No. 18-1276

IN THE

Supreme Court of the United States

ANDREW LEVERT,

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition for certiorari explained that *no* legal basis under the Armed Career Criminal Act (ACCA) currently exists for restraining petitioner's liberty. The Government does not dispute that stark reality. BIO 13–14. Nor does the Government dispute that it is currently imprisoning numerous others without any legal basis under ACCA—or that the same problem is unfolding under other federal statutory schemes. Finally, the Government concedes (as it must) that an entrenched circuit split exists over how 28 U.S.C. § 2255 applies under the circumstances here—that is, where an inmate brings a successive motion to vacate his sentence based on a new decision of this Court holding that part of the statute under which he was sentenced is unconstitutional, and the record is silent as to whether the sentencing court based the sentence on that now-invalid provision. BIO 9.[1]

The Government nevertheless opposes certiorari on the grounds that (1) the Eleventh Circuit is correct that Section 2255 does not provide any avenue for defendants in petitioner's position to secure their freedom; (2) it is unclear how many defendants are currently illegally imprisoned pursuant to statutory schemes other than ACCA, under circumstances

[1] After the petition for certiorari was filed, the Fifth Circuit deepened the split by adopting the position of the First, Sixth, Eighth, Tenth, and Eleventh Circuits, and expressly rejecting the holdings of the Third, Fourth, and Ninth Circuits. *See United States v. Clay*, 921 F.3d 550, 554–56 (5th Cir. 2019).

equivalent to those here; and (3) this case is an unsuitable vehicle for deciding the question presented. None of the Government's arguments is persuasive.

1. The Government's merits argument is nothing more than a compressed summary of, and cross-reference to, its prior filings in *Couchman v. United States*, No. 17-8480, and *King v. United States*, No. 17-8280. *See* BIO 8–10. Petitioner has already explained why those filings miss the mark. *See* Pet. 12–19. It therefore suffices here to reiterate that the Government continues to improperly conflate the gateway requirement for bringing a claim in a successive Section 2255 motion with the standards governing whether such a claim is meritorious. In particular, the Government says a movant bringing a successive claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015), cannot obtain relief unless he shows "it is more likely than not that the sentencing court relied on the now-invalid residual clause." BIO 8. But under the plain text of the operative statutes and well-established precedent, a defendant bringing a successive motion under Section 2255 may obtain relief if (a) his "claim"—not his sentence—"relies on" *Johnson*, 28 U.S.C. § 2244(b)(2)(A) (emphasis added); (b) it is possible the sentencing court relied on the residual clause; and (c) his sentence cannot now be sustained on any other statutory basis. *See* Pet. 12–19. Petitioner's motion satisfies each of these requirements.

Any other analysis would produce an intolerable anomaly. All agree that defendants whose sentences clearly rest on the residual clause may now obtain relief. *See, e.g.*, *United States v. Geozos*, 870 F.3d 890,

895 (9th Cir. 2017) (noting that "the Government concedes" this). And several courts have held that defendants whose sentences clearly rest on *other* clauses of ACCA may obtain post-conviction relief (under 28 U.S.C. § 2241) whenever subsequent case law removes the basis for the enhancement. *See Brooks v. Wilson*, 733 F. App'x 137, 138 (4th Cir. 2018); *Hill v. Masters*, 836 F.3d 591, 597–99 (6th Cir. 2016); *Brown v. Rios*, 696 F.3d 638, 642–43 (7th Cir. 2012). Those two things being so, it cannot be that defendants like petitioner cannot also obtain relief because, even though their sentences were necessarily enhanced in one of those two ways, the record does not disclose which one.

2. The importance of the question presented to defendants, such as petitioner, whose sentences were dramatically increased under ACCA—and who are now clearly serving illegal sentences—is reason enough to grant review here. And, contrary to the Government's argument, this Court's recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), makes the question presented all the more pressing.

Davis involved 18 U.S.C. § 924(c), which authorizes heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal "crime of violence." *Id.* § 924(c)(1)(A). Section 924 defines "crime of violence" in two subparts: an elements clause and a residual clause, § 924(c)(3)(A) & (B). Drawing on its holdings in *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court held that the residual clause in Section 924(c) was also unconstitutionally vague. 139 S. Ct. at 2325–36.

Like *Johnson* and *Dimaya*, the *Davis* decision opens the door for a large group of federal prisoners to bring claims in successive Section 2255 motions seeking relief based on the new rule of constitutional law from this Court. Some of these prisoners will face the same hurdle as those, like petitioner, seeking relief from sentences enhanced under the ACCA: Their records will be silent as to whether the district court relied on the prong of the statute this Court invalidated or another prong to enhance their sentences. Thus, to obtain relief, they will have to bring motions that implicate the circuit split here. In the Third, Fourth, and Ninth Circuits, they will have to show that their sentences *may have* rested on the residual clause in Section 924(c). But in the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, they will have to establish that their sentences were *in fact* based on the residual clause in Section 924(c).

The Government does not dispute any of this. But it says *Davis* "does not provide" additional reason to grant review here because it is unclear whether "many" defendants will be caught in the same legal muddle ACCA defendants like petitioner currently find themselves. BIO 10.

The Government's assertion is unconvincing. The provision at issue in *Davis*—Section 924(c)—is a frequently invoked component of the federal criminal code. "Over the last 33 years, tens of thousands of § 924(c) cases have been prosecuted in the federal courts." *Davis*, 139 S. Ct. at 2337 (Kavanaugh, J., dissenting). No doubt aware of this fact, the Government suggests that silent records are less common in the

Section 924(c) context because the law is "more settled" under Section 924(c) than under ACCA concerning which crimes were qualifying offenses only under the residual clause. BIO 10. Maybe so. But a favorable comparison to ACCA—perhaps the most notoriously obtuse and indeterminate criminal statute in the U.S. Code—is hardly reassuring. More to the point, trial courts invoking Section 924(c) before *Davis* sometimes did not specify the precise basis for the sentencing enhancement. *See, e.g.*, *United States v. Fultz*, 923 F.3d 1192 (9th Cir. 2019) (reflecting that district court did not specify whether enhancement was based on elements clause or residual clause); *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (same), *petition filed*, No. 18-1338 (Apr. 24, 2019); *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018) (same).[2] So there will unquestionably be numerous Section 924(c) cases where silent records prevent courts from knowing for sure whether the sentencing court relied on the statute's residual clause or elements clause.

In short, this Court should definitively resolve what a defendant must show when he is seeking relief in a successive Section 2255 motion from an enhanced sentence where the trial court record did not specify

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[2] In *Fultz*, the Government expressly argued—as it has in opposing post-conviction relief for defendants whose sentences were enhanced under ACCA where the trial court record did not specify whether the enhancement was based on ACCA's residual clause—that the defendant could not obtain relief because it was "possible to conclude . . . that the sentencing court's [] determination did not rest on the residual clause." Gov't Br. 10, *United States v. Fultz*, No. 17-56002 (9th Cir. Dec. 27, 2017) (quoting *Geozos*, 870 F.3d at 896) (second alteration in original).

the basis for the enhancement, before the intractable split over the question presented metastasizes in yet another statutory context.

3. Neither of the Government's vehicle arguments withstands scrutiny.

a. The Government never denies that the Eleventh Circuit had jurisdiction to review the district court's dismissal of petitioner's Section 2255 motion—much less that *this* Court has jurisdiction here. But the Government nevertheless asserts that a "substantial question" exists "regarding the court of appeals' jurisdiction to issue the ruling that petitioner now asks the Court to review." BIO 10. The Government is wrong.

It is true that defendants seeking relief under Section 2255 must obtain a certificate of appealability (COA) to appeal any "final order," 28 U.S.C. § 2253(c)(1)(B)—that is, any order resolving the motion on "the merits." *Harbison v. Bell*, 556 U.S. 180, 183 (2009). This requirement is jurisdictional. *See Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012). But even assuming the COA requirement applied to the district court's order in this case, it would not create any doubt about this Court's jurisdiction to hear this case and resolve the question presented.

Where, as here, the district court denied a COA (*see* Pet. App. 21a–22a), the court of appeals has jurisdiction to determine whether a COA should be issued. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Welch v. United States*, 136 S. Ct. 1257, 1263–64 (2016). And this Court squarely held in *Slack* that even when a court of appeals erroneously believed a COA was not required, this Court has jurisdiction to consider legal

questions that go to whether the court of appeals should have issued a COA. *See Slack*, 529 U.S. at 483–85; *see also Welch*, 136 S. Ct. at 1263–64. Finally, this Court's approach to resolving such legal questions is not in any way different from simply deciding whether the defendant's claim has merit (or whether it should be reinstated and remanded for further proceedings). *See Buck v. Davis*, 137 S. Ct. 759, 780 (2017) (holding not only that a COA should have issued but also that defendant was entitled to relief); *Welch*, 136 S. Ct. at 1264, 1268 (holding that a COA should have issued and remanding after correcting the court of appeals' misconception regarding a "broader legal issue").

In fact, this case is even more straightforward than *Slack*. There, the defendant did not even ask the court of appeals for a COA. Here, by contrast, petitioner coupled his argument for relief in the Eleventh Circuit with an express request that the court of appeals "provid[e] Appellant a Certificate of Appealability." CA11 Br. at 11; *see also id.* at 5–6. Surely a Section 2255 movant cannot be disadvantaged when he asked the court of appeals for exactly the right thing, but then the Government responded that a COA was unnecessary, and, after the court followed the Government's advice, the Government suggests a COA may have been required after all. *See* BIO 11 n.5.

None of the cases the Government cites casts any doubt on this analysis. The defendant in *Jackson v. United States*, 875 F.3d 1089 (11th Cir. 2017), did not seek a COA in the court of appeals. *Id.* at 1090. The Eleventh Circuit thus dismissed the appeal "without prejudice" to require the defendant to a request for a

COA. *Id.* at 1091. The Eleventh Circuit probably should not have required that formality, and instead should have followed this Court's instructions in *Slack* to "treat[] the notice of appeal as an application for a COA." 529 U.S. at 483; *see also* Fed. R. App. P. 22(b)(2) ("If no express request for a certificate [of appealability] is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals."). Regardless, the situation in *Jackson* is distinctly different from the situation here, where the defendant expressly asked the court of appeals for a COA.

The Government also cites cases from various other courts of appeals that it says suggest "petitioner's appeal could not proceed without a COA." BIO 12 (citing *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008); *Resendiz v. Quarterman*, 454 F.3d 456, 458 (5th Cir. 2006); *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir. 2005); *Jones v. Braxton*, 392 F.3d 683, 685 (4th Cir. 2004)). But those cases are doubly irrelevant. First, the Government again overlooks that petitioner *did* ask the Eleventh Circuit for a COA—a request that unquestionably vested jurisdiction in the court of appeals. Second, each of the defendants in those cases also failed to obtain permission from the courts of appeals to file a successive Section 2255 motions in the first place. Even if such a failure can have procedural consequences that might be relevant in an appeal from a dismissal of a Section 2255 motion, petitioner sought such permission at the outset of this proceeding and obtained it, *see* Pet. App. 23a, 30a.

b. That leaves the Government's contention that petitioner would not necessarily prevail under the approach that the Third, Fourth, and Ninth Circuits. BIO 13–14. This contention, too, is mistaken.

Under the approach of the Third and Fourth Circuits, a defendant's ability to bring a *Johnson* claim in a successive Section 2255 motion depends solely on the sentencing record. And where, as here, the sentencing court "did not specify" which clause of ACCA it believed was satisfied (Pet. App. 9a), the defendant may bring such a claim. *United States v. Peppers*, 899 F.3d 211, 224 (3d Cir. 2018); *see also United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017).

The Ninth Circuit follows the same general record-based approach, while allowing for exception to its approach where there was "binding circuit precedent" making it obvious the district court must have relied on a provision other than the residual clause. *Geozos*, 870 F.3d at 893–96. No such authority, however, existed when petitioner was sentenced. The only then-existing case the Government references (BIO 13) is *United States v. David H.*, 29 F.3d 489, 494 (9th Cir. 1994) (per curiam). But that decision was from the Ninth Circuit, so it could not have constituted "binding" authority when petitioner was sentenced within the Eleventh Circuit. Moreover, the Ninth Circuit itself later explained that *David H.* "applied the incorrect analysis and . . . , moreover, involved [a] different statute[]" than ACCA: the mandatory transfer provision of the Juvenile Delinquency Act, *United States v. Walton*, 881 F.3d 768, 775 (9th Cir. 2018). It seems doubtful the district court here would have looked to

that faulty, out-of-circuit decision interpreting a different federal law. Accordingly, the Eleventh Circuit here indicated it was "just as likely" that the district court based petitioner's sentence on the residual clause as the elements clause. Pet. App. 9a.

Once through the successive motion gateway, a defendant's ability to obtain relief in the Third, Fourth, and Ninth Circuits turns on "the current state of the law," *not* the legal landscape at the time of sentencing. *Peppers*, 899 F.3d at 227–31; *see also Geozos*, 870 F.3d at 897–98 (law "as it *currently* stands" controls); *Winston*, 850 F.3d at 684 ("current legal landscape" controls). The Government does not dispute that current law dictates that "California robbery does not qualify as a violent felony under the elements clause." BIO 13. Consequently, petitioner stands in the same position as numerous defendants within the Third, Fourth, and Ninth Circuits who have obtained relief—and immediate release. *See* Pet. 8 (citing cases); *see also United States v. Brown*, 249 F. Supp. 3d 287, 291-92 (D.D.C. 2017) (same); *United States v. Booker*, 240 F. Supp. 3d 164, 169 (D.D.C. 2017) (same).

This Court should grant certiorari to afford petitioner the same opportunity for relief here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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