NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JIMMY LEE FRANKLIN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant moving for relief under 28 U.S.C. § 2255, based on a retroactive constitutional decision invalidating a federal statutory enhancement provision, can satisfy his burden of proof by showing that his sentence may have been based on the unconstitutional provision, and his sentence exceeds the statutory maximum under current law.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Jimmy Lee Franklin ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's unpublished decision affirming the district court is provided in Appendix A. The district court's order denying the § 2255 motion under its binding precedent in *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017) is provided in Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's convictions and sentence was entered on .

This petition is timely filed pursuant to Supreme Court Rules 13(3) and 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e). Armed Career Criminal Act

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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 . . . .

(2) As used in this subsection—

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain ...

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable

Fla. Stat. § 784.03 Battery

(1) A person commits battery if he:

> (a) Actually and intentionally touches or strikes another person against the will of the other; or
>
> (b) Intentionally causes bodily harm to an individual.
>
> (2) Whoever commits battery shall be guilty of a misdemeanor of the first degree . . .

Fla. Stat. § 784.07 Assault or battery of law enforcement officers

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . ., while the officer . . . is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

> (a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
>
> (b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

STATEMENT OF THE CASE

On November 16, 2006, a federal grand jury charged Mr. Franklin with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §922(g)(1) and §924(e). On August 8, 2007, Mr. Franklin pled guilty to that offense.

In the Pre-Sentence Report, the probation officer recommended that Mr. Franklin be sentenced as an Armed Career Criminal because he had three qualifying "violent felonies," one of which was a conviction in a 1987 case for battery on a law enforcement officer ("BOLEO"). As an Armed Career Criminal, Mr. Franklin's offense level rose from a 22 to a 33; he faced a statutory term of imprisonment of 15 years to life (rather than 0-10 years); and his advisory Guideline range increased to 188-235 months imprisonment.

Mr. Franklin did not object to the recommended ACCA enhancement, or to the PSR in any manner.

At the October 16, 2007 sentencing, no mention was made of the particular definitional clause of the ACCA upon which the probation officer or the Court was relying. The government stated that it sought a sentence at the low end of the Guidelines, and since that was the 180-month minimum mandatory, the Court imposed a 180-month term followed by 5 years supervised release.

In June 2015, the Supreme Court declared the residual clause of the ACCA unconstitutionally vague and void. *Samuel Johnson v. United States*, 135 S.Ct. 2551 (June 26, 2015). Thereafter, Mr. Franklin sought to file a successor § 2255 motion challenging the legality of his ACCA sentence in light of *Johnson*'s elimination of

the residual clause, and the Eleventh Circuit authorized him to do so. *In re Jimmy Franklin*, Case No. 16-12528-J, Order at 3 (11th Cir. June 14, 2015).

On June 15, 2015, Mr. Franklin filed such a motion, arguing that in light of *Johnson* and the elimination of the ACCA's residual clause, it was now clear that he had been erroneously sentenced as an Armed Career Criminal.

On May 5, 2017, the magistrate judge issued a report recommending denial of Mr. Franklin's § 2255 motion. As a threshold matter, the magistrate judge found that the standard for determining whether a successor § 2255 motion met the statutory criteria for relief under 28 U.S.C. § 2255(h) was "far from settled within the Eleventh Circuit," given the conflicting standards suggested by dicta in *In re Moore*, 830 F.3d 1268, 1273 (11th Cir. 2016) and *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). The magistrate judge recommended following *Chance*'s suggestion that where it was unclear from the record on which ACCA clause the judge rested the enhancement, the movant's burden was only to show that the sentencing judge "*may* have used the residual clause."

Concluding that Mr. Franklin met that burden, the magistrate turned to whether under current law Mr. Franklin's priors qualified as ACCA predicates within the elements clause. Although the magistrate found as a threshold matter that "[a] conviction for battery on a law enforcement officer does not qualify as a violent felony for purposes of the ACCA" (DE 12:18, citing *Curtis Johnson v. United States*, 559 U.S. 133, 136-37 (2010)), the magistrate found that even without the BOLEO conviction, Mr. Franklin had three other still-qualifying "violent felonies."

Accordingly, the magistrate recommended that this Court deny the § 2255, and a certificate of appealability.

Both parties objected to different aspects of the Report and Recommendation. Pertinent to the issues herein, the government objected to the magistrate judge's rejection of the analysis in *Moore*, in favor of the analysis in *Chance*, and to his finding that Mr. Franklin's BOLEO was not a qualifying "violent felony" within the elements clause, under the modified categorical approach.

After the Court reviewed the record *de novo*, it concurred with the magistrate judge's application of *Chance*. However, the court agreed with the government that Mr. Franklin remained an Armed Career Criminal even after *Samuel Johnson* because his BOLEO conviction continued to qualify as a "violent felony" within the ACCA's elements clause, under the modified categorical approach. The Court explained:

> *Curtis Johnson* does not preclude use of a Florida battery conviction to support an ACCA enhancement if violent force was actually used in committing the battery. Instead, recognizing the battery statute is divisible and contains disjunctive elements, the Supreme Court determined courts should apply the modified categorical approach to decide "which version of the offense [the] defendant was convicted of." *Descamps*, 133 S.Ct. at 2284 (alteration added); *see Curtis Johnson*, 559 U.S. at 136.
>
> Under the modified categorical approach, the Court may consider *Shepard* documents including charging documents, plea agreements, and transcripts of plea colloquies to determine which stator phrase describes Movant's conviction. *Curtis Johnson*, 559 U.S. at 144 (citations omitted). Undisputed statements in a presentence investigation report may also be considered. *United States v. McCloud*, 818 F.3d 591, 595-96 (11th Cir. 2016) (citations omitted).

Since Mr. Franklin "did not object to the PSI and its summary of the battery

offense," the Court found, his BOLEO conviction constitutes "a third prior conviction for a violent felony, which, together with the convictions for armed robbery and attempted armed robbery, sustain his ACCA enhancement." The Court denied Mr. Franklin a certificate of appealability.

On August 10, 2017, Mr. Franklin filed a timely *pro se* motion for reconsideration pursuant to Fed. R. Civ. P. 59(e), arguing that the Court's finding that his BOLEO conviction qualified as a "violent felony" constituted "manifest error" after *Mathis v. United States*, 136 S.Ct. 2243 (2016), since the "touching or striking" language in Fla. Stat. § 784.03(1)(a) was "one element with two alternative means." The next day, August 11, 2017, the Court issued an order denying the motion.

After that definitive denial, on September 22, 2017, the Eleventh Circuit issued its opinion in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), clarifying the burden that a § 2255 movant like Mr. Franklin must make to establish a valid *Johnson* claim. Specifically, the Court held, a § 2255 movant must prove that it is "more likely than not" that the sentencing court relied *only* on the residual clause. *Id.* at 1222, 1224.

On October 4, 2017, Mr. Franklin filed a timely notice of appeal, and on October 16, 2017, he sought a certificate of appealability on whether this Court erred by concluding that his BOLEO conviction was a "violent felony" within the elements clause under the modified categorical approach. On January 2, 2018, the

Eleventh Circuit denied Mr. Franklin a certificate of appealability. *Franklin v. United States*, Order (11th Cir. Jan. 2, 2018) (No. 17-14495).

On April 6, 2018, Mr. Franklin sought certiorari on whether the "touch or strike" language in the Florida battery offense was indivisible under *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis*, and if so, whether it was error to hold that a Florida conviction for battery on a law enforcement officer categorically requires the use of "violent force" as defined in *Curtis Johnson*.

On July 6, 2018, the Solicitor General filed a memorandum acknowledging that the Florida battery statute is divisible into only "*two* parts:" one that covers "actually and intentionally touch[ing] or strik[ing] another person against the will of the other," and the other that covers "intentionally caus[ing] bodily harm to another person." Memorandum of the United States, *Franklin v. United States*, No. 17-8401, at 4 (Jul. 6, 2018) (citation omitted; emphasis added). Thus, a "touching or striking" battery was not itself further divisible, as this Court had held. "Since it was clear from *Curtis Johnson* that a conviction for a 'touching or striking' battery requires only the "most 'nominal contact,' such as a 'tap on the shoulder without consent," the government agreed that "a conviction for that type of simple battery does not categorically qualify as a 'violent felony' under the ACCA." Memorandum at 5.

Here, the government acknowledged, there was "[n]othing in the record" to indicate that Mr. Franklin's conviction was for "bodily harm" battery. Memorandum at 5. "And because 'touching or striking' battery does not

categorically require the use of violent force," the government also acknowledged that Mr. Franklin's BOLEO conviction "does not qualify as a violent felony under the ACCA's elements clause." Memorandum at 5. Accordingly, the government asked the Court to grant certiorari, vacate this Court's judgment, and remand (GVR) for further consideration of Mr. Franklin's challenge to his ACCA sentence in light of its position. Memorandum at 5-6.

On February 25, 2019, the Court GVR'd the case, remanding to the Eleventh Circuit "in light of the position asserted by the Solicitor General in his brief for the United States filed on July 5, 2018." *Franklin v. United States*, 139 S.Ct. 1254 (Feb. 25, 2019).

On April 12, 2019, the Eleventh Circuit granted Mr. Franklin a certificate of appealability "[i]n light of the Supreme Court's decision granting certiorari." *Franklin v. United States, Order*, (11th Cir. Apr. 12, 2019) (No. 17-14495).

On April 23, 2019, the parties filed a joint motion for summary reversal and remand under *United States v. Pickett*, 916 F.3d 960 (11th Cir. 2019) to allow consideration of *Beeman.* In *Pickett*, the court of appeals explained that because *Beeman* requires a showing that a defendant was "more likely than not" sentenced under the residual clause, that in turn required a determination of "what the district court actually had in mind when it sentenced Pickett under ACCA." *Id.* at 961, 964. [1]

[1] The Eleventh Circuit clarified in *Pickett* that a defendant did *not* have to show "that the convictions *only qualified under* the residual clause—that would be an escalation of the burden of proof above what *Beeman* requires." *Id.* at 964.

In the joint motion for summary reversal and remand, the parties advised the court of their agreement that the "touch or strike" language of the Florida battery statute was *not* divisible. In that regard, they noted with significance that the Eleventh Circuit had itself just so recognized in *United States v. Vereen*, 920 F.3d 1300, 1314 (11th Cir. Apr. 5, 2019). And since a "touching or striking" battery was *not* a qualifying ACCA predicate, they noted that the only remaining issue to be decided in Mr. Franklin's case was whether he could meet his burden under *Beeman* of showing that it was "more likely than not" that the district court imposed the

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In addition, the court clarified that only one way of showing what the district court had in mind at the time of sentencing was to consider the "legal landscape" at the time of sentencing. In that regard, the court recognized that when Mr. Pickett was sentenced in February of 2007, a Florida battery conviction "almost certainly qualified under the residual clause, though no binding precedent said as much at the time." *Id*. at 964–65 (noting that while an unpublished decision of that court had so held, it was "nonbinding and difficult to locate;" however, the district court "would not have needed to dig so deep in order to find that the convictions easily qualified under the residual clause.") Indeed, the court found, the residual clause "was the most obvious clause under which the convictions qualified," *id*. at 965, and the "district court likely would have quickly determined that Pickett's battery convictions qualified under the residual clause." *Id.* at 966. By contrast, the court found, it was "uncertain at best" whether BOLEO also qualified under the elements clause at that time. *Id.* at 964-66. But even so, the court held, Mr. Pickett still needed to show that it was at least "unlikely that the trial court thought the convictions also qualified under the elements clause." *Id*.

"With the residual clause plainly available," the Eleventh Circuit acknowledged, "the district court would not have needed to consider the elements clause at all." *Id*. However, since the court simply did "not know what else [the district court] might have thought," the court remanded the case. *Id*. at 966. And indeed, it encouraged the district court on remand in *Pickett* to make a factual finding about "what actually happened" – "which clause(s) it had actually considered at the original sentencing," and then, in light of that, "whether Pickett can show, as a historical fact, that he was more likely than not sentenced under only the residual clause." *Id*. at 967.

ACCA enhancement under the residual clause, and "only the residual clause." *Id.* at 1221-22, 1224.

On that issue, the parties noted that *Pickett* was on point and indicated a remand was in order. In neither *Pickett* nor this case, they explained, did the parties have an "opportunity to address" – nor did the district court have an opportunity to determine – whether it was "more likely than not" that in finding that Florida BOLEO was an ACCA "violent felony," it "*only relied*" on the residual clause. *Pickett*, 916 F.3d at 964, 966-67. Because (1) *Beeman* was rendered after the district court denied Mr. Franklin's § 2255 motion; (2) there could be no substantial question that his case should be remanded under *Pickett*; and (3) time was of the essence since Mr. Franklin had almost completely served his entire 15 year ACCA term by that juncture,[2] the parties urged the Eleventh Circuit to summarily reverse and remand his case to allow the district court to conduct a *Beeman* inquiry.

On May 30, the Eleventh Circuit granted the parties' joint motion, and reversed the district court's judgment denying Mr. Franklin's § 2255 relief. *Franklin v. United States*, Order (11th Cir. May 30, 2019) (No. 17-14495). In remanding to the district court for reconsideration in light of *Beeman*, the Eleventh Circuit agreed that both a summary disposition and remand were appropriate under *Pickett*, as

[2] In that regard, the parties advised that Mr. Franklin's BOP release date on his 15-year ACCA sentence was (then) December 26, 2019, with an expected June 27, 2019 release to a halfway house. However, Mr. Franklin's release date was thereafter recalculated to take into account the new gain time provisions of the First Step Act, and he was released on September 13, 2019. He is currently serving his term of supervised release.

"this case's circumstances align almost identically to those in *Pickett*," and "[b]oth parties indicate that they do not wish to rest on the record as it exists." *Id.* at 3 (citing *Beeman*, 871 F.3d at 1221). As such, the court "follow[ed] *Pickett*'s remedy to allow the parties to present their arguments about *Beeman* and to allow the district court to decide the issue in the first instance." *Id.* at 3-4 (citing *Pickett*, 916 F.3d at 967).

On June 24, 2019, Mr. Franklin filed a supplemental memorandum in support of his § 2255 motion, asking the district court – given the Eleventh Circuit's decision in *Pickett* and its reversal and remand based upon *Pickett* in this case — to make explicit what was "more likely than not" the case at his 2007 sentencing: namely, that the district court relied solely on the residual clause to impose the ACCA enhancement. In that regard, Mr. Franklin noted that *Pickett* acknowledged that in 2007, Florida battery convictions had "easily qualified" under the residual clause, which was "plainly available." 916 F.3d at 965–66. Indeed, it was for that very reason that he (Franklin) did not object to the ACCA enhancement. And given that there was no objection at the 2007 sentencing, it would have been entirely unnecessary for the district court to even consider the elements clause at the sentencing – let alone use the elements clause as an alternative basis for imposing the ACCA enhancement.

Mr. Franklin noted that three additional facts about the "legal landscape" at the time made it exceedingly unlikely that the district court would have "also" imposed the enhancement under the elements clause. *First*, as the Eleventh Circuit

recognized in *Pickett*, whether a BOLEO offense qualified under the elements clause was "uncertain" as a matter of law in 2007. *Id.* at 966. *Second*, what was certain – and had been certain since the Court's 1990 decision in *Taylor v. United States*, 495 U.S. 575 (1990) – was that sentencing courts were permitted to impose all ACCA enhancements under the residual clause, even if a predicate potentially qualified under another clause. Indeed, the Court had explicitly encouraged courts to do so in *Taylor*. *See id.* at 598, 609 n. 9 (confirming that "[t]he Government remains free to argue that *any offense* – including offenses similar to [the enumerated crime of] generic burglary – should count towards enhancement as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" under the residual clause) (emphasis added). *Third*, it was not until April of 2008 (after the sentencing in this case) in *Begay v. United States*, 553 U.S. 137 (2008), that this Court put *any* constraint on using the residual clause as the go-to path for the enhancement.

Since he was sentenced during the 18-year residual clause "free-for-all" that existed between *Taylor* and *Begay*, Mr. Franklin argued that common sense compelled the conclusion that it is "more likely than not" that the district court counted his BOLEO offense as an ACCA "violent felony" solely under the residual clause. And indeed, he noted, that common sense conclusion was bolstered by the fact that other judges on the district court had explicitly confirmed that in imposing ACCA sentences at uncontested sentencings during this very same time period, they focused only on the residual clause.

On July 2, 2019, the government responded that Mr. Franklin could not satisfy his burden under *Beeman* to prove that it was "more likely than not" that the district court relied exclusively on the residual clause in imposing his ACCA sentence, because five months before he was sentenced, the Eleventh Circuit had issued its decision in *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197 (11th Cir. May 15, 2007). In that case, a panel of the court had held that a Florida conviction for aggravated battery on a pregnant woman – which had simple battery as an element -- was a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii). *Id.* at 1197 (characterizing *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005) as having "held" that a Florida BOLEO was a "crime of violence" under U.S.S.G. § 4B1.2(a), and finding "no persuasive reason why" BOLEO was a "crime of violence" while aggravated battery on a pregnant woman was not). The existence of *Llanos-Agostadero* by the time of Mr. Franklin's sentencing distinguished his case from *Pickett*, the government asserted. After *Llanos-Agostadero*, the "law in this Circuit in place at the time of Movant's sentence was clear that BOLEO was a crime of violence under the elements clause ... of the ACCA." (DE28).

On July 8, 2019, the district court issued an order acknowledging that it "ha[d] no specific recollection of Mr. Franklin's sentencing hearing, some 12 years later," but holding nonetheless that it "must agree with the government that it is more likely than not that [the court] did not rely on the ACCA's residual clause in counting the BOLEO conviction as an ACCA violent felony." It stated:

> In *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197-98 (11th Cir. 2007), the Eleventh Circuit stated "*Glover* . . . held that simple

> battery on a law enforcement officer, in violation of Fla. Stat. §§ 784.03 and 784.07, is a crime of violence," and "aggravated battery on a pregnant woman, in violation of Fla. Stat. § 784.045(1)(b), constitutes a crime of violence." (alteration added). As noted by the Government, the law in this Circuit . . . at the time of Movant's sentencing was clear that BOLEO was a crime of violence under the elements clauses of U.S.S.G. §§ 2L1.2(b)(1) and 4B1.2(a)(1) and, in turn, a violent felony under the elements clause of the ACCA." (Resp. 2-3 (alteration added)). The Court would not have ignore the binding precedent of *Llanos-Agostadero*, decided on May 15, 2007, to determine Mr. Franklin's ACCA eligibility based solely on the residual clause, but instead would have decided BOLEO was a crime of violence under the ACCA's elements clause.

(DE 29: 1-2).

The district court did not address whether a certificate of appealability ("COA") was warranted to allow Mr. Franklin to seek further review of the ruling in *Beeman* on how the burden of proof is to be satisfied in a silent record case. Accordingly, Mr. Franklin moved specifically for a COA to enable her to seek Supreme Court review of *Beeman*'s particular approach to that question, noting that the circuits were intractably divided on the issue. After detailing the circuit breakdown, he asked the court to grant a COA on the following issue:

> In a case where the sentencing record does not reveal which clause of the ACCA was the basis for the enhancement, whether a section 2255 movant must prove it is "more likely than not" the court relied on the residual clause, as the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held; or rather, the movant need only show the ACCA enhancement "may have" rested on the residual clause, as the Second, Third, Fourth, and Ninth Circuits have held.

The district court granted a COA on that issue.

Mr. Franklin appealed to the Eleventh Circuit arguing that *Beeman* had been wrongly decided, and for the reasons stated by the Second, Fourth, Fourth, and

Ninth Circuits at that time. He noted that he was preserving his challenge with the hope that this Court would resolve the circuit conflict.

On April 14, 2020, the Eleventh Circuit issued a decision affirming the district court. *Franklin v. United States*,___ F. App'x ___, 2020 WL 1867910 (11th Cir. Apr. 14, 2020). The court found that "Franklin's claim is foreclosed by binding precedent as *Beeman* remains the applicable standard § 2255 movants asserting Johnson-based claims must meet in this circuit. *Id.* at *4. "Alternatively," the Court found, because the district court found that "'it would not have ignored binding precedent' and instead at the time of sentencing would have determined that the conviction in question qualified under the ACCA's elements clause," "even the 'may have relied on' burden does not help Franklin." *Id.*

REASON FOR GRANTING THE WRIT

The circuits are intractably divided on an important and recurring question as to a § 2255 movant's burden of proof in challenging a concededly-illegal ACCA sentence after *Johnson*

The parties in this case agree that Mr. Franklin did not qualify as an Armed Career Criminal after the invalidation of the ACCA's residual clause in *Samuel Johnson v. United States*, 576 U.S. 591 (2015). They agree that Mr. Franklin's 15-year enhanced ACCA term of imprisonment – which he fully served – was illegally imposed. However, they disagree, intensely, on whether he should have been entitled to relief from that illegal sentence where the record, as here, is unclear as to whether the sentence was based on the residual clause, or another "violent felony" definition in the ACCA. In similar "silent record" cases, the Second, Third,

Fourth, and Ninth Circuits have held that a movant is entitled to relief if his sentence "may have been" based on the residual clause. By contrast, as the Eleventh Circuit held in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017) and the First, Fifth, Sixth, and Tenth Circuits agree – it is the movant's burden to prove that his sentence was "more likely than not" based "***only***" on the residual clause.

This well-entrenched conflict cannot be allowed to persist. Every day, identically-situated defendants in this country are being treated disparately, and denied the very relief their cohorts are receiving, because of this circuit divide. The conflict must be resolved, and it should be resolved in this case.

Notably, the decision that was the basis for the district court's denial of relief to Mr. Franklin was itself a split decision with a strong dissent. The majority in *Beeman* concluded that a *Johnson* claim may be established if it is "more likely than not" that his ACCA sentence was based "only" on the residual clause. 871 F.3d at 1221-22. A movant cannot satisfy this burden if "it is just as likely that the sentencing court relied on the elements or enumerated crimes clause, solely or as an alternative basis for the enhancement," the Eleventh Circuit held. *Id.* at 1222. Characterizing the inquiry as one of "historical fact," the court stated;

> Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that [movant's prior conviction] no longer qualifies under present law as a violent felony under the elements clause (and thus could not 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[at his original sentencing the movant] was, in fact, sentenced under the residual clause only.

Id. at 1224 n. 5. Under the *Beeman* majority's standard. A silent record must be construed against a movant, and a movant may *not* rely on current law to establish that he was sentenced under the residual clause.

The *Beeman* dissent urged the court to adopt a rule that, when (as here) the sentencing record is inclusive, *Johnson* error is established when the movant shows he could not be sentenced under any other clause of the "violent felony" definition. *Id.* at 1229-30. The dissent emphasized that under its rule, movants would still have to prove that they were more likely than not sentenced under the residual clause, but movants could satisfy that burden by establishing that, if sentenced today, they could not be sentenced under the elements or enumerated-crimes clauses. *Id.*

In *Dimott v. United States*, 881 F.3d 232, 240 (1st Cir. 2018), the First Circuit adopted the Eleventh Circuit's approach and likewise held, over a strong dissent, that a § 2255 movant "bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause." 881 F.3d at 243. Like the Eleventh Circuit, movants in the First Circuit may not rely on current law to prove they were solely sentenced under the residual clause. *Id.* at 243 & n. 8.

In *United States v. Snyder*, 817 F.3d 1122 (10th Cir. 2017), the Tenth Circuit adopted an approach that is effectively the same as the Eleventh Circuit approach. *Id.* at 1130. In the Tenth Circuit, a movant must show that his prior convictions

would not have satisfied the elements or enumerated-crimes clauses under "the relevant background legal environment" at the time of his sentencing. *Id.* The "relevant background legal environment" does not include "post-sentencing decisions that may have clarified or corrected pre-sentencing decisions." *Id.* at 1129. As a result, movants in the Tenth Circuit may not rely on current law to prove they were sentenced under the residual clause. And notably, the Fifth, Sixth, and Eighth Circuits agree with the First, Tenth, and Eleventh Circuits. *See United States v. Wiese*, 896 F.3d 720, 724-25 (5th Cir. 2018); *Raines v. United States*, 898 F.3d 680, 686 (6th Cir. 2018); *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018).

By contrast to these courts, the Second, Third, Fourth, and Ninth Circuits have held, in accordance with *dicta* from the Eleventh Circuit's earlier decision in *In re Chance*, 831 F.3d 1335, 1339-41 (11th Cir. 2016), that a movant need only show that his sentence "may have been predicated on application of the now-void residual clause." These circuits set forth the better-reasoned approach to adjudicating *Johnson* claims, for the reasons they have detailed which are discussed below.

In *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit "disagree[d] with the government's position" that a successive § 2255 motion was due to be dismissed "because the record does not establish that the sentencing court relied on the residual clause." *Id.* at 681-82. Instead, the court "agree[d] with the district court's conclusion that Winston's claim for post-conviction relief 'relied on,'

at least in part, the new rule of constitutional law announced in *Johnson*." *Id.* at 682.

That was so even though "the record does not establish that the residual clause served as the basis" for the enhancement, because "'nothing in the law requires a court to specify which clause it relied upon in imposing a sentence.'" *Id.* (quoting *In re Chance*, 831 F.3d at 1340) (brackets and ellipsis omitted). The Fourth Circuit refused to "penalize a movant for a court's discretionary choice not to specify under which clause of [the ACCA] an offense qualified as a violent felony," since "imposing the burden on movants urged by the government in the present case would result in 'selective application' of the new rule of constitutional law announced in *Johnson* . . ., violating 'the principle of treating similarly situated defendants the same.'" *Id.* (quoting *In re Chance*, 831 F.3d at 1341). Accordingly, the Fourth Circuit "h[e]ld 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 'relies on' a new rule of constitutional law within the meaning of" the gatekeeping statute. *Id.* (emphasis added).

That holding, moreover, was unaffected by the fact that the movant's claim depended on the "interplay" between (*Samuel) Johnson* and *Curtis Johnson v. United States*, 559 U.S. 133 (2010), which had narrowed the elements clause. *Id.* at 682 n. 4. It explained: "Any argument that Winston's claim did not 'rely on' *Johnson II*, because that claim would not be successful, does not present a

procedural bar. Instead, that issue presents the substantive argument whether, even after receiving the benefit of *Johnson II*, the defendant still is not entitled to relief, because his conviction nonetheless falls within the force clause." *Id.* Accordingly, the court proceeded to the merits of the *Johnson* claim, analyzing whether the movant had three predicate offenses under current law. *Id.* at 682-86. The court determined that the district court had erred, and it remanded for a determination about whether he remained an armed career criminal. *Id.* at 686. On remand, the district court concluded that he did not, and it ordered his immediate release from custody. *United States v. Winston*, 2017 WL 1498104 (W.D. Va. Apr. 25, 2017).

The Ninth Circuit employed a similar approach in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). It framed the question as one "that has cropped up somewhat frequently in the wake of *Johnson II* and *Welch v. United States*, 136 S.Ct. 1257 (2016): When a defendant was sentenced as an armed career criminal, but the sentencing court did not specify under which clause(s) it found the predicate 'violent felony' convictions to qualify, how can the defendant show that a new claim 'relies on' *Johnson II*, a decision that invalidated only the residual clause?" *Id.* at 894. Favorably citing *Winston*, the court "h[e]ld 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 it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson II*." *Id.* at 896 & n. 6 (emphasis added).

The Ninth Circuit was persuaded that the "situation is analogous to that of a defendant who has been convicted, in a general verdict, by a jury that was instructed on two theories of liability, one of which turns out to have been unconstitutional." *Id.* at 895. Under the so-called "*Stromberg* principle," "[t]he rule in such a situation is clear: '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.'" *Id.* at 896 (quoting *Griffin v. United States*, 502 U.S. 46, 53 (1991) (emphasis added by court of appeals)); *see Stromberg v. California*, 283 U.S. 359 (1931). The Ninth Circuit acknowledge that, despite a silent record, a claim would not rely on *Johnson* if "binding precedent at the time of sentencing was that crime Z qualified as a violent felony only under" one of the other clauses. *Id.* But that was not the situation in the case before it, since there was no controlling precedent at the time of sentencing, and the legal landscape otherwise indicated that the predicate qualified under both the residual clause and the elements clause. *Id.* at 897. As a result, it was "unclear whether the district court relied on the residual clause," and therefore the claim relied on *Johnson*. *Id.*

Similar to the Fourth Circuit, the Ninth Circuit then proceeded to the merits, asking "whether the *Johnson II* error [wa]s harmless – in other words, are there three convictions that support an ACCA enhancement under one of the causes of ACCA that survived *Johnson II*." *Id.* To do so, the court "look[ed] to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing." *Id.* After doing so in that case, the court concluded that the

movant was no longer an armed career criminal, and it therefore reversed the denial of his successive § 2255 motion and instructed the district court to release him from custody immediately. *Id.* at 898-900.

The Second and Third Circuits have agreed with the approach of the Fourth and Ninth. *See Belk v. United States*, 743 F. App'x 481, 482 n. 4 (2d Cir. Nov. 27, 2018) ("Because it is unclear from the record whether Belk's sentence was enhanced pursuant to the ACCA's residual clause, it appears that his claim does rely on the new rule of constitutional law announced in Johnson . . . such that we may proceed to the merits of his claim"); *United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018) (Section "2255(h) only requires a petitioner to show that his sentence may be unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court. Peppers met that standard by demonstrating that he may have been sentenced under the residual clause of the ACCA, which was rendered unconstitutional in *Johnso*n.").

Moreover, "[n]umerous district courts around the country have similarly concluded that the government's position [adopted by the courts that have followed *Beeman*] is constitutionally untenable." *United States v. Taylor*, 873 F.3d 476, 480 (5th Cir. 2017). Notably, before the Eleventh Circuit's decision in *Beeman*, "[t]he government's position ha[d] been rejected by virtually every court to have considered the question." *United States v. Wilson*, 249 F.Supp.3d 305, 311-12 (D.D.C. 2017) (citing cases); *see Beeman*, 871 F.3d at 1227-28 (Williams, J., dissenting) (citing additional cases). These district courts employed similar

reasoning, analogizing the situation to *Stromberg*, observing that courts had not been required to specify the clause upon which they relied, and recognizing that the government's approach would impose an unfair burden on movants, lead to inequitable results, and result in the selective application of *Johnson*. *Wilson*, 249 F.Supp.3d at 312-13.

Under the view of all of these courts, it was wrong for the Eleventh Circuit to have required Mr. Franklin to prove that the sentencing court relied on the residual clause. That the sentencing court "may have" done so – and that he would no longer be subject to the ACCA enhancement today – should suffice to entitle him to relief under *Johnson*. The district court's finding that it "would not have" ignored *Llanos-Agostadero* was entirely speculative. The court acknowledged that it had no actual recollection of the sentencing; this relatively-new decision was not directly on point either for Battery on a Law Enforcement Officer or the ACCA; it did not hold any battery offense *only* qualified under the elements clause; it was not cited by either party prior to sentencing because the ACCA's residual clause was then interpreted so broadly that the enhancement was uncontested; and there was no proof that the judge even knew of the decision at the time of Mr. Franklin's sentencing. Under no circumstances would a speculative finding like this have tipped the scales against relief for Mr. Franklin if his case had been heard in the Second, Third, Fourth, and Ninth Circuits. In those circuits, he would *not* have been forced to serve out his illegal ACCA sentence.

The contrary rule adopted by the First, Fifth, Sixth, Tenth, and Eleventh Circuits requires courts to ignore whether a prisoner is currently serving an illegal sentence. And a prisoner's eligibility for relief under *Johnson* – a new retroactive rule of constitutional law by the Supreme Court – should not turn on the happenstance of what a judge said at the sentencing hearing a decade earlier, or the existence of a published decision not directly on point which the court did not mention at the sentencing, and might not even have learned of until after this Court's invalidation of the residual clause. Penalizing movants for a silent record would be cruelly ironic, since that silence was often attributable to the residual clause itself. Its scope was so broad that there was seldom a need to object (the case here), and thus no need for the courts to identify the clause or authority it was following. It would be circular and unduly harsh to uphold illegal sentences – confining prisoners to a minimum of five additional years of incarceration, and, in this case, *both* additional incarceration *and* supervised release – on the basis of a silent record that was itself attributable to the breadth of the unconstitutional provision that now provides the basis for relief.

For all of these reasons, the Eleventh Circuit's approach to a § 2255 movant's burden of proof on a *Johnson* claim is incorrect, and the Court should grant certiorari to say so definitively. This case presents an ideal vehicle to resolve the untenable circuit conflict because overruling *Beeman* will be case-dispositive for Mr. Franklin. The government has conceded he no longer qualifies as an Armed Career Criminal. And, if *Beeman* is overruled, his current 5-year term of supervised

release (the maximum he faced as an Armed Career Criminal) must immediately be reduced since it exceeds the otherwise applicable maximum of 3 years for a § 922(g) offense. 18 U.S.C. § 3583(b)(2).

As a non-Armed Career Criminal, Mr. Franklin's current term of supervised release is an illegal sentence that cannot stand.

CONCLUSION

Because the issue presented divides the circuits, affects scores of prisoners nationwide, and would be case-dispositive, Mr. Franklin respectfully requests that the Court grant his petition and resolve the circuit conflict in his case.

Respectfully submitted,

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