

No. 25-

IN THE SUPREME COURT OF THE UNITED STATES

TODD HAROLD COOPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit, No. 23-4052

Petition for a Writ of Certiorari

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Question Presented

In *Johnson v. United States*, 576 U.S. 591, 597–98 (2015), this Court established a new rule of constitutional law that invalidates vague, statutory residual clauses that impose recidivist punishments by combining the categorical approach to prior-conviction analysis with imprecise risk standards. The rule is retroactive to cases on collateral review, *Welch v. United States*, 578 U.S. 120, 130 (2016), and this Court has applied it to invalidate several residual clauses, *see Sessions v. Dimaya*, 584 U.S. 148, 152 (2018); *United States v. Davis*, 588 U.S. 445, 470 (2019). The federal three-strikes law contains the same kind of vague residual clause, 18 U.S.C. § 3559(c)(2)(F)(ii), which the Government concedes is unconstitutional.

The federal courts of appeals, however, are deeply divided over what a movant under 28 U.S.C. § 2255 must prove to obtain collateral relief under *Johnson*'s new rule. The question presented is:

What must a § 2255 movant show as to reliance on an unconstitutional residual clause to receive relief under *Johnson*?

Parties to the Proceedings

Petitioner Todd Cooper was the defendant and movant in the district court and the appellant in the court of appeals.

Respondent United States of America was the plaintiff and respondent in the district court and the appellee in the court of appeals.

Related Cases

Decisions Under Review:

Cooper v. United States, No. 1:16-CV-00088-JNP, 2023 WL 2696500 (D. Utah Mar. 29, 2023), *aff'd*, 159 F.4th 768 (10th Cir. 2025), *reh'g denied* (Jan. 22, 2026).

Prior, Related Decisions:

United States v. Cooper, No. 1:00-cr-00051 (D. Utah) (underlying criminal case against Mr. Cooper).

United States v. Cooper, 375 F.3d 1041 (10th Cir. 2004), *cert. denied*, 543 U.S. 1011 (2004) (direct appeal).

Cooper v. United States, No. 1:05-cv-00142 (D. Utah Mar. 28, 2006), *United States v. Cooper*, 212 F. App'x 743 (10th Cir. 2007), *cert. denied*, 552 U.S. 930 (2007) (initial collateral challenge).

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Petitioner Todd Harold Cooper petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit.

Opinions Below

Cooper v. United States, No. 1:16-CV-00088-JNP, 2023 WL 2696500 (D. Utah Mar. 29, 2023), *aff'd*, 159 F.4th 768 (10th Cir. 2025), *reh'g denied* (Jan. 22, 2026).

Jurisdiction

The judgment of the court of appeals was entered on November 18, 2025. Pet. App. 060a. Mr. Cooper timely petitioned for panel and en banc rehearing on December 23, 2025. The Tenth Circuit denied rehearing on January 22, 2026. Pet. App. 061a.

On March 27, 2026, Justice Gorsuch granted Mr. Cooper's application, No. 25A1061, to extend the time within which to file a petition for a writ of certiorari to and including May 22, 2026. This petition is timely. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

Mr. Cooper was sentenced under the federal three-strikes law, which as relevant here triggers a “sentence[] to life imprisonment” if a person is convicted of a “serious violent felony” and “the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of . . . 2 or more serious violent felonies.” 18 U.S.C. § 3559(c)(1)(A)(i).

Section 3559(c)(2)(F) defines “serious violent felony” in three ways. **First**, the “enumerated clause” lists offenses that qualify. 18 U.S.C. § 3559(c)(2)(F)(i). **Second**, the “elements clause” (or “force clause”) includes any offense “punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Id.* § 3559(c)(2)(F)(ii). **Third**, the “residual clause” sweeps in any offense “punishable by a maximum term of imprisonment of 10 years or more . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.” *Id.*

Under 28 U.S.C. § 2255(a), a federal prisoner “may move the court which imposed the sentence to vacate, set aside or correct the sentence” if he asserts “the right to be released upon the ground that the sentence was imposed in

violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law,” but, as relevant here, a second or successive motion must be certified by the 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(a), (h)(2).

Introduction

Decades ago, a federal court in Utah condemned Todd Harold Cooper to die in prison under the federal three-strikes law. The Government represented that he had five prior strikes. When sentencing Mr. Cooper, the court did not state which of his prior convictions it was relying on or why they qualified as strikes.

Since then, this Court has repeatedly held that sentence-enhancing recidivist statutes defining prior convictions by the same combination of features Congress used in 18 U.S.C. § 3559(c)(2)(F)(ii)—an “ordinary case,” categorical inquiry¹ layered on top of an imprecise residual clause risk standard—violate the Constitution’s Due Process Clause. *See Johnson*, 576 U.S. 591, 597–98 (2015);

¹ Under the categorical approach, courts assess whether a prior conviction qualifies for a sentence enhancement by looking at “how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.” *Johnson*, 576 U.S. at 596 (quotations omitted); *see Taylor v. United States*, 495 U.S. 575 (1990).

Sessions v. Dimaya, 584 U.S. 148, 152 (2018); *United States v. Davis*, 588 U.S. 445, 470 (2019).

The Government concedes that the residual clause of the federal three-strikes law is unconstitutional under this line of authority. *See* Pet. App. 020a; 2023 WL 2696500 at *2; *see also, e.g., United States v. Reed*, 163 F.4th 338, 376 (6th Cir. 2025) (“*Johnson*, *Dimaya*, and *Davis* dictate the unconstitutionality of § 3559(c)(2)(F)’s residual clause.”).

The Government has also conceded that some of the prior convictions it relied on at sentencing, 1982 Oregon first-degree burglaries, qualified as “serious violent felonies” only under the residual clause. *See* Pet. App. 050a; 159 F.4th at 774. Because the court that sentenced Mr. Cooper accepted the Government’s notice wholesale, it necessarily relied on the unconstitutional residual clause to count these convictions. In several circuits, this showing would entitle Mr. Cooper to a harmlessness analysis under current law.

Under current law, courts would order Mr. Cooper to be resentenced because the Government cannot make out three valid strikes today. Mr. Cooper is not a three-strikes offender. He has only two qualifying “serious violent felony”

convictions—both of which he readily concedes—and the Government can qualify none of his prior convictions as a third strike.

Yet the Tenth Circuit affirmed Mr. Cooper’s life sentence and further divided the circuits as to what a § 2255 movant must prove for relief under *Johnson*’s new rule. Below, in theory, Mr. Cooper had to prove that the sentencing court relied on the unconstitutional residual clause as a matter of historical fact, but the historical analysis was circumscribed by the Government’s concession on collateral review that it would no longer rely on certain prior convictions it had relied on at sentencing. In other words, the Tenth Circuit cabined the historical inquiry to the prior conviction the Government now favors, a 1981 California robbery conviction.² Analytically, this meant Mr. Cooper had to prove not only historical reliance on the residual clause but also that the sentencing court could not have reached the same outcome through any other route. Such an approach wrongly collapses the historical and harm inquiries.

Only this Court can restore uniformity and ensure that federal prisoners do not die in prison under sentences that should be vacated under *Johnson*’s new rule.

² As shown below, the California robbery conviction did not qualify as a strike when Mr. Cooper was sentenced in 2003, and it doesn’t qualify today.

The question presented is particularly important where the sentencing court failed to put its reasoning on the record, and this case is an unusually clean vehicle for resolving it. The Government concedes that the three-strikes residual clause is unconstitutional, and it concedes that two of Mr. Cooper's predicates qualified only under that clause. Mr. Cooper does not qualify for the life sentence. The petition for a writ of certiorari should be granted.

Statement of the Case

I. Mr. Cooper receives a three-strikes sentence, but the basis for his life term remains unclear through direct appeal and his first § 2255 motion.

In 2003, Mr. Cooper received a three-strikes life sentence in the District of Utah after a federal jury convicted him of armed bank robbery in violation of 18 U.S.C. § 2113. *See* Pet. App. 044a; 159 F.4th at 771. To secure the three-strikes sentence, the Government asserted Mr. Cooper had five strikes, or “serious violent felonies”:

- 1) a 1981 California robbery conviction,
- 2) a 1982 Oregon burglary conviction,
- 3) a second 1982 Oregon burglary conviction,
- 4) two 1988 federal bank robbery convictions occurring in Washington (counted together as one prior conviction), and

5) a 1990 Oregon robbery conviction.

See Pet. App. 021a, 045a; 159 F.4th at 774.³ The three-strikes statute required the Government to file this information “stating in writing the previous convictions to be relied upon.” 21 U.S.C. § 851(a)(1); *see* 18 U.S.C. § 3559(c)(4).

As the panel below acknowledged, the sentencing court imposed the mandatory life sentence under § 3559(c) without identifying which of Mr. Cooper’s prior convictions it relied on, or which clause of § 3559(c)(2)(F) allowed the convictions to qualify as strikes. Pet. App. 045a; 159 F.4th at 773.

Mr. Cooper argued on direct appeal that the sentencing court had improperly shifted the burden to him to prove he was *not* subject to the three-strikes provision. 375 F.3d at 1052–53. The Tenth Circuit rejected his argument, but its analysis did not clarify which convictions supported the life term. *Id.* at 1052–54.

By all appearances, the sentencing court accepted the Government’s representation that all the listed convictions counted as strikes. Indeed, the sentencing court’s wholesale acceptance of the Government’s three-strikes notice

³ Mr. Cooper concedes he has two strikes based on the 2003 and 1988 bank robberies.

was further revealed when the sentencing judge later denied Mr. Cooper’s first § 2255 motion. The court remained under the impression that the above-listed convictions qualified, and it even included in its list of strikes a Utah burglary conviction that the Government had expressly disclaimed before sentencing because the conviction does not belong to Mr. Cooper. *See* Pet. App. 004a, 007a–008a; *Cooper v. United States*, No. 1:05-CV-00142 PGC, at pp. 4, 7–8 (Mar. 28, 2006) (recounting that Government’s notice stated Mr. Cooper had “at least five” strikes and that “[t]hese serious violent felonies occurred in 1981 in California *and Utah*, 1982 in Oregon, 1988 in Washington and Oregon, and 1990 in Oregon” (emphasis added)).

Nine years passed between the district court’s denial of Mr. Cooper’s first § 2255 motion in 2006, and this Court’s *Johnson* decision in 2015.

II. The new rule of constitutional law that this Court established in *Johnson* makes the residual clause of the federal three-strikes law unconstitutional, and the Tenth Circuit authorizes Mr. Cooper’s second § 2255 motion.

In *Johnson*, this Court held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), violated constitutional due process. 576 U.S. at 597. The statute combined two features—the categorical approach and an

indeterminate potential risk standard—that rendered the law impermissibly vague. *Id.* at 596–98.

A year later, this Court held that *Johnson* announced a substantive rule that applies retroactively on collateral review. *Welch v. United States*, 578 U.S. 120, 129–30 (2016). Because *Johnson*’s rule “alters . . . the class of persons that the law punishes,” it carries “a significant risk that a defendant stands convicted of an act that the law does not make criminal,” and the rule’s retroactivity follows. *Id.* at 129–31 (quotation omitted).

Shortly thereafter, in *Dimaya* and *Davis*, this Court applied *Johnson*’s rule to invalidate the residual clauses in 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B) because they too combined the categorical approach with an imprecise risk standard. *See* 584 U.S. at 157–58; 588 U.S. at 453, 470.

Mr. Cooper sought authorization to file a second § 2255 motion, which the Tenth Circuit granted. *See* Pet. App. 013a–16a, *In re Cooper*, No. 16-4115 (10th Cir. July 14, 2020). The text of the three-strikes residual clause is materially indistinguishable from residual clauses this Court has held unconstitutionally vague. Although the Government and Mr. Cooper agree that the residual clause of the federal three-strikes law, 18 U.S.C. § 3559(c)(2)(F)(ii), is unconstitutionally

vague under *Johnson* and its progeny, the Tenth Circuit did not decide the point.

Pet. App. 047a, 159 F.4th at 772.⁴

III. The Tenth Circuit affirms the district court’s denial of Mr. Cooper’s second § 2255 motion applying its two-step framework for adjudicating *Johnson* claims.

A. The Tenth Circuit’s framework

After *Johnson*, the Tenth Circuit adopted a two-step framework for adjudicating § 2255 motions challenging sentencing enhancements based on unconstitutional residual clause applications. *See, e.g., United States v. Driscoll*, 892 F.3d 1127, 1132 (10th Cir. 2018) (“First, we determine whether the sentencing court erred by relying on the residual clause Second, if the sentencing court erred, we determine whether that error ‘had substantial and injurious effect or influence in determining’ [the movant’s] sentence.” (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638, (1993))).

⁴ The Sixth Circuit has held 18 U.S.C. § 3559(c)(2)(F)(ii) unconstitutional. *Reed*, 163 F.4th at 376. Additionally, district courts have held the law unconstitutional, often with the Government’s express concession. *See, e.g., Moss v. United States*, 731 F. Supp. 3d 697, 708 (W.D.N.C. 2024); *Arnold v. United States*, 632 F. Supp. 3d 1005, 1011 (D. Ariz. 2022); *Morrison v. United States*, No. 16-CV-1517 DMS, 2019 WL 2472520, at *3 (S.D. Cal. June 12, 2019); *United States v. Minjarez*, 374 F. Supp. 3d 977, 992 (E.D. Cal. 2019); *United States v. Goodridge*, 392 F. Supp. 3d 159, 173–74 (D. Mass. 2019); *Haynes v. United States*, 237 F. Supp. 3d 816, 823 (C.D. Ill. 2017).

As the Tenth Circuit applies step one, the movant has the burden of showing that the sentencing court more likely than not relied on the invalid residual clause. This is a question of “historical fact” about “what the sentencing court did,” not what it could have done. *United States v. Lewis*, 904 F.3d 867, 872 (10th Cir. 2018) (quotation omitted).⁵

When the sentencing record is silent, courts examine as part of the step-one inquiry “the relevant background legal environment at the time of sentencing” to determine whether the sentencing court would have needed to rely on the residual clause. *United States v. Copeland*, 921 F.3d 1233, 1242 (10th Cir. 2019) (quotations omitted); *see id.* at 1243 (explaining that “background law is only useful insofar as it helps to show the most likely reasoning of the district court” (quotations omitted)). Where “background law foreclosing the enumerated *or* elements clause is coupled with a silent or ambiguous record, the movant has adequately shown it is more

⁵ Easy cases are easy: if the sentencing court made a record that it relied on only the residual clause or on only another clause to count prior convictions, then whether the defendant’s sentence rests on an unconstitutional theory is clear. *See United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017) (contrasting these situations from cases where the record is unclear), *overruled on other grounds by Stokeling v. United States*, 586 U.S. 73 (2019).

likely than not that the sentencing court relied on the residual clause to enhance his sentence.” *Id.* at 1243 (emphasis added) (quotation omitted).

The Tenth Circuit holds out a second step if the movant clears step one. In assessing harmlessness at step two, the burden shifts to the Government, and the analysis is governed by current law: “Would a sentencing judge, applying current law, determine that the movant’s conviction(s) still qualifies . . . ?” *Id.* at 1252 (quotations omitted)); *see Lewis*, 904 F.3d at 872–73 (explaining current law applies at step two because “harmless error review goes to the question of remedies and resentencing,” i.e., is the movant entitled to a reduced sentence or would a sentencing judge determine that the movant’s conviction still qualifies and re-sentence him to the same length of imprisonment?).

Thus, step one asks what happened, and the movant has the burden; step two asks whether what happened mattered given today’s law, and the Government has the burden. The decision below upended the two-step framework and brought further division among the circuits in applying *Johnson*.

B. Application in Mr. Cooper’s case

Because the Government conceded in the district court that (1) the three-strikes residual clause is unconstitutional; (2) Mr. Cooper’s 1990 Oregon robbery

conviction does not count as a strike because it occurred before the 1988 federal bank robberies, *see* 18 U.S.C. § 3559(c)(1)(B) (imposing sequencing requirement for strikes); (3) Mr. Cooper’s 1982 Oregon first-degree burglaries qualify as a strike only under the residual clause; and (4) Mr. Cooper’s 1988 federal bank robbery convictions count as a single qualifying strike, the district court boiled the analysis down to whether Mr. Cooper’s California robbery conviction qualified as a non-residual-clause strike at the time of sentencing in 2003. Pet. App. 020a, 027a–029a; 2023 WL 2696500 at *2, 6 (reasoning that the Government, by limiting its argument to a subset of convictions, “moot[ed]” Mr. Cooper’s arguments as to other convictions); *see also* Pet. App. 050a & n.4; 159 F.4th at 774 & n.4.

The district judge who decided the second § 2255 motion was not the judge who sentenced Mr. Cooper. *Cf. Dimott v. United States*, 881 F.3d 232, 237 (1st Cir. 2018) (giving “due weight” to findings where “the habeas judge was describing his own decisions at sentencing”).

Thus, despite the Government’s concession that the sentencing court would have had to use the residual clause to count the Oregon burglaries, the district court allowed the Government to narrow the analytical playing field: “In response to Cooper’s present motion, the government identifies offenses (1) [the California

robbery], (4) [the prior federal bank robberies], and the underlying District of Utah bank robbery conviction as the relevant three strikes.” Pet. App. 021–022a; 2023 WL 2696500, at *6. By focusing on the California robbery, the district court ignored how the sentencing court counted Mr. Cooper’s other prior convictions.

Relying on the California robbery conviction, the district court denied Mr. Cooper’s § 2255 motion. Pet. App. 029a–039a; 2023 WL 2696500, at *6–11. Although such convictions are not a categorical fit for § 3559(c)(2)(F)(i)’s enumerated clause because they can entail mere threats to property, *see* Cal. Penal Code § 212 (defining “fear”),⁶ the district court ruled Mr. Cooper’s California robbery conviction would have qualified under the enumerated clause in 2003.⁷ The district court believed the sentencing court could have and seemingly would have applied a circumstance-specific, rather than a categorical, approach, and

⁶ *See Minjarez*, 374 F. Supp. 3d at 989 (holding California robbery conviction not a categorical match for “robbery” under the three-strikes law); *Thompson v. United States*, 585 F. Supp. 3d 809, 823 (E.D. Va. 2022) (same); *Morrison*, 2019 WL 2472520, at *7 (S.D. Cal. June 12, 2019) (same). The Government has also conceded that Mr. Cooper’s California robbery conviction would not qualify as a strike if the categorical approach applied at sentencing. Pet. App. 052a–053a; 159 F.4th at 775.

⁷ The Government did not argue California robbery qualified as a strike under the elements clause. Pet. App. 051a; 159 F.4th at 774.

factually Mr. Cooper’s offense involved threats of physical violence. Pet. App. 029a-037a; 2023 WL 2696500 at *8–11. Although it denied relief, the district court granted a certificate of appealability. Pet. App. 041a–042a; *Cooper v. United States*, No. 1:16-cv-00088-JNP (D. Utah June 2, 2023). *See* 28 U.S.C. § 2253(c)(1)(B).

In a published opinion, the Tenth Circuit affirmed. Pet. App. 043a–057a; *United States v. Cooper*, 159 F.4th 768 (10th Cir. 2025). The panel avoided deciding whether *Johnson* reaches § 3559(c)(2)(F)(ii) by holding that Mr. Cooper failed to establish that the sentencing court “actually relied” on the residual clause. An “actual reliance” showing requires not only that the sentencing court used the residual clause, but also that “the sentencing court would have had to rely upon the residual clause to impose a life sentence.” Pet. App. 049a; 159 F.4th at 772–73. Like the district court, the panel only cared if the sentencing court used the residual clause with respect to the California robbery. Pet. App. 051a; 159 F.4th at 774. Put differently, the panel blurred the two-step framework by requiring the movant to prove the sentencing court relied on the residual clause in a way that was necessarily harmful—that no non-residual-clause pathway existed at the time. Pet. App. 050a n.4; 159 F.4th at 774 n.4 (rejecting Mr. Cooper’s argument that “he

only needs to establish that the sentencing court relied on the residual clause to count *any* of his five prior convictions”).

Regarding the California robbery, the panel acknowledged that the categorical approach applies to the three-strikes law, but the panel reasoned that the decision expressly holding as much, *United States v. Leaverton*, 895 F.3d 1251, 1253 (10th Cir. 2018), was not decided until 2018, so “it would have been permissible for the sentencing court to apply the circumstance-specific approach and conclude Cooper’s California robbery conviction qualified as a ‘serious violent felony’ under the enumerated clause.” Pet. App. 054a; 159 F.4th at 775–76.

In its assessment of 2003 background law, the panel relied on *United States v. Mackovich*, 209 F.3d 1227, 1240 (10th Cir. 2000), which held that the circumstance-specific approach applied to an entirely different part of the three-strikes law, and *United States v. Martinez-Candejas*, 347 F.3d 853, 859 (10th Cir. 2003), a case decided after Mr. Cooper’s sentencing, that the panel said was nevertheless representative of how courts would have (mis)read *Mackovich*. Pet. App. 054a–055a; 159 F.4th at 776.

The panel thus concluded that Mr. Cooper failed to meet his step-one burden. Pet. App. 057a; 159 F.4th at 777.

The Tenth Circuit denied Mr. Cooper's petition for panel and en banc rehearing. Pet. App. 061a.

Reasons for Granting the Petition

The Tenth Circuit's decision deepens an entrenched and acknowledged split among the federal courts of appeals over what a § 2255 movant must prove to obtain collateral relief from a sentence imposed under an unconstitutional residual clause. The split is mature, outcome-determinative here, and ill-suited to further percolation.

The Tenth Circuit's method of retrofitting the historical analysis to the convictions the Government wants to defend on collateral review is the wrong approach. This Court should confirm that a § 2255 movant satisfies his burden by showing, whether under a "may have" or preponderance standard, that the sentencing court relied on an invalid residual clause as a matter of historical fact to count any of his prior convictions for the enhancement.

This case is the right vehicle. The Government concedes that the three-strikes residual clause is unconstitutional. It concedes that two of Mr. Cooper's prior convictions qualified only under that clause. And it concedes Mr. Cooper's

California robbery conviction can count only under a circumstance-specific approach that is not the law.

I. Circuit courts are split on the issue, and Mr. Cooper would receive relief in other jurisdictions.

The circuits are openly divided as to the § 2255 movant’s burden. Although most circuits, like the Tenth Circuit, apply the preponderance standard, even these circuits’ tests are not the same. Two circuits apply a more lenient “may have relied” standard, and two other circuits are on the sidelines.

A. The Fourth and Ninth Circuits hold that a “may have relied” showing suffices.

In the Fourth and Ninth Circuits, a § 2255 movant satisfies his burden when the sentencing record is silent and the sentencing court “may have” relied on the residual clause. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017), and *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017).⁸

⁸ This Court’s decision in *Stokeling v. United States*, 586 U.S. 73 (2019), abrogated *Winston* and *Geozos* with respect to their discussions of the minimum force required under the ACCA, see *United States v. White*, 987 F.3d 340, 343 (4th Cir. 2021) (addressing *Winston*’s status); *Ward v. United States*, 936 F.3d 914, 919 (9th Cir. 2019) (addressing *Geozos*’s status), but the *Stokeling* development is irrelevant to these circuits’ approaches to evaluating *Johnson* claims.

The Fourth Circuit reasoned courts must “not penalize a movant for a court’s discretionary choice not to specify under which clause” the sentencing predicates qualified. 850 F.3d at 682. A rule requiring that the record establish that the sentencing court relied on the residual clause “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.* (quotations omitted).

The Ninth Circuit grounded its rule in this Court’s *Stromberg* jurisprudence, analogizing to jury verdicts that may rest on unconstitutional theories: “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.” 870 F.3d at 896 (alterations omitted) (quoting *Griffin v. United States*, 502 U.S. 46, 53 (1991), and citing *Stromberg v. California*, 283 U.S. 359 (1931)).

B. The First, Third, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits apply a “preponderance” standard, but their tests are not identical.

Most circuits require the § 2255 movant to show by a preponderance of the evidence that the sentencing court relied on the residual clause. *See Dimott v. United States*, 881 F.3d 232, 240–43 (1st Cir. 2018); *United States v. Peppers*, 899

F.3d 211, 235 n.21 (3d Cir. 2018); *United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–25 (11th Cir. 2017); *United States v. West*, 68 F.4th 1335, 1338 (D.C. Cir. 2023).

Despite the seeming uniformity, these courts are not applying the same test. In the Third Circuit, for instance, the movant can point to evidence that the district court sentenced him under the residual clause, but he can also demonstrate “that he could not have been sentenced under the elements or enumerated offenses clauses *based on current case law*, and that that made a difference in his sentence.” *Peppers*, 899 F.3d at 235 n.21 (emphasis added); *see id.* (acknowledging circuits are divided over “whether a movant may rely on post-sentencing case law to prove his *Johnson* claim”); *cf.* Pet. App. 048a; 159 F.4th at 773 (considering law at time of sentencing).

The Tenth Circuit’s decision to add an additional, step-two-style inquiry to the movant’s step-one burden—i.e., its holding that the sentencing court’s historical reliance on the residual clause to count certain convictions is irrelevant if

the Government no longer defends those convictions—generated further inter-circuit conflict.

C. The Second and Seventh Circuits remain undecided.

The Second Circuit has acknowledged the split but reserved the question. *See Barnes v. United States*, 162 F.4th 58, 65 n.4 (2d Cir. 2025). The Seventh Circuit has likewise declined to take a position. *See Waagner v. United States*, 971 F.3d 647, 655–56 & n.8 (7th Cir. 2020). These remaining reservations confirm that the issue is recurring, important, and ripe for resolution.

D. The split is acknowledged, mature, and outcome-determinative.

Multiple courts of appeals have acknowledged the split. *See, e.g., United States v. Taylor*, 873 F.3d 476, 479–81 (5th Cir. 2017) (collecting cases); *Barnes*, 162 F.4th at 65 n.4 (quoting acknowledgment of split from four years earlier).

After more than a decade of percolation since *Johnson*, the lower courts are no closer to resolving this important question. Rather, the cases are entrenching the circuits into “preponderance” and “may have relied” camps that simply disagree with each other and among themselves.

With better geographic luck, Mr. Cooper would have received relief. The Fourth and Ninth Circuits would have applied a more lenient standard, but even under the Third Circuit’s preponderance standard, Mr. Cooper would have been

able to show his three-strikes sentence is illegal under current law. This Court should grant review to eliminate such arbitrary treatment of sentencing enhancements.

II. The Tenth Circuit’s approach is wrong.

The panel below misallocated the burden of proof and collapsed its two-step framework. It made *Johnson*’s substantive constitutional rule depend on the historical contingencies of which sentencing judges bothered to make a sentencing record. The panel also exacerbated intra- and inter-circuit tension on which prior convictions the movant may target when making a *Johnson* challenge. And the panel opinion is wrong on its own terms.

A. The decision below warps the two-step framework that *Johnson* collateral review requires.

Johnson’s new rule of constitutional law invalidated vague residual clauses such that they can “no longer mandate or authorize any sentence.” *Welch*, 578 U.S. at 130. Applying the rule requires analysis of how the defendant was sentenced and whether any residual clause reliance was ultimately harmless. The Tenth Circuit’s approach warps the analysis at each of the two steps.

At step one, the Tenth Circuit’s approach improperly inputs the Government’s harm-based strategic judgments on collateral review into the inquiry

over what happened at sentencing. Here, because the Government now defends only the two conceded bank robbery strikes and the California robbery, the Tenth Circuit treated Mr. Cooper's Oregon burglary convictions as superfluous. But narrowing the historical analysis as the Government prefers is nonsensical because which convictions are "superfluous" is an invention of the Government's position on collateral review; it does not reveal what most likely happened at sentencing.

The Government gave formal pre-sentencing notice as to "the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). At Mr. Cooper's sentencing, the court accepted all five of the Government's proffered strikes, which means it used the residual clause to count his Oregon burglaries. The Tenth Circuit had proclaimed that the "sole objective" at step one was to "determine what the sentencing court did—even if that decision would be erroneous under current law." *Lewis*, 904 F.3d at 872 (quotation omitted). What most likely happened at sentencing is not whatever is most advantageous to the Government on collateral review, but the panel below did not ask what the sentencing court did; it asked whether Mr. Cooper could show that what the sentencing court was imagined to have done (applied an erroneous, circumstance-specific approach to the California robbery conviction) mattered in light of the narrowed set of convictions the

Government now defends. The Government's litigation choices on collateral review have nothing to do with what happened at sentencing. The Tenth Circuit's rule effectively places on the movant a burden that should rest with the Government under this Court's precedent.

At step two, the Government should bear the burden of showing the sentencing court's use of the residual clause was harmless, i.e., whether such use had substantial and injurious effect or influence in determining the movant's sentence. *See Brecht*, 507 U.S. at 638; *id.* at 640–41 (Stevens, J., concurring); *O'Neal v. McAninch*, 513 U.S. 432, 439 (1995) (noting the risk of doubt is on the State); *Fry v. Pliler*, 551 U.S. 112, 121 n.3 (2007) (discussing *O'Neal*); *Fry*, 551 U.S. at 122 (Stevens, J., concurring in part and dissenting in part); *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (noting Government's burden); *see also United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006) (applying *Brecht* standard under § 2255).

The Tenth Circuit's rule requires a § 2255 movant to establish not only that the sentencing court used the residual clause, but also that it did so in a way that was necessarily harmful. Harm should be a step-two question, but if clearing step one requires the movant to show historical use of the residual clause that was

necessarily prejudicial, there will never be anything to analyze at step two. The Tenth Circuit's approach thus warps both steps of the analysis by importing into the historical analysis the Government's strategic collateral-review concessions as to certain convictions that were in fact before the sentencing court and thus may have been counted under the residual clause.

B. The decision below arbitrarily diminishes the application of *Johnson* where the sentencing court did not make a record.

The consequence of the Tenth Circuit's approach is to arbitrarily diminish the application of *Johnson*'s rule. The Tenth Circuit's rule insulates sentencing courts for failing to articulate their reasoning. In the pre-*Johnson* era, vague residual clauses allowed sentencing courts to avoid specifying their reasoning for imposing recidivist enhancements. *See Geozos*, 870 F.3d at 894 n.4 (noting that, pre-*Johnson*, courts often did not specify under which clause predicate offenses qualified). The murkiness of pre-*Johnson* sentencing practices should not lead to a post-*Johnson* world where *Johnson* lacks bite precisely where sentencing courts did not specify their reasoning and more likely leaned on the residual clause. Where the sentencing record is unclear, a showing that the sentencing court relied on the residual clause as to any of "the previous convictions . . . relied upon" in the Government's three-strikes notice should suffice for a reliance showing. 21 U.S.C. § 851(a)(1).

C. The decision below bypassed an important question the Tenth Circuit previously reserved, causing further intra- and inter-circuit conflict.

Because the Government now considers the Oregon burglaries superfluous to Mr. Cooper's three-strikes sentence, it did not matter to the panel that the sentencing court could only have counted these convictions using the residual clause. Pet. App. 050a & n.4; 159 F.4th at 774 & n.4. The panel's choice to make Mr. Cooper's California robbery conviction the only conviction relevant to the historical analysis was an important analytical move that bypassed the question reserved in *United States v. Lozado*, 968 F.3d 1145 (10th Cir. 2020), i.e., whether "the sentencing court's reliance on the residual clause with respect to *any* of the predicate convictions is sufficient to satisfy the first stage of *Johnson* and trigger harmless-error review for the other convictions," *id.* at 1150 (emphasis added).

The panel opinion never cited *Lozado* or acknowledged this issue, but it effectively resolved it, causing tension within the Tenth Circuit's precedent because, if step one is really about "determine[ing] what the sentencing court did," *Lewis*, 904 F.3d at 872 (quotations omitted), then the movant should be able to meet his step-one burden by showing that the sentencing court used the residual

clause to count any of the prior convictions that the Government relied on at sentencing.

Further, the panel's effective resolution of the *Lozado* question brings the Tenth Circuit deeper into conflict with other circuits. In the Third Circuit case of *Peppers*, for instance, the Government relied on six prior convictions at sentencing, but after the panel ruled the movant's Pennsylvania robbery could not be a qualifying offense, it remanded for a harmlessness inquiry; it did not require the movant to show that residual clause reliance on the Pennsylvania robbery was necessary to his enhanced sentence before reaching harm. 899 F.3d at 217, 233–34, 236.

This Court's review is warranted because the panel opinion below exacerbates intra- and inter-circuit conflict as to which convictions are fair game for the § 2255 movant. The rule should be that, if the sentencing court used the residual clause to count any of the movant's prior convictions for a sentence enhancement, the movant has satisfied his burden.

D. The decision below is wrong on its own terms.

Even assuming Mr. Cooper was limited to showing residual clause reliance as to his California robbery conviction, he did.

Before this case, a movant in the Tenth Circuit “adequately show[ed] it [was] more likely than not that the sentencing court relied on the residual clause to enhance his sentence” where “background law foreclosing the enumerated *or* elements clause [was] coupled with a silent or ambiguous record.” *Copeland*, 921 F.3d at 1243 (emphasis added) (quotations omitted). In other words, ruling out one of the two still-valid clauses on a silent or ambiguous record is enough for a movant to satisfy his step-one burden.

Mr. Cooper satisfied this burden. The Government did not argue that California robbery can qualify as a strike under the elements clause. Pet. App. 051a; 159 F.4th at 774. Background law foreclosed that path. *See* 18 U.S.C. § 3559(c)(2)(F)(ii); Cal. Penal Code, §§ 211, 212; *United States v. Romero*, 122 F.3d 1334, 1343 (10th Cir. 1997); *see also* Pet. App. 056a–057a; 159 F.4th at 777 (addressing *Romero*’s elements-clause scope). Thus, under the Tenth Circuit’s *Copeland* decision, Mr. Cooper’s ruling out one valid clause was an adequate showing, but the panel opinion below required him to rule out both clauses, Pet. App. 051a–056a; 159 F.4th at 773–77.

Even assuming Mr. Cooper was limited to the California robbery conviction and had to rule out both the enumerated and elements clauses, he did that, too.

As just discussed, the Government concedes the inapplicability of the elements clause. To count Mr. Cooper’s California robbery conviction under the enumerated offense clause, § 3559(c)(2)(F)(i), the panel had to imagine that the sentencing court permissibly yet wrongly applied a circumstance-specific approach that was never the law. Pet. App. 054a-056a; 159 F.4th at 775–77. The panel’s reasoning fails on multiple levels.

First, the categorical approach has always governed § 3559(c). The panel identified no pre-2003 opinion permitting the circumstance-specific approach. Rather, the panel reasoned that the categorical approach came into the picture only in 2018, when the Tenth Circuit decided *Leaverton*. Pet. App. 054a; 159 F.4th at 776. *Leaverton*, however, simply acknowledged what the text always required: “Both parties state that the categorical approach applies under § 3559(c), although our court has not expressly considered the question. We agree.” *Leaverton*, 895 F.3d at 1253. The statutory text—and thus the categorical approach—bound the sentencing court even in 2003. *See Bostock v. Clayton Cty.*, 590 U.S. 644, 654 (2020) (“[O]nly the words on the page constitute the law adopted by Congress and approved by the President.”); *see id.* (discussing the people’s “right to continue relying on the original meaning of the law”); *see also Schriro v. Summerlin*, 542 U.S.

348, 351–52 (2004) (explaining that decisions “narrow[ing] the scope of a criminal statute by interpreting its terms” tend to apply retroactively because they “necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him” (citations and quotations omitted)).

In any event, pre-2003 precedent showed the categorical approach applied to the three-strikes elements clause. *See Romero*, 122 F.3d at 1343. The panel discounted *Romero* because it addressed the elements clause, not the enumerated clause, Pet. App. 056a-057a; 159 F.4th at 777, but the text makes clear both clauses require the categorical approach, *see Leaverton*, 895 F.3d at 1254.

Second, the panel distorted two cases to justify its conclusion that the sentencing court “could have permissibly applied the circumstance-specific approach” to count Mr. Cooper’s California robbery conviction as a strike. Pet. App. 055a; 159 F.4th at 776. The first of these cases was *United States v. Mackovich*, 209 F.3d 1227 (10th Cir. 2000), which addressed a different part of the three-strikes law, the non-qualification inquiry under 18 U.S.C. § 3559(c)(3).

The three-strikes law first requires a categorical inquiry into whether a statute governing a prior conviction qualifies as a strike under § 3559(c)(2). If so, the three-strikes law goes on to provide an escape hatch in § 3559(c)(3) so

defendants can eliminate otherwise qualifying convictions by proving, as a circumstance-specific factual matter, that the offense meets the non-qualification requirements by clear and convincing evidence. *Mackovich* correctly held that the circumstance-specific approach applies to the non-qualification provision, but *Mackovich* never allowed for the circumstance-specific approach generally. See *Mackovich*, 209 F.3d at 1239–40; see also *Leaverton*, 895 F.3d at 1254 n.1 (discussing *Mackovich* and explaining that “use of the circumstance-specific approach as to that exception does not require us to abandon the categorical approach under § 3559(c) generally”). *Mackovich* did not make the sentencing court’s imagined use of the circumstance-specific approach right or reasonable.

The panel acknowledged that its second case, *United States v. Martinez-Candejas*, 347 F.3d 853 (10th Cir. 2003), was not really part of the relevant background law because it was decided after Mr. Cooper’s sentencing, but the panel said *Martinez-Candejas* “nonetheless supports our understanding of how courts interpreted *Mackovich* at that time.” Pet. App. 055a; 159 F.4th at 776. *Martinez-Candejas*, according to the panel opinion, “described *Mackovich* as holding that ‘the *Taylor* categorical approach is inapplicable to a district court’s

determination of whether an offense qualifies as a “strike” under the federal “three-strikes” law.’” Pet. App. 055a; 159 F.4th at 776 (quoting 347 F.3d at 859).

But the panel opinion cuts off *Martinez-Candejas*’s description of *Mackovich* mid-sentence. *Martinez-Candejas* immediately continued: “because the *applicable statute* provided that a prior robbery does not qualify as a ‘strike’ if the defendant affirmatively establishes that no use or threatened use of a dangerous weapon was involved.” 347 F.3d at 859 (emphasis added). *Martinez-Candejas* correctly understood *Mackovich* as bound to the non-qualification inquiry. *Martinez-Candejas* was not attributing to *Mackovich* the panel opinion’s sweeping statement about the non-applicability of the categorical approach generally, and cutting off a passage mid-sentence would not have been a reasonable way for the sentencing court to read this (after-the-fact) precedent. The circumstance-specific approach was never permissible for qualifying an offense, and the Tenth Circuit’s pre-2003 precedent did not make it reasonable to think otherwise.

Finally, even assuming the applicability of the circumstance-specific approach, the panel opinion offers no analysis as to which of the three “enumerated” forms of robbery in § 3559(c)(2)(F)(i) that Mr. Cooper’s conviction—a residential robbery—fits.

This Court should grant review to correct the Tenth Circuit’s approach to resolving *Johnson* claims.

III. This is the right vehicle to decide this important issue.

The question presented is recurring and consequential for liberty. *Johnson*’s rule invalidates vague residual clauses in a variety of statutes that are routinely subject to collateral attacks. This Court should settle the governing framework for adjudicating collateral-review claims under *Johnson*’s new rule, and three features make this case an exceptional vehicle.

A. The Government concedes this residual clause is unconstitutional.

The Government concedes the three-strikes residual clause is unconstitutional. Pet. App. 020a; 2023 WL 2696500, at *2. As more cases are decided on the Government’s concession, fewer cases will produce live vehicles for resolving the framework question that determines how prisoners can vindicate their constitutional rights. This Court should settle the framework, not wait for the issue to disappear.

Further, although the Tenth Circuit merely assumed the law’s unconstitutionality, Pet. App. 047a; 159 F.4th at 772, the Sixth Circuit has now squarely so held, *Reed*, 163 F.4th at 376. And district courts have granted relief on this basis. *See, e.g., Moss*, 731 F. Supp. 3d at 708–10; *Minjarez*, 374 F. Supp. 3d at

992–94; *Morrison*, 2019 WL 2472520, at *9. With this case, this Court can confirm that *Johnson*'s rule reaches § 3559(c)'s residual clause.

B. The Government's concessions as to Mr. Cooper's prior convictions mean the issue is cleanly presented.

The case presents the issue in clean and dispositive fashion. The sentencing court was silent, and the Government has conceded that Mr. Cooper's Oregon burglaries qualified only under the residual clause. Pet. App. 050a; 159 F.4th at 774. The remaining dispute concerns a single conviction, the California robbery, for which the only path to qualification is the enumerated clause because the Government concedes the elements clause is not in play. Pet. App. 051a; 159 F.4th at 774.

C. Mr. Cooper is not subject to the three-strikes enhancement because he has only two strikes.

Although the issue is recurring, it is hard to imagine a more consequential application of the rule than this case. Mr. Cooper is serving a life sentence, but he is not eligible for this punishment because he has two strikes, not three. The Government relies on the California robbery conviction for its third strike, but it does not dispute that the conviction cannot qualify under the governing, categorical framework. Pet. App. 052a–053a; 159 F.4th at 775. The Tenth Circuit's heightened step-one rule is the only barrier between Mr. Cooper and a lawful sentence.

Conclusion

This Court should issue a writ of certiorari.

Dated: June 3, 2026.

Respectfully submitted,

s/ Adam Mueller

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