No. ____

IN THE

Supreme Court of the United States

LUIS FERNANDEZ,

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

In *United States v. Davis*, 588 U.S. 445 (2019), this Court declared unconstitutionally vague the "residual clause" definition of the term "crime of violence" in 18 U.S.C. § 924(c) but left undisturbed the remaining "elements clause" definition. In this case, the Eleventh Circuit expressly recognized that "neither of [Mr. Fernandez's two predicate] crimes"—*i.e.*, conspiracy to commit Hobbs Act robbery or attempted Hobbs Act robbery—"qualifies as a 'crime of violence' under the elements clause." *Fernandez v. United States*, 114 F.4th 1170, 1175 (11th Cir. 2024). And Judge Rosenbaum, who authored the court's opinion, openly acknowledged in a separate concurrence that Mr. Fernandez "stands convicted of and will spend twenty-five years in prison for something that Congress did not make a crime." *Id.* at 1183.

Nonetheless, the court affirmed the denial of his motion to vacate that illegal conviction under 28 U.S.C. § 2255. It reasoned that Petitioner was required to prove that the district court had relied on the residual clause, as opposed to the elements clause, and he could not meet that burden of proof because the record was silent. As Judge Rosenbaum's concurrence recognized, three circuits do not require § 2255 movants to satisfy that heightened burden of proof. *Id*. at 1186 n.3 (citing cases).

The question presented is:

Are federal courts precluded from granting a federal prisoner's 28 U.S.C. § 2255 motion to vacate an illegal conviction in light of *Davis* where the record is unclear about whether the conviction was based on the now-invalid residual clause?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

The following proceedings are related under this Court's Rule 14.1(b)(iii):

- *Fernandez v. United States*, No. 21-12915 (11th Cir. Aug. 13, 2024);
- *Fernandez v. United States*, No. 20-cv-23034 (S.D. Fla. June 28, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Luis Fernandez respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is published and reported at 114 F.4th 1170 (11th Cir. 2004) and reproduced as Appendix A-1. The district court's order denying the 28 U.S.C. § 2255 motion is unreported but reproduced as Appendix A-3.

JURISDICTION

The Eleventh Circuit issued its decision on August 13, 2024. The Eleventh Circuit denied a timely petition for rehearing en banc on November 16, 2024. On April 7, 2025, Justice Thomas extended the time to file this certiorari petition up to and including May 16, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under the Antiterrorism and Effective Death Penalty Act of 1996, "[a] second or successive [§ 2255] motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . 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). Following certification, the movant's second or successive motion goes before the district court for merits consideration under § 2255, which provides, in relevant part, that if the district court "finds . . . that the sentence imposed was not authorized by law or otherwise open to collateral attack, . . . the court shall vacate and set the judgment aside . . . ." 28 U.S.C. § 2255(b).

STATEMENT OF THE CASE

The question presented here has recurred frequently in the wake of this Court's precedents in *Johnson v. United States*, 576 U.S. 591 (2015) and *United States v. Davis*, 588 U.S. 445 (2019): are federal courts precluded from granting collateral relief under these precedents where the record is silent or unclear about whether the district court relied on the residual clause? The courts of appeals are now divided 7–3 on that general question: the First, Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits require movants to prove that the district court relied on the residual clause. By contrast, the Third, Fourth, and Ninth Circuits have held that it is sufficient that the district court *may have* relied on the residual clause, and that the movant could no longer be sentenced under the ACCA or convicted under section 924(c), as the case may be, under current law. As a result, geography alone now determines whether federal prisoners may obtain relief on convictions and sentences that are indisputably invalid under this Court's precedents. This question is one of national importance: it affects numerous prisoners serving sentences under ACCA and section 924(c). It is recurring: most district court records are silent, since the residual clauses had previously encompassed numerous offenses, obviating any need for courts to specify the particular clause. And its resolution is urgently needed: it will determine whether numerous federal prisoners will be required to continue serving what are now indisputably illegal sentences, as this case perfectly illustrates.

A. LEGAL BACKGROUND

The Armed Career Criminal Act ("ACCA") requires a fifteen-year mandatory minimum for federal defendants convicted of certain firearms offenses. 18 U.S.C. § 924(e). The enhancement applies where the defendant convicted of being a felon in possession of a firearm has three "violent felonies" or "serious drug offenses."

ACCA contains three definitions of a "violent felony"—a felony 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 second half of the definition in subsection (ii) is known as the "residual clause." In *Johnson v. United States*, 576 U.S. 591 (2015), this Court held that ACCA's residual clause was unconstitutionally vague. *Johnson*, however, left undisturbed the validity of both the elements and enumerated-offense clauses. *Id.* at 2563. This Court later held that *Johnson* announced a new, substantive rule of constitutional law, and it therefore had retroactive effect to cases on collateral review. *Welch v. United States*, 578 U.S. 120 (2016).

Subsequently, in *United States v. Davis*, 588 U.S. 445 (2019), this Court declared unconstitutionally vague a very similar residual clause in 18 U.S.C. § 924(c). Section 924(c) imposes (at least) a five-year mandatory prison sentence consecutive to any other sentence (as well as a statutory maximum of life imprisonment) for possession of a firearm "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). To be validly convicted under the statute,

as relevant here, a defendant must have committed a "crime of violence." The statute provides two definitions for "crime of violence": an offense that is a felony and (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (B) "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." 18 U.S.C. § 924(c)(3). The former definition is referred to as the "elements clause"; the latter is referred to as the "residual clause."

In *Davis*, this Court declared unconstitutionally vague the "residual clause" definition but left undisturbed the remaining "elements clause" definition. The Eleventh Circuit subsequently held that *Davis* announced a new rule of constitutional law made retroactive by this Court, satisfying the criteria in section 2255(h)(2). *In re Hammoud*, 931 F.3d 1032, 1037–39 (11th Cir. 2019). As a result of that holding, federal prisoners could seek authorization to file second or successive section 2255 motions to vacate their section 924(c) convictions under *Davis*.

Following *Johnson* and *Davis*, numerous federal prisoners filed motions to vacate their ACCA and section 924(c) sentences pursuant to 28 U.S.C. § 2255. Because many had already filed previous § 2255 motions, they were statutorily required to obtain authorization from the court of appeals before filing a successive § 2255 motion. The court of appeals must grant such authorization where, *inter alia*, the movant makes a "*prima face*" showing 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), 2244(b)(3)(C). After

authorization, the district court must evaluate whether the successive motion actually satisfies the statutory requirements; if not, it must deny the motion. *See* 28 U.S.C. § 2244(b)(4); *Tyler v. Cain*, 533 U.S. 656, 660–61 & n.3 (2001) (contrasting the *prima facie* showing required for authorization with the actual showing required in the district court). If the district court "finds . . . that the sentence imposed was not authorized by law or otherwise open to collateral attack, . . . the court shall vacate and set the judgment aside . . . ." 28 U.S.C. § 2255(b).

B. PROCEDURAL BACKGROUND

In 2008, a grand jury charged Petitioner with two counts of drug-trafficking (Counts 3 and 4); conspiracy to commit Hobbs Act robbery (Count 5); attempt to commit Hobbs Act robbery (Count 6); and carrying and possessing a firearm in furtherance of a "crime of violence" and a "drug trafficking crime," in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 7). (Underlying Criminal Case No. 07-cr-20714-CMA (S.D. Fla.) Docket Entry ("Crim. DE") 176.) As relevant here, the indictment alleged that the § 924(c) offense in Count 7 was predicated on Counts 3 through 6.

A jury found Petitioner guilty on Counts 5, 6, and 7, but not guilty on Counts 3 and 4 (the two drug offenses). (Crim. DE 527.) The jury was instructed that, to convict Petitioner the § 924(c) offense in Count 7, it would have to find that he "committed a drug trafficking offense or crime of violence charged in Counts [3], [4], [5] or [6] of the Superseding Indictment." (Crim. DE 659 at 153.) The jury returned a general verdict and therefore did not make a finding about, or otherwise specify, the predicate offense supporting the § 924(c) conviction on Count 7. (Crim. DE 527.)

The court sentenced Petitioner to a total term of 360 months' imprisonment. The court sentenced him to 60 months on Counts 5 and 6, to be served concurrently with each other and with a sentence that had been imposed in another criminal case. And, as relevant here, the court sentence him to 300 months on the § 924(c) count, to run consecutively to Counts 5 and 6 and to the sentence in the other case. (Crim. DE 602.) Petitioner's direct appeal was unsuccessful. (Crim. DE 726.)

In 2016, Petitioner filed his first § 2255 motion, in which he challenged his § 924(c) conviction based on *Johnson*. The court denied the motion. (Crim. DE 804.)

In 2020, Petitioner filed with the Eleventh Circuit an application for authorization to file a second or successive § 2255 motion. (Civil Case No. 20-cv-23034-CMA (S.D. Fla.) Docket Entry ("Civ. DE") 1.) In his application, he sought leave to challenge his § 924(c) conviction in light of *Davis*, which, as noted above, invalidated the residual clause definition of "crime of violence" in section 924(c).

The Eleventh Circuit granted him leave to file because the § 924(c) offense in Count 7 "referenced multiple, distinct predicate offenses and the jury returned a general guilty verdict as to Count 7," and because it had already "determined [in *Brown v. United States*, 942 F.3d 1069 (11th Cir. 2019)] that conspiracy to commit Hobbs Act robbery, one of the potential predicate offenses, does not qualify as a crime of violence under § 924(c)(3)'s elements clause," Petitioner "made a *prima facie* showing that his claim satisfies the statutory criteria of § 2255(h)(2) on the basis that his § 924(c) conviction may be unconstitutional under *Davis*, as he potentially was sentenced under the now-invalid residual clause of § 924(c)(3)." (Civ. DE 1:7-8.)

Petitioner accordingly filed a successive 28 U.S.C. § 2255 motion in the district court, contending that his § 924(c) conviction was invalid in light of *Davis*. (Civ. DE 8.) In 2021, the district court denied the motion because attempted Hobbs Act robbery remained a valid "crime of violence" under the elements clause. (Civ. DE 19.) Petitioner moved for reconsideration, noting that this Court had since granted certiorari to consider whether attempted Hobbs Act robbery satisfied the elements clause in *United States v. Taylor*, 596 U.S. 845 (2022) (cert. granted July 2, 2021). (Civ. DE 21:1-2.) The district court granted the motion for reconsideration by issuing a certificate of appealability on that issue. (DE 27:2.)

Ultimately, this Court in *Taylor* held that attempted Hobbs Act robbery does not satisfy the elements clause in section 924(c), eliminating any doubt that Petitioner's conviction was invalid. Nonetheless, the Eleventh Circuit affirmed the denial of Petitioner's § 2255 motion to vacate. Following oral argument, the court explained that it "cannot sidestep prior panel precedent even if" the court disagreed with it. *Fernandez v. United States*, 114 F.4th 1170, 1182 (11th Cir. 2024). In particular, the court relied on its precedent in *Beeman v. United States*, 871 F.3d 1215 (2017), which it was "require[d] [ ] to apply" and which required Petitioner to prove that, as a matter of 'historical fact,' his § 924(c) conviction resulted from the unconstitutional residual clause" as opposed to the elements clause. *Id.* He could not.

Judge Rosenbaum, the author of the majority opinion, issued a lengthy concurrence, opining that "*Beeman* itself is wrong" because it was "unmoored from the text of 28 U.S.C. § 2255." *Id.* at 1183. She noted that the circuits were divided on

that question, and the circuits following *Beeman* also failed to consider the statutory text. *Id.* at 1186 n.3. Judge Newsom also authored a separate concurrence, opining that *Beeman*'s "historical fact" inquiry "contradicts the Supreme Court's holding in *Rivers v. Roadway Express, Inc.*," 511 U.S. 298, 312–13 n.13 (1994). *Id*. at 1188.

Petitioner sought rehearing en banc. Relying heavily on the concurrences issued by Judges Rosenbaum and Newsom, Petitioner argued that: (1) *Beeman* was wrongly decided and should be overruled; and (2) even assuming that *Beeman* was correctly decided, its historical-fact inquiry was inconsistent with *Rivers*. The Eleventh Circuit denied rehearing, with no active Judge calling for a vote.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

As Judge Rosenbaum's concurrence below noted, the circuits are divided on whether federal prisoners seeking relief under *Johnson* or *Davis* must prove that the district court relied on the residual clause. *Fernandez*, 114 F.4th at 1186 n.3. Seven circuits have said yes; three circuits have said no. The Second and Seventh Circuits have not taken a position but have each noted the circuit conflict. *See Savoca v. United States*, 21 F.4th 225, 234 n.7 (2d Cir. 2021) ("there is currently a circuit split as to a petitioner's burden of proof where the sentencing record is 'unclear' as to which ACCA clause an original sentencing court relied on"); *Waagner v. United States*, 971 F.3d 647, 655 & n.8 (7th Cir. 2020) (same). This 7–3 circuit conflict is deep and intractable. The question presented is important and recurring. And the majority view among the circuits is incorrect. Accordingly, the Court should grant certiorari.

A. The Third, Fourth, and Ninth Circuits Do Not Require Movants to Prove Reliance on the Residual Clause

1. In *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the court "disagree[d] with the government's position" that a successive § 2255 motion was due to be dismissed "because the record does not establish that the sentencing court relied on the residual clause." *Id.* at 681–82. Instead, the court "agree[d] with the district court's conclusion that Winston's claim for post-conviction relief 'relied on,' at least in part, the new rule of constitutional law announced in *Johnson*." *Id.* at 682.

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

That holding, moreover, was unaffected by the fact that the movant's claim in that case depended on the "interplay" between *Johnson* and *(Curtis) Johnson v. United States*, 559 U.S. 133 (2010), which had narrowed the elements clause. *Id.* at 682 n.4. It explained: "Any argument that Winston's claim did not 'rely on' *Johnson II*, because that claim would not be successful, does not present a procedural bar. Instead, that issue presents the substantive argument whether, even after receiving the benefit of *Johnson II*, the defendant still is not entitled to relief, because his conviction nonetheless falls within the [elements] clause." *Id.* Accordingly, the court proceeded to the merits of the *Johnson* claim, analyzing whether the movant had three predicate offenses under current law. *Id.* at 682–86. The court of appeals determined that the district court had erred, and it remanded for a determination about whether he remained an armed career criminal. *Id.* at 686. On remand, the district court concluded that he did not, and it ordered his immediate release from custody. *United States v. Winston*, 2017 WL 1498104 (W.D. Va. Ap. 25, 2017).

2. The Ninth Circuit employed a similar approach in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). It framed the question as one "that has cropped up somewhat frequently in the wake of *Johnson II* and *Welch*: When a defendant was sentenced as an armed career criminal, but the sentencing court did not specify under which clause(s) it found the predicate 'violent felony' convictions to qualify, how can the defendant show that a new claim 'relies on' *Johnson II*, a decision that invalidated only the residual clause?" *Id.* at 894. Favorably citing *Winston*, the court "h[e]ld that, when it is unclear whether a sentencing court relied on the residual clause in finding

that a defendant qualified as an armed career criminal, but it *may have*, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson II*." *Id.* at 896 & n.6 (emphasis added).

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

Similar to the Fourth Circuit, the Ninth Circuit then proceeded to the merits, asking "whether the *Johnson II* error [wa]s harmless—in other words, are there three convictions that support an ACCA enhancement under one of the clauses of ACCA

that survived *Johnson II*." *Id.* To do so, the court "look[ed] to the substantive law concerning the [elements] clause as it currently stands, not the law as it was at the time of sentencing." *Id.* After doing so in that case, the court concluded that the movant was no longer an armed career criminal, and it therefore reversed the denial of his successive § 2255 motion and instructed the district court to release him from custody immediately. *Id.* at 898–900.

3. The Third Circuit followed a similar approach in *United States v. Peppers*, 899 F.3d 211 (3rd Cir. 2018). There, the court held that "once a defendant has satisfied § 2255(h)'s gatekeeping requirements by relying on *Johnson*, he may use post-sentencing cases such as *Mathis, Descamps,* and *Johnson 2010* to support his *Johnson* claim because they are Supreme Court cases that ensure we correctly apply the ACCA's provisions." *Id.* at 230. Having made this determination, the Third Circuit then "proceed[ed] to consider whether Peppers's prior convictions were properly determined to be predicate offenses under the ACCA." *Id.* at 230. Applying post-sentencing caselaw, it found that Petitioner's two Pennsylvania robbery convictions did not categorically constitute violent felonies under the ACCA's elements clause (and also were not enumerated in the ACCA's enumerated offenses clause). *Id.* at 233-34.

Thus, the court reasoned, "the only remaining option, then, is that Peppers was sentenced pursuant to the unconstitutional residual clause." *Id.* at 234. The Third Circuit then moved on to consider whether Petitioner's Pennsylvania burglary conviction was a violent felony and concluded that it was. However, because it

"decided that Peppers's sentence was imposed due to constitutional error given that he may have been sentenced pursuant to the now-unconstitutional residual clause of the ACCA," it remanded and ordered the district court to resolve whether that error was harmless. *Id.* at 236. Specifically, it ordered that the district court should analyze in the first instance whether Peppers has at least two other qualifying predicate offenses rendering any constitutional error harmless. *Id.* at 236. It instructed that if the district court concludes that the error was not harmless, "it must proceed to correct Peppers's sentence by removing the sentencing enhancement under the ACCA." *Id.* at 236. The district court then found that he did not qualify as an armed career criminal and resentenced him to the statutory maximum terms of ten years' imprisonment. *See United States v. Peppers*, 779 F. App'x 934, 935 (3d Cir. 2019).

The Third Circuit applies this same approach in the section 924(c) context. *See United States v. Jordan*, 96 F.4th 584, 589 (3d Cir. 2024) (citing *Peppers*).

4. In accordance with the approach adopted by the Third, Fourth and Ninth Circuits, "[n]umerous district courts around the country ha[d] similarly concluded that the government's position [was] constitutionally untenable." *Taylor*, 873 F.3d at 480. Indeed, before contrary circuit decisions began to emerge, "[t]he government's position ha[d] been rejected by virtually every court to have considered the question." *United States v. Wilson*, 249 F. Supp. 3d 305 (D. D.C. 2017) (citing cases); *see Beeman*, 871 F.3d at 1227–28 (Williams, J., dissenting) (citing additional cases). They employed similar reasoning, analogizing the situation to *Stromberg*, observing that courts had not been required to specify the clause upon which they

relied, and recognizing that the government's approach would impose an unfair burden on movants, lead to inequitable results, and result in the selective application of *Johnson*. *E.g.*, *Wilson*, 249 F. Supp. 3d at 312–13.

B. The First, Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits Do Require Movants to Prove Reliance on the Residual Clause

1. The Eleventh Circuit took the contrary approach in *Beeman*, though not without substantial internal disagreement. Before *Beeman*, two different Eleventh Circuit panels came to different opinions when adjudicating applications for leave to file successive § 2255 motions. In *In re Moore*, 830 F.3d 1268 (11th Cir. 2016), the panel stated in dicta that "a movant has the burden of showing that he is entitled to relief in a § 2255 motion," and "in this context the movant cannot meet that burden unless he proves that he was sentenced using the residual clause and that he use of that clause made a difference in the sentence." *Id.* at 1272–73. "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." *Id.* at 1273.

Less than a week later, a different panel of the Eleventh Circuit opined, in its own dicta, that *In re Moore* "seems quite wrong." *In re Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016). For it required courts to "ignore" this Court's precedents in *Descamps* and *Mathis*, "except in the rare instances where the sentencing judge thought to make clear that she relied on the residual clause. That is not right." *Id.* at 1339–40. Indeed, "[n]othing in the law require[d] a judge to specify which clause .

. . it relied upon in imposing a sentence," and so the availability of *Johnson* relief would arbitrarily turn on whether the sentencing judge had made a "chance remark." *Id.* at 1340–41. Thus, the panel opined that "the required showing is simply that [the statute] may no longer authorize his sentence as that statute stands after *Johnson*." *Id.* at 1341.

The Eleventh Circuit ultimately embraced the reasoning employed in *In re Moore*. In *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), a divided panel held that, in order to prove a *Johnson* violation in an initial § 2255 motion, the movant bears the burden to prove by a preponderance of the evidence that the sentencing court relied solely on the residual clause. *Id.* at 1221–25. As a result, where it was "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 meet his burden. *Id.* at 1222. The court rejected the argument that this holding "would make the outcome depend on the 'fluke' of a district court having expressly stated which clause it was relying on." *Id.* at 1224.

Sitting by designation, Judge Kathleen Williams dissented. She opined that courts must apply current Supreme Court precedent like *Descamps*, "many district courts across the country have adopted this approach in evaluating *Johnson* claims . . . with an unclear sentencing record," and the majority's contrary approach "not only would be unfair" to movants, "but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court." *Id.* at 1226–28. Embracing the reasoning of *In re Chance*, and that of *Winston* and *Geozos*, she argued that the

majority's approach would "lead to unwarranted and inequitable results," for she could "see no basis for predicating a defendant's right to relief on the precision of the verbiage employed by a judge . . . at the time of sentencing." *Id.* at 1228–29. She concluded: "I fear that the practical effect of today's opinion is that many criminal defendants . . . who were, in fact, sentenced under a constitutionally infirm statute will be denied their right to seek the relief to which they may very well be entitled by the holdings of the Supreme Court." *Id.* at 1231.

Now, several years after *Beeman*, Judge Williams' words seem even more prescient. Not only did her prediction prove true in the ACCA context, but here, in this case, the Eleventh Circuit has now extended the same "unfair" approach to another "infirm statute": section 924(c). As set forth herein, its practical effect is being felt presently by Petitioner and countless other federal prisoners who are and stand to be denied their right to seek § 2255 relief for illegal terms of imprisonment.

2. The First Circuit adopted the same harsh approach in *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018). Expressly agreeing with *Beeman*, the court "h[e]ld 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 pursuant to ACCA's residual clause." *Id.* at 240, 243. Moreover, the court expressly disagreed with the contrary approaches taken by other circuits. *Id.* at 242 ("Our view is different from those taken in *Geozos Winston*, and *Taylor* And because there was no suggestion that the movants in that case were sentenced under the residual clause, the court of appeals affirmed the denial of the motions. *Id.* at

240–41, 243. Judge Torruella dissented in part, noting the "emerging split amongst the circuits" on how to resolve silent-record *Johnson* cases. *Id.* at 245 n.9.

3. The Sixth Circuit adopted the same approach in *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018). It rejected the notion that "*Johnson* open[s] the door for prisoners to file successive collateral attacks any time the sentencing court *may* have relied on the residual clause." *Id.* at 788 (emphasis in original). Instead, and favorably citing *Beeman*, it concluded that the movant bears the burden to prove such reliance. *Id.* In that case, the court of appeals emphasized that "[n]either the presentence report nor the sentencing transcript shows that the district court relied on the residual clause." *Id.* And it speculated that the district court had likely sentenced the movant under the enumerated-offense clause. *Id.* Because the movant supplied no contrary evidence, the court affirmed the denial of his § 2255 motion based on *Johnson*. *Id.* at 787–89.

4. The Tenth Circuit too has employed a similar approach. In *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), the sentencing record was again unclear, and the court of appeals was "unable to disagree" with the district court's finding that, based on that record and the legal landscape at the time of sentencing, it had imposed the enhancement under the enumerated-offense clause. *Id.* at 1128–30. In doing so, the court of appeals effectively placed the burden of proof on the movant to show that the sentencing court relied only on the residual clause. Because the movant could not refute the district court's finding to the contrary, the court of appeals affirmed the denial of his § 2255 motion. *Id.* at 1129–30. In subsequent

cases, the Tenth Circuit formally adopted *Beeman*'s approach to the burden of proof. *See United States v. Driscoll*, 892 F.3d 1127, 1135 & n.5 (10th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018).

5. The Eighth Circuit has also adopted a similar approach. In *Walker v. United States*, 900 F.3d 1012, 1013 (8th Cir. 2018), a successive § 2255 petitioner claimed that his Missouri burglary of an inhabitable structure convictions no longer qualified him as an armed career criminal after *Johnson*. The district court had denied relief, reasoning that—as the law stood in 2016—petitioner's burglary convictions still qualified as violent felonies under the enumerated-offenses clause. *Id.* After announcing a rule virtually identical to that of *Beeman* (and specifically citing *Beeman*), the Eighth Circuit vacated the district court's order due solely to the "sparse sentencing record" and remanded to the district court "to determine in the first instance whether petitioner had shown by a preponderance of the evidence that his successive § 2255 claim relies on *Johnson*'s new rule invalidating the residual clause." *Id.* at 1015. Adopting *Beeman*'s rule, it instructed that it "should proceed to the merits only if [petitioner] is able to carry his burden." *Id.* at 1015–16.

6. The Fifth Circuit now also employs a similar approach. In *United States v. Clay*, 921 F.3d 550, 557–58 (5th Cir. 2019), the court noted that it was impossible to determine whether a petitioner's prior burglary convictions were for enumerated felonies under the categorical approach because, at the time of his convictions, Mississippi had multiple statutes criminalizing the burglary of a house and "neither the superseding indictment, PSR, nor sentencing court indicated which of those

statutes he was convicted of violating." Therefore, the court could not "rule out the possibility that the sentencing court relied solely on the residual clause to impose [an] ACCA-enhanced sentence." *Id.* at 558. Because of this, citing *Beeman*, the court found that petitioner "failed to show by a preponderance of the evidence that he was sentenced under the residual clause . . . ." As a result, it held that the district court lacked jurisdiction over his successive § 2255 petition." *Id.* at 558-59.

7. Finally, in 2023, the District of Columbia Circuit also adopted the same approach used by the Eleventh Circuit in *Beeman* and by the other circuits noted above, specifically citing those precedents. *See United States v. West*, 68 F.4th 1335, 1338–39 (D.C. Cir. 2023). In *West*, a § 2255 petitioner sought vacatur of his ACCA sentence on the grounds that his second-degree robbery conviction and two aggravated assault convictions (all under New Jersey law) "may have" rested on the residual clause. *Id.* at 1337–38. The court affirmed the district court's "use[ ] [of] the preponderance of evidence standard in determining that West failed to show that it was more likely than not that his sentence relied on the residual clause." *Id.* at 1338. It reasoned, in pertinent part, that "[n]othing in the record indicates whether West's sentence rested on the residual clause, or on the elements clause, or on both." *Id.*

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

The question presented is frequently recurring. After *Johnson*, numerous federal prisoners across the country filed § 2255 motions. As the discussion above illustrates, these lawsuits quickly resulted in a deep circuit conflict about whether federal prisoners had to prove that the district court relied on the residual clause.

This conflict has therefore been extant nearly a decade. Nearly every circuit has weighed on it. The split is intractable. And, as this case reflects, it continues to recur.

Moreover, this 7–3 conflict is important because it effectively determines whether illegal convictions and sentences can be invalidated. As things stand, federal prisoners in seven circuits are effectively unable to obtain relief under this Court's precedents in *Johnson* and *Davis*. That is so because, as the cases reflect, most district court records are silent. In the pre-*Johnson* era, district courts rarely specified the definitional clause upon which they relied. There was certainly no legal requirement that they do so. And, given the all-encompassing scope of the residual clause, there was often no practical reason for them to do so either. Indeed, in many cases, the defendant had no basis to object given the scope of the residual clause, and thus there was no need for the district court to say anything about the ACCA enhancement or specific section 924(c) predicate offenses, let alone the clauses in those statutes.

The approach adopted by seven circuits effectively penalizes scores of defendants for that silence, precluding them from obtaining relief under *Johnson* and *Davis*, even where it is undisputed that they would no longer be subject to the ACCA or section 924(c) today. The Eleventh Circuit's decision below only underscores the need for this Court's immediate intervention. That is because the Eleventh Circuit has extended *Beeman*'s reach beyond illegal ACCA sentences to illegal *convictions*. As Judge Rosenbaum powerfully observed in the opening line of her concurrence: "Luis Fernandez stands convicted of and will spend twenty-five years in prison for something that Congress did not make a crime." *Fernandez*, 114 F.4th at 1183.

Meanwhile, defendants in the Third, Fourth and Ninth Circuits will not be so penalized; instead, they will obtain relief despite a silent record. Indeed, numerous defendants in these circuits have obtained section 2255 relief on their section 924(c) convictions after *Davis* and *Taylor*—all because they did not have to (impossibly) prove that the district court relied on the residual clause.[1] Indeed, that is what happened in *Taylor* itself, where this Court affirmed the Fourth Circuit's decision vacating a section 924(c) conviction predicated on attempted Hobbs Act robbery where the conviction was challenged in a second section 2255 motion based on *Davis*.

Thus, similarly-situated defendants across the country are now being treated disparately: those in the Third, Fourth, and Ninth Circuits are having their convictions vacated and, in many cases, being released; but those like Petitioner in the other circuits will remain incarcerated for many more years. Geography alone should not account for such inequitable treatment for so many federal prisoners. Accordingly, the Court's intervention is required to put a stop to this untenable disparity in the administration of federal criminal law.

[1] *See, e.g.*, *United States v. Graham*, No. 13-cr-620, DE 237 (D. Md. Oct. 23, 2023); *United States v. Gross*, No. 07-cr-132, DE 80 (D. Md. Sept. 18, 2023); *United States v. Richardson*, 97-cr-5129, DE 470 (E.D. Cal. Jan. 27, 2023); *Walker v. United States*, No. 07-cr-263, DE 498 (M.D. Pa. Dec. 7, 2022); *Jones v. United States*, 2022 WL 4590582 (W.D. N.C. Sept. 29, 2022); *Soto v. United States*, No. 19-cv-21981, DE 17 (D. N.J. July 5, 2022) (government conceding relief in three cases post-*Taylor*); *Murry v. United States*, No. 11-cr-73, DE 555 (E.D. Va. Jan. 19, 2023); *see also United States v. Lorenzana*, 2024 WL 5047224, at *8–10 (S.D.N.Y. Dec. 9, 2024) (granting relief based on the "may have relied" standard adopted by the Third and Fourth Circuits).

III. THIS CASE IS AN IDEAL VEHICLE

For several reasons, this case is the ideal vehicle for resolving the question.

1. Procedurally, Petitioner fully preserved his burden-of-proof argument below, and that issue was extensively litigated by the parties. After this Court decided *Taylor* and the Eleventh Circuit lifted the stay in this case, Petitioner asserted that he had met his burden of proving a *Davis* claim because there are only two predicates convictions in this case—Hobbs conspiracy and Hobbs attempt—and pursuant to *Brown* and *Taylor*, they can only stand as predicates under § 924(c)'s unconstitutionally vague residual clause. In response, the Government relied exclusively on the burden-of-proof framework established in *Beeman*, contending that Petitioner had not met his burden because the district court never said which clause it applied at the time of his conviction and because the legal landscape at the time was silent on the issue. At oral argument, the parties repeated these arguments once again, in even greater detail. And, in his unsuccessful petition for rehearing en banc, Petitioner argued that *Beeman* was wrongly decided and conflicted with the decisions of the Third, Fourth, and Ninth Circuits. *See* C.A. Reh'g Pet. 9–12.

The court of appeals, moreover, squarely decided the burden-of-proof issue. Indeed, it rested its decision on the exclusive ground that Petitioner could not meet his burden under *Beeman* to prove that the district court relied on the residual clause. Thus, the question presented is fully preserved and squarely presented for review.

2. That question is also dispositive of Petitioner's case. In response to his brief in the Eleventh Circuit, the government did not advance any alternative

grounds for denial. The court of appeals, moreover, expressly recognized that "*Brown* and *Taylor* stand for the propositions, respectively, that Hobbs Act conspiracy and attempt were not "crimes of violence" under the elements clause at any point—not when Fernandez was convicted in 2009, and not now." *Fernandez*, 114 F.4th at 1181. It nonetheless affirmed Petitioner's conviction, finding he had failed to show that the district court relied solely on the unconstitutional residual clause as directed by *Beeman* – *i.e.*, by "either show[ing] that the district court expressly relied solely on the residual clause, or [by] cit[ing] case law showing at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a crime of violence." *Id.* at 1181. Thus, this case comes to the Court following an explicit holding by the court of appeals that the only two predicate offenses supporting Petitioner's section 924(c) conviction are not now—and never have been—crimes of violence under section 924(c)'s elements clause. So the burden of proof is dispositive.

And resolution of that issue will have very real ramifications for Petitioner. If the Eleventh Circuit's decision below stands, then Petitioner will be required to serve an additional *twenty-five* years in prison. Again, that is so even though the Eleventh Circuit recognizes he stands convicted of something that Congress did not make a crime. The miscarriage of justice presented by this case exemplifies the injustice created by the precedents of seven circuits representing more than half the country.

3. That grievous injustice is further exacerbated here because Petitioner would have clearly obtained relief had he been sentenced in the Third, Fourth or Ninth Circuits. First, "it is unclear whether [the district] court relied on the residual

clause in finding [that one of his predicate convictions constituted a crime of violence], but it may have." *See Geozos*, 870 F.3d at 896; *accord Winston*, 850 F.3d at 682 (burden satisfied where ACCA enhancement "may have been predicated on application of the now-void residual clause"); *see also Peppers*, 899 F.3d at 230 ("once a defendant has satisfied § 2255(h)'s gatekeeping requirements by relying on *Johnson*, he may use post-sentencing cases . . . to support his *Johnson* claim").

As Petitioner conceded below, the record here is silent: at no time did the parties, the jury, or the court ever specify the definitional clause upon which the section 924(c) conviction was based. And at no point did the district court find that it had in fact relied on the elements clause. Furthermore, the court of appeals acknowledged that the law at the time of Petitioner's conviction did not resolve that issue. See *Fernandez*, 114 F.4th at 1182. Thus, the district court very well may have relied on the broad catchall that was then the residual clause.

Having satisfied the first step of the Third, Fourth, and Ninth Circuits' approach, the next question would be whether that error was harmless—*i.e.*, whether Petitioner would remain convicted under section 924(c) if he were sentenced today without the residual clause. As explained above, there is no dispute that the answer is no: this Court has squarely held that Hobbs attempt is not a crime of violence under the elements clause, and the Eleventh Circuit has held the same regarding Hobbs conspiracy. And all agree that his section 924(c) conviction could only have been based upon one of these two predicates. So his section 924(c) sentence is indisputably illegal.

Thus, there can be little doubt that, had Petitioner been convicted in Philadelphia, Baltimore, or San Francisco, as opposed to Miami, his § 2255 motion would have been granted. Accordingly, this case squarely implicates the circuit conflict. Only this Court can resolve that untenable geographical disparity.

IV. THE DECISION BELOW IS WRONG

Finally, the decision below is wrong for the many reasons given in Judge Rosenbaum's concurrence below, by the Fourth Circuit in *Winston*, by the Ninth Circuit in *Geozos*, in the dissenting opinion in *Beeman*, and by numerous district courts around the country. In short, it was wrong to require Petitioner to prove by a preponderance of evidence that the district court relied on the residual clause. That the district court may have done so—and that Petitioner would clearly no longer be subject to a section 924(c) conviction today—should entitle him to relief under *Davis*.

The contrary rule adopted by the First, Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits is plagued with problems. As this case concretely illustrates, it requires federal courts to remain idle while federal prisoners serve illegal sentences after *Johnson* and *Davis*. As Judge Rosenbaum pointedly noted in her concurrence: Mr. Fernandez "stands convicted of and will spend twenty-five years in prison for something that Congress did not make a crime." *Id.* at 1183 (Rosenbaum, J., concurring). That is so "even though Congress enacted a mechanism by which [the Court] can correct this error – 28 U.S.C. § 2255." *Id.*

It is well-established, as Judge Rosenbaum referenced, that federal prisoners whose sentences were "imposed in violation of the Constitution or laws of the United

States" are entitled to relief. 28 U.S.C. § 2255(a). Condemning prisoners like Petitioner to serve illegal sentences contravenes the core remedial purpose of § 2255, as enacted by Congress. Correcting this manifest injustice is why Judge Rosenbaum explicitly invited *en banc* rehearing here (which, as noted above, was denied): "While our prior-panel-precedent rule compels me to concur in the result, I would rehear this case *en banc* to revisit *Beeman*, *Hammoud*, and their progeny"). *See id.* at 1187 (Rosenbaum, J., concurring). This is because, as she noted, "the *Beeman* framework contravenes the plain text of § 2255(b), undercuts precedent, and threatens the separation of powers." *Id.*

Regarding the text, "[a]s relevant here, § 2255(h)(2) requires that '[a] second or successive motion must be certified . . . 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.'" *Id.* at 1183 (quoting 28 U.S.C. § 2255(h)(2)). "By its terms, then," a § 2255(h)(2) certification "is not a merits determination; rather, it is merely a finding that a petitioner has met the gatekeeping requirements. That is, it's a circuit court's determination that the movant's motion includes a qualifying new rule." *Id.* at 1184. Accordingly, "[b]ecause a § 2255(h)(2) certification is not a merits determination, . . . a movant meets his responsibilities under that section with a prima facie showing that his challenged conviction (or sentence) "may – not that it does, but it may – implicate" a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *Id.* (quoting *In re Hammoud*, 931 F.3d 1032,

1040 (11h Cir. 2019)). "Once [a panel of this Court has] certified a movant's motion to contain a qualifying new rule, § 2255(h)(2) has served its function, and [its] gatekeeping role is complete." *Id.* (citing *Peppers*, 899 F.3d at 229–30).

Following certification, "the movant's second or successive § 2255 motion then goes before the district court for merits consideration under § 2255(b), [which] provides, in relevant part, that if the district court 'finds . . . that the sentence imposed was *not authorized by law* or otherwise open to collateral attack, . . . the court shall vacate and set the judgment aside . . . .'" *Id.* (citing 28 U.S.C. § 2255(b)) (emphasis in original). Here, neither of Mr. Fernandez's two predicate offenses, Hobbs Act conspiracy and attempt, qualify as crimes of violence under section 924(c)'s elements clause—and, as the court of appeals below recognized, have ***never*** so qualified under the *Rivers* principle. *See id.* at 1170. Thus, the district court (and the court of appeals) should have found that the sentence imposed "was not authorized by law" and the judgment should have been vacated. Yet, as Judge Rosenbaum observed, "instead of this straightforward conclusion, *Beeman* [and the rule imposed by other circuits] compels the opposite result." *Id.* at 1185. Its framework "requires courts to travel back in time to determine not that the district court was wrong when it convicted the movant – as we know now, it was – but rather whether the district court was wrong in what *Beeman* says is the right way," *i.e.*, that, as a matter of "historical fact," his § 924(c) conviction resulted from the unconstitutional residual clause. *Id.* at 1185; *see also id.* at 1182. As noted above, this framework is "without textual justification." *Id.* at 1186. And notably, "[n]one of [the other] circuits who have adopted *Beeman*'s rule

appear to have consulted the text of § 2255(b), either." *Id.* at 1186 n.3 (collecting cases from the First, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits).

The textually-untethered *Beeman* rule imposed here and by other circuits on the wrong side of the split stands "in contravention of the separation of powers," as it "effectively rewrites § 2255(b), raising the burden on habeas petitioners beyond that imposed by Congress." *Id.* Indeed, "it 'penalize[s] a [habeas petitioner] for a court's discretionary choice not to specify under which clause' it sentenced him." *Id.* (citing *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017)).

As a matter of fundamental fairness, a federal prisoner's eligibility for § 2255 relief under *Johnson* or *Davis*—new rules of constitutional law that this Court not only announced but are retroactive—should not turn on the happenstance of what a district court judge said over a decade earlier. Not only would it be unfair to penalize a movant like Mr. Fernandez for that silence, but it would lead to disparate results for prisoners who were otherwise identically-situated. There is no basis for imposing such a "magic words" requirement. To the contrary, that harsh approach would result in the arbitrary application of *Johnson* and *Davis* and run afoul of "equitable principles [that] have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quotation omitted).

And it is no answer to ask federal courts to re-create the legal landscape that existed at the time of sentencing. Doing so would make relief turn on the particular state of the law in a particular circuit at a particular moment in time, even though there is no basis in the record to believe that the sentencing judge actually consulted

that law. And that fictional approach would be hopelessly impractical, requiring reviewing courts to engage in speculative counterfactuals about which clause a sentencing court might have relied upon many years earlier. Indeed, merely "[a]ttempting to recreate the legal landscape at the time of a defendant's [sentence] is difficult enough on its own." *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016). And that is particularly true where, as here, the proceeding occurred over a decade earlier, when the state of the law in this area was nascent.

Finally, penalizing movants for silent records would be cruelly ironic, since that silence was often attributable to the residual clause itself. Again, its scope was so capacious in the decades leading up to *Johnson* and *Davis* that there was seldom a need for defendants to challenge what constituted "violent felonies" or "crimes of violence" under the respective ACCA and section 924(c) statutes, and thus no need for the district courts to identify the particular clause on which they relied. It would be circular and even Kafkaesque to uphold illegal convictions—confining prisoners to additional years of incarceration—on the basis of a silent record that was itself attributable to the unconstitutional provision that now supplies the basis for relief.

This is simply wrong, "*Beeman* [ ] is wrong," and as Judge Rosenbaum contends, "[i]t is wrong, then, [for circuits on the wrong side of the split] to continue to insist that [federal judges] use [these precedents]." *Id.* at 1187. This Court should reverse here, overrule *Beeman* and the other circuit decisions on the wrong side of the issue, and ensure that the federal courts fulfill their obligation to "correct past sentences that were not 'authorized by law'" such as the one imposed here. *See id.*

* * *

In sum, seven circuits are refusing to correct illegal sentences. In doing so, they are nullifying this Court's precedents. The Court's intervention is required.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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