NO. _____

In The
Supreme Court of the United States

LEWIS MCKENZIE,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CHRISTINE A. FREEMAN
EXECUTIVE DIRECTOR
MACKENZIE S. LUND
Counsel of Record
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, AL 36104
(334) 834-2099
Mackenzie_S_Lund@fd.org

May 20, 2020

QUESTION PRESENTED

In *Johnson v. United States*, this Court invalidated the residual clause of the Armed Career Criminal Act, but left intact the two remaining definitions of a "violent felony." In Mr. McKenzie's case, the sentencing court did not specifically indicate whether his prior convictions qualified as "violent felonies" under the residual clause, the enumerated offenses clause, or some combination of the two. To prove that his claim falls within the scope of the new constitutional rule announced in *Johnson*, a 28 U.S.C. § 2255 movant must prove that his sentence was based upon the now-defunct residual clause.

The question presented is: when the record is silent as to which enhancement clause applied, what showing is a § 2255 movant required to make to satisfy the requirements of § 2255(h)(2) and prove he is entitled to relief on the merits of his *Johnson* claim?

As the Third, Fourth, and Ninth Circuits have held, may he satisfy the requirements of § 2255(h)(2) by showing that his sentence "may have" been based on the residual clause? Once the § 2255 movant passes through the gatekeeping requirement in § 2255(h)(2), may the court consider modern, existing precedent when ruling on the merits of the *Johnson* claim?

Or, as a majority of Circuits have held, must the § 2255 movant bear the burden of showing by a preponderance of the evidence that he was sentenced solely upon the residual clause at the time of his sentencing hearing?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes

PETITION FOR A WRIT OF CERTIORARI

Mr. Lewis McKenzie respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's order denying Mr. McKenzie an application for a certificate of appealability is unpublished. The order is included in Petitioner's Appendix. Pet. App. 1a.

The district court's opinion and order denying Mr. McKenzie's 28 U.S.C. § 2255 motion is unpublished. *McKenzie v. United States*, 2019 WL 2023727 (M.D. Ala. 2019) (unpublished). The opinion and order is included in Petitioner's Appendix. Pet. App. 1b.

The Eleventh Circuit's order granting Mr. McKenzie leave to file an authorized successive 28 U.SC. § 2255 motion is unreported, but reproduced in the Petitioner's Appendix. Pet. App. 1c.

JURISDICTION

The Eleventh Circuit's order in this case was issued on January 2, 2020. *See* Pet. App. 1a. No rehearing was sought, rendering the petition for writ of certiorari due on or before April 1, 2020. However, due to public health concerns relating to the COVID-19 pandemic, this Court entered an order, extending the deadline to file the petition to 150 days from the date of the lower

court judgment. The certiorari petition is now due on June 1, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year 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.

18 U.S.C. § 924(e)(2)(B).

Section 2255(h)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> . . .
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

28 U.S.C. 2244(b)(4) provides:

> (4) 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.

28 U.S.C. § 2244(b)(4).

STATEMENT OF THE CASE

A. Legal Background.

Ordinarily, a defendant convicted of possession of a firearm by a convicted felon is subject to a statutory maximum penalty of 10 years' imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2). However, under the ACCA, a defendant convicted under 18 U.S.C. § 922(g) is subject to a mandatory minimum sentence of 15 years' imprisonment if he has three prior convictions for a "violent felony" or "serious drug offense." 18 U.S.C. § 924(e)(1). A "violent felony" is any offense punishable by a term of imprisonment exceeding one year 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.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is referred to as the "elements clause," while the second prong contains the "enumerated" offenses

and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

In *Johnson v. United States,* 135 S. Ct. 2551, 2558-63 (2015), this Court held that the residual clause of the ACCA is unconstitutionally vague because of the combined, two-fold indeterminacy surrounding how to estimate the risk posed by a crime, and how much risk is required for a crime to qualify as a violent felony. This Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated offenses clause of the ACCA's definition of a violent felony. *Id.* The following term, this Court held that *Johnson* announced a new, substantive rule of constitutional law that has retroactive effect to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

28 U.S.C. § 2255 expressly authorizes a federal prisoner to file a motion collaterally attacking his sentence on the ground that "it was imposed in violation of the Constitution or laws of the United States," or that it was "in excess of the maximum authorized by law." 28 U.S.C. § 2255(a). However, a federal prisoner who wishes to file a second or successive § 2255 motion is required, first, to move the court of appeals for an order authorizing the district court to consider such a motion. *See* 28 U.S.C. § 2255(h), *cross-referencing* 28 U.S.C. § 2244. The appellate court will grant such authorization only if the prisoner makes a *prima facie* showing that his proposed claim satisfies the

requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C). Section 2255(h) provides, in relevant part, that:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> > . . . (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h)(2). However, the appellate court's threshold determination that an applicant has made a prima facie showing that he has met the statutory criteria of § 2255(h) does not conclusively resolve that issue. *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357 (11th Cir. 2007) (involving the functionally equivalent § 2244(b)(2) successive application standard applicable to state prisoners). Once the prisoner has filed his authorized successive § 2255 motion, "the district court not only can, but must, determine for itself whether those requirements are met." *Id.*

However, this Court has yet to address what showing a § 2255 movant is required to make to satisfy the requirements of § 2255(h)(2) and prove his *Johnson* claim. This silence has led the federal Courts of Appeals to fall into a state of disarray when, as is often the case, the sentencing court did not specifically discuss whether a prior conviction qualified as a violent felony under the residual clause, the enumerated offenses clause, the elements clause, or some combination of the three. Accordingly, there is now an open,

entrenched circuit split concerning the issue presented by these "silent record" cases.

B. Facts and Procedural History.

In October 2002, a federal grand jury returned a superseding indictment against Mr. McKenzie, charging him with: (1) possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1) (Count One); (2) distribution of 0.75 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count Two); (3) possession with intent to distribute approximately 9.03 grams of cocaine and 0.31 grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Count Three); and (4) carrying a firearm during and in relation to the drug trafficking crime charged in Count Three, in violation of 18 U.S.C. § 924(c)(1) (Count Four). As to Count One, the indictment alleged, specifically, that Mr. McKenzie was subject to an enhanced, 15-year statutory mandatory penalty under the Armed Career Criminal Act ("ACCA") because he had been "convicted of three serious, felony drug offenses and three serious violent felony offenses and a combination of serious felony drug offenses and violent felony offenses."

Mr. McKenzie proceeded to trial, where a jury convicted him of all four counts.

The Presentence Investigation Report ("PSI") determined that Mr. McKenzie qualified as an armed career criminal under the ACCA and U.S.S.G. § 4B1.4(a). In reaching this conclusion, the PSI did not identify which of Mr.

McKenzie's prior convictions qualified as ACCA predicate offenses, or which enhancement clause applied. However, according to the probation officer's description of Mr. McKenzie's criminal history, Mr. McKenzie had eight adult criminal convictions:

(1) misdemeanor third degree assault, in 1985, in Alabama;

(2) third degree burglary, in 1986, in Alabama case no. CC85-442;

(3) distribution of marijuana, in 1986, in Alabama case no. CC86-104;

(4) vehicle theft, in 1989, in Florida;

(5) simple possession of marijuana, in 1991, in Alabama;

(6) simple possession of cocaine, in 1991, in Alabama;

(7) second degree arson, in 1991, in Alabama case no. CC91-123; and

(8) misdemeanor third degree assault, in 2000, in Alabama.

Thus, the record is clear that the only convictions that could have supported application of the ACCA enhancement were: (1) Mr. McKenzie's 1986 conviction for Alabama third degree burglary; (2) his 1986 conviction for Alabama distribution of marijuana; and (3) his 1991 conviction for Alabama second degree arson.[1] With respect to Mr. McKenzie's conviction for second

[1] Mr. McKenzie's 1991 convictions for simple possession of cocaine and simple possession of marijuana could not have qualified as ACCA predicates, because they were not "serious drug offenses" within the meaning of the ACCA. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (requiring a serious drug offense under state law to involve manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance and also be punishable by a maximum term of 10 years' imprisonment or longer). Likewise, Mr. McKenzie's two prior convictions for third degree assault could not have qualified as "violent *felonies*," because "[a]ssault in the third degree is a Class A misdemeanor" under Alabama law. Ala. Code § 13A-6-22(b). Similarly, Florida vehicle theft is not enumerated in § 924(e)(2)(B)(ii), nor does it conceivably involve as an element the use of physical force against the person of another.

degree arson, the PSI explained that: "Records reflect that while McKenzie was incarcerated at the Tallapoosa County Jail for Possession of Cocaine he set fire to some cotton material that he pulled out of his mattress." As to the third degree burglary conviction, the PSI noted the following: "Reports reflect that the defendant and Anthony Young broke out a window of a Chevron gas station in Sylacauga, AL, crawled in and stole a quantity of cigarettes."

Application of the ACCA and § 4B1.4 enhancements increased Mr. McKenzie's total offense level to 34. Based on a total offense level of 34 and a criminal history category of VI, the resulting guideline range was 262-327 months on Counts One, Two, and Three, to be followed by a mandatory consecutive 60 months as to Count Four.

Mr. McKenzie was sentenced in July 2003, under the mandatory Guidelines. Mr. McKenzie objected to the application of the ACCA enhancement, arguing that his 1986 burglary conviction should not qualify as a valid ACCA predicate offense. The district court overruled the objection and adopted the factual findings and guideline calculations contained in the PSI. There was no further discussion concerning the ACCA, or which enhancement clause applied. As a result, the sentencing court did not state whether Mr. McKenzie's prior conviction for Alabama third degree burglary constituted a generic burglary within the meaning of the ACCA's enumerated offenses clause, or simply fell within the scope of the catchall residual clause. The court

likewise did not specify which enhancement clause applied to Mr. McKenzie's conviction for Alabama second degree arson.

The district court sentenced Mr. McKenzie to: 277 months as to Count One (the § 922(g) offense); 240 months as to each of Counts Two and Three (the § 841(a) offenses), to be served concurrently; and 60 months as to Count Four (the § 924(c) offense), to be served consecutively. The court explained that it had selected this 337-month total sentence "because the defendant is an armed career criminal . . . "

Mr. McKenzie appealed, but the Eleventh Circuit rejected his arguments, and affirmed his convictions and his 337-month total sentence in 2004. *See United States v. McKenzie*, 91 F. App'x 656 (11th Cir. 2004) (unpublished table decision). Mr. McKenzie filed a petition for a writ of *certiorari*, which this Court denied on May 24, 2004. *McKenzie v. United States*, 541 U.S. 1068 (2004) (Mem.).

In April 2005, Mr. McKenzie filed an initial *pro se* 28 U.S.C. § 2255 motion, seeking to vacate his convictions and his 337-month total sentence. *Inter alia*, Mr. McKenzie argued that the ACCA enhancement was imposed in violation of the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court denied Mr. McKenzie's § 2255 motion on the merits in July 2007, and the Eleventh Circuit declined to issue a certificate of appealability.

Subsequently, on June 26, 2015, this Court decided *Johnson v. United States*, and held that the residual clause of the ACCA was unconstitutionally vague because of the combined twofold indeterminacy surrounding how to estimate the risk posed by a crime, and how much risk was required for a crime to qualify as a violent felony. 135 S. Ct. 2551, 2558-63 (2015).

On May 16, 2016, Mr. McKenzie filed, in the Eleventh Circuit, an application for leave to file a second or successive § 2255 motion based on *Johnson*. The Eleventh Circuit determined that Mr. McKenzie had made the required *prima facie* showing that his *Johnson* claim satisfied the requirements of § 2255(h), and it granted his application based on his claim "that *Johnson* and *Welch* make his ACCA sentence void." The Court explained that:

> McKenzie's ACCA sentence appears to have been based in part on his Alabama convictions for third-degree burglary. Prior to *Johnson*, the Supreme Court interpreted ACCA's "residual clause" to cover state burglary offenses. *See James v. United States*, 550 U.S. 192, 195, 127 S. Ct. 1586, 1590 (2007), *overruled by Johnson*, 135 S. Ct. 2551. Without the "residual clause," ACCA doesn't cover McKenzie's Alabama burglary conviction. *See United States v. Howard*, 742 F.3d 1334, 1349 (11th Cir. 2014) (holding that Alabama burglary does not fall under ACCA's "enumerated crimes clause"). *Howard* applies retroactively on collateral review, so it governs McKenzie's § 2255 proceedings. *See Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016). This means McKenzie has made a *prima facie* showing that his motion "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h).

On June 21, 2016—within one year of *Johnson* for purposes of § 2255(f)(3)—Mr. McKenzie filed an authorized, successive § 2255 motion,

seeking to vacate his ACCA-enhanced total sentence based on *Johnson*. Mr. McKenzie pointed out that the only convictions that could have supported application of the ACCA enhancement were "a conviction in 1985 for Third Degree burglary; a conviction in 1986 for distribution of marijuana; and a conviction in 1991 for Arson Second Degree." Mr. McKenzie argued that, following *Johnson*, he no longer had the requisite three predicate felonies necessary to trigger the ACCA enhancement, and his 277-month sentence exceeded the statutory maximum penalty authorized for Count One.

Nine days later, on June 30, 2016, the government filed a response to Mr. McKenzie's § 2255 motion, conceding that Mr. McKenzie was entitled to resentencing without the ACCA enhancement. The government explained that Mr. McKenzie's prior conviction for third degree burglary no longer qualified as a "violent felony" because the residual clause in § 924(e)(2)(B)(ii) was unconstitutionally vague following *Johnson*. Additionally, this conviction could not alternatively qualify as a "violent felony" under the enumerated offenses clause, because the relevant Alabama statute was both non-generic and indivisible post-*Descamps*.[2] (citing *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014)). Therefore, the government concluded that, "pursuant to prevailing jurisprudence, McKenzie should not be considered an Armed Career Criminal as his third degree burglary conviction no longer qualifies as a violent felony."

[2] *Descamps v. United States*, 133 S. Ct. 2276 (2014).

Approximately one year later, on June 18, 2017, Mr. McKenzie filed a motion for ruling and grant of resentencing. In this pleading, Mr. McKenzie argued that he no longer qualified as an armed career criminal because two of the three predicate convictions used to support application of the ACCA enhancement did not qualify as "violent felonies" without regard to the residual clause. Specifically, Mr. McKenzie argued that his 1991 arson conviction did not qualify as a "violent felony" under the enumerated offenses clause in § 924(e)(2)(B)(ii), because Alabama's second degree arson statute was broader than the generic arson. Mr. McKenzie reiterated his argument that his 1986 conviction for Alabama third degree burglary did not qualify as a "violent felony" under the enumerated offenses clause.

The government responded to Mr. McKenzie's motion, once again concluding that it was "compelled to concede that McKenzie's sentence should be vacated, and that he should be resentenced without the ACCA designation."

Mr. McKenzie replied, arguing that his 1991 arson conviction no longer qualified as a violent felony, under the ACCA or under § 4B1.1. Mr. McKenzie noted that the Alabama statute criminalizing second degree arson—Ala. Code § 13A-7-42—could be violated in two alternative ways: first, by *intentionally damaging* a building by starting a fire; or, second, by intentionally starting a fire *that happens to cause damage* to property in a correctional facility with reckless disregard for the safety of others. Mr. McKenzie argued that he was

not convicted of a generic arson because his 1991 conviction arose under the second prong of this definition.

In September 2017, a divided panel of the Eleventh Circuit decided *Beeman v. United States*, 871 F.3d 1215, 1221-25 (11th Cir. 2017), and held that, to prove a *Johnson* claim, the movant must show that—more likely than not—he was sentenced based *solely* on the residual clause. (emphasis added). As a result, if it was just as likely that the sentencing court relied on the elements clause or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant failed to show that the application of the ACCA was due to use of the residual clause. *Id.*

The *Beeman* panel determined that the key question was one of "historical fact"—that is, was the movant sentenced "solely per the residual clause" at the time of his sentencing hearing. *Id.* at 1224 n.5. Under the *Beeman* rule, cases decided after the movant's sentencing hearing—including cases that categorically exclude a conviction as a valid ACCA predicate offense under the enumerated offenses or elements clause—"cast[] very little light, if any, on the key question of historical fact[.]" *Id.* Thus, according to the *Beeman* panel, this Court's decision in *Descamps*, is unavailable to those seeking relief based on *Johnson* if they happened to be sentenced before *Descamps* was decided. *See id.*

Following supplemental briefing by the parties, a magistrate judge issued a report and recommendation, recommending that Mr. McKenzie's

§ 2255 motion be denied, and his case dismissed with prejudice and without an evidentiary hearing. Specifically, the magistrate judge determined that Mr. McKenzie failed to satisfy the requirements of *Beeman*, and prove on the merits that it was more likely than not that the sentencing court relied solely upon the residual clause in finding that his prior convictions for second degree arson and third degree burglary qualified as "violent felonies" under the ACCA.

The magistrate judge explained that, because the record was silent as to which enhancement clause the sentencing court relied upon, "the record [was] unclear," and "the party with the burden loses." The magistrate judge expressly acknowledged that applying this Court's precedent in *Descamps v. United States,* 570 U.S. 254 (2013), would mandate the conclusion that Mr. McKenzie's prior conviction for Alabama third degree burglary could not qualify as a violent felony under the ACCA's enumerated offenses clause, because Alabama's third-degree burglary statute was both non-generic and indivisible. (citing *Descamps,* 570 U.S. 254 and *Howard*, 742 F.3d 1334). However, because Mr. McKenzie was sentenced pre-*Descamps*, it was possible that the sentencing court might have applied the modified categorical approach to Alabama's indivisible burglary statute—a practice that this Court explicitly disallowed in *Descamps*—and then relied upon the undisputed facts contained in the PSI to determine that Mr. McKenzie was convicted of a generic burglary satisfying the requirements of the enumerated offenses clause.

Mr. McKenzie filed objections to the R&R, challenging the magistrate judge's conclusion that he was not entitled to relief on the merits of his *Johnson* claim.

On May 8, 2019, the district court entered an order denying Mr. McKenzie's § 2255 motion. The court overruled Mr. McKenzie's objections, adopted the R&R, and dismissed the case with prejudice. The district court explained that Mr. McKenzie had failed to carry his burden of demonstrating that he was sentenced solely upon the residual clause, because "[t]his case, like *Beeman,* presents a silent sentencing record as to whether the residual clause played any part in McKenzie's ACCA-enhanced sentence."

The district court reasoned that that Mr. McKenzie's *Johnson* claim failed to "eliminate the applicability of the enumerated offenses to the arson conviction":

> As McKenzie's hypothesis goes, the sentencing court, although unguided by precedent, decided that (1) Alabama's second-degree arson statute is divisible, (2) applied the modified categorical approach, (3) projected that the modified categorical approach would permit consideration of the PSI's undisputed facts, (4) concluded that, on the basis of those facts, McKenzie's conviction could have only been under § 13A-7-42, (5) resolved that subsection (d) does not require an intent to cause property damage, and (6) opined that, therefore, subsection (d) was broader than generic arson as enumerated in the ACCA.
>
> Under *Beeman*, McKenzie asks far too much. Perhaps the sentencing court thought it through, step by step, exactly as McKenzie proposes, and reached the result McKenzie advances. Perhaps it did not. There is no way to know. McKenzie has not shown that it is more likely than not that the sentencing court followed this path and therefore relied only on the residual clause.

Although the district court did not specifically analyze Mr. McKenzie's prior conviction for Alabama third degree burglary, it apparently adopted the magistrate judge's determination that it was required to ignore binding intervening precedent such as *Descamps*, because it was not relevant to *Beeman*'s residual clause analysis and its focus on what occurred as a matter of historical fact at Mr. McKenzie's 2003 sentencing hearing. In short, the court found that "[t]he Eleventh Circuit's decision in *Beeman* compels the denial of McKenzie's motion."

The district court declined to issue a COA, and Mr. McKenzie timely filed an appeal. The Eleventh Circuit likewise declined to issue a COA.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The decisions of the federal Courts of Appeals are in conflict with one another concerning the question presented.

This Court has not yet addressed what showing a § 2255 movant is required to make to satisfy the requirements of § 2255(h)(2) and prove his *Johnson* claim. This silence has led the federal Courts of Appeals to fall into a state of disarray when, as is often the case, the sentencing court did not specifically discuss whether a prior conviction qualified as a violent felony under the residual clause, the enumerated offenses clause, the elements clause, or some combination of the three. Accordingly, there is now an open, entrenched circuit split concerning the issue presented by these "silent record" cases.

As already discussed, the Eleventh Circuit held in *Beeman*[3] that a § 2255 movant bears the burden of showing by a preponderance of the evidence that he was sentenced solely upon the residual clause, and he may only meet this burden by establishing what occurred as a matter of historical fact at his sentencing hearing. *Beeman*, 871 F.3d at 1221-22.[4] In determining whether the § 2255 movant has met this burden and proven his *Johnson* claim, Eleventh Circuit courts must ignore this Court's intervening precedent establishing that his prior convictions do not qualify as "violent felonies" under any other enhancement provision. *See id.* at 1224 n.5.[5] Thus, a silent record is

[3] It is worth noting that the *Beeman* rule has already proved deeply divisive, even amongst the judges of the Eleventh Circuit. *See Beeman*, 871 F.3d at 1225 (Williams, J., dissenting); *Beeman v. United States*, 899 F.3d 1218, 1224 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing *en banc*); *Chance*, 831 F.3d at 1341 (describing the precursor to *Beeman*, *In re Moore*, as "quite wrong").

[4] "To prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause."

[5] "[A] sentencing court's decision today that [a prior conviction] no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact here: whether in 2009 Beeman was, in fact, sentenced under the residual clause only."

ordinarily fatal to the § 2255 movant's *Johnson* claim in the Eleventh Circuit. *Id.* at 1224.[6]

The First, Fifth, Sixth, Eighth, and Tenth Circuits have each followed suit, adopting their own variations of the *Beeman* approach. *See Dimott v. United States,* 881 F.3d 232, 243 (1st Cir. 2018) (noting that the *Beeman* approach "makes sense"; holding 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 ACCA's residual clause"; and determining that the petitioners' § 2255 motions were untimely because they relied upon intervening, non-retroactive decisions such as *Mathis v. United States*, 136 S. Ct. 2243 (2016)); *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018) (expressly joining the *Beeman* approach to silent record cases, and holding that "we must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause or the residual clause."); *United States v. Washington* 890 F.3d 891, 896 (10th Cir. 2018) ("we hold the burden is on the defendant to show by a preponderance of the evidence—i.e., that it is more likely than not—his claim relies on *Johnson"*); *Walker v. United States,* 900 F.3d 1012 (8th Cir. 2018) ("We agree with those circuits that require a movant to show by a preponderance of the evidence that the residual clause led the

[6] "It is no more arbitrary to have the movant lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one."

sentencing court to apply the ACCA enhancement. . . Where the record or an evidentiary hearing is inconclusive, the district court may consider 'the relevant background legal environment at the time of ... sentencing' to ascertain whether the movant was sentenced under the residual clause."); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) ("As the proponent of a § 2255 motion, and a second motion at that, Potter has the burden to show he deserves relief. . . Nor does Johnson open the door for prisoners to file successive collateral attacks any time the sentencing court may have relied on the residual clause.").

However, the Third, Fourth, and Ninth Circuits have all reached a contrary conclusion, both with respect to the gatekeeping requirements in § 2255(h)(2), and the relevance of modern existing precedent.

For instance, in the Fourth Circuit, a *Johnson* claimant faced with a silent record satisfies the requirements of § 2255(h)(2) if he "may have" been sentenced based on the residual clause. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Noting that "nothing in the law requires a court to specify which clause [] it relied upon in imposing a sentence," the Fourth Circuit declined to "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." *Id.* To hold otherwise would result in arbitrary "selective application" of the new substantive rule of constitutional law announced in *Johnson*. *Id.* Accordingly, the Court held that "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 'relied on' a new rule of constitutional law. *Id.*

The *Winston* Court further held that, once a § 2255 movant passes through the gatekeeping requirement in § 2255(h)(2)—by showing only that he may have been sentenced based upon the residual clause—the court may consider modern, existing precedent when ruling on the merits of a *Johnson* claim. *Id.* at 684 ("we now must consider under the current legal landscape whether Virginia common law robbery qualifies as a violent felony under the ACCA's force clause"). The *Winston* Court then conducted a review of post-sentencing caselaw, and determined that the petitioner's prior convictions no longer qualified as "violent" felonies without regard to the residual clause. *Id.* at 686. Thus, unlike in the Eleventh Circuit, a silent record is not necessarily, or even ordinarily, fatal to an otherwise meritorious *Johnson* claim in the Fourth Circuit.

The Ninth and Third Circuits have followed the Fourth Circuit's lead. In *Geozos*, the Ninth Circuit addressed the requirements of § 2255(h)(2) in the context of a silent record case, and held that "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but may have, the defendant's § 2255 claim 'relies on" the constitutional law announced in *Johnson*[.] *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017). The Court explained that in silent

record cases, it was "necessarily unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id.* Therefore, the rule in such a situation is clear: "[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that *may have* rested on that ground." *Id.* (relying upon the "*Stromberg* principle" announced in *Stromberg v. California*, 283 U.S. 359 (1931)). Finding the § 2255(h)(2) gatekeeping requirements satisfied, the Ninth Circuit proceeded to the merits, and addressed whether the petitioner could prove his claim by reference "to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing." *Id.* at 897.

The Third Circuit reached the same conclusion as the Fourth and Ninth Circuits. *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). In *Peppers,* the Third Circuit cited approvingly from *Geozos* and *Winston*, and held that "the jurisdictional gatekeeping inquiry for second or successive § 2255 motions based on Johnson requires only that a defendant prove he might have been sentenced under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced under that clause." *Id.* at 216. The Court further held that "a defendant seeking a sentence correction in a second or successive § 2255 motion based on Johnson, and who has used Johnson to satisfy the gatekeeping requirements of § 2255(h), may rely on post-sentencing cases (i.e., the current state of the law) to support his Johnson claim." *Id.* So, as in the

Fourth Circuit and Ninth Circuits, a silent record does not prevent a § 2255 movant in Mr. McKenzie's position from proving his *Johnson* claim.

II. The question presented is of exceptional importance and arises frequently in the lower courts.

The question presented is one of exceptional importance, because thousands of prisoners filed § 2255 motions challenging their ACCA-enhanced sentences in the wake of *Johnson*. In many of these cases, the sentencing court had no reason to state that it was sentencing the defendant "solely upon the residual clause," as opposed to also or solely upon either the enumerated offenses clause or elements clause. In many of these silent record cases—such as Mr. McKenzie's—the inmate has already served more than the 10-year statutory maximum penalty in § 924(a), and would therefore be entitled to immediate release based on current precedent. Nevertheless, inmates in the Eleventh Circuit will be unable to obtain relief on their *Johnson* claim, while identically situated inmates in the Third, Fourth, and Ninth Circuits will prevail, and be released from custody as a result of the sentencing court's discretionary—and often arbitrary—decision not to specify which enhancement clause applied.

It is solely the happenstance of geography that determines who obtains relief on a *Johnson* claim. Imagine two identically-situated federal inmates, housed at the same federal correctional institute, serving time for identical § 922(g) offenses. At their respective sentencing hearings, both defendants qualified as armed career criminals, and received enhanced sentences as a

result of their three prior convictions for Alabama third degree burglary. However, one inmate was sentenced in the Central District of California, while the other was sentenced in the Middle District of Florida.

After *Johnson* was decided, each inmate received permission to file a second or successive § 2255 motion challenging their ACCA-enhanced sentence based on *Johnson*. The first inmate gets the benefit of the Ninth Circuit's case law, and leaves prison after serving the non-ACCA statutory maximum of 10 years. The second inmate is stuck with the Eleventh Circuit's contrary case law, and will spend an additional five or more years in prison. [7]

Unless this Court grants certiorari and resolves the intractable circuit split, this scenario will continue to occur. Regardless of which side of the split this Court takes, permitting the split to fester undermines confidence in the federal courts and the criminal justice system. For this reason alone, this Court should grant certiorari and finally resolve the circuit split.

III. The Eleventh Circuit's rule is incorrect.

This Court's intervening precedent is not irrelevant to determining whether a § 2255 movant has established his *Johnson* claim. As the Eleventh Circuit explained, in *Mays* and then in *Beeman* itself, "*Descamps* does not announce a new rule—*its holding merely clarified existing precedent*." *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016). As a result, "the rules for

[7] The hypothetical is not far-fetched. Counsel for Mr. McKenzie has spoken with clients who have watched their fellow prisoners receive *Johnson* relief, while her clients are denied such relief based solely on geography.

evaluating predicate offenses—other than under the residual clause—are the same today as they always have been." *Beeman v. United States*, 2018 WL 3853960 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing *en banc*). Therefore, if the sentencing court applied the modified categorical approach to the indivisible Alabama burglary statute, it was just as incorrect for it do so then as it would be now, and Mr. McKenzie prior conviction for Alabama third degree burglary cannot be considered a *valid* ACCA predicate under the enumerated offenses clause. *See id.* ("As *Descamps* explains, if the sentencing court analyzed the elements clause in a different way, the court was wrong. And the *Beeman* panel opinion binds all members of this Court to recreate and leave in place the misunderstandings of law that happened at sentencing. Ignoring for a moment that we must apply Supreme Court precedent, what is the value in binding ourselves to erroneous decisions?").

Moreover, despite *Beeman*'s insistence that it "would be arbitrary [] to treat *Johnson* claimants differently than all other § 2255 movants claiming a constitutional violation," the practical effect of its historical fact inquiry is to impose a higher burden of proof upon a *Johnson* claimant than upon any other § 2255 movant. *See Beeman*, 871 F.3d at 1224. This is so because, in order to prevail on a *Johnson* claim, a § 2255 movant must show: first, that he was sentenced under the now-invalidated residual clause of the ACCA; and, second that he could not have been sentenced under the elements clause or the enumerated offenses clause. *See, e.g., Beeman v. United States*, 871 F.3d at

1225-26 (11th Cir. 2017) (Williams, J., dissenting). When a *Johnson* claimant invokes the holding of *Descamps*, he is not doing so as part of a freestanding claim that he was erroneously sentenced as an armed career criminal under the enumerated offenses or elements clause. Rather, his contention is that he has proved the second prong of his *Johnson* claim, because the offense that qualified under the residual clause could not have alternatively have qualified under a different enhancement provision. *Id.* at 1226 ("the [*Beeman*] majority conflates Beeman's argument that he *could not have been sentenced* under the elements clause—made in the context of establishing his *Johnson* claim—with the argument that he *was improperly sentenced* under the elements clause—which would be an untimely *Descamps* claim"). By precluding a *Johnson* claimant from invoking *Descamps*, *Beeman* effectively prevents a § 2255 movant from offering what will usually be the only circumstantial evidence available with respect to the second part of his *Johnson* claim. *Id.* ("By artificially delineating what constitutes a *Johnson* argument—and by disposing of Beeman's petition without reaching the second required showing for success on a Johnson claim—the majority elides all of Beeman's elements-clause arguments from their Johnson analysis, leaving Beeman with 'insufficient' assertions regarding the sentencing court's reliance on the residual clause, which the majority peremptorily rejects. In so doing, the majority has set up a straw man regarding Beeman's *Johnson* arguments that they then proceed to knock down.").

IV. This case is an ideal vehicle to resolve the conflict.

Mr. McKenzie's case presents an ideal vehicle to resolve the circuit split, because it is pellucidly clear from the record that he no longer qualifies as an armed career criminal under this Court's current precedent. As Mr. McKenzie argued in the district court, the *only* convictions that could have supported application of the ACCA enhancement were: (1) Mr. McKenzie's 1986 conviction for Alabama third degree burglary; (2) his 1986 conviction for Alabama distribution of marijuana; and (3) his 1991 conviction for Alabama second degree arson.. And, as the magistrate judge acknowledged, applying this Court's precedent in *Descamps* mandates the conclusion that Alabama's third-degree burglary statute is both non-generic and indivisible. *See Descamps*, 570 U.S. 254; *Howard*, 742 F.3d 1334. Therefore since the residual clause is unconstitutionally vague, Mr. McKenzie does not have the requisite three predicate felonies necessary to trigger the ACCA enhancement, and his 277-month sentence on Count One exceeds the ten-year statutory maximum penalty in § 924(a). Accordingly, Mr. McKenzie is serving an illegal sentence. Since Mr. McKenzie was sentenced in 2003, he has already served several years in excess of the statutory maximum penalty.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

Christine Freeman, Executive Director
Mackenzie S. Lund, Assistant Federal Defender*
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353

*Counsel of Record