NO. _____

In The
Supreme Court of the United States

CLAUDE JEROME WILSON, II,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Johnson v. United States*, 576 U.S. 591 (2015), this Court invalidated the residual clause of the Armed Career Criminal Act, but left intact the two remaining definitions of a "violent felony." In Mr. Wilson's case, the sentencing court did not specifically indicate whether his prior convictions qualified as "violent felonies" under the residual clause, the enumerated offenses clause, or some combination of the two. To prove that his claim falls within the scope of the new constitutional rule announced in *Johnson*, a 28 U.S.C. § 2255 movant must prove that his sentence was based upon the now-defunct residual clause.

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

As the Third, Fourth, and Ninth Circuits have held, is it sufficient for him to show that his sentence "may have" been based on the residual clause? Or, as a majority of Circuits have held, must the § 2255 movant bear the burden of showing by a preponderance of the evidence that he was sentenced solely upon the residual clause at the time of his sentencing hearing?

LIST OF PARTIES

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

RELATED CASES

- *United States v. Claude Jerome Wilson, II*, No. 06-cr-141, U.S. District Court for the Middle District of Alabama. Judgment entered on June 12, 2009.
- *Claude Jerome Wilson, II v. United States*, No. 16-cv-464, U.S. District Court for the Middle District of Alabama. Judgment entered on September 30, 2020.
- *Claude Jerome Wilson, II v. United States*, No. 20-14454, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on September 28, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Claude Jerome Wilson, II respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision is unpublished. *Wilson v. United States*, 2021 WL 4438745 (11th Cir. 2021) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's opinion and order denying Mr. Wilson's 28 U.S.C. § 2255 motion is unpublished. *Wilson v. United States*, 2020 WL 5820999 (M.D. Ala. 2020) (unreported). The opinion and order is included in Petitioner's Appendix. Pet. App. 1b.

The district court's order granting Mr. Wilson's application for a certificate of appealability is unreported, but reproduced in the Petitioner's Appendix. Pet. App. 1c.

The report and recommendation of the magistrate judge, which recommended that Mr. Wilson's § 2255 motion be denied, is unreported. *Wilson v. United States*, 2019 WL 11232150 (M.D. Ala. 2019), *adopted by* 2020 WL 5820999. The recommendation is reproduced in the Petitioner's Appendix. Pet. App. 1d.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on September 28, 2021. *See* Pet. App. 1a. No rehearing was sought, rendering the petition for writ of certiorari due on or before December 27, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

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

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

18 U.S.C. § 924(e)(1).

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

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

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

> (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.

STATEMENT OF THE CASE

A. Legal Background.

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

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is referred to as the "elements clause," while the second prong contains the "enumerated" offenses and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

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

28 U.S.C. § 2255 expressly authorizes a federal prisoner to file a motion collaterally attacking his sentence on the ground that "it was imposed in violation of the Constitution or laws of the United States," or that it was "in excess of the maximum authorized by law." 28 U.S.C. § 2255(a).

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

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

B. Facts and Procedural History.

In June 2006, a federal grand jury returned an indictment against Mr. Claude Jerome Wilson, II, charging him with a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count One). (CM/ECF for U.S. Dist. Ct. for M.D. Ala., case no. 3:06-cr-141-MEF-SRW ("Criminal Docket"), doc. 1).

Mr. Wilson initially pled guilty before a magistrate judge in June 2006. (Criminal CM/ECF, docs. 31, 32). However, the district court allowed him to withdraw his plea in August 2007. (Criminal CM/ECF, docs. 48, 55). Mr. Wilson then proceeded to trial, where a jury convicted him in January 2009. (Criminal Docket, docs. 111, 112).

The Presentence Investigation Report ("PSI") applied the 2008 Guidelines Manual, and calculated a base offense level of 24, based on § 2K2.1(a)(2) and the probation officer's determination that Mr. Wilson "has at least two prior convictions for crimes of violence." (PSI ¶ 22). Mr. Wilson did not receive any other enhancements related to the specific characteristics of the offense, so his adjusted offense level was 24. (*Id.* ¶¶ 23-26).

The PSI determined that Mr. Wilson qualified as an armed career criminal under the ACCA and § 4B1.4, because he "has been convicted of felony crimes of violence." (*Id.* ¶ 28). In reaching this conclusion, the PSI did not

identify which of Mr. Wilson's prior convictions qualified as ACCA predicate offenses, or which enhancement clause applied. (*See id.*). However, according to the probation officer's description of Mr. Wilson's criminal history, Mr. Wilson had accrued the following adult criminal convictions:

> **(1) three counts of burglary and one count of theft by receiving stolen property, in Georgia, in 1981;**
>
> (2) theft by taking, in Georgia, in 1984;
>
> (3) escape (felony), in Georgia, in 1986;
>
> (4) misdemeanor bad checks, in Georgia, in 1994;
>
> (5) three counts of misdemeanor deposit account fraud, in Georgia, in 1995;
>
> **(6) aggravated assault and robbery, in Georgia, in 1999;**
>
> **(7) aggravated stalking, in Georgia, in 2004;** and
>
> (8) misdemeanor battery with visible physical harm, in Georgia, in 2004.

(*Id.* ¶¶ 32-39).

According to the PSI, Mr. Wilson's 1999 convictions for aggravated assault and robbery arise out of a single incident, where he "physically assaulted the victim by striking her with his fists and then choking her. He then took her purse which contained approximately $120." (*Id.* ¶ 37). Furthermore, with respect to Mr. Wilson's 1981 convictions for Georgia burglary, the PSI explained that: "Wilson unlawfully entered and committed burglary on the commercial property of Trailways Bus Station, Keenan Auto Parts, [and] the Golden Alms in Thomaston[,] Georgia. Wilson received stolen

money in the quantity of $370 belonging to Leland Elliot." (*Id.* ¶ 32). Finally, as to the 1986 conviction for Georgia felony escape, the PSI noted that Mr. Wilson "escaped the custody of the Upso[n] County Sheriff when he walked away from the Upson Courthouse on December 7, 1984, subsequent to his probation being revoked." (*Id.* ¶ 34).

Application of the ACCA and § 4B1.4 enhancements increased Mr. Wilson's total offense level from 24 to 33. (*Id.* ¶¶ 26-28). Mr. Wilson received 13 criminal history points, corresponding to a criminal history category of VI. (*Id.* ¶ 42). Based on a total offense level of 33 and a criminal history category of VI, the resulting guideline range was 235-293 months. (*Id.* ¶ 70). Finally, the PSI noted that the statutory mandatory minimum was 15 years' imprisonment as a result of § 924(e). (*Id.* ¶ 69).

Mr. Wilson filed objections to the PSI, disputing its determination that he qualified as an armed career criminal under the ACCA and § 4B1.4 (PSI Addendum ¶ 5).

The probation officer responded that application of the ACCA enhancement was appropriate because Mr. Wilson "has six predicate offenses when only three are required." (*Id.* ¶ 6). The probation officer then identified the following as the six predicate convictions giving rise to the ACCA enhancement: (1) three convictions for burglary in Case No. 15997; (2) one conviction for felony escape in Case No. 17602; (3) *one* of the two convictions

for aggravated assault and robbery in Case No. SU98CR2426; and (4) one conviction for aggravated stalking in Case No. SU03CR2234. (*Id.*).

The government, in turn, argued that Mr. Wilson had *four* "straightforward violent felonies" triggering the ACCA enhancement. (Criminal Docket, doc. 119 at 4-6). The government explained that the sentencing court did not need to consider whether Mr. Wilson's prior convictions for aggravated stalking and felony escape qualified as valid ACCA predicates, because he had three convictions for Georgia burglary and one conviction for Georgia robbery that qualified as "straightforward violent felonies." (*Id.* at 5-6).

At the sentencing hearing on June 11, 2009, Mr. Wilson withdrew his objection to the ACCA enhancement. (Doc. 124 at 3). The district court then adopted the factual findings and guideline calculations contained in the PSI, noting that, based on a total offense level of 33 and a criminal history category of VI, the resulting guideline range was 235-293 months. (*Id.* at 13). The court sentenced Mr. Wilson to 273 months' imprisonment. (*Id.* at 24). There was no further discussion of the ACCA enhancement at any point during the sentencing proceedings. (*See generally, id.*).

Mr. Wilson declined to file a direct appeal.

Subsequently, on June 26, 2015, the Supreme Court decided *Johnson v. United States*, and held that the residual clause of the ACCA was unconstitutionally vague because of the combined two-fold indeterminacy

uncertainty surrounding how to estimate the risk posed by a crime, and how much risk was required for a crime to qualify as a violent felony. 135 S. Ct. 2551, 2558-63 (2015).

Less than a year later, on June 21, 2016, Mr. Wilson filed this initial 28 U.S.C. § 2255 motion, seeking to vacate his ACCA-enhanced, 273-month sentence based on *Johnson*. (CM/ECF for U.S. Dist. Ct. for M.D. Ala., case no. 3:16-cv-464-ALB-SRW ("Habeas Docket"), doc. 1). Specifically, Mr. Wilson argued that his underlying predicate convictions for three counts of Georgia burglary no longer qualified as "violent felonies" for purposes of § 924(e)(2)(B) following *Johnson*. (*Id.* at 3-7). Mr. Wilson pointed out that these convictions could not alternatively qualify as "violent felonies" under the enumerated offenses clause, because: (1) Georgia's burglary statute was categorically overbroad; and (2) there were no *Shepard*[1] documents in the record that would have enabled the sentencing court to apply the modified categorical approach and determine that Mr. Wilson was in fact convicted of the essential elements of a generic burglary. (*Id.* at 6). Absent these convictions, Mr. Wilson no longer had the requisite three predicate felonies necessary to trigger the ACCA enhancement, and his 273-month sentence exceeded the statutory maximum penalty authorized for Count One. (*Id.* at 6-7).

The government filed a response in opposition to Mr. Wilson's § 2255 motion, conceding that his *Johnson* claim was timely under § 2255(f)(3).

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

(Habeas Docket, doc. 13 at 8-9). However, the government argued that Mr. Wilson was not entitled to relief on the merits of his *Johnson* claim, because he still had five prior felonies—that is, three convictions for Georgia burglary, one conviction for aggravated assault, and one conviction for robbery—that continued to qualify as ACCA predicate offenses without regard to the residual clause. (*Id.* at 9-30).[2]

More specifically, the government argued that Mr. Wilson's three 1981 convictions for Georgia burglary continued to qualify as "violent felonies" under the enumerated offenses clause in § 924(e)(2)(B)(ii). (*Id.* at 28-30). In making this argument, the government agreed with Mr. Wilson that Georgia's burglary statute was categorically overbroad, but divisible. (*Id.* at 29) (noting that Georgia's burglary statute included alternative locational elements criminalizing both "generic" burglary of a dwelling house or building, as well as "non-generic" burglary of a vehicle, railroad car, watercraft, or aircraft). However, the government requested that the court apply the modified categorical approach, and rely on new *Shepard* documents—documents that were never submitted to the sentencing court—to determine that Mr. Wilson was in fact convicted of generic burglaries. (*Id.* at 29-30). According to the government, it "appeared" from these new *Shepard* documents "that Wilson's

[2] The government apparently agreed that Mr. Wilson's prior convictions for felony escape and aggravated stalking could not have qualified as valid ACCA predicates, as it did not list these offenses as one of the five convictions it considered to be unaffected by *Johnson*. (*See id.* at 9).

three Georgia burglary convictions were based on entries of buildings housing businesses, which would make them generic burglaries." (*Id.* at 30).

The government also argued that Mr. Wilson's 1999 convictions for Georgia aggravated assault and Georgia robbery continued to qualify as "violent felonies" under the elements clause in § 924(e)(2)(B)(i). (*Id.* at 12-28). As a result, the government concluded that, irrespective of *Johnson*, Mr. Wilson still had five prior felonies that qualified as valid ACCA predicates. (*Id.* at 30).

The government submitted—for the first time as an attachment to its response in opposition to Mr. Wilson's § 2255 motion—several documents pertaining to Mr. Wilson's 1981 convictions for three counts of Georgia burglary and one count of theft by receiving stolen property. (Doc. 13-8). The indictment for this case reveals only that, on November 3, 1981, a grand jury returned a true bill against Mr. Wilson, charging him with three counts of "burglary" and one count of theft by receiving stolen property. (*Id.* at 1; doc. 15-2 at 1). The indictment does not track the language of the statute, specify the particular locations burgled, or otherwise identify whether Mr. Wilson committed the burglary offenses by entering a dwelling house or building, as opposed to a vehicle, railroad car, watercraft, or aircraft. (*See id.*). The advice of rights form (doc. 13-8 at 5; doc. 15-2 at 5), judgment (doc. 13-8 at 4; doc. 15-2 at 4), orders setting the conditions of probation (doc. 13-8 at 6-8; doc. 15-2 at 6-8), and order revoking probation (doc. 13-8 at 3; doc. 15-2 at 3), likewise

describe each offense as simply "burglary." Only the arrest warrant affidavits—which are not *Shepard* documents—provide any detail concerning the particular locations burgled. (*See* doc. 13-8 at 9-12; doc. 15-2 at 10-12). These affidavits recite that Mr. Wilson: (1) "did enter the Trailway Bus Station in Upson County" (doc. 13-8 at 10; doc. 15-2 at 10); (2) "did enter Keenan Auto Parts Place in Upson County" (doc. 13-8. at 11; doc. 15-2 at 11); and (3) "did enter the Golden Alms on Highway 19 South" (doc. 13-8 at 12; doc. 15-2 at 12).

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

The *Beeman* panel determined that the key question was one of "historical fact"—that is, was the movant sentenced "solely per the residual clause" at the time of his sentencing hearing. *Id.* at 1224 n.5. Under the *Beeman* rule, cases decided after the movant's sentencing hearing—including cases that categorically exclude a conviction as a valid ACCA predicate offense under the enumerated offenses or elements clause—"cast[] very little light, if any, on the key question of historical fact[.]" *Id.*

On May 13, 2019, a magistrate judge issued a report and recommendation, recommending that Mr. Wilson's § 2255 motion be denied, and his case dismissed with prejudice. (Habeas Docket, doc. 24 at 13). Because the record was silent as to which enhancement clause the sentencing court relied on, the magistrate judge determined that Mr. Wilson could not satisfy the requirements of *Beeman*, and prove on the merits that it was more likely than not that the sentencing court relied *solely* upon the residual clause in sentencing him as an armed career criminal. (*Id.* at 5-13).

Mr. Wilson filed objections to the R&R, challenging the magistrate judge's conclusion that he was not entitled to relief on the merits of his *Johnson* claim. (Habeas Docket, doc. 30). In particular, Mr. Wilson emphasized that: (1) Georgia's burglary statute was categorically overbroad because it criminalized, not only unlawful entry into buildings or structures, but also entry into vehicles, railroad cars, watercraft, or aircraft; and (2) there were no *Shepard* documents or undisputed PSI statements anywhere in the record that would have enabled the sentencing court, in 2009, to determine whether Mr. Wilson was in fact convicted of the essential elements of a generic burglary. (*Id.* at 11-18). In the absence of such evidence, the sentencing court could not have applied the modified categorical approach, and Mr. Wilson's burglary convictions could not have qualified as "violent felonies" under the enumerated offenses clause. (*Id.*).

On September 30, 2020, the district court entered an order denying Mr. Wilson's § 2255 motion. (Habeas Docket, doc. 35). The court overruled Mr. Wilson's objections, adopted the R&R, and dismissed the case with prejudice. (*Id.* at 8). The district court explained that, "[u]nder the *Beeman* standard, Wilson fails to show that the burglary convictions were found to be violent felonies based solely on the ACCA's residual clause." (*Id.* at 7). The court granted Mr. Wilson a COA as to the following issue:

> The Petitioner has made the requisite showing to obtain a COA on the sole issue of whether his 273-month sentence, which includes an Armed Career Criminal Act enhancement, is unconstitutional in light of *Johnson v. United States*, 576 U.S. 591 (2015).

(Habeas Docket, doc. 41 at 1).

Mr. Wilson appealed, challenging the appropriateness of the *Beeman* approach, and the district court's determination that he had failed to prove his *Johnson* claim.

The Eleventh Circuit affirmed the district court's denial of Mr. Wilson's § 2255 motion. *Wilson*, 2021 WL 4438745 at *4. The panel explained that Mr. Wilson had failed to satisfy the requirements of *Beeman*, and prove that the sentencing court relied *only* on the residual clause as the basis for the ACCA enhancement. *Id.* The panel explained its conclusion as follows:

> While Wilson initially objected to the PSI on the basis of the ACCA enhancement, he withdrew that objection at sentencing, and therefore no facts regarding his Georgia burglary convictions were presented at sentencing. Thus, the sentencing court had only the undisputed PSI facts, on which it was permitted to rely, when determining whether those convictions qualified as generic

> burglaries. While the PSI stated only that Wilson unlawfully entered and committed burglary on three commercial properties, because no evidence was presented to the sentencing court that those burglaries did not involve Wilson entering a building or structure, the court could have concluded that the burglaries were generic and thus constituted predicate offenses. Because the evidence does not clearly explain what happened and Wilson had the burden of proof under *Beeman*, his claim fails.

Id. at *3 (citations omitted).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

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

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

As already discussed, the Eleventh Circuit held in *Beeman*[3] that a § 2255 movant bears the burden of showing by a preponderance of the evidence

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

that he was sentenced solely upon the residual clause, and he may only meet this burden by establishing what occurred as a matter of historical fact at his sentencing hearing. *Beeman*, 871 F.3d at 1221-22.[4] In determining whether the § 2255 movant has met this burden and proven his *Johnson* claim, Eleventh Circuit courts must ignore this Court's intervening precedent establishing that his prior convictions do not qualify as "violent felonies" under any other enhancement provision. *See id.* at 1224 n.5.[5] Thus, a silent record is ordinarily fatal to the § 2255 movant's *Johnson* claim in the Eleventh Circuit. *Id.* at 1224.[6]

The First, Fifth, Sixth, Eighth, and Tenth Circuits have each followed suit, adopting their own variations of the *Beeman* approach. *See Dimott v. United States,* 881 F.3d 232, 243 (1st Cir. 2018) (noting that the *Beeman* approach "makes sense"; holding that "to successfully advance a *Johnson II* claim on collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely

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

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

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

pursuant to ACCA's residual clause"; and determining that the petitioners' § 2255 motions were untimely because they relied upon intervening, non-retroactive decisions such as *Mathis v. United States*, 136 S. Ct. 2243 (2016)); *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018) (expressly joining the *Beeman* approach to silent record cases, and holding that "we must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause or the residual clause."); *United States v. Washington* 890 F.3d 891, 896 (10th Cir. 2018) ("we hold the burden is on the defendant to show by a preponderance of the evidence—i.e., that it is more likely than not—his claim relies on *Johnson"*); *Walker v. United States,* 900 F.3d 1012 (8th Cir. 2018) ("We agree with those circuits that require a movant to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement. . . Where the record or an evidentiary hearing is inconclusive, the district court may consider 'the relevant background legal environment at the time of ... sentencing' to ascertain whether the movant was sentenced under the residual clause."); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) ("As the proponent of a § 2255 motion, and a second motion at that, Potter has the burden to show he deserves relief. . . Nor does Johnson open the door for prisoners to file successive collateral attacks any time the sentencing court may have relied on the residual clause.").

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

For instance, in the Fourth Circuit, a *Johnson* claimant faced with a silent record satisfies the requirements of § 2255(h)(2) if he "may have" been sentenced based on the residual clause. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Noting that "nothing in the law requires a court to specify which clause [] it relied upon in imposing a sentence," the Fourth Circuit declined to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.* To hold otherwise would result in arbitrary "selective application" of the new substantive rule of constitutional law announced in *Johnson*. *Id.* Accordingly, the Court held that "when an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, *may be* an unlawful sentence under the holding in *Johnson* [], the inmate has shown that he 'relied on' a new rule of constitutional law. *Id.*

The *Winston* Court further held that, once a § 2255 movant passes through the gatekeeping requirement in § 2255(h)(2)—by showing only that he may have been sentenced based upon the residual clause—the court may consider modern, existing precedent when ruling on the merits of a *Johnson* claim. *Id.* at 684 ("we now must consider under the current legal landscape whether Virginia common law robbery qualifies as a violent felony

under the ACCA's force clause"). The *Winston* Court then conducted a review of post-sentencing caselaw, and determined that the petitioner's prior convictions no longer qualified as "violent" felonies without regard to the residual clause. *Id.* at 686. Thus, unlike in the Eleventh Circuit, a silent record is not necessarily, or even ordinarily, fatal to an otherwise meritorious *Johnson* claim in the Fourth Circuit.

The Ninth and Third Circuits have followed the Fourth Circuit's lead. In *Geozos*, the Ninth Circuit addressed the requirements of § 2255(h)(2) in the context of a silent record case, and held that "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but may have, the defendant's § 2255 claim 'relies on" the constitutional law announced in *Johnson*[.] United *States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017). The Court explained that in silent record cases, it was "necessarily unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id.* Therefore, the rule in such a situation is clear: "[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that *may have* rested on that ground." *Id.* (relying upon the "*Stromberg* principle" announced in *Stromberg v. California*, 283 U.S. 359 (1931)). Finding the § 2255(h)(2) gatekeeping requirements satisfied, the Ninth Circuit proceeded to the merits, and addressed whether the petitioner could prove his claim by reference "to the substantive law concerning the force

clause as it currently stands, not the law as it was at the time of sentencing." *Id.* at 897.

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

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

The question presented is one of exceptional importance, because thousands of prisoners filed § 2255 motions challenging their ACCA-enhanced sentences in the wake of *Johnson*. In many of these cases, the sentencing court had no reason to state that it was sentencing the defendant "solely upon the residual clause," as opposed to also or solely upon either the enumerated offenses clause or elements clause. In many of these silent record cases—such

as Mr. Wilson's—the inmate has already served more than the 10-year statutory maximum penalty in § 924(a), and would therefore be entitled to immediate release based on current precedent. Nevertheless, inmates in the Eleventh Circuit will be unable to obtain relief on their *Johnson* or *Davis*[7] claims, while identically situated inmates in the Third, Fourth, and Ninth Circuits will prevail, and be released from custody as a result of the sentencing court's discretionary—and often arbitrary—decision not to specify which enhancement clause applied. In other words, it is solely the happenstance of geography that determines who obtains relief on a *Johnson* claim.

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

CONCLUSION

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

Respectfully submitted,

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[7] *United States v. Davis*, 139 S. Ct. 2319 (2019).

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