255 applies to prisoners, like Mr. Clay, in federal custody, *i.e.*, those who are "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 . . . ." § 2255(a). Therefore, Mr. Clay's successive motion needed to be "certified as provided in section 2244 by a panel of the [Fifth Circuit 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."

§ 2255(h)(2) (emphasis added). Mr. Clay met this standard. Pet. App. 29a–30a.

Section 2244 governs the "finality of determination" for *habeas corpus* applications. The statutory remedy provided by § 2255 has almost completely displaced the common-law *habeas corpus* remedy for federal prisoners. See 28 U.S.C. § 2255(e); but see *Prost* v. *Anderson*, 636 F.3d 578, 584 (10th Cir. 2011) (recognizing that a federal prisoner may file a *habeas corpus* application under § 2241, rather than § 2255, in "extremely limited circumstances"). In many places, § 2244 is explicitly limited to a "habeas corpus application *under section 2254*," that is, to prisoners in custody under a *state court* judgment. For example, § 2244(b) requires that "a second or successive habeas corpus application *under section 2254* that was not presented in a prior application" be dismissed, unless "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." § 2244(b)(2)(A) (emphasis added).

The "new rule of constitutional law" provision in § 2244 thus differs slightly from the "new rule of constitutional law" provision in § 2255: the former requires the successive petition to "rel[y] on" and the latter requires the successive petition to "contain" the new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable to the movant.

However, based upon § 2255(h)'s general reference to § 2244 and § 2244(a)'s general reference to § 2255, courts have incorporated additional requirements from § 2244 into § 2255. The Sixth Circuit recently held that the reference to § 2244 in § 2255 refers only to the process of certification provided in § 2244. *Wil-*

liams v. *United States*, 927 F.3d 427, 435 (6th Cir. 2019) ("[Section] 2255(h)'s reference to § 2244's certification requirement is much more sensibly read as referring to the portions of § 2244 that actually concern the certification procedures."); see, *e.g.*, 28 U.S.C. § 2244(b)(3)(A)–(B), (D)–(E) (providing for the appropriate court, number of judges, timeframe, unreviewability of the order).

But many circuit courts incorporate more than § 2244's certification process into § 2255, including § 2244(b)(4), which provides that the "district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." § 2244(b)(4); see, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 897–98 (5th Cir. 2001) ("[F]inding that §§ 2244(b)(3)(C) and 2244(b)(4) have been incorporated into § 2255"). There is no parallel provision in § 2255.

On this basis, most, if not all, of the circuit courts permit the district court to assume a second gatekeeping role for federal prisoners, like Mr. Clay.[2] The Fifth Circuit's authorization granting Mr. Clay's successive motion is a straightforward example. The au-

---

[2] In some instances, and in Mr. Clay's case, the district court has interpreted the gatekeeping inquiry as a jurisdictional prerequisite to reaching the merits of a motion. The Sixth Circuit recently held that § 2244(b)(4) and the "substantive requirements of § 2255" do not impose a jurisdictional bar. *See Williams*, 927 F.3d at 434, 438. The Sixth Circuit in *Williams* declined to state whether the opening clause of § 2255, "[A] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals," is jurisdictional, because the authorization in that case (as in Mr. Clay's case) had been granted. *Id.* at 434 n.4.

thorization provided, "Because he has made a prima facie showing that he satisfies the requirements of § 2255(h), IT IS ORDERED that the motion for authorization is GRANTED." Pet. App. 29a. This alone satisfies the requirements of § 2255(h)—"A second or successive motion must be certified [. . .] to contain [. . .] a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(2). But the Fifth Circuit's authorization continued, reading an untenable standard into § 2255: "This grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Clay has failed to make a showing required to file such a motion."[3]

The Fifth Circuit's gatekeeping requirement is unmoored from AEDPA's text as it applies to federal prisoners. See *Bennett* v. *United States*, 119 F.3d 468, 469 (7th Cir. 1997) ("By 'prima facie showing' we understand (without guidance in the statutory language or history or case law) simply a sufficient showing of possible merit to warrant a fuller exploration by the

---

[3] The Fifth Circuit cited § 2255(h), § 2244(b)(3)(C), and *Reyes-Requena*. In *Reyes-Requena*, the Fifth Circuit incorporated into § 2255 both (i) § 2244(b)(3)(C), "which provides that a petitioner must make a 'prima facie showing' that his or her motion satisfies § 2255's requirements for second or successive motions in order to obtain permission from a court of appeals to file such a motion," and (ii) § 2244(b)(4), which provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section," and in turn requires dismissal of a successive motion unless 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," in § 2244(b)(2)(A). 243 F.3d at 898–90, 899 n.11.

district court."). As the Fifth Circuit explained, "[a] [federal] prisoner making a successive § 2255 motion must pass through two jurisdictional 'gates' in order to have his motion heard on the merits." *United States* v. *Bullard*, 765 F. App'x 81, 82 (5th Cir. 2019) (per curiam). Under both § 2244(b) and § 2255(h), "[a] second or successive habeas motion must meet strict procedural requirements before a district court can properly reach the merits of the application." Pet. App. 4a (citing *United States* v. *Wiese*, 96 F.3d 720, 723 (5th Cir. 2018)). The first "gate" is making a "prima facie showing" that the motion "relies on a new claim," including as a result from "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," quoting both § 2244(b) and § 2255(h). See also *Bullard*, 765 F. App'x at 82 ("Bullard successfully passed through the first gate by obtaining this court's permission to file a successive § 2255 motion based on his prima facie showing that his motion relies on the new and retroactive constitutional rule set forth in *Johnson*.").

The second "gate" is that the movant "must actually prove at the district court level that the relief he seeks relies upon either a new, retroactive rule of unconstitutional law or on new evidence." Pet. App. 4a; see also *Bullard*, 765 F. App'x at 82 ("To pass through the second gate, Bullard was obligated to establish jurisdiction in the district court by *actually proving* that he is seeking relief based on *Johnson*'s new and retroactive constitutional rule." (emphasis added)).

Most other circuit courts take a similar two-step approach as the Fifth Circuit. See*, e.g.*, *In re Matthews*, 934 F.3d 296, 301 (3d Cir. 2019) ("Whether the Petitioners' crimes fall under the elements clause or the challenged residual clause is itself a merits in-

quiry."); *Walker* v. *United States*, 900 F.3d 1012, 1014–15 (8th Cir. 2018), (concluding that the appellate court's "grant is tentative" and that the movant "also must satisfy the district court that his claim in fact 'relies on' a new rule.") *cert. denied*, 139 S. Ct. 2715 (2019); *United States* v. *Washington*, 890 F.3d 891, 895 (10th Cir. 2018) ("[T]he court of appeals' grant of authorization is only a 'preliminary determination' indicating the claim has 'possible merit to warrant a fuller exploration by the district court.'"), *cert. denied*, 139 S. Ct. 789 (2019); *In re Hoffner*, 870 F.3d 301, 307 (3d Cir. 2017) ("[Section 2244(b)] provides that after our authorization, a district court shall consider anew whether the petitioner has 'show[n] that the claim satisfies the requirements of this section.'" (citing 28 U.S.C. § 2244(b)(3) & (4))); *Moore* v. *United States*, 871 F.3d 72, 78 (1st Cir. 2017) ("A 'prima facie showing' at the certification stage is merely 'a sufficient showing of possible merit to warrant a fuller exploration by the district court.'"); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016) ("Embry need only make a 'prima facie' showing of an entitlement to relief, 28 U.S.C. § 2244(b)(3)(C), and the district court is free to decide for itself whether Embry's claim relies on a new rule made retroactive by the Supreme Court."); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) ("[W]e conclude that Mr. Moss has made a *prima facie* showing that his application satisfies §§ 2255(h) and 2244(b)(3)(C). This is a limited determination on our part, and [. . .] '[t]he district court is to decide the [§ 2255(h)] issue[s] fresh, or in the legal vernacular, *de novo*.'" (citing *Jordan* v. *Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007))); *Bennett*, 119 F.3d at 470 ("The grant 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)."); *Belk*, 2017 WL 3614446, at *4 ("The Petition thus is not procedurally barred, it was timely filed, and Petitioner has satisfied the requirements for a second or successive Section 2255 motion. The Petition is properly before the Court.").

This additional gatekeeping role—whether jurisdictional or as a part of the merits analysis—is at odds with the statutory text and intent of a *Johnson* claim. "Section 2255(h)(2) does not require that qualifying new rule be 'the movant's *winning* rule,' but 'only that the movant rely on such a rule.'" *Hoffner*, 870 F.3d at 309 (citing *In re Arnick*, 826 F.3d 787, 790 (5th Cir. 2016) (Elrod, J., dissenting)).[1] Circuit courts have equated § 2255's text that a successive petition "contain" a new rule of constitutional law with § 2244's text that a successive motion show that the claim "relies on" a new rule of constitutional law. See, *e.g.*, *In re Arnick*, 826 F.3d 787, 789 (5th Cir. 2016) ("[T]he two provisions codify 'identical' legal standards, *In re Elwood*, 408 F.3d 211, 213 (5th Cir. 2005), and we have used language in the two provisions interchangeably."). Even though § 2255 may have been "intended to mirror § 2254," *Davis* v. *United States*, 417 U.S. 333, 344 (1974), automatic equation of "contain" and "relies on" here is problematic.

Section 2244(b), which refers only to § 2254, expressly relates to state prisoners. For those standards in § 2244 that expressly relate to state prisoners, such as § 2244(b)(2)(A), "Congress said what it meant and meant what it said." See *Williams*, 927 F.3d at 435 (citing *Loughrin* v. *United States*, 573 U.S. 351, 360 (2014)); see also *In re Bradford*, 830 F.3d 1273, 1277 n.2 (11th Cir. 2016) ("[Section] 2255(h) cannot

and does not incorporate § 2244(b)(2)."); *United States* v. *Villa-Gonzalez*, 208 F.3d 1160, 1164 n.4 (9th Cir. 2000) (per curiam) ("[I]n the context of a section 2255 motion, the phrase 'the requirements of this section' in section 2244(b)(4) refers to the requirements set out in section 2255, not section 2244(b)(2)."). In contrast to § 2244(b)(2)(A), § 2255(h), applicable to federal prisoners, requires a successive movant to show only that the motion "contains" a new rule of constitutional law.

Congress could well have intended to impose different standards for state and federal prisoners. AEDPA was enacted to promote "comity, finality, and federalism," but "two of those three considerations fall aside when it comes to federal prisoners." *Williams*, 927 F.3d at 436 n.6. "[I]t is not absurd to understand Congress as having intended to provide a marginally less restrictive regime for federal prisoners (whose § 2255 motions threaten no comity or federalism interests)." *Id.*

Requiring prisoners like Mr. Clay to "prove" that the sentencing court was actually thinking about the residual clause thus may impose an improper burden. Section 2255 provides a remedy where "the sentence was imposed in violation of the Constitution or laws of the United States" or where "the sentence was in excess of the maximum authorized by law." 28 U.S.C. § 2255(a). As long as the ACCA's residual clause remained intact, Mr. Clay was unable in good-faith to challenge his ACCA sentence. Even assuming the district court mistakenly relied upon the ACCA's enumerated offense clause, the residual clause provided an alternative basis to sustain the sentence. It was only *after* this Court struck down the residual clause that Mr. Clay had a chance to correct any erroneous reliance on the remainder of the statute.

Mr. Clay cannot point to anything in the sentencing transcript or other records to explain which sort of error the court was committing. Even if they had recognized that the burglaries were non-generic, Mr. Clay's sentencing and direct-appeal lawyers surely understood that the residual clause would apply. Mr. Clay thus has no record to show which ACCA clause his sentencing judge relied upon. Section 2255 requires only that a successive petition "contain" a rule of constitutional law. Mr. Clay's successive petition clearly does, as he would not have been able to bring a successive motion without this Court's decision in *Johnson*. Requiring more "would effectively turn the gatekeeping analysis into a merits determination." *United States* v. *Peppers*, 899 F.3d 211, 223 (3d Cir. 2018) ("[S]trict though Congress intended it to be, AEDPA surely was not meant to conflate jurisdictional [or gatekeeping] inquiries with analyses of the merits of a defendant's claims.").

B. Courts are imposing different, outcome determinative burdens on movants during the gatekeeping stage.

This Court held the residual clause unconstitutionally vague. The ambiguity in Mr. Clay's sentence only exacerbates the constitutional risk. See *Johnson*, 135 S. Ct. at 2560 ("Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process."). In *Welch*, the sentencing court explicitly concluded that it was relying on both the elements clause and the residual clause in applying ACCA. 136 S. Ct. at 1262. The Eleventh Circuit, on direct appeal, affirmed and held that the conviction qualified under the residual clause, but did not decide whether conviction could qualify as a violent felony under the elements clause. *Id.* at 1263. This Court applied *John-*

son retroactively, suggesting that a *Johnson* error can exist even when the sentencing court based the enhanced sentence on more than just the residual clause. *Id.* at 1268. In a silent record case there is even less of an indication that the sentencing judge was considering either or both of the other clauses.

Despite this Court's posture in *Welch*, there is disagreement by the circuit courts as to what a successive movant must show to avail himself of the new constitutional rule in *Johnson*. The Second, Third, Fourth, and Ninth Circuits require a successive movant to show only that his enhanced sentence "may have" been imposed pursuant to the unconstitutional residual clause of the ACCA. In contrast, the First, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits require a successive movant to prove something more.[4]

---

[4] The Fifth Circuit in *Clay* articulated the circuit court split as between the Fourth and Ninth Circuits, where "a prisoner need only show that the sentencing court 'may have' invoked the residual clause," and the First, Third, Sixth, Eighth, Tenth, and Eleventh Circuits, where "a prisoner must show that it is 'more likely than not' that the sentencing court invoked the residual clause." Pet. App. 5a. The Fifth Circuit seems to have mistakenly read the Third Circuit's decision in *Peppers*, in which the court held that "the evidence demonstrates that Peppers *may have* been sentenced under the ACCA's residual clause, and that, in turn, is enough to demonstrate that his motion to correct his sentence relies on the new rule of constitutional law announced in *Johnson*. The district court thus properly determined that it had jurisdiction to reach the merits of Peppers's § 2255(h)(2) motion." 899 F.3d at 224 (emphasis added). The court noted that on the merits, "it is appropriate to require the movant to prove by a preponderance of the evidence that his sentence depends on the ACCA's residual clause." *Id.* at 235 n.21. Additionally, the Fifth Circuit's decision predated the Sixth Circuit's decision in *Williams*, in which the Sixth Circuit announced that it remains undecided as to "what lesser showing a movant might be required to make where there is no affirma-

The Second Circuit has held that a district court should "proceed to the merits of [a § 2255] claim" where "it is unclear from the record whether [the movant's] sentence was enhanced pursuant to the ACCA's residual clause" since such a "claim does rely on the new rule of constitutional law announced in *Johnson*." *Belk* v. *United States*, 743 F. App'x 481, 482 n.4 (2d Cir. 2018) (summary order); see also *Brunstorff* v. *United States*, 754 F. App'x 48, 49 (2d Cir. 2019) (summary order) ("[The court] assume[d] without deciding that Brunstorff was sentenced using the ACCA's residual clause" where Brunstorff argued that the district court "may have relied on [the residual] clause when sentencing him."), *cert. denied*, 140 S. Ct. 254 (2019). In *Belk*, the district court found that the Pre-Sentence Investigation Report "did not indicate the precise subsection or clause of the ACCA under which the Petitioner's prior convictions qualified as 'violent felonies.'" *Belk*, 2017 WL 3614446, at *2. The sentencing court stated "[t]here is no dispute that each of the prior convictions cited in the indictment was a violent felony within the meaning of Section 924(e)," but did not specify which part of § 924(e) covered the prior convictions. *Id.*

Similarly, the Third Circuit determined that a successive motion under § 2255(h) "only requires a peti-

---

tive evidence that he was sentenced under a different clause than the residual clause." *Williams*, 927 F.3d at 439 n.7. This signifies a retreat from the standard previously espoused by the Sixth Circuit, which required a movant to show that it is "more likely than not 'that the district court relied only on the residual clause in sentencing' him." *Id.* at 439. The Sixth Circuit circumscribed the applicability of this standard to cases in which there is "affirmative evidence" that the sentencing court invoked a clause other than the residual clause at sentencing. *Id.* at n.7. The confusion among the circuit courts seems to have compelled this clarification.

tioner to show that his sentence *may be* unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court." *Peppers*, 899 F.3d at 221 (emphasis added). Peppers demonstrated that "he *may have* been sentenced under the residual clause of the ACCA." *Id.* The plea agreement and charging document did not specify what part of the ACCA applied. *Id.* at 217. Additionally, "[a]t the plea colloquy, the District Court and the parties discussed only in broad terms whether the prior convictions fell within the ACCA," not which part of the ACCA. *Id.*

The Fourth Circuit also determined "when an inmate's sentence *may have been* predicated on application of the now-void residual clause and, therefore, *may be* an unlawful sentence under the holding in [*Johnson*], the inmate has shown that he 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A)." *United States* v. *Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (emphasis added). This remains true, according to the Fourth Circuit, "regardless of any non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence." *Id.* What matters is the clause, stated or unstated, the sentencing court used to enhance the individual's sentence. *Id.*; see also *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016).

The Ninth Circuit, in assessing a § 2255(h) motion, decided that "[g]iven [the] background legal environment and the sentencing record, it is unclear whether the district court relied upon the residual clause in determining that the Florida robbery convictions qualified as violent felonies. Accordingly, Defendant's claim 'relies on' [*Johnson*]." *United States* v. *Geozos*, 870 F.3d 890, 897 (9th Cir. 2017).

Successive movants in the First, Fifth, Eighth and Tenth Circuits must satisfy a more onerous standard. There, a movant must show that it is *more likely than not* that the sentencing court relied upon the residual clause. The First Circuit has held that a "habeas petitioner bears the burden of establishing that it is *more likely than not* that he was sentenced solely pursuant to ACCA's residual clause." *Dimmott* v. *United States*, 881 F.3d 232, 243 (1st Cir. 2018) (emphasis added), *cert. denied subnom*, *Casey* v. *United States*, 138 S. Ct. 2678 (2018). Likewise, the Fifth Circuit in the case challenged here "[held] that a prisoner . . . must show that it was more likely than not that he was sentenced under the residual clause." Pet. App. 12a.

The Eighth Circuit "agree[s] with those circuits that require a movant to show 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; see also *Washington*, 890 F.3d at 900–01 (determining that because "neither the relevant background legal environment nor the materials before the district court reveal that the court more likely than not used the residual clause for either conviction in sentencing Defendant. . . . Defendant has not established by a preponderance of the evidence that his motion 'relies on' *Johnson*.").

The Eleventh Circuit has adopted a similar standard, concluding that "[i]f it is just as likely that the sentencing court relied on [ACCA's] 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, 1222 (11th Cir. 2017), *cert. denied* 139 S. Ct. 1168 (2019). [5]

II. REQUIRING A SHOWING THAT A SENTENCE "MORE LIKELY THAN NOT" WAS BASED UPON THE RESIDUAL CLAUSE IMPOSES A HIGHER STANDARD THAN OTHERWISE APPLIED IN INSTANCES OF UNCERTAINTY

By concluding that the "more likely than not" standard "best 'comports with the general civil standard for review and with the stringent and limited approach of [AEDPA] to successive habeas applications,'" the Fifth Circuit read into the text the most burdensome standard that only a subset of circuit courts have imposed. Pet. App. 12a (quoting *United States* v. *Weise*, 896 F.3d 720, 724 (5th Cir. 2018)). This standard is inconsistent with the approach courts have taken to account for uncertainty in other criminal contexts.

---

[5] The D.C. Circuit has yet to rule on the standard a movant must meet to satisfy that his challenge relies on *Johnson* for a successive § 2255 motion. There is a case currently pending before the court. *United States* v. *West*, 314 F. Supp. 3d 223 (D.D.C. 2018), *appeal filed*, No. 18-3063 (D.C. Cir. Aug. 31, 2018). Likewise, the Seventh Circuit has yet to rule on the exact issue of what standard needs to be met to show a movant's claim sufficiently contains, or relies on, the new constitutional rule in *Johnson*.

An analogous situation is that in which a jury returns a general verdict that may have been based upon an unconstitutional ground. In *Stromberg*, the jury returned a general verdict, which "did not specify the ground upon which it rested." *Stromberg* v. *California*, 283 U.S. 359, 368 (1931). The jury had been instructed "that their verdict might be given with respect to any one of [three purposes set forth in the statute], independently considered." Recognizing that it was "impossible" to determine under which "clause of the statute the conviction was obtained," and, "if any of the clauses in question is invalid under the Federal Constitution," this Court held that the conviction could not stand. *Id.*

The situation is similar here—the sentencing judge could have enhanced Mr. Clay's sentence based upon any of the three ACCA clauses. But rather than following this Court's principle set forth in *Stromberg*, the Fifth Circuit imposed an impossibly high standard. Fairness dictates, just as "where 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) (citing *Stromberg*, 283 U.S. at 368), that where the Constitution prohibits a sentence on a particular ground, the constitutional guarantee is violated by a sentence that may have rested on that ground. The issue is whether the sentence is constitutional without the residual clause. There is no way of knowing with certainty where there is no indication from the record.

Additionally, even in those circuit courts where successive movants have to prove more than a possibility that their sentence may have been imposed based upon the residual clause recognize that it would be "arbitrary" to treat *Johnson* claimants "dif-

ferently than all other § 2255 movants claiming a constitutional violation." *Beeman*, 871 F.3d at 1224; see also *Walker*, 900 F.3d at 1015 (same). In the present legal landscape, not even all *Johnson* claimants are treated equally—some need only prove a mere possibility that the residual clause was used to enhance their sentence; others face an incredible burden of proof.

This Court recently took issue with the idea of "consign[ing] 'thousands' of defendants to prison for 'years—potentially decades,' not because it is certain or even likely that Congress ordained those penalties, but because it is merely 'possible' Congress might have done so. In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty." *United States* v. *Davis*, 139 S. Ct. 2319, 2335 (2019) (citation omitted). Similarly here, the Fifth Circuit has affirmed additional jail time on a "speculative possibility" that Mr. Clay was sentenced constitutionally.

The "more likely than not" standard adopted by the Fifth Circuit additionally violates the rule of lenity. See *In re Chance*, 831 F.3d at 1341 n.5 ("Nothing requires courts to construe federal statutes *against* an inmate based on a concern that it would be 'inequitable' to grant relief instead. The presumption of lenity goes in the other direction."). The rule of lenity applies when a statute is ambiguous. *United States* v. *Hayes*, 555 U.S. 415, 429 (2009).

In the face of a silent record, a subset of circuits are inverting the deeply rooted principle that "guilt of a criminal charge be established by proof [by the government] beyond a reasonable doubt." *In re Winship,* 397 U.S. 358, 361 (1970). This rule is "indispensable" because the individual's "liberty" is at stake. *Id.* at 364. Instead of the government having to show that

the sentencing court did not rely on the residual clause, courts impose the burden on the movant to prove by a preponderance of the evidence—even where no evidence exists—that his sentence was more than likely based upon the residual clause. This is an exceptionally burdensome requirement, because the ACCA does not require a sentencing judge to specify which clause of the ACCA the enhancement rests on. *Winston,* 850 F.3d at 682; *Peppers,* 899 F.3d at 223–24. The Third Circuit recognized that "[a] defendant's *Johnson* claim should not be unfairly tethered to the discretionary decision of his sentencing judge [to specify which clause he relied upon] . . . . The government's rule results in randomly unequal treatment of § 2255 claims." *Peppers*, 899 F.3d at 224. The Fourth Circuit agreed, explaining that the more likely than not standard "penalize[s] a movant for a court's discretionary choice [of whether to specify the clause on which it relied]." *Winston*, 850 F.3d at 682.

III. THIS CASE IS THE APPROPRIATE VEHICLE TO ADDRESS THE DISPARATE APPROACHES TO SUCCESSIVE *JOHNSON* PETITIONS TAKEN BY THE CIRCUIT COURTS

Mr. Clay's record is silent because the sentencing court here, as often happens elsewhere, did not provide any indication of the ACCA clause used to enhance Mr. Clay's sentence.[6] Moreover, Mr. Clay's

---

[6] The sentencing judge also reviewed Mr. Clay's § 2255 motion; however, the district court explained that the court "was not called upon to explicitly state under which of the ACCA's three definitions [Mr. Clay's prior] convictions qualified as 'violent felonies.'" Pet. App. 22a. The district court did not avail itself of the insight that may have been gleaned from having also imposed Mr. Clay's sentence. *Id.* ("In any event, defendant has failed to show that he is entitled to relief on the merits.").

presentence report does not provide ample information about his predicate offenses, confounding his ability to use to his benefit the legal background and later legal developments. As the Fifth Circuit recognized, "[w]ithout conviction records, this court cannot conclusively determine which [burglary] statute(s) Clay was convicted of violating—and, accordingly, whether his prior convictions for 'house burglary' qualified as 'violent felonies' under the ACCA's enumerated offense clause." Pet. App. 10a. Mr. Clay sought discovery of these records as a *pro se* litigant; the district court in response determined that it had no jurisdiction. Thus, other avenues through which a movant may show that his sentence was based upon the residual clause were closed to Mr. Clay. See *Williams*, 927 F.3d at 440–41, 444 (enumerating the "sources of evidence for assessing whether a movant was sentenced for a relevant predicate conviction under the ACCA's residual clause: [. . .] (1) The sentencing record[;] (2) The legal background[;] (3) Informed decisionmakers[;] (4) Nature of the predicate offense[; and] (5) Later legal developments (at least if highly predictable).").

Most critically, the Court's decision here will have life-altering impact on movants, including Mr. Clay, who have served more than the maximum sentence for conviction as a felon in possession of a firearm, a crime that carries a maximum penalty of 10 years. The ACCA imposes a mandatory minimum of 15 years for the same defendant who has three qualifying prior convictions. The possibility of serving an unconstitutionally long sentence has real, life-altering impact.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LINDSAY N. WALTER
SIDLEY AUSTIN LLP
555 W 5TH STREET
Los Angeles, CA 90013
(213) 896-6000

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

JEFFREY T. GREEN *
SIDLEY AUSTIN LLP
1501 K STREET, NW
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Petitioner

* Counsel of Record

December 5, 2019