No. _____

In The Supreme Court of the United States

JEROME WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The proponent of a 28 U.S.C. § 2255 motion bears the burden of proving by a preponderance of the evidence that he is entitled to relief. Most circuits have specifically held that the same standard applies to § 2255 claims that rely on this Court's voiding of the Armed Career Criminal Act ("ACCA") residual clause in *Johnson v. United States*, 576 U.S. 591 (2015). Courts throughout the country also agree that the legal landscape from the time of sentencing may carry a § 2255 movant's preponderance burden even if the sentencing record is silent as to whether the sentence depended on the residual clause.

The Eleventh Circuit, however, has added to the traditional burden of proof a heightened burden of *production*. It alone among the courts of appeals will not even weigh evidence of the legal landscape unless at the time of sentencing "*clear precedent* show[ed] that the court could only have used one clause or another," Pet. App. 14a (emphasis added) (quoting *United States v. Pickett*, 916 F.3d 960, 964 (11th Cir. 2019)). No other circuit imposes an equivalent burden of production. Mr. Williams presents this question:

> Where a § 2255 movant relies on evidence of the legal background at the time of his sentencing to prove he was sentenced under an unconstitutional law, does he bear a heightened burden of production to prove his claim?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Jerome Williams respectfully petitions 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 opinion affirming the denial of Mr. Williams's 28 U.S.C. § 2255 motion is reported at 985 F.3d 813 and is included in Appendix A. Pet. App. 1a. The district court's memorandum opinion is unreported and is included in Appendix B. Pet. App. 28a.

JURISDICTION

The Eleventh Circuit affirmed the denial of Mr. Williams's § 2255 motion on January 13, 2021. This petition is timely under this Court's March 19, 2020, order extending the deadline for any petition for a writ of certiorari to 150 days from the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause. The Due Process Clause of the Fifth Amendment to the United States Constitution provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

2. 18 U.S.C. § 924(e)(2)(B). Section 924(e)(2)(B) of United States Code Title 18 states,

> [T]he 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 . . . .

3. 28 U.S.C. § 2255. Section 2255 of United States Code Title 28 provides, in relevant part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming 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 court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> . . .

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

. . .

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

. . .

(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.

INTRODUCTION

The ACCA's residual clause "violates the Constitution's guarantee of due process," *Johnson*, 576 U.S. at 606, and cannot "mandate or authorize any sentence," *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). To correct an unlawful pre-

Johnson sentence, a federal defendant must file a § 2255 motion and show that his ACCA enhancement depended on the residual clause. A § 2255 motion is judged by the traditional civil preponderance standard, and the Eleventh Circuit's burden of proof and persuasion for *Johnson* § 2255 claims purportedly conforms to that, requiring an inmate to show an ACCA enhancement more likely than not depended on the residual clause.

Obtaining relief, however, is notably harder in the Eleventh Circuit than anywhere else in the country, because that court of appeals alone has held that proponents of *Johnson* § 2255 claims bear an extraordinary burden of production. When the residual clause was still in force, sentencing courts often did not create a record of which clause of the "violent felony" definition they relied on. So, in many cases where the record is silent, the legal landscape at the time of sentencing provides the strongest evidence on that point. But to prevail in the Eleventh Circuit, a *Johnson* § 2255 claimant must first produce practically incontrovertible evidence from either the record or the legal background against which he was sentenced. Where the record is silent, that burden of production requires "clear precedent showing that the court could only have used one clause or another," Pet. App. 14a (quoting *Pickett*, 916 F.3d at 964)—i.e., "authority that would have *compelled* a particular result," *id.* at 16a (emphasis added). Without that threshold showing of clarity, "the party with the burden loses," *Beeman v. United States*, 871 F.3d 1215, 1225 (11th Cir. 2017), and courts in the Eleventh Circuit do not proceed to decide the persuasive weight of evidence about the legal landscape at sentencing. In this case, that caused the court

of appeals to conclude that even if the legal landscape suggested the sentencing court would have committed reversible error by *not* relying on the residual clause, it "shed[] too little light on the historical question at issue here." Pet. App. 16a.

The Eleventh Circuit's heightened burden of production for this class of § 2255 claims is not a traditional component of a preponderance burden, and no other court of appeals imposes an equivalent requirement. Mr. Williams's sentence remains in place even though the legal background readily shows that the sentence more likely than not depended on the ACCA's vague residual clause. That showing would be sufficient to carry his burden of proof in any other circuit.

This case is an excellent vehicle for the Court to decide whether that should be so. The Eleventh Circuit's extraordinary burden of production has been a central issue throughout this case. It ultimately was dispositive here, and courts in the circuit continue to apply the same burden to other § 2255 claims that do not involve *Johnson*'s ACCA holding. The Court should grant the writ to consider whether the Eleventh Circuit has erected an unwarranted barrier that results in uneven application of § 2255 across circuits.

STATEMENT OF THE CASE

1. Mr. Williams's 1998 ACCA-Enhanced Sentence. Jerome Williams was convicted and sentenced in 1998 on three federal criminal counts. His sentence for one of them, firearm possession after a felony conviction, 18 U.S.C. § 922(g)(1), was enhanced under the ACCA because the sentencing court found that Mr. Williams "ha[d] three previous convictions . . . for a violent felony . . . committed on occasions

different from one another," 18 U.S.C. § 924(e)(1). That finding increased the statutory imprisonment range for the § 922(g)(1) conviction, which ordinarily is 0 to 10 years, § 924(a)(2), to a minimum of 15 years and a maximum of life, § 924(e)(1). The sentencing court adopted a Presentence Investigation Report ("PSR") that identified three of Mr. Williams's prior convictions as ACCA violent felonies generally. But neither the PSR nor anything else in the sentencing record linked any violent-felony classification to a specific clause of the statute's definition of "violent felony."

2. The ACCA's Residual Clause and *Johnson v. United States*. This Court explained the ACCA's definition of a violent felony in *Johnson*:

> The [ACCA] defines "violent felony" as follows:
>
> > "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 use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added).
>
> The closing words of this definition, italicized above, have come to be known as the Act's residual clause.

576 U.S. at 594. Courts commonly call subsection (e)(2)(B)(i) the elements clause or the force clause. The list immediately preceding the residual clause in subsection (e)(2)(B)(ii), including the phrase "involves use of explosives," is called the enumerated-offenses clause, or just the enumerated clause.

In *Johnson*, the Court held that the residual clause infringes on the right, under the Fifth Amendment's Due Process Clause, not to be punished "under a

criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." 576 U.S. at 595 (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). Concluding "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 597, the Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process," *id.* at 606. The following Term, in *Welch*, the Court held that "*Johnson* is retroactive in cases on collateral review," 136 S. Ct. at 1268.

3. Mr. Williams's § 2255 Claim under *Johnson*. In 2016, Mr. Williams moved under § 2255 for collateral review of his sentence. One of the predicates for his ACCA enhancement was a 1977 conviction for federal kidnapping in violation of 18 U.S.C. § 1201(a)(1). Mr. Williams's § 2255 motion alleged that the ACCA enhancement depended on the kidnapping conviction's classification as a violent felony, and the violent-felony classification depended on the residual clause. The government did not contend that federal kidnapping remained a violent felony after *Johnson*, but it argued that Mr. Williams could not show the residual clause was the basis for designating it a violent felony in 1998.

Since kidnapping is not enumerated in § 924(e)(2)(B)(ii), the dispute concerned whether the kidnapping conviction was more likely classified as a violent felony under the residual clause alone, or instead (or also) under the elements clause.

Neither provision was mentioned in the sentencing record, but Mr. Williams argued in a 2016 pleading,

> [T]he state of the law at the time of . . . sentencing shows that it is more likely than not that the sentencing court based its ACCA classification on the residual clause. Many actions that trial courts take are founded on legal authorities that the courts do not bother to name. A court may grant or deny a motion to suppress without announcing that its ruling is based on a particular prior case or even mentioning the Fourth Amendment; overrule or sustain an evidentiary objection without naming a specific rule of evidence; and grant a motion to compel disclosure of exculpatory evidence without citing *Brady v. Maryland*, 373 U.S. 83 (1963). Yet the legal bases for those actions usually can be discerned by examining the applicable law and assuming that the court knew the law without naming it.

Reply to Gov't Resp. to § 2255 Mot. at 13, *Williams v. United States*, No. 2:16-cv-8101, 2018 WL 6171434 (N.D. Ala. filed Nov. 29, 2016). The following year, while Mr. Williams's § 2255 motion was still pending, the Eleventh Circuit adopted the "more likely than not" standard anticipated by his pleadings. *See Beeman*, 871 F.3d at 1222 ("[T]he 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."). And it agreed with the principle that even where the "sentencing record[] [does not] contain direct evidence" that the sentencing court relied on the residual clause, "the law . . . at the time of sentencing" might still provide "sufficient circumstantial evidence," *id.* at 1224 nn.4, 5.

That was true in Mr. Williams's case, he argued, because precedent in 1998 established that the elements clause—as its text makes plain—focuses exclusively on the statutory elements of a prior offense. *See United States v. Gonzalez-Lopez*, 911 F.2d 542, 546 (11th Cir. 1990) ("The phrase 'as an element' only permits an exami-

nation of the statute under which the defendant was convicted to determine if the statute has as an ingredient the requisite use of force (or attempted or threatened use of force)."); *United States v. Oliver*, 20 F.3d 415, 418 n.4 (11th Cir. 1994) ("[I]n analyzing whether an offense is a 'violent felony' pursuant to § 924(e), we must employ 'a formal categorical approach, looking only to the statutory definitions of the prior offense, and not to the particular facts underlying those convictions.'" (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990))).

It also was settled at the time that federal kidnapping did not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i). An individual violates § 1201(a)(1) if he "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person," and "the person is willfully transported in interstate or foreign commerce . . . ." In *Chatwin v. United States*, 326 U.S. 455 (1946), the Court explained that in enacting § 1201, Congress used "[c]omprehensive language . . . to cover every possible variety of kidnaping followed by interstate transportation." 326 U.S. at 463. Six years before Mr. Williams was sentenced, the Eleventh Circuit wrote that because § 1201(a) "appli[es] to kidnappings accomplished solely by . . . inveigling or decoying," "[t]he mere fact that force was not used . . . does not prevent Boone's acts from constituting a kidnapping." *United States v. Boone*, 959 F.2d 1550, 1555, 1556 (11th Cir. 1992). And by 1998, several published federal decisions had addressed the classification of various jurisdictions' kidnapping offenses under enhancement provisions in the ACCA, the Sentencing Guidelines, and

similarly worded statutes such as 18 U.S.C. §§ 16 and 924(c). In most instances, those courts held that kidnapping fell under the relevant law's residual clause.

4. District Court Denial of § 2255 Motion. The district court denied Mr. Williams's § 2255 motion, concluding that he "failed to satisfy his burden . . . of proving that, more likely than not, the sentencing court relied upon the residual clause to enhance his sentence." Pet. App. 36a–37a. The court did not discuss § 1201(a)(1)'s elements or judicial interpretations of them, such as *Chatwin* and *Boone*. It did note that by 1998 several courts of appeals had held that kidnapping convictions were residual-clause offenses. But it also cited dicta from the Eleventh and Second Circuits that suggested federal kidnapping fell under the elements clause.

The district court concluded that "persuasive authority support[ed]" both parties' positions, but declined to say which body of authority was more persuasive: "[T]he best that can be said is that it was unclear at the time of Williams's 1998 sentencing whether his prior conviction for federal kidnapping would have been considered under the elements clause of the ACCA, the residual clause, or possibly both." *Id.* at 36a. Quoting *Beeman*'s burden of production, the court wrote, "Where, as here, the evidence does not clearly explain what happened . . . the party with the burden loses." *Id.* at 37a (quoting *Beeman*, 871 F.3d at 1225).

5. Affirmance by Divided Eleventh Circuit. Mr. Williams appealed, and a divided panel of the Eleventh Circuit affirmed. All judges agreed that the textual basis for classifying kidnapping as a violent felony presented "a matter of historical

fact," *id.* at 2a, but also agreed that the district court's finding should be reviewed de novo "because Williams's *Johnson* motion relies exclusively on the state of the law in 1998 and the district court resolved it by reference to legal principles alone," *id.* at 6a; *accord id.* at 20a (Jordan, J., dissenting).

The dissenting judge concluded that the legal landscape in 1998 was sufficient to carry Mr. Williams's preponderance burden, because "we (and the Supreme Court) had instructed district courts to . . . 'look[] only to the statutory definitions of the prior offense.' We had also ruled by 1998 that federal kidnapping did not require the use, attempted use, or threatened use of physical force." *Id.* at 22a–23a (quoting *Oliver*, 20 F.3d at 418; citing *Boone*, 959 F.2d at 1555). With those principles settled, the dissent explained, "In the Eleventh Circuit, . . . a district court in 1998 could not have properly used the ACCA's elements clause to classify federal kidnapping as a violent felony." *Id.* at 24a. And since "district courts are 'presumed to know the law and apply it in making their decisions,'" it was "more likely than not that the district court relied only on the residual clause," *id.* at 24a, 26a (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990)).

The majority rejected that conclusion because "our dissenting colleague's approach requires carefully parsing circa-1998 precedents," so "it *necessarily sheds too little light* on the historical question at issue here." *Id.* at 16a (emphasis added). "The root problem," the majority wrote, was that there was too little evidence to weigh, because Mr. Williams had not "come forward with 'clear precedent,'" *id.* at 17a (quoting *Pickett*, 916 F.3d at 964). It denied that it was "applying something higher

than a more-likely-than-not standard," writing that authorities showing the legal background against which Mr. Williams was sentenced were merely "circumstantial evidence which, when unclear, has little to no bearing on the ultimate issue." *Id.* at 17a–18a. The majority analogized to the hypothetical case of a car crash, in which the only evidence was "a local business's security footage, focused not on the intersection where the accident occurred, but on the street a few yards away." *Id.* As with that kind of video evidence, the court wrote, "the authorities that Williams cites are not clear, [so] they fail to shed light on what the sentencing court did as a matter of historical fact." *Id.*

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit differs from every other court of appeals by imposing a heightened burden of production on a § 2255 movant whose claim turns on evidence of the relevant legal background at the time of a claimed constitutional injury. That court has written that "the burden of proof and persuasion" was "critical" to its holding that a movant who claims his sentence was enhanced under the ACCA's impermissibly vague residual clause "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." *Beeman*, 871 F.3d at 1221, 1222. But courts in the Eleventh Circuit will not even weigh the more-likely-than-not question of persuasion "[a]bsent *clear precedent* showing that the [sentencing] court could only have used one [ACCA] clause or another," Pet. App. 14a (emphasis added) (quoting *Pickett*, 916 F.3d at 964); *see also Beeman*, 871 F.3d at 1225 ("Where . . . the evidence does not *clearly explain* what

happened . . . the party with the burden loses." (emphasis added) (quoting *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001))).

That demand for clarity at the threshold is not a part of a traditional preponderance standard, which "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence," *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring))). The Eleventh Circuit's standard has caused courts to shut down their consideration of § 2255 claims without even assessing the persuasive weight of the evidence—especially in the frequent case where the sentencing record itself is silent about the textual basis for an ACCA violent-felony classification. The Eleventh Circuit has agreed with other courts of appeals that a silent record need not prove fatal because "the law . . . at the time of sentencing" by itself may "strongly point to a sentencing per the residual clause." *Beeman*, 871 F.3d at 1224 n.5. But its extraordinary burden of production, by requiring practically indisputable on-point precedent, can prevent courts from following merely persuasive indications where they lead.

In practice, this means sentences imposed in the Eleventh Circuit can remain in force even if precedent from the time shows the sentencing court would have erred by *not* relying on the residual clause. This case illustrates that point, as both the district court and the court of appeals stopped short of weighing indications from the legal landscape at the time of Mr. Williams's 1998 sentencing. The ACCA's elements clause expressly focuses only on a prior offense's elements, and the Eleventh Circuit

had interpreted it accordingly. It also had held that federal kidnapping does not require a force element, which suggests that it "would have been an error under binding precedents" for the sentencing court not to rely on the residual clause at sentencing Mr. Williams. Pet. App. 15a. Despite that, a majority of the Eleventh Circuit panel simply concluded that "we do not know," *id.* at 16a. Like the district court before it, the court of appeals rested on the burden of production: "Absent authority that would have *compelled* a particular result in 1998, Williams cannot meet his burden of proof through case law alone. . . . [T]here is no *clear precedent* on point . . . ." *Id.* (emphasis added).

No other circuit imposes such an obstacle to relief from a sentence based on an unconstitutional law. While they agree that a preponderance burden can "present[] a tall order when a movant's sentencing record . . . is silent as to which ACCA clause a district court applied," *Raines v. United States*, 898 F.3d 680, 685 (6th Cir. 2018), courts in other circuits will assess the persuasive weight of legal-landscape evidence without requiring definitive preexisting authority. Only in the Eleventh Circuit are courts precluded from granting relief based on the legal background if a threshold burden of producing "clear precedent" is not satisfied. Pet. App. 14a (quoting *Pickett*, 916 F.3d at 964). By imposing a unique, heightened burden of production on a particular class of § 2255 claims, the Eleventh Circuit has allowed sentences to remain in force even where a claimant could show that his sentence more likely than not depended on the ACCA's vague residual clause.

I. A heightened burden of production presents an extraordinary barrier to correcting lengthy sentences imposed in violation of due process.

A. The legal landscape at the time of sentencing is often the best proof of whether a sentence depended on the ACCA's vague residual clause.

A sentence based on the ACCA's residual clause "violates the Constitution's guarantee of due process," *Johnson*, 576 U.S. at 606. That is as true of a sentence imposed decades ago as of one imposed today, because "[t]he residual clause . . . [cannot] mandate or authorize *any* sentence," *Welch*, 136 S. Ct. at 1265 (emphasis added).

The residual clause's role can be hard to identify in a pre-*Johnson* sentence, though, because it functioned as a catch-all provision that covered its own tracks in many cases. Silent sentencing records are common because defendants often did not object to violent-felony classifications. That usually was not a matter of bad lawyering, but of futility: as long as *one* of the three clauses encompassed an offense, there was no cause to object or create a record of which clause a sentencing court relied on. And before *Johnson*, where an ACCA enhancement was not contested, sentencing courts had no reason to say whether they were relying on the residual clause, nor "to think . . . that distinctions between various clauses in ACCA would take on such significance" in the years to come. *Pickett*, 916 F.3d at 961; *see also United States v. Geozos*, 870 F.3d 890, 894 n.4 (9th Cir. 2017) ("'[N]othing in the law requires a [court] to specify which [ACCA] clause . . . it relied upon in imposing a sentence.' Thus, at many pre-*Johnson* . . . sentencings, the court did not specify under which clause it found the ACCA predicate offenses to qualify." (quoting *In re Chance*,

831 F.3d 1335, 1340 (11th Cir. 2016))), *abrogated on other grounds by Stokeling v. United States*, 139 S. Ct. 544 (2019).

This Court's 1990 decision in *Taylor v. United States* specifically suggested that the residual clause could be useful in instances of doubt. 495 U.S. at 600 n.9 ("The Government remains free to argue that any offense . . . 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)."). Courts throughout the country came to refer to it as the "catch-all" (or "catchall") clause, before the "residual clause" label finally stuck. *See, e.g.*, *United States v. Davis*, 16 F.3d 212, 217 (7th Cir. 1994) ("Congress plainly included [the residual clause] to serve as a catch-all provision."); *United States v. Martinez*, 954 F.2d 1050, 1052 (5th Cir. 1992); *United States v. O'Brien*, 972 F.2d 47, 49 (3d Cir. 1992); *United States v. King*, 979 F.2d 801, 803 (10th Cir. 1992); *United States v. Demint*, 74 F.3d 876, 877 (8th Cir. 1996).

Perversely, the residual clause's effectiveness as a catch-all backstop has now become a barrier to showing that it affected a sentence—and that barrier is tallest in the Eleventh Circuit. The fact that federal kidnapping does not have a force element is so uncontroversial that the government routinely concedes the point now.[1] Those

[1] *See, e.g.*, *Knight v. United States*, 936 F.3d 495, 498 (6th Cir. 2019) ("The government concedes that Knight's kidnapping conviction under 18 U.S.C. § 1201(a) is not a crime of violence" that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," § 924(c)(3)(A)); *United States v. Walker*, 934 F.3d 375, 379 (4th Cir. 2019) ("the Government has conceded . . . that kidnapping does not qualify as a crime of violence under [§ 924(c)(3)(A)]" (citing *United States v. Taylor*, 848 F.3d 476, 491 (1st Cir. 2017))); *United States v. Minaya*, 841 F. App'x 301, 304 (2d Cir. 2021) ("The government does not challenge Minaya's contention that substantive kidnapping is not a crime of violence" under

concessions came long after Mr. Williams was sentenced, but they were not based on intervening legal developments. Rather, they bubbled to the surface once the Court held, in *United States v. Davis*, 139 S. Ct. 2319 (2019), that the § 924(c)(3)(B) residual clause—which is worded similarly to its ACCA counterpart—is impermissibly vague. Until then, catch-all residual clauses made it largely unnecessary to confront the obvious answer.

B. When Mr. Williams was sentenced, the residual clause was the soundest and most likely basis for the violent-felony classification, given the legal landscape at the time.

At the time of Mr. Williams's sentencing, no Eleventh Circuit decision had expressly held federal kidnapping to be a violent felony under a particular ACCA clause—the kind of "clear precedent on point" that the majority below required. Pet. App. 16a. Still, by looking at existing authorities, a probation officer preparing the presentence report was able to conclude, "This conviction constitutes a violent felony for purposes of 18 U.S.C. § 924(e)." PSR at ¶ 43. Mr. Williams's counsel was able to conclude that the PSR's statement did not merit an objection. And the district court was able to conclude that the ACCA enhancement should apply, and to adopt the PSR without change. The fact that they all reached the same conclusion is the very reason there is no record of whether they relied on the residual clause.

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§ 924(c)(3)(A)); Transcript of Oral Argument at 67, *United States v. Davis*, 139 S. Ct. 2319 (2019) (No. 18-431) (concession by Assistant to the Solicitor General that "there are a lot of offenses that we're going to lose" if the § 924(c)(3)(B) residual clause is unconstitutional, including "[k]idnapping").

The bases for that consensus, a legal conclusion, seem obvious: the ACCA's definition of a violent felony, the statutory definition of federal kidnapping, and precedents interpreting them. The enumerated-offenses clause plainly did not apply, because it only covers a conviction for an offense that "is burglary, arson, or extortion, [or] involves use of explosives," § 924(e)(2)(B)(ii). And the elements clause only covers a conviction for an offense that "*has as an element* the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i) (emphasis added). A quick glance at the definition of federal kidnapping would have confirmed that § 1201(a)'s elements don't require force against the person. If anyone needed further guidance, binding precedent had established (1) that the elements clause embraces only offenses that require a force element and (2) that federal kidnapping has no required force element. Moreover, published decisions from several circuits had decided the proper classification of kidnapping predicates from different jurisdictions, and a solid majority placed them under the residual clause's serious-risk-of-injury language. *See, e.g.*, *United States v. Kaplansky*, 42 F.3d 320, 321, 323 (6th Cir. 1994) (en banc); *United States v. Phelps*, 17 F.3d 1334, 1342 (10th Cir. 1994); *United States v. Williams*, 110 F.3d 50, 53 (9th Cir. 1997); *United States v. Sherbondy*, 865 F.2d 996, 1009 (9th Cir. 1988). So, while the classification of federal kidnapping might not have been entirely settled, the legal landscape was hardly a barren desert.

The majority below expressed skepticism, though, about the value of looking at pre-1998 precedents. It explained, "the question before us now is not how a hypothetical sentencing court *should* have ruled" but "what the sentencing court

could have done," Pet. App. 16a. And, it suggested, the sentencing court could have made all sorts of errors. For example, it might have made its violent-felony determination based on a violent description in the PSR, *see id.*, notwithstanding *Gonzalez-Lopez* and the plain language of the elements clause. *See* Pet. App. 16a. Or it might have relied on dicta in *United States v. Salemi*, 26 F.3d 1084 (11th Cir. 1994), in which the Eleventh Circuit held federal kidnapping to be a crime of violence under U.S.S.G. § 4B1.2. *See id.* at 11a–12a. *Salemi* expressly based that conclusion on the fact that kidnapping was an enumerated offense in the guideline's commentary, U.S.S.G. § 4B1.2 cmt. n.2 (1990), but the court suggested, without explanation, that the commentary meant "[t]he [Sentencing] Commission recognized that kidnapping inherently involves the threat of violence." 26 F.3d at 1087.

If the ultimate question is what the sentencing court did, though—did it base the violent-felony determination solely on the residual clause?—then why wouldn't "how [the] sentencing court *should* have ruled," Pet. App. 16a, provide a sufficient answer? It seems unremarkable to say that, more likely than not, the court did *what it should have done* under the law at the time. That is a well-established presumption, after all. *See Walton*, 497 U.S. at 653 ("Trial judges are presumed to know the law and to apply it in making their decisions."), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

As the next section explains, satisfying a preponderance standard ordinarily does not require affirmatively disproving that something improbable "*could* have" happened, *cf.* Pet. App. at 16a; the improbability is dispositive. But in the many cases

where the record is silent, the Eleventh Circuit's extraordinary burden of production effectively stops § 2255 movants like Mr. Williams at the threshold. They cannot cross it by merely showing how a prior offense was construed and how the violent-felony definition was applied; they must be able to show that before they were sentenced, the offense was authoritatively held to be a residual-clause offense (and only a residual-clause offense).

C. A § 2255 movant bears a traditional preponderance burden, which recognizes and allocates the risk of error without requiring evidence that eliminates uncertainty.

On its face, the Eleventh Circuit's "more likely than not" standard, *Beeman*, 871 F.3d at 1222, is an ordinary preponderance-of-the-evidence standard of proof. *See Concrete Pipe and Prods. of Cal., Inc.*, 508 U.S. at 622 (preponderance standard "simply requires the trier of fact to believe that the existence of a fact is *more probable than* its nonexistence" (emphasis added) (quoting *Winship*, 397 U.S. at 371–72 (Harlan, J., concurring))). That is well established as a federal inmate's burden in postconviction proceedings. *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938); *Walker v. Johnston*, 312 U.S. 275, 286 (1941).

While most lawyers are well acquainted with the preponderance standard, some might struggle to describe its rudiments. But those fundamentals show how the Eleventh Circuit's standard for a *Johnson* § 2255 claim creates an extraordinary burden. The preponderance standard "is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, *however slight the edge may be*." *Preponderance of the Evidence*, BLACK'S

LAW DICTIONARY (11th ed. 2019) (emphasis added). In the Eleventh Circuit, civil juries are instructed, "A 'preponderance of the evidence' simply means an amount of evidence that is enough to persuade you that [a party's] claim is more likely true than not true." Eleventh Circuit Pattern Civ. Jury Instructions 3.7.1 (2019).

The purpose of a standard of proof is not to ensure certainty—no standard purports to do that—but "to allocate the risk of error between the litigants," *Addington v. Texas*, 441 U.S. 418, 423 (1979). A standard of proof recognizes that erroneous findings are possible because uncertainty can never be completely eliminated, and "the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants," placing no thumb on the scale except to break a tie. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

Like any evidentiary standard, the preponderance burden "encompasses two separate burdens of proof": a burden of persuasion and a burden of production. 2 Kenneth S. Broun et al., *McCormick On Evidence* § 336 (8th ed.). But those constituent burdens do not increase the ultimate standard of proof. They simply relate to different components of the risk of error. The burden of persuasion brings with it "the risk of nonpersuasion," *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 510 n.6 (1995). Likewise, with the burden of production comes the risk of nonproduction. 2 Broun et al., *supra*, § 336 ("The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced.").

D. The Eleventh Circuit's heightened burden of production enhances a § 2255 movant's traditional preponderance burden and departs from that court's usual application of the standard, as well as other circuits' application of it in this § 2255 context.

Ordinarily, courts in the Eleventh Circuit apply those established principles to preponderance-of-the-evidence determinations and do not require production that satisfies an elevated standard of clarity. Indeed, the Eleventh Circuit routinely affirms the sufficiency of fragmentary evidence to support district courts' preponderance findings. *See, e.g.*, *United States v. Faust*, 456 F.3d 1342, 1344, 1348 (11th Cir. 2006) (evidence that firearms were found in apartment defendant shared with a woman, though only she signed lease renewal, was sufficient to support preponderance finding that defendant possessed firearms); *United States v. Smith*, 480 F.3d 1277, 1280 (11th Cir. 2007) (evidence that defendant possessed and "attempted to conceal in his sock" "a white, powdery substance," which was not recovered, was sufficient to support preponderance finding that he possessed cocaine); *United States v. Barsoum*, 763 F.3d 1321, 1332–34 (11th Cir. 2014) ("varying estimates" of drug quantity were sufficient to support quantity finding by a preponderance of the evidence, because in some circumstances "the sentencing court *must* find the total drug quantity by estimating" (emphasis added)).

Similarly, when courts in other circuits review *Johnson* § 2255 claims, they allow that the legal landscape at sentencing may suffice even without "clear precedent on point" that necessarily "compelled a particular result," *cf.* Pet. App. 16a. The Fourth and Ninth Circuits' standards arguably do not even require a movant to show the residual clause's role by a preponderance of the evidence. The Fourth Circuit has

held that "when an inmate's sentence may have been predicated on application of the now-void residual clause . . . , the inmate has shown that he 'relies on' [*Johnson*'s] new rule of constitutional law . . . ." *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017), *abrogated on other grounds by Stokeling*, 139 S. Ct. at 544. Similarly, the Ninth Circuit has held that a movant's claim relies on *Johnson*'s new constitutional rule where, from the "background legal environment and the sentencing record, it is unclear whether the district court relied on the residual clause" to make a violent-felony determination. *Geozos*, 870 F.3d at 897.

Even courts of appeals that demand more, and that have expressly adopted the same "more likely than not" standard of proof as the Eleventh Circuit, do not impose the same stringent burden of production. For example, in *United States v. Taylor*, 873 F.3d 476 (5th Cir. 2017), the Fifth Circuit acknowledged that there was not absolutely clear precedent precluding the sentencing court from relying on the ACCA's enumerated-offenses clause for a particular violent-felony designation. 873 F.3d at 482. But "there was precedent *suggesting* that Taylor's third predicate conviction could have applied only under the residual clause. Thus, even using the Tenth Circuit's 'snapshot' [of the law at sentencing] inquiry or the Eleventh Circuit's 'more likely than not' test, Taylor would prevail." *Id.* (emphasis added; citation omitted).[2]

[2] The Fifth Circuit did not decide in *Taylor* "which, if any, of [the] standards [prescribed by other courts of appeals] we will adopt because we conclude that Taylor's § 2255 claim merits relief under all of them." 873 F.3d at 481. But in a later case where the standard proved to be determinative, the court "side[d] with the majority of circuits and [held] that . . . a successive § 2255 petition raising a *Johnson* claim must show that it was more likely than not that [the movant] was sentenced

Despite the distinction *Taylor* draws between the Tenth Circuit's standard and the Eleventh Circuit's, those two courts have defined them in the same essential terms. As in the Eleventh Circuit, a proponent of a *Johnson* § 2255 claim in the Tenth must "show[] it is more likely than not that the sentencing court relied on the residual clause to enhance his sentence." *United States v. Copeland*, 921 F.3d 1233, 1243 (10th Cir. 2019) (quoting *United States v. Snyder*, 871 F.3d 1122, 1135 (10th Cir. 2017)). But like other courts of appeals, the Tenth Circuit does not adhere to the Eleventh Circuit's requirement that a movant produce pre-sentencing precedent that expressly disavows all but the residual clause for the same predicate offense.

Copeland illustrates that approach well. "[D]iscussions at the . . . hearing" where Mr. Copeland pleaded guilty and statements in his PSR both "at least suggest[ed] the court relied on the enumerated clause" instead of the residual clause for a necessary violent-felony classification. 921 F.3d at 1244. But "the relevant background law [at sentencing] permitted the court to rely on the enumerated clause only if *Shepard*[3] documents . . . showed that the prior offense was generic burglary," and "there were no *Shepard* documents in the record." *Id.* at 1250. Because of that, "the applicable law allowed an ACCA sentencing enhancement for the burglary conviction *only* under the residual clause," and since the statements in the record were inconclusive, "[t]he background law points more strongly toward . . . the residual clause than the sentencing record points toward . . . the enumerated clause." *Id.* at

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under the residual clause." *United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019).

[3] *Shepard v. United States*, 544 U.S. 13 (2005).

1251 (emphasis added); *see also United States v. Lozado*, 968 F.3d 1145 (10th Cir. 2020) (holding that legal landscape carried movant's burden because, as in *Copeland*, prior offense was broader than generic burglary and record did not contain *Shepard* documents to support reliance on enumerated-offenses clause); *United States v. Driscoll*, 892 F.3d 1127, 1134–35 (10th Cir. 2018) (pre-sentencing precedents interpreting the enumerated-offenses clause would have made clear that a prior Nebraska burglary conviction was broader than generic burglary, so even without binding authority involving that offense, "the sentencing court must have relied on the residual clause").

The Sixth Circuit, too, has found that a § 2255 movant can carry the burden of "show[ing] that it is more likely than not 'that the district court relied only on the residual clause'" without producing clear, binding precedent on point. *Williams v. United States*, 927 F.3d 427, 439 (6th Cir. 2019) (quoting *Potter v. United States*, 887 F.3d 785, 787 (6th Cir. 2018)). "[T]here was only one case at the time of Williams's sentencing that could have informed his sentencing": an unpublished Sixth Circuit decision involving a different (but similar) state offense and a different (but similar) federal recidivist provision. *Id.* at 441 (citing *United States v. Calloway*, 189 F. App'x 486 (6th Cir. 2006)). *Calloway* had rejected a defendant's "argu[ment] that his crime did not qualify under the elements clause, . . . because his crime *did* qualify under the residual clause." *Id.* at 442 (citing *Calloway*, 189 F. App'x at 491). By doing so, the decision had not affirmatively held the elements clause *in*applicable, but it "at

the very least suggested strongly that the residual clause was a better justification than the elements clause." *Id.*

Despite the coincidence of sharing a name with this case, the Sixth Circuit's *Williams* decision starkly contrasts with the decision below. The Sixth Circuit wrote, "Williams's challenge here is to prove that the residual clause was more likely than not the decisive clause on which [the sentencing judge] relied—not that it is *impossible* to imagine an alternate universe in which he relied on the elements clause instead." *Id.* Applying the "presumption . . . that a district court knows and applies the law correctly," the court of appeals "presume[d] that when [the judge] sentenced Williams, *Calloway* pointed him to the residual clause." *Id.*

The Eleventh Circuit squarely rejected that approach here: "[T]he question . . . is not how a hypothetical sentencing court *should* have ruled on a question that was never presented." Pet. App. 16a. Rather, "[t]he question . . . is what the sentencing court *could* have done, as a matter of historical fact, when it sentenced Williams." *Id.* The court held that Mr. Williams had not carried his burden, because precedents that merely made it *unlikely* that the sentencing court applied the elements clause to an offense with no force element were not enough. They did not establish—as the Eleventh Circuit's burden of production for *Johnson* § 2255 cases requires—that the sentencing court *could not* have reached an unlikely conclusion.

II. The Eleventh Circuit's burden of production raises important questions, and this case is an excellent vehicle.

A. The Eleventh Circuit has erected an atextual barrier to § 2255's remedy for claims based on *Johnson* and similar constitutional rules, which have arisen frequently in recent years.

Nothing in § 2255's text supports an enhanced production requirement for claims that depend on a particular type of proof—here, proof of the background legal principles that would have informed a sentencing court's choice of a specific ACCA clause. Section 2255 proceedings are ordinary civil actions that should be, and usually are, governed by ordinary civil rules except "to the extent that they are . . . inconsistent with any statutory provisions or [the Rules Governing Section 2255 Proceedings for the United States District Courts]," Rule 12, § 2255 Rules; *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) ("Our decisions have consistently recognized that habeas corpus proceedings are civil in nature." (citing *Browder v. Dir., Ill. Dep't of Corrs.*, 434 U.S. 257, 269 (1978))). And the "burden of proof . . . generally imposed in civil cases . . . [is] the duty of prevailing by a mere preponderance of the evidence." *Woodby v. INS*, 385 U.S. 276, 285 (1966).

The Eleventh Circuit's novel burden of production was created in the context of § 2255 litigation in *Johnson*'s aftermath, but it is not confined to that realm. The same burden logically applies, at a minimum, wherever a conviction or sentence depended on a ruling that might have been based on an unconstitutional law, but the record does not specify the basis. Put another way, it applies where the best way to prove that a court *did* rely on an unconstitutional law is to show that the court *had to* rely on it, or at least should have done so.

Johnson § 2255 claims are not the only ones that involve courts in that kind of inquiry. Even a direct line from *Johnson* leads to several more examples:

- **18 U.S.C. § 16(b)** includes a residual clause encompassing a felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," which the Court held unconstitutional in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

- **18 U.S.C. § 924(c)(3)(B)** includes a residual clause encompassing a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," which the Court held unconstitutional in *United States v. Davis*, 139 S. Ct. at 2319.

- **18 U.S.C. § 3559(c)(2)(F)(ii)** includes a residual clause encompassing certain felonies "that, by [their] nature, involve[] a substantial risk that physical force against the person of another may be used in the course of committing the offense," which "[t]he government . . . [has] concede[d] . . . is unconstitutionally vague." *Gatewood v. United States*, 979 F.3d 391, 394 (6th Cir. 2020).

In § 2255 proceedings challenging convictions or sentences involving those provisions, courts are returning to the requirements established for *Johnson* claims. *See, e.g.*, *Godwin v. United States*, 824 F. App'x 955, 958 (11th Cir. 2020) ("[D]istrict courts should apply *Beeman* in the context of § 2255 motions challenging § 924(c) convictions under *Davis*." (citing *In re Hammoud*, 931 F.3d 1032, 1041 (11th Cir. 2019))); *United States v. Garcia*, 811 F. App'x 472, 479, 481 (10th Cir. 2020) (§ 2255 movant claiming § 924(c) "crime of violence" classification depended on § 924(c)(3)(B) residual clause "must prove that the . . . court, more likely than not, relied on the residual clause" (quoting *Driscoll*, 892 F.3d at 1135)); *Dade v. United States*, No. 4:16-CV-224-BLW, 2019 WL 361587, at *2 n.1 (D. Idaho Jan. 29, 2019) ("the nearly identical language in the residual and elements clauses in [the ACCA] and [§ 16], and

the similarity between *Johnson* and *Dimaya*," "make[] *Geozos* directly applicable to this [*Dimaya* § 2255 claim]").

Like proponents of *Johnson* claims, § 2255 movants whose convictions or sentences involved § 16, § 924(c), or § 3559(c)(2)(F)(ii) must show that a court at the time of conviction or sentencing would have relied on the infirm provision. And in those contexts too, the legal background at the time is often more probative than the record. *See, e.g.*, *United States v. Rodella*, No. 20-2020, 2021 WL 1235162, at *3 (10th Cir. Apr. 1, 2021) (unreported) ("Where . . . the record is silent as to whether a sentencing court relied on [the § 924(c)(3)(B)] residual clause, a court must examine 'the relevant background legal environment at the time of sentencing to determine whether the district court would have needed to rely on the residual clause,' given the option of the elements clause." (quoting *Copeland*, 921 F.3d at 1242)); *Godwin*, 824 F. App'x at 958 ("the *Beeman* inquiry looks to the state of the law at the time of the § 924(c) conviction" to determine "whether at the time of sentencing, the defendant was sentenced solely under the residual clause"); *Acosta v. United States*, No. 1:16-cv-00401-MAT, 2019 WL 4140943, at *7 (W.D.N.Y. Sept. 2, 2019) (looking to "the Second Circuit's precedent at [the] time" of conviction because "the record is unclear as to the basis for finding that the [18 U.S.C.] § 242 . . . conviction qualified as a [§ 924(c) crime of violence]"); *Langford v. United States*, No. 4:16-cv-00132-RGE, 2019 WL 12025155, at *5 (S.D. Iowa Sept. 30, 2019) ("Where the record is inconclusive, the Court must then inquire as to the relevant background legal environment at the time of sentencing to determine whether the sentencing court

more likely than not relied upon the residual clause in classifying the prior convictions as [§ 3559(c) serious] violent felonies."); *Dade*, 2019 WL 361587, at *2 ("A claim does not rely on *Dimaya* if it is possible to conclude, using both the record before the court and the relevant background legal environment at the time of trial, that the court's determination did not rest on the residual clause." (cleaned up) (quoting *Geozos*, 870 F.3d at 896)).

In short, the Eleventh Circuit's heightened burden of production applies to questions that aren't going away. Courts in § 2255 proceedings continue to ask whether the legal background to a conviction or sentence can provide an answer where the record does not. And even though the answer need only be established by a preponderance of the evidence, courts in the Eleventh Circuit alone continue to be bound to stop short of an answer unless the legal background offers up a conclusion that is not just probable, but virtually indisputable.

B. This case is an excellent vehicle, because the burden of production has been a central issue and ultimately was dispositive.

From the beginning of this § 2255 proceeding, both Mr. Williams and the government have focused on the legal background from the time of sentencing in their arguments about his ability to prove the residual clause's role in his sentence. For the district court and the court of appeals, that was the exclusive, dispositive focus. And the Eleventh Circuit's extraordinary burden of production figured prominently in each court's decision to deny relief. *See* Pet. App. 16a–18a, 36a–37a.

In a different circuit, the clearly defined elements of kidnapping and the text and interpretation of the ACCA's elements clause at the time of Mr. Williams's

sentencing would have readily carried his preponderance burden to show that his sentence depended on the residual clause. *See supra* pp. 22–26. Because of the happenstance of geography, though, his § 2255 motion confronted a burden of production that is not native to the traditional preponderance burden and is unique to a particular class of § 2255 claims in the Eleventh Circuit. He could not clear that elevated threshold even by showing that the sentencing court would have erred by *not* relying on the residual clause, which would have been a sufficient showing in any other circuit. But in the Eleventh Circuit, his ACCA-enhanced sentence lives on because he could not disprove the possibility that the sentencing court applied the elements clause to an offense with no force element.

The Eleventh Circuit's burden of production continues to present an important question as to the burden an inmate bears under § 2255. That question has been central to the arguments and results throughout this case, which is an excellent vehicle for the Court to decide the question.

CONCLUSION

For the foregoing reasons, Mr. Williams prays that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted this, the 14th day of June, 2021.

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