

No. _____

IN THE
Supreme Court of the United States

GREGORY KING,
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 *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), this Court declared unconstitutionally vague the “residual clause” of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii), but it left undisturbed the two remaining “violent felony” definitions in the ACCA. In *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), this Court held that *Johnson*’s invalidation of the ACCA’s residual clause was a new, substantive rule of constitutional law that had retroactive effect in cases on collateral review.

The question presented is:

Are federal courts precluded from granting a federal prisoner’s successive 28 U.S.C. § 2255 motion to vacate an illegal sentence based on *Johnson* where the record is unclear about whether the movant’s sentence was enhanced under the now-invalidated residual clause?¹

¹ A similar question is presented in *Snyder v. United States*, No. 17-7157 (filed Dec. 15, 2017); *Westover v. United States*, No. 17-7607 (filed Jan. 29, 2017); and *Casey v. United States*, No. 17-1251 (filed Mar. 8, 2018).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit’s opinion is unreported but reproduced as Appendix A. App. 1a. The district court’s two orders dismissing and denying the 28 U.S.C. § 2255 motion are unreported but reproduced as Appendix C & D. App. 18a, 43a.

JURISDICTION

The court of appeals issued its decision on January 9, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act (“ACCA”) defines “violent felony” as 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).

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).

“A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.” 28 U.S.C. § 2244(b)(4).

STATEMENT OF THE CASE

The question presented here has arisen frequently in the wake of *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016): are federal courts precluded from granting collateral relief under *Johnson* where the record is silent about whether the sentencing court relied on the residual clause? The courts of appeals are now divided 3–2 on that general question: the First, Tenth, and Eleventh Circuits require movants to prove that the sentencing court relied on the residual clause. By contrast, the Fourth and Ninth Circuits have determined that it is sufficient that the sentencing court *may have* relied on the residual clause, and the movant is no longer an armed career criminal under current law. This question is one of national importance: it affects hundreds if not thousands of federal prisoners. It is recurring: many sentencing records are silent, since the residual clause had previously encompassed numerous offenses, obviating any need to specify the clause. And its resolution is urgently needed: it will determine whether numerous prisoners will be required to serve what are now indisputably-illegal sentences for a minimum of five additional years.

A. LEGAL BACKGROUND

The Armed Career Criminal Act (“ACCA”) transforms a ten-year statutory maximum penalty into a fifteen-year mandatory minimum for federal defendants convicted of certain firearms offenses. 18 U.S.C. §§ 924(a)(2), 924(e). The enhancement applies where the defendant has a three “violent felonies” or “serious drug offenses.”

The 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 definition in subsection (i) is known as the “elements” or “force” clause. The first half of the definition in subsection (ii) is known as the “enumerated” offense clause. And the second half of the definition in subsection (ii) is known as the “residual” clause.

In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), this Court held that the ACCA’s residual clause was unconstitutionally vague. *Johnson*, however, left undisturbed the validity of both the elements and enumerated-offense clauses. *Id.* at 2563. The following Term, this Court 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. ___, 136 S. Ct. 1257, 1268 (2016).

Following *Johnson* and *Welch*, thousands of federal prisoners filed motions to vacate their ACCA 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 facie* 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).² After authorization, the district court must evaluate whether the successive motion actually satisfies the statutory requirements and, if not, dismiss the motion. 28 U.S.C. § 2244(b)(4); *see Tyler v. Cain*, 533 U.S. 656, 660–61 & n.3 (2001) (contrasting *prima facie* showing required for authorization with the actual showing required in the district court).

B. PROCEDURAL BACKGROUND

In 2007, Petitioner pled guilty in the Southern District of Florida to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The probation officer recommended that he receive the ACCA enhancement, but did not identify the predicate convictions, let alone the definitional clause, upon which that classification relied. There was no objection to the enhancement at sentencing, and there was no discussion about the clause upon which it depended. The court

² The parallel gatekeeping provision for state prisoners requires authorization where there the petition “relies on” on such a rule. 28 U.S.C. § 2244(b)(2)(A).

sentenced Petitioner to the 15-year mandatory minimum. He has now served more than the 10-year maximum penalty that would have otherwise applied.

Following *Johnson* and *Welch*, the Eleventh Circuit granted Petitioner's application for leave to file a second § 2255 motion to in light of *Johnson*. App. 2a. The court concluded that he had made the requisite *prima facie* showing, because he was reasonably likely to benefit from the rule announced in *Johnson*. Reviewing his criminal history, the court reasoned that the validity of his enhancement post-*Johnson* ultimately turned on his 1997 Florida conviction for burglary.³ As to that offense, the court explained that Florida burglary was broader than “generic” burglary, since it included the curtilage, and it would not satisfy the enumerated-offense clause if the burglary statute was “indivisible” under *Descamps v. United States*, 570 U.S. 254 (2013). The court granted authorization, but left it to the district court to determine whether, procedurally, it could consider *Descamps*.

In the district court, the government initially responded to the § 2255 motion by “conced[ing] that King does not have three valid predicate convictions under the ACCA” based on current law. The government maintained that Petitioner had one qualifying drug offense, but in light of *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016) (clarifying *Descamps*' divisibility analysis), it “agree[d] that under the circumstances of this case we are unable to make the requisite showing as to”

³ The court found that: Petitioner had two qualifying drug offenses, but they only counted as one because there was no indication that they arose out of distinct criminal episodes; his offense for aggravated battery of a pregnant woman likely satisfied the elements clause; his simple battery conviction likely did not, since there was no indication that it was committed by anything other than a touching; and his theft convictions clearly did not qualify. That left the burglary offense.

any of Petitioner's other offenses, including the Florida burglary. Accordingly, the Magistrate Judge entered a Report, recommending that the district court grant the § 2255 motion. The parties entered a "Joint Stipulation," agreeing that Petitioner be re-sentenced to the non-enhanced 10-year statutory maximum.

The district court, however, requested supplemental briefing on whether it could consider *Descamps* and *Mathis* in determining whether Petitioner had satisfied the requirement in § 2255(h)(2). Petitioner advocated the following approach: a successive motion "contains" (or "relies upon") the rule of *Johnson* where it was unclear that the enhancement was imposed under the enumerated or elements clause; and, if so, the court should then proceed to the merits of the *Johnson* claim by determining whether the movant still has three predicate offenses under current law, including *Descamps* and *Mathis*. Focusing on his Florida burglary conviction, Petitioner argued that he satisfied that approach: the record was unclear whether the sentencing court had relied on the residual clause or the enumerated-offense clause; and *Descamps/Mathis* made clear that the Florida burglary statute was indivisible and thus categorically non-generic.

In response, the government reversed its position. Relying on newly-announced dictum in *In re Moore*, 830 F.3d 1268 (11th Cir. 2016), it argued that Petitioner had not satisfied § 2255(h)(2), because he was required to prove that the sentencing court relied on the residual clause, regardless of whether his enhancement was valid under current law. And it was unclear whether the court had relied on that clause rather than the enumerated-offense clause. In reply,

Petitioner relied on competing dictum from an Eleventh Circuit decision that had since criticized *In re Moore*. *In re Chance*, 831 F.3d 1335 (11th Cir. 2016).

The district court issued a 25-page non-final order dismissing Petitioner's successive motion for failure to satisfy § 2255(h)(2). App. 18a. Agreeing with the government's position and the dictum from *In re Moore*, it required Petitioner to prove that the sentencing court actually relied on the residual clause. And it refused to consider whether Petitioner remained subject to the enhancement under current law, including *Descamps/Mathis*, since those decisions did not independently satisfy the gatekeeping criteria in § 2255(h)(2). Petitioner moved for reconsideration, reiterating his approach and arguing that, based on the law at the time of sentencing, the court could have counted the burglary conviction only under the residual clause. In response, the government reiterated that Petitioner failed to meet his burden "because the record is not clear" as to the clause relied upon.

After Petitioner notified the court of *United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016)—holding that Florida burglary was indivisible in light of *Descamps/Mathis*, and was thus categorically not a violent felony—the district court dismissed the § 2255 motion for lack of jurisdiction due to his failure to comply with § 2255(h)(2) and, alternatively, denied it on the merits. App. 43a, 57a–58a. The court re-affirmed its earlier refusal to apply *Descamps/Mathis* and added, *inter alia*, that the law at the time of sentencing did not demonstrate that the court had relied on the residual clause. With regard to the Florida burglary, the court relied on case law reflecting that, although this offense satisfied the residual clause

at the time of sentencing, courts also could have employed the modified categorical approach and considered undisputed PSI facts, which reflected that Petitioner’s burglary offense was generic. *United States v. Matthews*, 466 F.3d 1271, 1274–76 (11th Cir. 2006).

Petitioner sought a certificate of appealability (“COA”) from the court of appeals. He emphasized that the parties had agreed that he was no longer subject to the ACCA enhancement in light of *Johnson*. And, in an effort to show that reasonable jurists could debate the district court’s resolution of his motion, he pointed out that there was both an intra-circuit and intra-district split of authority on whether he was required to prove that the sentencing court relied on the residual clause. That conflict alone, he asserted, warranted a COA.

But while Petitioner’s motion was pending, the court of appeals adversely resolved that split of authority. In *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), a divided panel held that, in order to prove a *Johnson* violation, 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. Shortly after *Beeman*, the court of appeals denied Petitioner’s motion. App. 1a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

The circuits are divided on whether a federal prisoner seeking to benefit from *Johnson* must prove that the sentencing court relied on the residual clause. The Fourth and Ninth Circuits sensibly say no; the First, Tenth, and Eleventh Circuits

harshly say yes. The Fifth Circuit, without taking a position, has expressly noted this conflict of authority. *See United States v. Taylor*, 873 F.3d 476, 480–82 (5th Cir. 2017) (discussing cases). So too have individual Judges. *See Dimott v. United States*, 881 F.3d 232, 245 n.9 (1st Cir. 2018) (Torruella, J., dissenting in part) (noting “emerging split amongst the circuit courts as to the burden of proof placed on petitioners facing a silent record”). Only this Court can resolve that conflict.

1a. In *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the court of appeals “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 requires 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 Court 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 Fourth Circuit “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 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 force 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).

1b. 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 relied on *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 force 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.

1c. In accordance with the approach adopted by the Fourth and Ninth Circuits, “[n]umerous district courts around the country have similarly concluded that the government’s position is 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*. *Wilson*, 249 F. Supp. 3d at 312–13.

2a. The Eleventh Circuit has since taken 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 dictum, 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.

2b. The First Circuit adopted that same harsh approach in *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018), *cert. petition pending sub. nom. Casey v. United States* (U.S. No. 17-1251) (filed Mar. 8, 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 there 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.

2c. The Tenth Circuit employed a similar approach in *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), *cert. petition pending* (U.S. No. 17-7157) (filed Dec. 15, 2017). Although the sentencing record was again unclear, 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 essentially 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.

II. THE QUESTION PRESENTED IS RECURRING AND NATIONALLY IMPORTANT

As the Court is undoubtedly aware, thousands of federal prisoners across the country filed § 2255 motions in the wake of *Johnson* and *Welch*, arguing that their ACCA sentences were illegal. Many of these prisoners, including Petitioner here, have over-served the otherwise-applicable ten-year statutory maximum and, under current law, would be entitled to immediate release from custody. And, indeed, many prisoners have obtained such relief, including in the Eleventh Circuit.

But along came the Eleventh Circuit’s decision in *Beeman*, which the Tenth and First Circuits have since followed. Those decisions effectively gut *Johnson* for scores of remaining, pending ACCA cases in those Circuits. That is so because, as several courts have recognized, many cases involve a silent record. *See, e.g., Geozos*, 870 F.3d at 894 (observing that this “question has cropped up somewhat frequently”). In the pre-*Johnson* era, particularly before this Court began construing the residual clause, sentencing judges rarely specified the definitional clause upon which the enhancement depended. There was certainly no legal requirement that they do so. And, given the broad catch-all scope of the residual clause, there was often no practical reason for them to do so either. Indeed, in many

cases (this one included), the defendant had no basis to object to the enhancement given the residual clause, and thus there was no need for the sentencing judge to say anything about the enhancement, let alone the clauses.

The approach adopted by the First, Tenth, and Eleventh Circuits effectively penalizes scores of defendants for that silence, precluding them from obtaining relief under *Johnson*, even where there it is undisputed that they would no longer be subject to the ACCA enhancement today. Meanwhile, defendants in the Fourth and Ninth Circuits will not be so penalized; instead, they will continue to obtain relief despite the silent record. Thus, similarly-situated defendants across the country are now being treated disparately: those in the Fourth and Ninth Circuits are being released and going home; others in the First, Tenth, and Eleventh Circuits will remain incarcerated for at least five additional years. Geography alone should not account for such grossly inequitable treatment for so many defendants.

III. THIS CASE IS A GOOD VEHICLE

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

Petitioner would be entitled to relief had he been sentenced in the Fourth or Ninth Circuits. First, “it is unclear whether [the] sentence court relied on the residual clause in finding that [he] qualified as an armed career criminal, but it may have.” *Geozos*, 870 F.3d at 896; *accord Winston*, 850 F.3d at 682 (sufficient where enhancement “may have been predicated on application of the now-void residual clause”). The sentencing record here is wholly silent: at no time did the probation officer, the parties, or the court ever mention the definitional clause.

Furthermore, at the time of sentencing in August 2007, binding precedent made clear that Florida burglary categorically satisfied the residual clause. *See James v. United States*, 550 U.S. 192 (2007) (holding, in April 2007, that Florida attempted burglary satisfied residual clause); *United States v. Matthews*, 466 F.3d 1271, 1274–76 (11th Cir. 2006) (holding that Florida burglary satisfied residual clause). At the same time, circuit precedent also would have allowed the sentencing court to employ the modified categorical approach and consult undisputed PSI facts, which reflected that Petitioner’s burglary offense was generic. *Matthews*, 466 F.3d at 1274–75. Thus, given the silent record and state of the law, it is unclear whether the sentencing court relied on the residual clause. *Geozos*, 870 F.3d at 897 (movant showed lack of clarity where record was silent and the law at the time of sentencing reflected that predicate satisfied residual clause and another clause).

Having satisfied the first step of the Fourth and Ninth Circuits’ approach, the next question would be whether that error was harmless—*i.e.*, whether Petitioner would still be an armed career criminal if he were sentenced today without the residual clause. The answer is clearly no: the Eleventh Circuit has squarely held that, in light of *Descamps* and *Mathis*, Florida burglary categorically is not a violent felony under the enumerated-offense clause. *United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016). And, in its order granting Petitioner authorization to file a successive § 2255 motion, the Eleventh Circuit correctly observed that his

enhancement turned on that burglary conviction. That is precisely why the government originally and expressly conceded that Petitioner was entitled to relief.⁴

Furthermore, these issues were litigated extensively below. Petitioner repeatedly advocated the Fourth/Ninth Circuit/*Chance* approach in multiple filings: he had shown reliance on, and error under, *Johnson* because the record was unclear; and he was no longer was an armed career criminal under current law, including *Descamps/Mathis*. The district court issued two lengthy decisions addressing the question presented; and it found only that the sentencing court “could have” relied on the enumerated-offense clause, not that it actually did so. And, although the court of appeals summarily denied Petitioner’s motion for a COA, it necessarily did so based on *Beeman*, as there was no alternative basis to deny relief, *Beeman* was decided only a few months earlier, and the court of appeals will not issue a COA “where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law.” *Hamilton v. Sec’y, Fla. Dep’t of Corrs.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (citation omitted). That is so even where, as here, there is a circuit split. *Lambrix v. Sec’y, Fla. Dep’t of Corrs.*, 851

⁴ Seeking to insulate its ruling, the district court stated in its second order that, based on the PSI facts, Petitioner’s two drug offenses occurred on separate occasions. App. 49a–51a. But the PSI does not reflect that at all; to the contrary, it reflects that they occurred on the same day and location. Exacerbating that egregious error, the court then erroneously placed the burden on Petitioner to prove that there was only criminal episode; in fact, it was the government’s burden to prove otherwise, which it could not do. *United States v. McCloud*, 818 F.3d 591, 596–98, 600 (11th Cir. 2016). That explains why both the government and the court of appeals easily agreed that these offenses counted as only one predicate.

F.3d 1158, 1171 (11th Cir. 2017) (“we need not evaluate that circuit split because Lambrix’s . . . argument is foreclosed by our binding” precedent).

Finally, this case is an attractive vehicle because the district court dismissed the motion for lack of jurisdiction based on Petitioner’s failure to satisfy § 2255(h)(2), and it alternatively denied the motion on the merits. App. 57a–58a. Thus, this case would ideally allow the Court to address both related questions here: what does it mean for a successive § 2255 motion to “contain” the *Johnson* rule for purposes of § 2255(h)(2); and what must a movant do to demonstrate a *Johnson* violation on the merits? Like this case, *Winston* and *Geozos* arose in the successive posture, and they implicitly found that satisfying the former also satisfied the latter. But these questions may be analytically distinct: a motion might “contain” the *Johnson* rule but fail to demonstrate a *Johnson* violation. And it is important that the Court address *both* questions because many pending cases, like this one, arise in the successive posture, and the statutory requirement in § 2255(h)(2) is a jurisdictional pre-requisite that cannot be bypassed.

IV. THE DECISION BELOW IS WRONG

The decision below is wrong for the many reasons given by the Fourth Circuit in *Winston*, the Ninth Circuit in *Geozos*, the Eleventh Circuit in *In re Chance*, the dissenting opinion in *Beeman*, and numerous district courts around the country. In short, it was wrong to require Petitioner to prove by a preponderance of evidence that the sentencing court relied on the residual clause—both to satisfy the gatekeeping statute in § 2255(h)(2) and to prevail on the merits. That the

sentencing court may have done so—and that Petitioner would no longer be subject to the enhancement today—should suffice to entitle him to relief under *Johnson*.

The contrary rule adopted by the First, Tenth, and Eleventh Circuits is plagued with problems. It requires courts to ignore whether a prisoner is serving an illegal sentence and to knowingly disregard this Court’s binding precedents in *Descamps* and *Mathis*. Furthermore, a prisoner’s eligibility for relief under *Johnson*—a new retroactive rule of constitutional law by this Court—should not turn on the happenstance of what a judge said at the sentencing hearing a decade earlier. Not only would it be unfair to penalize a movant for that silence, but it would lead to disparate results for prisoners who were otherwise identically-situated. It would also impractically require courts to engage in messy counterfactuals about which clause a sentencing court relied upon years earlier by looking solely at what the law was at that particular moment in time. Yet “[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). 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 broad a decade ago that there was seldom a need to object, and thus no need for the courts to identify the clause. It would be downright circular and even Kafkaesque to uphold illegal sentences—confining prisoners to a minimum of five additional years of incarceration—on the basis of a silent record that was itself attributable to the unconstitutional provision that now provides the basis for relief.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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