In the

Supreme Court of the United States

GARY LEE WILLINGHAM,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT,

PETITION APPENDIX

United States Court of Appeals for the Fifth Circuit

No. 19-11392

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GARY LEE WILLINGHAM,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:16-CV-116
USDC No. 1:01-CR-64-1

ORDER:

Gary Lee Willingham, federal prisoner # 27598-177, was convicted in 2002 of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He was sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to 210 months of imprisonment. This court granted Willingham tentative authorization to file a successive 28 U.S.C. § 2255 motion raising claims grounded in *Johnson v. United States*, 576 U.S. 591 (2015), which determined that the residual clause of the ACCA was unconstitutionally vague. The district court dismissed his authorized successive § 2255 motion on jurisdictional grounds, finding that Willingham failed to show his claims relied on a new rule of constitutional law as

announced by the Supreme Court and made retroactively applicable to his case on collateral review. Willingham now moves this court for a certificate of appealability (COA) to appeal the district court's dismissal of his successive § 2255 motion.

Willingham contends that it is debatable whether he, as a federal prisoner, was required to satisfy the standards set forth in 28 U.S.C. § 2244(b)(2)(A) and (b)(4), in order for the district court to have jurisdiction to entertain the merits of his authorized successive § 2255 motion. He avers that the district court should have considered the merits of his claims and that he should not have been required to show that his claims relied on the holding in *Johnson* or that it was more likely than not that the sentencing court relied on the residual clause.

To obtain a COA, Willingham must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). A COA movant makes that showing "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

All of Willingham's claims are raised for the first time in his COA pleadings. As such, we decline to consider them. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003); *see also Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018). Furthermore, Willingham has abandoned any challenge to the district court's implicit findings that he failed to demonstrate that it was more likely than not that the sentencing court relied on the ACCA's residual clause when imposing sentence. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Because Willingham has effectively abandoned any challenge to the district court's reasons for denying his successive § 2255 motion and all of his arguments are raised for the first time in his COA pleadings, he has not shown that his claims deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327. His motion for a COA is therefore DENIED.

EDITH H. JONES
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10859

In re: GARY LEE WILLINGHAM,

Movant

A True Copy
Certified order issued Sep 19, 2016

Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Abilene to consider
a successive 28 U.S.C. § 2255 motion

Before JOLLY, DAVIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Gary Lee Willingham, federal prisoner # 27598-177, has filed a motion for authorization to file a successive 28 U.S.C. § 2255 motion challenging the sentence imposed following his conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Willingham maintains that his sentence was unconstitutionally enhanced under the Armed Career Criminal Act (ACCA) because his prior Texas burglary convictions were violent felonies only under the residual clause of the ACCA, which has been invalidated. He invokes the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551,

2557 (2015), which determined that the residual clause of the ACCA was unconstitutionally vague.

This court will not grant a prisoner authorization to file a successive § 2255 motion absent a prisoner's prima facie showing that his claims rely on: (1) newly discovered evidence establishing that no reasonable factfinder would have convicted him of the underlying offense or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. § 2255(h); *see* 28 U.S.C. § 2244(b)(3)(C); *Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001). The Supreme Court has held that *Johnson* announced a new rule of constitutional law that is retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Our assessment of Willingham's motion for authorization is limited by the records available to us, and we express no view of the ultimate merit of his claims. We have sufficient information, however, to grant him authorization to proceed further under § 2255(h)(2). *See Reyes-Requena*, 243 F.3d at 899.

Therefore, IT IS ORDERED that Willingham's motion for authorization to file a successive § 2255 motion is GRANTED. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Willingham has failed to make the showing required to file such a motion. *See* § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899. The Clerk is

DIRECTED to transfer the motion for authorization and related pleadings to the district court for filing as a § 2255 motion. *See Dornbusch v. Comm'r*, 860 F.2d 611, 612-15 (5th Cir. 1988). The filing date shall be, at the latest, the date the motion for authorization was filed in this court, unless the district court determines that an earlier filing date should apply. *See Spotville v. Cain*, 149 F.3d 374, 376 (5th Cir. 1998) (prisoner mailbox rule)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

GARY LEE WILLINGHAM	§	
	§	
V.	§	**CIVIL ACTION 1:16-CV-116-O**
	§	**(Criminal No. 1:01-CR-064-O (1))**
UNITED STATES OF AMERICA	§	

ORDER DENYING GOVERNMENT'S MOTION TO DISMISS § 2255 MOTION AND ORDER FOR EXPEDITED RESPONSE

Now pending before the Court is Defendant Gary Lee Willingham's successive motion for relief under 28 U.S.C. § 2255. The Government filed a motion to dismiss, along with an appendix containing multiple copies of records related to Willingham's prior convictions. The Court then appointed counsel for Willingham, and Willingham, through counsel, filed a response to the motion to dismiss. The issue before the Court is whether the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), which held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act ("ACCA") violates the Constitution's guarantee of due process" provides Willingham any basis for relief. After careful consideration and review of Willingham's successive motion under § 2255, the Government's motion to dismiss, Willingham's reply, and the applicable law, the Court concludes that the Government's motion to dismiss must be denied, and the Government must file an expedited response to the § 2255 motion regarding whether Willingham's sentence under the ACCA may still be supported.

I. Background/Underlying Case History

On December 3, 2001, Willingham pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(l) and 924(e). The plea agreement expressly provided that he pleaded guilty "to the one count Indictment charging a violation of Title 18, United

States Code, Section 922(g)(1), the penalty for which is found in Title 18, United States Code, Section 924(e), that being Convicted Felon in Possession of a Firearm (Armed Career Criminal)." Plea Agreement, CR ECF No. 38, at 2. At the time of the entry of the plea agreement, the Court also entered Willingham's factual resume into the record, which included his admission of pawning a shotgun, and his admission of having been convicted of the following crimes:

> 1. Cause No. 7385, 118th Judicial District Court of Howard County, Texas - Burglary of a Habitation committed on December 6, 1987, for which he received fifteen (15) years incarceration in the Texas Department of Corrections.
>
> 2. Cause No. 7386, 118th Judicial District Court of Howard County, Texas - Burglary of a Habitation committed on November 22, 1987, for which he received fifteen (15) years incarceration in the Texas Department of Corrections.
>
> 3. Cause No. F-9365611-RS, 282nd Judicial District Court of Dallas County, Texas - Burglary of a Habitation committed on August 20, 1993, for which he received ten (10) years incarceration in the Texas Department of Criminal Justice - Institutional Division.

Factual Resume, CR ECF No. 39, at 2. After the entry of his plea, a presentence report was prepared by a probation officer, and that document again listed these three prior convictions for burglary of a habitation in the listing of the offense conduct. Presentence Report ("PSR") ¶ 7. The PSR also found that Willingham's offense level was determined based on his having at least three prior convictions for a "violent felony" or "serious drug offense," such that he was classified as an armed career criminal subject to an enhanced sentence under 18 U.S.C. § 924(e). PSR ¶ 22. With adjustments for acceptance of responsibility, his total offense level was 30, and his criminal history category was VI. PSR ¶¶ 25–39. Although the applicable range was then 168-210 months, because the low end of the guideline range was less than the statutorily required minimum sentence of 180 months, the PSR found the guideline range to be 180-210 months under U.S.S.G. § 5G1.1(c)(2).

PSR ¶ 65. Willingham was sentenced on February 22, 2002, to 210 months incarceration in the Bureau of Prisons and a five-year term of supervised release. Judgment, CR ECF No. 43.

Willingham filed a direct appeal, but the United States Court of Appeals for the Fifth Circuit affirmed his conviction and sentence in an unpublished opinion. *See Willingham v. United States*, No. 02-10265 (5th Cir. Oct. 22, 2002). The Supreme Court denied his petition for writ of certiorari. *Willingham v. United States*, 537 U.S. 1239 (2003). He then filed his first motion under § 2255 in 2003, and it was denied in an order and judgment entered on February 23, 2004.[1] In August 2015, Willingham sought an authorization from the court of appeals to file a successive § 2255 motion based upon *Johnson*, but by order entered on November 12, 2015, the court of appeals denied Willingham's 2015 motion, noting that he had not then shown that his claims were based upon *Johnson*. *In re Willingham*, No.15-10794 (5th Cir. Nov. 12, 2005). On June 24, 2016, Willingham filed the instant motion under § 2255 with the Clerk of Court, and acknowledged that he again sought authorization to file a successive § 2255 motion in the court of appeals. Willingham also submitted another motion for authorization to the court of appeals:

> Willingham maintains that his sentence was unconstitutionally enhanced under the Armed Career Criminal Act (ACCA) because his prior Texas burglary convictions were violent felonies only under the residual clause of the ACCA which has been invalidated. He invokes that Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015), which determined that the residual clause of the ACCA was unconstitutionally vague.

In re Willingham, No.16-10859 (5th Cir. Sept. 19, 2016). Upon review of this, the court of appeals granted Willingham's authorization to proceed further under § 2255(h)(2). *Id.* The appellate court's order directed that Willingham's motion and related pleadings be transferred to the Clerk of this

[1]The original § 2255 motion was assigned civil case number 1:03-CV-086-C.

Court for filing as a § 2255 motion, and all of these documents were then filed in this civil case number, 1:16-CV-116-O. ECF Nos. 4, 5.

Thus, Willingham's § 2255 pleadings consist of his June 23, 2016 motion filed in the court of appeals and forwarded to this Court, and his June 24, 2016 motion filed directly in this case. ECF Nos. 1, 5. Willingham argues that the burglary of a habitation convictions recited in the Factual Resume and the PSR (Howard County case numbers 7385 and 7386, and Dallas County case number F-9365611-RS), previously considered as violent felonies under the ACCA residual clause, no longer support his ACCA sentence since the residual clause has been held unconstitutional. ECF Nos. 1 at 7; 5 at 7. After service of the § 2255 motion, the Government filed a motion to dismiss for lack of jurisdiction, along with an appendix in support. ECF Nos. 8, 9. The Court then granted Willingham's motions for the appointment of counsel, and appointed the Office of the Federal Public Defender to assist Willingham in this proceeding. ECF No. 10. Willingham's counsel filed a response to the motion to dismiss. ECF No. 14. The Government has not filed any reply.

II. Whether the Successive § 2255 Motion is Subject to Review on the Merits

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") modified the provisions of 28 U.S.C. §§ 2244, 2254, and 2255 related to successive collateral challenges, making it "significantly harder for prisoners filing second or successive federal habeas corpus motions to obtain hearings on the merits of their claims." *United States v. Orozco-Ramirez*, 211 F.3d 862, 864 (5th Cir. 2000). The final paragraph of § 2255 states:

> A second or successive 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.A. §§ 2255(h)(1) and (2) (West Supp. 2016). Although the AEDPA included specific provisions in section 2244 detailing the requirements for successive section 2254 petitions by state prisoners, those details were not included in section 2255. *See Reyes Requena v. United States*, 243 F.3d 893, 897 n.8 (5th Cir. 2001) ("When AEDPA amended the various collateral review and habeas corpus statutes, it did not include the details applicable to successive § 2255 motions; rather, it simply referred to the § 2254 procedures detailed in § 2244"). However, in *Reyes Requena*, the Fifth Circuit determined that § 2255 incorporates the detailed provisions of both § 2244(b)(3)(C) and §2244(b)(4). *Id.* at 897. Those provisions provide:

> [§ 2244(b)(3)(C)] The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> [§ 2244(b)(4)] A district court *shall dismiss any claim* presented in a second of 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.A. §§ 2244(b)(3)(C) and (b)(4) (West 2016) (emphasis added). Thus, before a defendant may receive a merits adjudication of his successive § 2255 motion, he must pass through two gates. *See In re Swearingen*, 556 F.3d 344, 347 (5th Cir. 2009) ("Section 2244 establishes two independent gates through which a motion to file a successive petition must pass before the merits will be addressed") (citation omitted). First, the inmate must present a motion to the court of appeals and therein make a prima facie showing that his application to file a successive § 2255 motion satisfies the requirements of § 2255(h). *See In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003); *Reyes-Requena*, 243 F.3d at 897; 28 U.S.C.A. §§ 2244(b)(3)(C) and 2255.

Willingham has passed through this first gate. The Fifth Circuit concluded that he made a prima facie showing under § 2255(h)(2) on the claim that "his sentence was unconstitutionally enhanced under the Armed Career Criminal Act (ACCA) because his prior Texas burglary

convictions were violent felonies only under the residual clause of the ACCA, which has been invalidated" by noting that "the Supreme Court has held that *Johnson* announced a new rule of constitutional law that is retroactively applicable to cases on collateral review." *In re Willingham*, No. 16-10859 (5th Cir. Sept. 19, 2016) (citing *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016)). A prima facie showing is a sufficient showing of possible merit to warrant a fuller exploration by the district court. *See In re Hearn*, 418 F.3d 444, 445, 447–48 (5th Cir. 2005).

The second gate for Willingham is through this Court. The grant of authorization to file a second or successive motion by the court of appeals is "tentative," and the district court "is the second 'gate' through which the [2255 movant] must pass before the merits of his or her motion are heard." *In re Morris*, 328 F.3d at 741. The Fifth Circuit has explained "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 filing of such a motion." *Id.* (citing *Reyes-Requena*, 243 F.3d at 899). This Court has the authority and obligation to dismiss any claim if the movant fails to satisfy the criteria identified in 28 U.S.C. § 2255(h). But, if those criteria are satisfied, then the case should proceed to full adjudication on the merits.

In *Reyes-Requena*, the district court dismissed the authorized, successive motion because the new rule invoked—*Bailey v. United States*, 516 U.S. 137 (1995)—was not "a new rule of *constitutional* law." 28 U.S.C. § 2255(h)(2) (emphasis added). In affirming the district court's dismissal, the Fifth Circuit focused on this requirement:

> The Supreme Court in *Bailey* conducted a routine statutory analysis. *See* 516 U.S. at 144, 116 S.Ct. 501 ("We conclude that the language, context, and history of §924(c)(1) indicate that the Government must show active employment of the firearm."). In *Bousley v. United States*, the Court reiterated the statutory nature of its *Bailey* case. *See* 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L. Ed.2d 828 (1998) (stating that *Bailey* "[decided] the meaning of a criminal statute enacted by Congress"). This statement affirmed our earlier holding to the same effect in *United States v. McPhail*, in which we held that *Bailey* "is a substantive, *non-constitutional*

> decision concerning the reach of a federal statute." 112 F.3d 197, 199 (5th Cir.1997) (emphasis added). As such, the *Bailey* decision does not put forth a "new rule of constitutional law." *See, e.g.*, *Triestman*, 124 F.3d at 372 (stating that petitioner may not raise his *Bailey* claim in a second or successive § 2255 motion because *Bailey* was not a constitutional case) (collecting cases from other circuits); *United States v. Lorentsen*, 106 F.3d 278, 279 (9th Cir.1997) (stating that "*Bailey* announced only a new statutory interpretation, not a new rule of constitutional law" and thus was not a basis for a successive § 2255 motion).

Reyes-Requena, 243 F.3d at 900. Section 2244(d) did not allow the district court to decide, at the dismissal stage, whether the petitioner was entitled to relief under *Bailey*. The sole question was whether the *Bailey* rule was of the type described in § 2255(h)(2).

This case is distinguishable from *Reyes-Requena* because the parties agree that the new rule announced in *Johnson* is constitutional, substantive, previously unavailable, and has been "made" retroactive by the Supreme Court in *Welch v. United States*, 136 S. Ct. 1257 (2016). Moreover, Willingham satisfies the criteria specified in 28 U.S.C. § 2244: his claim "relies on" the rule in *Johnson*, a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *See* 28 U.S.C. § 2244(b)(2)(A); *see generally Kirk v. United States*, No 4:05CR52-GHD-DAS, 2016 WL 6476963, at *3 (N.D. Miss. Nov. 1, 2016) ("*Johnson II* (*Johnson v. United States*, 135 S. Ct. 2551 (2015)) invalidated the residual clause of 18 U.S. Code § 924(e)(2)(B(ii), creating a new rule of constitutional law retroactive to cases on collateral review. *Welch v. United States*,136 S. Ct. 1257, 1265 (2016). As the invalidation of the 'residual clause' was unavailable to [§ 2255 Movant] Kirk before *Johnson II* was decided, he has fulfilled the gatekeeping provision of 28 U.S.C. § 2255(h), and the court will examine the merits of his § 2255 claim"). Willingham has satisfied the threshold requirements and the Court will now turn to an adjudication of the § 2255 motion on the merits.

III. *Johnson v. United States*, 135 S. Ct. 2551 (2015)

In *Johnson*, the Supreme Court examined ACCA, which provides for an enhanced sentence of 15 years to life for an individual who is convicted of possessing a firearm and has three or more convictions for a serious drug offense or violent felony. The ACCA defines "violent felony" as:

> any crime punishable by imprisonment for a term 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 the 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) (emphasis added). The definition set forth in paragraph (i) is known as the "elements" or "force" clause. The non-italicized offenses listed in paragraph (ii) are the "enumerated offenses." The italicized portion found in paragraph (ii) describing conduct that "presents a serious risk of physical injury to another" is the ACCA's "residual" clause. The Supreme Court found the residual clause to be unconstitutionally void for vagueness, explaining that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557. The Court, however, also expressly noted that their opinion "does not call into question application of the (ACCA) to the four enumerated offenses, or the remainder of the (ACCA's) definition of a violent felony." *Id.* at 2563. Accordingly, not every person previously sentenced under the ACCA is entitled to seek retroactive relief on collateral review.

Whether Willingham can benefit from *Johnson* on the merits is not readily apparent. The Government and Willingham argue two different approaches to resolving the proper burden Willingham must meet in order to recover on the merits. The Government argues that Willingham's burden is to demonstrate that the sentencing court relied upon the residual clause when reviewing whether the underlying prior offenses were "violent felonies" under the ACCA, and that he is not

entitled to relief unless he can make this showing. Government's Mot., ECF No. 8, at 3, 5–6. Willingham argues instead that he must show, (1) constitutional error by showing only that the sentencing court relied upon the entire *pre-Johnson* definition of "violent felony" when it applied the ACCA enhancement, and (2) prejudice, that he would not be eligible for an ACCA sentence under current law. Willingham's Resp., ECF No. 14, at 4–6.

IV. Willingham's Underlying Sentencing Record

As the Government notes, it is not evident from the records of the sentencing proceeding in this case that Willingham's sentence was imposed under the residual clause. The probation officer recounted that his offense of conviction was under 18 U.S.C. § 922(g) and that he had at least three prior convictions for a "violent felony" or "serious drug offense," both committed on occasions different from one another, such that he was "classified as an armed career criminal subject to an enhanced sentence under 18 U.S.C. § 924(e)." PSR ¶ 22. Within the criminal history section, the PSR recited two convictions for burglary of a building, (PSR ¶¶ 26–27); one for burglary, (PSR ¶28); one for voluntary manslaughter, (PSR ¶ 29); one each for expired driver's license, expired license plates, and intoxication by a substance other than alcohol, (PSR ¶ 31); one for possession of cocaine and heroin, (PSR ¶ 33); and four for burglary of a habitation, (PSR ¶¶ 30, 32, 34, 35). And as noted above, three of the four convictions for burglary of a habitation (Howard County case numbers 7385 and 7386, and Dallas County case number F-9365611-RS) were expressly listed within the factual resume and in another portion of the PSR. FR, ECF No. 39; PSR ¶ 7. In none of the sentencing documents were the prior offenses referenced as falling under the residual clause, and review of the transcripts of the rearraignment and sentencing proceedings do not provide any indication that the Court made a determination as to whether any of Willingham's offenses qualified

as violent felonies under the residual clause. Rearraignment Hr'g Tr., ECF No. 47; Sentencing Hr'g Tr., ECF No. 38.

Thus, under this record the Court can be certain only that the sentencing judge adopted the probation officer's report, which simply concluded that Willingham had three violent felonies or serious drug offenses to qualify for an enhanced sentence under § 924(e). The record is not clear exactly which prior convictions the sentencing judge relied upon, and whether those prior convictions qualified as violent felonies under the elements clause, the enumerated clause, or the residual clause of ACCA.

V. Applicable Burden on Movant

The Government recites that Willingham's burden cannot be met unless "he proves that he was sentenced under the residual clause." *Id.* (citing *In re Moore*, 830 F.3d 1268, 1272–73 (11th Cir. 2016) ("If the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence—if the court cannot tell one way or the other—the district court must deny the § 2255 motion"). Consistent with this approach, some courts hold that a court cannot look at current case law to determine whether the residual clause was implicated in a defendant's sentencing, concluding that how the defendant was actually sentenced is what matters:

> If the defendant cannot show, as a factual matter, that his sentencing judge would have been unable at the time of sentencing to use one of the ACCA's other clauses, he cannot meet his burden to show that the residual clause was implicated in his sentence and [that] his motion is thus based on *Johnson's* invalidation of the residual clause.

United States v. Carrion, 2017 WL 662484, at *3, n.24 (collecting cases taking the approach that defendant/movant must show the sentencing court employed the residual clause).

The Court observes that the *In re Moore* opinion of a panel of the Eleventh Circuit cited by the Government has been criticized and distinguished by another panel of the Eleventh Circuit. *See*

In re Chance, 831 F.3d 1335, 1339 (11th Cir. 2016) (noting that the "commentary in [*Moore*] undoubtedly is dicta" and later noting that such "dicta . . . also seems quite wrong"). Other courts have criticized the *In re Moore* opinion and suggested that a § 2255 movant challenging an ACCA conviction that may no longer qualify as a violent felony, must meet a lesser burden. *See United States v. Booker*, Crim. No. 04-049 (PLF), Civ. No. 16-1107 (PLF), 2017 WL 829094, at *4 (D.D.C. Mar. 3, 2017) ("The government's position would create the absurd result that [a § 2255 Movant with a record devoid of the sentencing judge's intent] is not entitled to relief under *Johnson*, but a defendant who filed the same motion and had the same prior convictions would be entitled to relief if the sentencing judge years earlier had 'thought to make clear that she relied on the residual clause'") (quoting *In re Chance*, 831 F.3d at 1340); *see also Thrower v. United States*, No. 04-CR-0903 (ARR), 2017 WL 1102871, at *4 (E.D.N.Y. Feb. 13, 2017) ("[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") (emphasis in original). Courts following this approach have reasoned that "[w]here the record is silent and a court did not address any sentencing objections, it is unfair to require a petitioner to show 'actual reliance' on the residual clause. Absent any record by the Court or analysis in the PSR, there is no means by which a defendant could prove this fact." *United States v. Hamilton*, 2017 WL 368512, at *3 (N.D. Okla. Jan. 25, 2017) (emphasis added); *see also Maxwell v. United States*, No. 1:16CV00249 ERW, 2017 WL 690948, at *1 (E.D. Mo. Feb. 21, 2017) (noting that where a court cannot determine whether the petitioner was sentenced under the residual clause of the ACCA, the better approach is to find relief available because the court might have relied on the unconstitutional residual clause). As the district court in *Carrion* explained:

> Most courts in this camp require a defendant to show some possibility that the sentencing judge might have relied on the residual clause. Once that low hurdle is surmounted, intervening case law can then be used to determine whether the defendant was harmed by this potential error, i.e., whether the convictions would qualify as violent felonies under one of the ACCA's remaining clauses under current case law. Under this approach, a plausible argument that *Johnson* is implicated gets the defendant through § 2255's gate, and intervening case law can then be used to show that the residual clause impacted the defendant's sentencing.

Carrion, 2017 WL 662484, at *4, n.30 (collecting cases allowing defendants to rely on *Johnson* in combination with recent law to challenge their sentences) (footnote and citations omitted).

This Court finds, like the majority of courts to consider the issue, that where a movant can show that the sentencing judge may have relied upon the now invalid residual clause in imposing his prior ACCA sentence, he has made a sufficient showing to then review whether he was prejudiced by the prior sentence. As a result, the Government's motion to dismiss the motion under 28 U.S.C. § 2255 must be denied.

VI. Prejudice Analysis

Multiple courts have recognized that *Johnson* requires them to reexamine prior burglary offenses under current law to determine whether a defendant suffered prejudice when sentenced under the prior, unconstitutional version of ACCA. For example, in *United States v. Gomez*, 2:04-CR-2126-RMP, 2016 WL 1254014, at *3 (E.D. Wash. Mar. 10, 2016), the district court granted relief on a *Johnson* claim where the defendant challenged a prior burglary conviction:

> 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. *See James*, 550 U.S. at 209 (finding that attempted burglary under Florida law was a "violent felony" under the residual clause); *Taylor*, 495 U.S. at 600 n.9 ("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.'"). As such, until *Johnson*, Defendant's 1996 residential burglary conviction remained a "violent felony" through the ACCA residual clause.

Id. The court in *United States v. Harris*, 205 F. Supp. 3d 651 (M.D. Pa. 2016), reached the same conclusion:

> We reject the government's argument that Defendant's challenge to the burglary conviction is untimely or that Defendant's motion is really an untimely *Descamps* claim. His 2255 motion is properly based on *Johnson* (2015), as he has shown above that two prior convictions, escape and resisting arrest, could only have been based on the now-defunct residual clause, and thus can no longer be considered predicate offenses. Having shown that he properly invoked *Johnson* (2015), Defendant can proceed to establish that his prior convictions do not qualify him as a career offender under the ACCA under the elements clause or enumerated-offenses clause . . . . And he can rely on current law in doing so.

Harris, 205 F. Supp. 3d at 665 (citations omitted); s*ee also 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).

If Willingham had challenged the classification of his burglary offenses at any time prior to *Johnson*, that challenge would have been futile. The Government would have pointed to the residual clause, and, under then-existing precedent, would have prevailed. *See generally James v. United States*, 550 U.S. 192, 212 (2007) (noting that the residual clause "can cover conduct that is outside the strict definition of, but nevertheless similar to, generic burglary"). By contrast, after *Johnson*, the Government can no longer rely on the residual clause. Willingham contends he is not eligible for an ACCA sentence without the unconstitutionally expanded definition of "violent felony." This Court must decide, under current law, whether Willingham is still eligible for an ACCA sentence. If he is not, then the constitutional error in applying the now-invalidated version of the ACCA prejudiced him.

Although the record is unclear which of Willingham's prior offenses the sentencing judge ultimately relied upon to determine ACCA status, the Government concedes that it was most likely the three Texas convictions for burglary of a habitation recited in the factual resume. Mot. Dismiss,

ECF No. 8, at 4, n.2. The Texas burglary statute under which Willingham was convicted, Section 30.02(a) of the Texas Penal Code, defines burglary as follows:

> (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Penal Code § 30.02(a) (West 2011).

The Fifth Circuit has examined the alternative elements of burglary under Texas law and has held that the offense of burglary under Section 30.02(a)(1) constitutes the generic offense of "burglary," while a conviction under the alternative element set forth at Section 30.02(a)(3) does not. *See United States v. Constante*, 544 F.3d 584, 585–87 (5th Cir. 2008). The court reasoned that a conviction under § 30.02(a)(1) expressly requires that the entry to the building or habitation be made "with the intent to commit a crime," while "§ 30.02(a)(3) lacks such an intent requirement" and thus does not qualify as the generic burglary offense. *United States v. Conde-Castaneda*, 753 F.3d 172, 176 (5th Cir. 2014) (citing *Constante*, 544 F.3d at 587). The court of appeals later held that "§30.02(a) is a divisible statute [because] 'one alternative . . . matches an element in the generic offense [of burglary of a dwelling], but the other . . . does not.'" *Conde-Castaneda*, 753 F.3d at 176 (citing *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (finding a statute which "sets out one or more elements of the offense in the alternative" is a "divisible statute")). The Fifth Circuit recently reaffirmed that the Texas burglary statute remains a divisible statute after the Supreme

Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See United States v. Uribe*, 838 F.3d 667, 670–71 (5th Cir. 2016).

The Government also concedes that all three of the convictions for burglary of a habitation they believe the sentencing court relied upon are convictions under Texas Penal Code § 30.02(a)(3), acknowledging that "the charging documents do not allege specific intent to steal at the time of the unlawful entry." Mot. Dismiss, ECF No. 8, at 4, n.2; Government App., ECF No. 9, at 20, 33–34, 38–39. Thus, the three convictions for burglary of a habitation recited in the factual resume and expressly listed in the offense conduct section of PSR, can no longer serve as qualifying violent felonies under the ACCA.

As noted above, in Willingham's criminal history as recited in the PSR, he has numerous other prior convictions. PSR ¶¶ 25–39. But the Court is without any information to determine whether, under current law, any of these prior convictions could still qualify Willingham for an ACCA sentence under 18 U.S.C. § 924(e)(1). Without that information, the Court cannot ultimately determine whether Willingham is entitled to a grant of relief under § 2255 in the form of a re-sentencing proceeding. Thus, the Court finds that, if the Government takes the position that other prior convictions still qualify Willingham for a sentence under the ACCA, it must provide a detailed response to the § 2255 motion, setting forth the three previous convictions for a violent felony or serious drug offense that could still qualify Willingham for a sentence under 18 U.S.C. § 924(e). The Court finds that an expedited response is required.

VII. Conclusion

It is therefore **ORDERED** that the Government's motion to dismiss (ECF No. 8) is **DENIED**. It is further **ORDERED** that the Government shall file a response to the motion under § 2255, setting forth it's current position regarding the status of Willingham's sentence, and if the

Government takes the position that other prior convictions will still qualify Willingham for a sentence under the ACCA, it must set forth the three previous convictions for a violent felony or serious drug offense that could still qualify.

It is further **ORDERED** that the Government's response must be filed on or before **June 28, 2017**.

It is further **ORDERED** that Willingham's time to file a reply to the Government's response is until fourteen (14) days after the filing of the response.

SO ORDERED this **19th day** of **June, 2017.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

GARY LEE WILLINGHAM,	)	
	)	
Movant,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	Civil Action No. 1:16-CV-116-C

ORDER

On June 24, 2016, Gary Lee Willingham ("Movant") filed his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. On October 25, 2019, Respondent filed a Status Report, therein requesting that the Court lift the stay and dismiss Movant's Section 2255 Motion.

Having considered Movant's Motion, Respondent's Status Report, and all relevant records, the Court is of the opinion that the stay should be **LIFTED** and that Movant's Motion Under 28 U.S.C.§ 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody should be **DENIED** and **DISMISSED** for the reasons stated in Respondent's briefing—namely, lack of jurisdiction. *See United States v. Clay*, 921 F.3d 550 (5th Cir. 2019). All relief not expressly granted is **DENIED**.[1]

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability is denied. For the reasons set forth herein,

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[1] In the alternative and in light of the Fifth Circuit's opinion in *United States v. Herrold*, ___ F.3d ___, 2019 WL 5288154 (5th Cir. Oct. 18, 2019), the Court finds that Movant's Section 2255 should be **DISMISSED** due to the fact that Movant continues to qualify for the enhanced penalty provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

Movant has failed to show that a reasonable jurist would find: (1) this Court's "assessment of the constitutional claims debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

SO ORDERED this 29th day of October, 2019.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

In the United States District Court
For the Northern District of Texas
Abilene Division

Gary Lee Willingham, Movant, v. United States of America, Respondent.	§ § § § § § § §	 Case No. 1:16-CV-116-O Related to 1:01-CR-67-C

Movant's Response in Opposition to Motion to Dismiss

The Government has moved to dismiss Mr. Willingham's authorized successive motion to vacate under 28 U.S.C. § 2255, arguing that the motion does not satisfy the criteria outlined in 28 U.S.C. § 2255(h)(2). (Doc. 8). The Government is wrong. The Court should deny the motion, proceed to the merits of the action, and grant relief to Mr. Willingham.

I. Contrary to the Government's argument in its Motion to Dismiss, Mr. Willingham's authorized successive motion "contains" and relies on the new constitutional rule announced on *Johnson v. United States*.

The Government's motion argues that Mr. Willingham "does not meet his burden to show that his sentence was imposed under the residual clause of the Armed Career Criminal Act." (Doc. 8 at 2.) There are two problems with this assertion: first, it mistakes the *merits* inquiry for the *jurisdictional* inquiry; second, it misstates Mr. Willingham's burden on the merits.

Under 28 U.S.C. § 2255(h), a federal prisoner seeking to challenge his sentence through a successive motion to vacate must obtain certification that his motion "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was

previously unavailable." 28 U.S.C. § 2255(h)(2). Mr. Willingham obtained that certification from the Fifth Circuit. (*See* ECF Doc. 4).

Admittedly, this authorization did not fully and finally determine whether the (h)(2) criteria were satisfied. In granting Mr. Willingham's motion, the Fifth Circuit stated that its grant of authorization was merely "tentative," and that this Court should "dismiss the § 2255 motion without reaching the merits if it determines that Willingham has failed to make the showing required by § 2255(h)(2)." (Doc. 4 at 2). According to the Government, this Court is free to dismiss the case at this preliminary stage without even looking at the "merits." But despite couching its motion in "jurisdictional" terms, the Government's argument is a merits-based argument.

The Government cites *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 1991), in support of its motion. (U.S. Mot. to Dism. At 2). But that case is distinguishable. Under the framework established by 28 U.S.C. § 2244(b), the Court of Appeals first reviews the motion for authorization to see if the prisoner makes a prima facie case that his proposed application will satisfy the requirements of § 2244, or, for a federal prisoner, the substantive requirements of § 2255(h). 28 U.S.C. § 2244(b)(3). Once the Court of Appeals makes that determination as to an entire proposed "application," the district court must then review each individual "claim" within that application to see if it satisfies § 2255(h). *See* 28 U.S.C. § 2244(b)(4). That is the process envisioned by the statute.

In *Reyes-Requena,* the Fifth Circuit first held that the claim-by-claim review in district court, 28 U.S.C. § 2244(b)(4) ,was incorporated into 28 U.S.C. § 2255. *Id.* at 899–900. As such, a district court must review each individual claim in an authorized application to see if it "contains" a new constitutional rule (or contains the appropriate kind of evidence of innocence). This Court has the authority and obligation to dismiss any claim if the movant fails to satisfy the criteria identified in

28 U.S.C. § 2255(h). But, if those criteria are satisfied, then the case should proceed to full adjudication on the merits.

In *Reyes-Requena*, the district court dismissed the authorized, successive motion because the new rule invoked—*Bailey v. United States*, 516 U.S. 137 (1995)—was not "a new rule of *constitutional* law." 28 U.S.C. § 2255(h)(2) (emphasis added). In affirming the district court's dismissal, the Fifth Circuit focused on this requirement:

> The Supreme Court in *Bailey* conducted a routine statutory analysis. *See* 516 U.S. at 144, 116 S.Ct. 501 ("We conclude that the language, context, and history of § 924(c)(1) indicate that the Government must show active employment of the firearm."). In *Bousley v. United States,* the Court reiterated the statutory nature of its *Bailey* case. *See* 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (stating that *Bailey* "[decided] the meaning of a criminal statute enacted by Congress"). This statement affirmed our earlier holding to the same effect in *United States v. McPhail,* in which we held that *Bailey* "is a substantive, *non-constitutional* decision concerning the reach of a federal statute." 112 F.3d 197, 199 (5th Cir.1997) (emphasis added). As such, the *Bailey* decision does not put forth a "new rule of constitutional law." *See, e.g., Triestman,* 124 F.3d at 372 (stating that petitioner may not raise his *Bailey* claim in a second or successive § 2255 motion because *Bailey* was not a constitutional case) (collecting cases from other circuits); *United States v. Lorentsen,* 106 F.3d 278, 279 (9th Cir.1997) (stating that "*Bailey* announced only a new statutory interpretation, not a new rule of constitutional law" and thus was not a basis for a successive § 2255 motion)

Reyes-Requena, 243 F.3d at 900. Contrary to the Government's argument here, § 2244(d) did not allow the district court to decide, at the dismissal stage, whether the petitioner was entitled to relief under *Bailey*. The sole question was whether the *Bailey* rule was of the type described in § 2255(h)(2).

This case is distinguishable from *Reyes-Requena* because all parties agree that the new rule announced in *Johnson* is constitutional, substantive, previously unavailable, and has been "made" retroactive by the Supreme Court in *Welch v. United States*, 136 S. Ct. 1257 (2016). Moreover, Mr. Willingham satisfies the criteria specified in 28 U.S.C. § 2244: his claim "relies on" the rule in *Johnson*, a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *See* 28 U.S.C. § 2244(b)(2)(A). As such, Mr. Willingham has satisfied all the threshold requirements and the case should proceed to an adjudication on the merits.

II. On the merits, *Johnson* provides relief to a defendant whose Armed Career Criminal Act sentence depends on one or more non-generic burglaries.

The Government's first error is to assert that this court must adjudicate the merits of the case as a prerequisite to exercising jurisdiction. But even assuming it were appropriate to delve into the merits (that is, whether Mr. Willingham is entitled to relief under the rule in *Johnson*), the Government compounds that first error with a second one: it misstates Mr. Willingham's burden on the merits. He is not required to show the *contents* of the district court's mind at the time it imposed the original sentence. Nor must it be "clear that Willingham's sentence was imposed in reliance on the residual clause." (U.S. Mot. at 3.) Instead, Mr. Willingham must show (1) constitutional error and (2) prejudice.

A. Mr. Willingham can satisfy his burden on the merits by showing that the Court *might* have relied on the residual clause.

The error here is utilizing the unconstitutional version of the "violent felony" definition. This Court utilized the entire, pre-*Johnson* definition of "violent felony" when it applied the ACCA enhancement at Mr. Willingham's original sentencing. The only question is one of prejudice. As

one district court recently recognized, "The government's position"—that the defendant must show that the district court *actually relied on* the residual clause—"has been rejected by virtually every court to have considered the question." Mem. Order (Doc. 59) at 6, *United States v. Ralph T. Wilson*, No. 1:96-CR-157 (D.D.C. April 18, 2017):

> The government's position has been rejected by virtually every court to have considered the question, including by two other judges in this district. *See United States v. Booker*, No. 04- cr-0049, 2017 WL 829094, at *3-*4 (D.D.C. Mar. 2, 2017) (Friedman, J.) ("The Court declines to impose the government's reliance requirement because [defendant] has done all that is required of him: shown that the sentencing judge might have relied on the now unconstitutional residual clause."); *United States v. Brown*, No. 09-0358, slip op. at 7-8 (D.D.C. Apr. 12, 2017) (Sullivan, J.) (same); *see also United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("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 [2015]*, the inmate has shown that he 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A)"); *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1159 (E.D. Wash. 2016) (defendant "successfully demonstrated constitutional error simply by showing that the Court might have relied on an unconstitutional alternative when it found that [defendant's] prior convictions for burglary and attempted rape were violent felonies); *Bevly v. United States*, No. 4:15-cv-965, 2016 WL 6893815, at *1, (E.D. Mo. Nov. 23, 2016) ("[i]n a situation where the Court cannot determine under what clause the prior offenses were determined to be predicate offenses, the better approach is for the Court to find relief is available, because the Court may have relied on the unconstitutional residual clause"); *United States v. Mitchell*, No. 1:06-cr-353, 2016 WL 6656771, at *3 (M.D. Pa. Nov. 10, 2016) ("It is sufficient for purposes of § 2255 review to

> show that the court might have applied the residual clause when it imposed the enhanced sentence."); *Shabazz v. United States*, No. 3:16-cv-1083, 2017 WL 27394, at *5 (D. Conn. Jan. 3, 2017) (same); *Givens v. United States*, No. 4:16-cv-1143, 2016 WL 7242162, at *4 (E.D. Mo. Dec. 15, 2016) (same); *Diaz v. United States*, No. 1:11-cr-0381, 2016 WL 4524785, at *5 (W.D.N.Y. Aug. 30, 2016) (same).

Wilson, *supra*, at 6–7.

If Mr. Willingham had argued that his Texas burglary offenses were not for generic "burglary," he could not escape the residual clause prior to *Johnson*. *See Hardeman v. United States*, 1:96-CR-192, 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 the *Johnson*'s impact on the analysis of non-generic burglaries). Now that the residual clause is gone, Mr. Willingham can finally argue that his sentence is illegal under *Johnson*.

B. Courts throughout the nation have recognized that *Johnson* invalidates sentences predicated upon non-generic burglary offenses.

Texas burglary under § 30.02(a)(3) is non-generic, and without the residual clause it is no longer a violent felony. *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008). If the statute is not divisible, then *none* of Mr. Willingham's burglaries count as violent felonies. And even assuming that the statute is divisible, the Government concedes that most were for non-generic burglary under subsection (a)(3). (U.S. Mot. at 4 n.2.). *Hardeman* shows that a defendant whose sentence was enhanced because of a non-generic burglary is entitled to relief under *Johnson*. 2016 WL 6157433, at *2–4.

To the extent the Government is arguing that this Court should apply the law as it existed back in 2001, it is doubly mistaken. In a post-conviction action, prejudice is evaluated under *current* law. *See*, e.g., *United States v. Niemann*, 204 F.3d 1115, 1999 WL 1328080, at *5, n.3 (5th Cir. 1999) (citing *Lockhart v. Fretwell,* 506 U.S. 364, 368–372 (1993)) ("On the 'prejudice' prong, the court must apply the current law to determine whether 'the result of the [initial] proceeding was fundamentally unfair or unreliable.'"). And when a court interprets a term in a statute—such as *Constante*'s analysis of the term "burglary"—the court is saying what the law *always has been*. Thus, substantive decisions are always deemed "retroactive." *See*, *e.g.*, *Bousley v. United States*, 523 U.S. 614, 620 (1998); *Schriro v. Summerlin,* 542 U.S. 348, 351 (2004) ("New *substantive*rules generally apply retroactively."); *Welch*, 136 S. Ct. at 1264 (same).

According to the motion to dismiss, *Johnson* has no effect on Mr. Willingham's sentence because the district court might very well have misapplied the enumerated-offense clause. (U.S. Mot. at 5.) But that is both wrong and beside the point. Texas burglary prohibits some conduct that is *not* generic burglary. *See Constante*, 544 F.3d 584 (5th Cir. 2008). Prior to *Johnson*, the Government relied on the catch-all residual clause to classify at least some Texas burglaries as violent felonies. And the Fifth Circuit approved this reliance. *See United States v. Ramirez*, 507 F. App'x 353 (5th Cir. 2013). Prior to *Johnson*, the Government repeatedly argued that non-generic Texas burglaries were violent felonies under the residual clause, even in post-conviction actions.

In *United States v. Emeary*, 794 F.3d 526 (5th Cir. 2015) (Dennis, J.), the court recognized that *Johnson* modified the analysis of Texas burglaries. *See id.* at 529 & n.3 ("In any event, the scope of *Constante* is academic now that the Supreme Court has held that the residual clause is unconstitutional and unenforceable.").

Courts throughout the nation have recognized that *Johnson* requires them to reexamine prior burglary offenses *under current law* to determine whether a defendant suffered prejudice when sentenced under the prior, unconstitutional version of ACCA. For example, in *United States v. Gomez*, 2:04-CR-2126-RMP, 2016 WL 1254014, at *3 (E.D. Wash. Mar. 10, 2016), the district court granted relief on a *Johnson* claim where the defendant challenged a prior burglary conviction:

> 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. *See James*, 550 U.S. at 209 (finding that attempted burglary under Florida law was a "violent felony" under the residual clause); *Taylor*, 495 U.S. at 600 n.9 ("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.'"). As such, until *Johnson*, Defendant's 1996 residential burglary conviction remained a "violent felony" through the ACCA residual clause.

The court in *United States v. Harris*, 1:CR-06-0268 (M.D. Pa. Aug. 31, 2016), reached the same conclusion:

> We reject the government's argument that Defendant's challenge to the burglary conviction is untimely or that Defendant's motion is really an untimely *Descamps* claim. His 2255 motion is properly based on *Johnson* (2015), as he has shown above that two prior convictions, escape and resisting arrest, could only have been based on the now-defunct residual clause, and thus can no longer be considered predicate offenses. Having shown that he properly invoked *Johnson* (2015), Defendant can proceed to establish that his

> prior convictions do not qualify him as a career offender under the ACCA under the elements clause or enumerated-offenses clause.

Harris, 2016 WL 4539183, at *9; *see also 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); *United States v. Winston*, 3:01-CR-00079, 2016 WL 4940211, at *2 (W.D. Va. Sept. 16, 2016) ("This is so because *Johnson II* eliminated an escape-hatch—that is, a statutory hook on which the Government otherwise could have hung Defendant's ACCA enhancement if robbery did not satisfy the force clause.").

The Eleventh Circuit recently recognized that a petitioner in Mr. Willingham's shoes is not required to prove beyond all doubt that the district court explicitly relied on the defunct residual clause:

> In our view, it makes no difference whether the sentencing judge used the words "residual clause" or "elements clause," or some similar phrase. If *Johnson* means that an inmate's § 924(c) (or § 924(o)) companion conviction should not have served as such, then the text of § 924(c) no longer authorizes his sentence and his imprisonment is unlawful. More specifically, a conclusion that *Johnson*'s rule applied to § 924(c)'s residual clause would mean that inmate's sentence was lawful up until the day *Johnson* was decided, but no longer is. To be sure, the inmate is the one who has to make the showing that his sentence is now unlawful. But we believe the required showing is simply that § 924(c) may no longer authorize his sentence as that statute stands after *Johnson—not proof of what the judge said or thought at a decades-old sentencing*. No matter what the judge said, it is precedent from the Supreme Court and this Court that dictates which offenses meet § 924(c)'s definitions. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–313 (1994) ("It is this Court's responsibility to say what a statute means, and once the

> Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (emphasis added)). So, if the Supreme Court has said an inmate's conviction does not meet one of the definitions that survive *Johnson*, then the inmate may have a claim that he has "the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law." 28 U.S.C. § 2255(a).5

In re Chance, 831 F.3d 1335, 1341 (11th Cir. 2016).

If Mr. Willingham had challenged the classification of his burglary offenses at any time prior to *Johnson*, that challenge would have been futile. The Government would have fallen back on the residual clause, and under *James*, the Government would have won. *C.f. Stanley v. United* States, 827 F.3d 562, 565 (7th Cir. 2016) (Easterbrook, J.), ("Perhaps a prisoner could argue that he decided not to press an argument about the elements clause at sentencing, or on appeal, when the only consequence would have been to move a conviction from the elements clause to the residual clause. Then it would be possible to see some relation between *Johnson* and a contention that the conviction has been misclassified, for the line of argument could have been pointless before *Johnson* but dispositive afterward.").

By contrast, after *Johnson*, the Government can no longer fall back on the residual clause escape-hatch. Mr. Willingham contends that he is not eligible for an ACCA sentence without the unconstitutionally expanded definition of "violent felony." The Court must decide, under current

law, whether he is eligible for an ACCA sentence. If he is not, then the constitutional error in applying the wrong version of ACCA prejudiced him.

C. Mr. Willingham preserves for further review the argument that Texas burglary is indivisible and non-generic.

Mr. Willingham concedes that, as of the date this Reply is filed, the Fifth Circuit has held that the Texas offense of burglary remains divisible. *See United States v. Uribe*, 838 F.3d 667 (5th Cir. Oct. 3, 2016). The Fifth Circuit denied rehearing en banc in *Uribe*, but multiple cases continue to press this issue. *See e.g. United States v. Herrold*, No. 14-11317 (pet. for reh'g en banc filed April 25, 2017).

More importantly, *Uribe* did not address Texas cases concerning jury unanimity, which is the *sine qua non* of divisibility after *Mathis*. Texas courts have consistently held that burglary under § 30.02(a) is a single offense, and that subsections (a)(1) and (a)(3) represent alternative means or theories to prove that single offense. *See Ex parte Cavazos*, 203 S.W.3d 333, 337 (Tex. Crim. App. 2006) (holding that a burglary "offense is complete once the unlawful entry is made, without regard to whether the intended theft or felony is also completed," and therefore it would violate double jeopardy to convict a defendant of multiple burglary offenses arising from a single unlawful "entry"); *Martinez* v. *State*, 269 S.W.3d 777, 783 (Tex. App. 2008); *Stanley* v. *State*, No. 03-13-00390-CR, 2015 WL 4610054, at *7 (Tex. App. July 30, 2015); *Washington* v. *State*, No. 03–11–00428–CR, 2014 WL 3893060, at *3–4 (Tex. App. Aug. 6, 2014) (recognizing that (a)(1) and (a)(3) "'are essentially alternative means of proving a single mens rea element and not separate offenses").

Mr. Willingham asks this Court to address this argument which was neither raised nor addressed in *Uribe*. If that argument is vindicated, he will be entitled to relief in this post-conviction petition because there will not be 3 or more violent felonies committed on separate occasions.

D. Mr. Willingham reserves the right to argue that any of the remaining convictions likewise fail to qualify as violent felonies.

The Government relies exclusively on the burglary convictions in its motion to dismiss. As such, Mr. Willingham will not address any of the other convictions in this response. However, none of the other offenses qualify as violent felonies or serious drug offenses under current law, either. Therefore, the Court should proceed to the merits, grant his motion to vacate, and order his immediate release.

Conclusion

For all these reasons, Mr. Willingham respectfully asks that the Court deny the Government's motion to dismiss.

Respectfully submitted,

/s/ J. Matthew Wright

Assistant Federal Public Defender
500 South Taylor Street, Suite 110
Amarillo, Texas 79101
806.324.2370
Matthew_Wright@fd.org

Certificate of Service

I filed this response via ECF. Opposing counsel is a registered filer and is deemed served.

/s/ J. Matthew Wright