No. _____

In the

Supreme Court of the United States

MICHAEL RAY WEST,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an authorized successive § 2255 motion argues that an Armed Career Criminal Act sentence should be set aside under *Johnson v. United States*, 135 S. Ct. 2551 (2015), what more must the movant show to obtain a ruling on the merits?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Michael Ray West was the defendant and movant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

LIST OF DIRECTLY RELATED PROCEEDINGS BELOW

1. *United States v. Michael West*, 4:02-CR-97, United States District Court for the Northern District of Texas. Judgment and Sentence entered on December 3, 2002.

2. *United States v. Michael West*, 02-11358, Court of Appeals for the Fifth Circuit. Appeal dismissed as frivolous on December 10, 2003.

3. *Michael West v. United States*, 4:04-CV-847, United States District Court for the Northern District of Texas. Motion to vacate under 28 U.S.C. § 2255 dismissed on August 25, 2006.

4. *In re: Michael West*, No. 16-10468, Court of Appeals for the Fifth Circuit. Order granting motion for authorization to file successive motion under 28 U.S.C. § 2255 entered on August 15, 2006. (Appendix B).

5. *Michael West v. United States*, 4:16-CV-573, United States District Court for the Northern District of Texas. Order of dismissal and denying certificate of appealability entered on May 2, 2019. (Appendix C).

6. *United States v. Michael West*, 19-10676, Court of Appeals for the Fifth Circuit. Order denying certificate of appealability filed on October 28, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Ray West asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's order denying a certificate of appealability was not selected for publication in the Federal Reporter. It is available at *United States v. West*, No. 19-10676 (5th Cir. Aug. 28, 2020), and is reprinted in Appendix A. The Appendix also contains copies of the Fifth Circuit's August 15, 2016, order authorizing a successive motion to vacate (App. B), and the district court's May 2, 2019, order dismissing the case and denying certificate of appealability (App. C)

JURISDICTION

The Fifth Circuit denied the requested certificate of appealability on August 28, 2020. App. A. On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves the interaction of 28 U.S.C. §§ 2244 & 2255. The case also involves the Armed Career Criminal Act, 18 U.S.C. § 924(e), and in particular how that statute applies to Texas burglary, Texas Penal Code § 30.01 & 30.02(a). Those provisions are reprinted verbatim in Part D of the Appendix.

STATEMENT OF THE CASE

Michael Ray West pled guilty to possessing a firearm after felony conviction in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). (Record in the Court of Appeals, at 294). That offense normally carries a maximum possible punishment of ten years in prison, 18 U.S.C. § 924(a)(2), but the district court applied the Armed Career Criminal Act after concluding that at least three of his prior Texas burglary convictions were violent felonies. *See* (Record in the Court of Appeals, at 459); *see* 18 U.S.C. § 924(e). The court sentenced him to 180 months in prison, consecutive to any related state sentences. (Record in the Court of Appeals, at 295).

At the original sentencing hearing in December 2002, the district court did not specify which portion of the "violent felony" definition applied to Petitioner's burglaries, probably because it did not make one whit of difference at the time. If a burglary is generic, it is a violent felony under the enumerated offense clause. But—as far as anyone knew at the time—offenses "similar to generic burglary" were also deemed violent felonies under ACCA's residual clause. *See Taylor v. United States*, 495 U.S. 575, 600 n.9 (1990) ("The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii).").

This Court had repeatedly characterized residential burglary as the quintessential residual-clause offense. For example, in 2004, the Court said burglary was the "classic example" of a crime satisfying the related residual clause in 18 U.S.C. § 16(b):

> A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, *but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.*

Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) (emphasis added). The Court picked up that same thread in *James v. United States*, 550 U.S. 192 (2007). *James* held that Florida *attempted* burglary was a violent felony under ACCA's residual clause because it presented a risk of confrontation similar to generic burglary. The enumerated offense of generic burglary provided the "baseline from which to measure whether other similar conduct" satisfied that clause. *Id.* at 203. Because attempted burglary presented the exact same risks as generic burglary, it was a residual-clause violent felony. The Fifth Circuit later proved willing to affirm an ACCA-enhanced sentence under the residual clause specifically for Texas burglary. *See United States v. Ramirez*, 507 F. App'x 353, 354 (5th Cir. 2013).

But that all changed once this Court struck down ACCA's residual clause in *Johnson*. After the Court recognized *Johnson*'s rule was retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016), *Taylor*'s distinction between "generic" burglaries and non-generic offenses "similar to generic burglary" became very important. This was "the rare case in which this Court announces a new rule of constitutional law and makes it retroactive within one year." *Dodd v. United States*, 545 U.S. 353, 359 (2005).

Petitioner—who had previously moved, unsuccessfully, to vacate his conviction and sentence—sought and received authorization from the Fifth Circuit to file a successive application for collateral relief under 28 U.S.C. § 2255(h)(2). Pet B. In

granting authorization, the Fifth Circuit recognized that *Johnson* might provide relief to a defendant whose ACCA sentence depends upon Texas burglary:

> West argues that his sentence was improperly enhanced under the ACCA because, after *Johnson*, his Texas burglary offenses no longer qualify as violent felonies to support his ACCA sentence. The available records do not rule out the possibility that West was invalidly sentenced under the residual clause of § 924(e)(2)(B)(ii). West has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court."

App. B, at 2 (quoting *Reyes-Requena*, 243 F.3d at 899).

Although the Fifth Circuit granted a certificate of appealability, the district court determined that West could not make the required showing to proceed. App. C, at 2–5. In support of this conclusion, the district court relied upon the Fifth Circuit's requirement that a petitioner relying on *Johnson* in a second or successive motion under Section 2255 prove that it was "more likely than not" that the sentencing court relied on the ACCA's unconstitutional residual clause. App. C, at 2–4 (citing *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019). The district court concluded that West could not meet that standard because at the time of his sentencing that his three convictions for Texas burglaries "were considered generic burglary under the enumerated[-]offense clause of the ACCA." App. C, at 4 (quoting *United States v. Wiese*, 896 F.3d 720, 726 (5th Cir. 2018).

Thus, the district court dismissed West's motion for lack of jurisdiction and denied a certificate of appealability. App. C, at 5.

The Fifth Circuit granted a certificate of appealability on two issues. In the first of these issues, West asked, "Whether a movant under *Johnson v. United States*, 135 S. Ct. 2551 (2015), in a successive § 2255 motion must prove, as a matter of

historical fact, that the sentencing court relied on the residual clause in sentencing him under the Armed Career Criminal Act ("ACCA")?", although he acknowledged this was foreclosed under the Fifth Circuit's jurisprudence.

Petitioner argued that, although the text of 28 U.S.C. § 2255(h)(2) calls for an *abstract* inquiry into the legality of the sentence without a residual clause, some courts of appeals, including the Fifth Circuit, currently require petitioners to show that the district court *actually* relied on the residual clause at sentencing. However, West argued that a COA should issue because the matter was subject to reasonable debate because prior decisions of the Fifth Circuit, including *United States v. Taylor*, 873 F.3d 476, 479 (5th Cir. 2017), favorably cited decisions that rejected imposing on petitioners a requirement to prove such actual reliance.

The Fifth Circuit, however, disagreed and denied him a certificate of availability. App. A, at 1–2.

This timely petition follows.

REASONS TO GRANT THE PETITION

Petitioner's application for post-conviction relief under § 2255 both "contains" and "relies on" the new substantive constitutional rule announced in *Johnson*. *Compare* 28 U.S.C. § 2255(h)(2) *with* § 2244(b)(2)(A). Moreover, this Court "made" the rule in *Johnson* retroactive, either in *Johnson* itself or shortly thereafter in *Welch*. Section 2255(h)(2) requires no more.

To reach the opposite outcome, the Fifth Circuit dubiously concluded that, even after Petitioner obtained authorization to file a successive motion, he had to satisfy a second "jurisdictional" hurdle in district court that involved an *evidentiary* question about the sentencing court's historic mindset. Granting review in this case would likely resolve a legal dispute that has split the lower courts.

I. WHEN ASKED TO APPLY THE STRAIGHTFORWARD TEXT OF 28 U.S.C. § 2255(h)(2) TO APPLICATIONS LIKE PETITIONER'S, THE LOWER COURTS ARE FLOUNDERING.

Before filing a "second or successive motion" for collateral relief under 28 U.S.C. § 2255, a federal prisoner's proposed motion

> must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (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). Everyone agrees that *Johnson* was the right kind of rule: it was *new*; this Court "made" the rule retroactive in *Johnson* itself or in *Welch*; and it was

"previously unavailable" to prisoners sentenced before *Johnson*. If a proposed motion "contains" the rule in *Johnson*, and particularly if a Court of Appeals "certifie[s]" that proposition, then a prisoner has satisfied all of the threshold requirements for a successive motion and is entitled to a ruling on the merits. Unfortunately, the Fifth Circuit and some of its sister courts have imposed an additional jurisdictional requirement by requiring petitioners under *Johnson* to prove that the sentencing court actually relied on the ACCA's unconstitutional residual clause.

A federal prisoner who wishes to file a successive motion to vacate must convince the court of appeals to "certify" his proposed motion "as provided in section 2244." 28 U.S.C. § 2255(h). This is sometimes described as obtaining "prefiling authorization." E.g. *United States v. McRae*, 793 F.3d 392, 397 (4th Cir. 2015).

Yet most circuit courts—including the Fifth Circuit—have held that a federal prisoner must also surmount a second "gatekeeping" step in district court. Judge Posner's opinion in *Bennett v. United States* was early and influential:

> The [Court of Appeals's] grant [of authorization] is, however, it is important to note, tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion. 28 U.S.C. § 2244(b)(4). The movant must get through two gates before the merits of the motion can be considered

Bennett, 119 F.3d 468, 470 (7th Cir. 1997). Almost all of the regional courts agree. *See United States v. Peppers*, 899 F.3d 211, 220 (3d Cir. 2018) ("But, even after we authorize a second or successive petition, § 2244 still requires the district court to 'dismiss any claim presented in a second or successive application . . . unless the

applicant shows that the claim satisfies the [gatekeeping] requirements[.]"); *United States v. Murphy*, 887 F.3d 1064, 1067–1068 (10th Cir.), *cert. denied*, 139 S. Ct. 414 (2018); *Massey v. United States*, 895 F.3d 248, 250–251 (2d Cir. 2018) (holding that the district court should have dismissed the authorized successive motion without reaching the merits); (*Darnell) Moore v. United States*, 871 F.3d 72, 85 (1st Cir. 2017) ("We have left much work for the district court. That is by necessity, as the district court is required to redo the very analysis performed in this opinion before entertaining a successive § 2255 motion."); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016) ("[T]he district court is free to decide for itself whether Embry's claim relies on a new rule made retroactive by the Supreme Court, see 28 U.S.C. § 2244(b)(4)."); *In re (Jasper) Moore*, 830 F.3d 1268, 1271–1272 (11th Cir. 2016); *(Kamil) Johnson v. United States*, 720 F.3d 720, 720–721 (8th Cir. 2013); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000).

But what must a petitioner prove to the district court to enter through this second gate? The circuit courts have taken two different approaches to this question. They have focused on the sentencing judge's mindset or "reliance." In some circuits, it is enough to show that the sentencing court *might have* relied on the residual clause. In other circuits, the prisoner must show it is *more likely than not* that the sentencing court relied on the residual clause. The split is entrenched and acknowledged. *See Clay*, 921 F.3d at 554 ("The circuits are split on this issue.")

1. In some courts, it is enough to show that the sentencing court *might have* relied on the residual clause.

Because the residual clause was always a backstop preventing prisoners from challenging mistaken conclusions about "generic" burglaries, many courts have held that a prisoner may use *Johnson* to challenge an ACCA sentence predicated on non-generic burglaries. The Third, Fourth, and Ninth Circuits have all adopted a *permissive* approach: if a defendant shows that the sentencing court *might have* relied on the residual clause, then the defendant satisfies the gatekeeping standard and is entitled to a ruling on the merits. *Peppers*, 899 F.3d at 216; *Geozos*, 870 F.3d at 896; *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Once the case proceeds to the merits in these circuits, the defendant may utilize intervening precedent to show that the enumerated offense and elements clauses do not justify the sentence.

The "vast majority" of district judges—who best understood how sentencing decisions were made prior to *Johnson*—were also willing to grant relief under the theory that they might have relied on ACCA's residual clause. *Thrower v. United States*, No. 04-CR-0903, 2017 WL 1102871, at *4 (E.D.N.Y. Feb. 13, 2017), and cases cited therein ("[T]he vast majority of the district courts that have considered the issue have decided that a petitioner meets his burden of proving constitutional error if the record is unclear and the petitioner shows that the sentencing court may have relied on the residual clause in calculating his sentence."), *rev'd on other grounds*, 914 F.3d 770 (2d Cir. 2019). As another district judge explained:

> Prior to *Johnson*, regardless of *Descamps* and the alleged invalidity of utilizing the modified categorical approach concerning the Washington State residential burglary statute, Defendant's 1996 residential burglary conviction could have been

> a predicate "violent felony" under the residual clause. . . . As such, until *Johnson*, Defendant's 1996 residential burglary conviction remained a "violent felony" through the ACCA residual clause.

United States v. Gomez, 2:04-CR-2126-RMP, 2016 WL 1254014, at *3 (E.D. Wash. Mar. 10, 2016) (citing *James* and *Taylor*); *see also Hardeman v. United States*, 1:96-CR-192 & 1:16-CV-703, 2016 WL 6157433, at *2–4 (W.D. Tex. Oct. 21, 2016) (explaining that the Government "continued" to argue that non-generic Texas burglaries were still violent felonies under the residual clause "until *Johnson* was decided," and rejecting Government's attempt to ignore *Johnson*'s impact on the analysis of non-generic burglaries). *In re Adams*, 825 F.3d 1283, 1284 (11th Cir. 2016) (allowing a defendant to challenge the classification of a prior burglary offense under *Johnson* and *Descamps* in a successive § 2255 motion).

2. Other courts—including the Fifth Circuit—require the defendant to present *evidence* that the district court was *probably* thinking about the residual clause at sentencing.

The First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have all embraced a *stricter* approach to the gatekeeping standard. In these circuits, a successive movant has to *prove*, by a preponderance of the evidence, that the sentencing court was *actually thinking about* ACCA's residual clause when imposing the sentence. *See, e.g., Dimott v. United States*, 881 F.3d 232, 240, 243 (1st Cir. 2018); *Clay*, 921 F.3d at 553; *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018); and *Snyder v. United States*, 871 F.3d 1122, 1128 (10th Cir. 2018). The Eleventh Circuit holds that the residual clause must have been the *sole* basis for the enhancement:

> 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.

Beeman v. United States, 871 F.3d 1215, 1221–1222 (11th Cir. 2017) (emphasis added).

The approach adopted below is quite extraordinary, because it would prevent Petitioner from *ever* obtaining relief from his illegal sentence. His pre-*Johnson* direct appeal would be doomed from the start, because the residual clause would suffice, and his post-*Johnson* § 2255 motion would be doomed because he could not show that the residual clause was the sole subjective basis of the enhancement. That approach has to be wrong.

II. THIS COURT SHOULD ISSUE A COURSE CORRECTION.

"Increasing a defendant's sentence under the [ACCA residual] clause denies due process of law." *Johnson*, 135 S. Ct. at 2557. That much is known. But what does it mean to say that a defendant's sentence was increased "*under*" ACCA's residual clause?

Most appellate courts seem to assume that this is a *historical* inquiry, susceptible of proof by *evidence*. Under this view, it matters what the sentencing court was actually *thinking about*. If the court was *thinking about* the residual clause—and the defendant can prove that "fact" many years later—then the defendant is entitled to a ruling on whether he is an Armed Career Criminal. But if the sentencing court was not *thinking about* the residual clause—either because it was thinking of another clause, or wasn't thinking at all—then *Johnson* provides no relief.

ACCA's enumerated offense of "burglary" has always meant the same thing. If—as Petitioner will contend on the merits—his prior crimes do not satisfy that unchanging meaning, then the enumerated offense *never* justified his sentence. At some point, the Court must intervene to resolve the split and relieve petitioners from this onerous and often impossible requirement.

CONCLUSION

Petitioner respectfully asks that this Court grant certiorari and to reverse the decision below.

Respectfully submitted,

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