NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SHAWNDELL LEE HARRISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A second or successive motion to vacate, set aside, or correct a federal sentence may be filed if it "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). In order to meet this standard, is a movant asserting that his sentence is unconstitutional under *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), required to show that his motion relies *solely* on that new and retroactive rule of constitutional law, as the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held? Or may he satisfy the standard by showing that the new and retroactive rule of constitutional law provides a potential basis for relief, as the Third, Fourth, and Ninth Circuits have held?

DIRECTLY RELATED PROCEEDINGS

Judgment was entered in the underlying criminal prosecution on August 8, 2011, in *United States v. Harrison*, No. 5:10-cr-00243-F-1 (W.D. Okla.), and the direct appeal of that conviction was dismissed on November 22, 2011, in *United States v. Harrison*, No. 11-6214 (10th Cir.). The court of appeals granted authorization to file a second or successive motion under 28 U.S.C. § 2255 on Apr. 27, 2016, in *In re: Shawndell Lee Harrison*, No. 16-6059 (10th Cir.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Shawndell Lee Harrison, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 22, 2019.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Harrison*, No. 17-6119 (10th Cir. Aug. 22, 2019), is found in the Appendix at 1a. The Appendix also contains the court of appeals order denying rehearing, *id.* at 11a; the district court order denying Mr. Harrison's § 2255 motion on the merits, *id.* at 12a; the transcript of Mr. Harrison's August 5, 2011, sentencing hearing, *id.* at 20a; and the order of the court of appeals authorizing Mr. Harrison to file a second or successive motion under 28 U.S.C. § 2255, *id.* at 51a.

JURISDICTION

The court of appeals issued its decision on August 22, 2019, and the petition for rehearing was denied on December 23, 2019. An application to extend the time to petition for certiorari to May 21, 2020, was granted on March 18, 2020. *See Harrison v. United States*, No. 19A1007 (Sup. Ct.). This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2255(h)(2) provides:

> 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.

The full text of 28 U.S.C. § 2255; 18 U.S.C. § 924; and Oklahoma Stat., tit. 21, § 644 are included in the Appendix at 53a.

STATEMENT OF THE CASE

Mr. Harrison pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), in November 2010. Ordinarily, that charge carries a maximum penalty of 10 years' imprisonment. The statutory sentencing range is increased from 15 years to life imprisonment, however, where a defendant has three qualifying convictions under the Armed Career Criminal Act (ACCA). 18 U.S.C. § 924(e)(1). At the time, a conviction could qualify as an ACCA predicate in three ways: (1) as an offense that "has an element the use, attempted use, or threatened us of physical force against the person of another" under the "elements clause," *id.* § 924(e)(2)(B)(i); (2) as an offense enumerated in the "enumerated offenses clause," *id.* § 924(e)(2)(B)(ii); or (3) as an offense "otherwise involv[ing] conduct that present[ed] a serious potential risk of physical injury to another" under the "residual clause," *id.*

At sentencing, the government contended that the ACCA applied because Mr. Harrison had three qualifying convictions. Relevant here, two of those convictions

were for the crime of Oklahoma Domestic Abuse Assault and Battery (DAAB), in violation of Okla. Stat., tit. 21, § 644(C). Mr. Harrison objected that this offense was not an ACCA predicate because it was a common-law battery offense that could be accomplished through "touching rather than violence." Appendix at 32a-33a; *see Curtis Johnson v. United States*, 559 U.S. 133, 139 (2010) (holding that common-law battery offenses requiring just "offensive touching" do not require the violent physical force necessary to qualify as an ACCA predicate under the elements clause). The government responded that even if the offense did not require the use of violent force, as necessary to qualify as an ACCA predicate under the elements clause, it remained an ACCA predicate under the residual clause. *See* Appendix at 31a ("[T]his conduct at the very least would fall under the residual clause.").

The district court recited the language of the elements clause, the residual clause, and the Oklahoma statute defining DAAB, and ruled: "I have no trouble at all concluding that these offenses, these domestic abuse offenses committed by this defendant, do fall within Section 924(e) as a definitional matter in terms of an analysis of the elements of the crime." Appendix at 33a-34a. The district court therefore sentenced Mr. Harrison to a 188-month sentence under the Armed Career Criminal Act.

The next year, Mr. Harrison filed his first motion under 28 U.S.C. § 2255, which was denied.

In 2016, this Court invalidated the residual clause in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson*), holding that it violated the Due Process Clause because it "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." *Id.* at 2557. The next year, this Court held that *Johnson*'s invalidation of the residual clause was a constitutional rule "that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

Shortly thereafter, Mr. Harrison obtained authorization to file a second or successive motion under 28 U.S.C. § 2255. Appendix at 51a. Proceeding *pro se*, Mr. Harrison argued that his sentence should be vacated because his Oklahoma convictions for DAAB no longer qualified as ACCA predicates after *Johnson*.[1] The district court denied the motion on the merits, concluding that those convictions remained valid ACCA predicates under the elements clause. *See id.* at 19a.[2] Mr. Harrison appealed.

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[1] The Federal Public Defender's Office was appointed to represent Mr. Harrison on appeal.

[2] After the Tenth Circuit decided his case, the sentencing judge reversed course and acknowledged that Oklahoma DAAB is no longer an ACCA predicate after *Johnson*. *See* Order at 2, *United States v. Brown*, No. 5:18-cr-00255-F-1, ECF No. 45 (W.D. Okla. Dec. 18, 2019) (Friot, J.) ("[T]he court concludes, based on the authorities currently available, that Mr. Brown's convictions for felony domestic abuse under 21 O.S. § 644(C) are not predicate convictions for purposes of the elements clause of the ACCA.").

The Tenth Circuit vacated the district court order and directed it to dismiss the § 2255 motion, holding that Mr. Harrison had "failed to satisfy the threshold requirements in 28 U.S.C. § 2255(h), which requires him to demonstrate that the district court relied on the residual clause." Appendix at 2a. The court of appeals found that the district court had relied on *both* the residual clause and the elements clause to find that Mr. Harrison's Oklahoma convictions for DAAB were ACCA predicates, and that he accordingly could not show that it was more likely than not that his motion relied *solely* on the residual clause. *See id.* at 9a. "Consequently," the Tenth Circuit concluded, Mr. Harrison "ha[d] failed to satisfy the requirements of section 2255(h)." *Id.* at 10a.

REASONS FOR GRANTING THE WRIT

I. The courts of appeal are openly divided on whether § 2255(h)(2) requires proof that the motion relies solely on the relevant new and retroactive rule of constitutional law.

There is a firmly entrenched circuit split over what a defendant must do in order to satisfy § 2255(h)(2). Along with the Tenth Circuit, the First, Fifth, Sixth, Eighth, and Eleventh Circuits require the movant to prove that he was sentenced *solely* under the residual clause, such that his claim relies exclusively on the asserted new and retroactive rule of constitutional law established in *Johnson*, in order to obtain authorization to proceed under § 2255(h)(2). *See Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018) ("We hold that to successfully advance a *Johnson II* claim on

collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to the ACCA's residual clause."); *United States v. Clay*, 921 F.3d 550, 558-59 (5th Cir. 2019) (finding § 2255(h)(2) requirement unmet where movant could not prove that "the sentencing court relied solely on the residual clause" in imposing his sentence); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) (holding that the proponent of a second or successive § 2255 motion bears the burden of establishing "that the district court . . . relied only on the residual clause"); *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018) (holding that the proponent of a second or successive § 2255 motion must show that "the residual clause provided the basis for an ACCA enhancement," and that "[i]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed" to meet his burden); *Ziglar v. United States*, 757 F. App'x 886, 888-89 (11th Cir. 2018) (on a second or successive § 2255 motion, "a movant is tasked with 'proving th[e] historical fact' that he was sentenced 'solely per the residual clause.'" (quoting *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017)).

The Third, Fourth, and Ninth Circuits, by contrast, have held that a movant can meet his burden under § 2255(h)(2) by showing that his sentence may have been based on the residual clause, such that the new and retroactive rule of constitutional law set forth in *Johnson* provides him with a potential basis for relief. *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."); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (holding that an inmate can satisfy § 2255(h)(2) by showing that his "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 II*"); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (holding that inmate may satisfy § 2255(h)(2) by showing thatds the sentencing court "may have" relied on the residual clause).

This question has fully percolated through the courts of appeal, which remain deeply divided. Only this Court can resolve the dispute.

II. This question is recurring and important.

The meaning of § 2255(h)(2) is a question of exceptional importance. The courts of appeals decide whether to authorize second or successive § 2255 motions on a frequent and regular basis. *E.g.*, *In re Williams*, 898 F.3d 1098, 1104 (11th Cir. 2018) (Wilson, J., concurring) ("Between 2000 and 2017, [the Eleventh Circuit] decided 10,565 [second or successive] applications, disposing of at least 300 each year."); *see also* Admin. Office of the United States Courts, *Federal Judicial Caseload Statistics 2019* (last visited May 19, 2020), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 (reporting that 63 percent of the 5,010 original

proceedings and miscellaneous applications filed in the courts of appeal in the 12 months ending on March 31, 2019, "involved second or successive motions for writs of habeas corpus"). In the years after *Johnson* was decided, literally thousands of second or successive § 2255 motions were filed asserting *Johnson* claims alone. *See In re Williams*, 898 F.3d at 1104 (the Eleventh Circuit received 3,588 applications for second or successive § 2255 motions "in the wake of *Johnson* between the years of 2015 and 2017").

The divide in authority is, moreover, enormously consequential for federal criminal defendants like Mr. Harrison. The way in which a circuit construes § 2255(h)(2) is frequently outcome determinative, as it was in this case. Failure to pass this procedural threshold, moreover, precludes review of the motion on the merits—even where, as here, it is clear that the underlying ACCA sentence is illegal. *See* Order at 2, *Brown*, No. 5:18-cr-0255-F-1, ECF No. 45 (W.D. Okla. Dec. 18, 2019) (Mr. Harrison's sentencing judge holding that Oklahoma DAAB is not, in fact, an ACCA predicate). If the Tenth Circuit decision remains in place, Mr. Harrison will be required to spend at least 68 additional months in prison solely because he was sentenced in the Western District of Oklahoma instead of, for instance, the Western District of Virginia.

Given the centrality of § 2255(h)(2) to the daily functioning of the federal courts, and the outcome-determinative role it plays in many cases, certiorari is warranted.

III. The Tenth Circuit rule is wrong.

The Tenth Circuit rule is wrong for at least two reasons.

First, it is unmoored from the text of the statute. Section 2255(h)(2) directs that a second or successive motion be authorized if it "*contain[s]* . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (emphasis added). The Tenth Circuit, however, construes this language to require proof that the motion *relies solely* on the new and retroactive rule. *See* Appendix at 9a; *see also, e.g.*, *Potter*, 887 F.3d at 788 (holding that the proponent of a second or successive § 2255 motion bears the burden of establishing "that the district court . . . relied only on the residual clause"). But to "contain" means "[t]o have as a component or constituent part; include." *American Heritage Dictionary of the English Language* (5th ed. 2019).[3] The plain meaning of "contain" precludes any interpretation of the statute that requires *sole* or *exclusive* reliance on the asserted new and retroactive rule of constitutional law.

[3] https://ahdictionary.com/word/search.html?q=contain

Second, it is divorced from the reality of federal criminal practice. Where multiple potential grounds exist for a particular legal decision, a court will not always specify which forms the "real" basis of its decision. Indeed, it was common for sentencing courts to apply the ACCA without specifying which clause of the statute was being used to identify each prior conviction as a valid predicate, as "[n]othing in the law require[d] a [court]" to do so. *Winston*, 850 F.3d at 682 (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). In this case, for example, the sentencing court simply stated that it had "no trouble at all concluding that these offenses . . . do fall within Section 924(e)," without identifying the particular clause involved. Appendix at 34a. Even if a defendant believed that one of the potential bases for the sentencing court's decision was wrong, there would have been no reason to appeal or otherwise seek clarification of the decision, as any error would have been harmless in light of the residual clause. *Cf. United States v. Smith*, 652 F.3d 1244, 1247 (10th Cir. 2011) (finding that any error in classifying Oklahoma assault and battery conviction was an ACCA predicate under the elements clause was harmless because the "crime qualifies on its face for enhancement under . . . the residual clause"). Rather than recognize these realities, the Tenth Circuit rule effectively requires second or successive movants to reconstruct a decision-making process that may never have occurred in the first place, all based on an atextual reading of § 2255(h)(2).

This Court should instead adopt the rule used in the Third, Fourth, and Ninth Circuits, and hold that a defendant satisfies § 2255(h)(2) by showing that his ACCA sentence may have been based on the residual clause. That rule is more consistent with the language of § 2255(h)(2), which requires only that the second or successive motion "contain" a new and retroactive rule of constitutional law. It is also more consistent with the reality of federal sentencing practice, which did not require judges to identify the specific basis of an ACCA sentence.

In the context of a jury verdict, this Court has held that "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). Put another way, where an unconstitutional ground provides a potential basis for a jury's verdict, that verdict contains the constitutional error. The same principle should apply here. Where, as here, the unconstitutional residual clause provided a potential basis for the district court's original sentencing decision, that sentence contains the constitutional error identified in *Johnson*. Contrary to the conclusion reached by the Tenth Circuit, that is sufficient to satisfy § 2255(h)(2).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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May 21, 2020