No. 18-5217

IN THE

Supreme Court of the United States

AUDY PEREZ,

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

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
SOWMYA BHARATHI
Counsel of Record
ANDREW L. ADLER
ASS'T FED. PUBLIC DEFENDERS
150 W. Flagler St., Ste. 1700
Miami, FL 33130-1555
(305) 530-7000
Sowmya_Bharathi@fd.org

Counsel for Petitioner

SEPTEMBER 18TH, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

REPLY BRIEF FOR PETITIONER

In its brief in opposition ("BIO"), the government concedes that the circuits are divided on the question presented: how may a movant seeking relief from an ACCA enhancement in a second or successive 28 U.S.C. § 2255 motion show that his claim relies upon *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015)? BIO 4–5. The government does not dispute that this question is recurring and important, affecting whether countless federal prisoners must serve sentences that *Johnson* rendered unlawful. *See* Pet. 17–18. And, despite finding numerous vehicle problems with other similar petitions, the government does not identify a single vehicle problem here. *See* Pet. 18–22. Instead, the government's only reason for opposing review is that the circuits requiring movants to prove actual reliance on the residual clause are correct. BIO 3. But that merits argument is no reason to deny review of a circuit conflict on an important question of federal law. And that argument is wrong in any event. The Court should grant the petition.

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT CONFLICT

The government expressly "acknowledge[s] that some inconsistency exists in the approach of different circuits to *Johnson*-premised collateral attacks like petitioner's." BIO 4; *see* BIO 4–5 (repeating that "inconsistency" exists "in the circuits' approaches"); *King* BIO 17 (observing that "courts of appeals have applied a different standard" to evaluate successive § 2255 motions based on *Johnson*). That concession is correct, though it understates the depth and openness of the division.

As explained in the Petition, the Fourth and Ninth Circuits do not require movants to prove that the sentencing court actually relied on the residual clause. Instead, they grant successive § 2255 motions based on *Johnson* where the ACCA enhancement "may have" been based on the residual clause, and the movant is no longer subject to the enhancement. *See* Pet. 9–13 (discussing *United States v. Winston*, 850 F.3d 677, 681–82 & n.4 (4th Cir. 2017) and *United States v. Geozos*, 870 F.3d 890, 894–96 & n.6 (9th Cir. 2017)). As the government acknowledges (BIO 4), the Third Circuit has since joined that camp. *United States v. Peppers*, 899 F.3d 211, 216, 220–24, 227–30 (3d Cir. 2018) (agreeing with *Winston* and *Geozos*).

By contrast, the First, Sixth, Tenth, and Eleventh Circuits require the movant to prove actual reliance on the residual clause. *See* Pet. 13–17 (discussing *Dimott v. United States*, 881 F.3d 232, 240–43 (1st Cir. 2018); *Potter v. United States*, 887 F.3d 785, 787–89 (6th Cir. 2018); *United States v. Driscoll*, 892 F.3d 1127, 1135 & n.5 (10th Cir. 2018) and *Beeman v. United States*, 871 F.3d 1215, 1221–25 (11th Cir. 2017)). The Eighth Circuit, in a divided opinion, has since joined that camp. *Walker v. United States*, __ F.3d __, 2018 WL 3965725, at *2–3 (8th Cir. Aug. 20, 2018); *see id.* at *4 (Kelly, J., concurring in part and dissenting in part) ("agree[ing] with the approach advanced by the Fourth and Ninth circuits").

Given that the circuits are now divided 5–3 on the question presented, the legal issues have been fully aired in the lower courts. There is no suggestion that further percolation would aid this Court's review. To the contrary, the circuits are now simply choosing sides. *E.g.*, *Walker*, __ F.3d at __, 2018 WL 3965725, at *2–3.

And they are effectively inviting this Court's intervention by continuing to highlight the circuit conflict. *See, e.g.*, *id.* at *2 ("Our sister circuits disagree on how to analyze this issue."); *Beeman v. United States*, 899 F.3d 1218, 1227 n.2 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing en banc) ("The circuits are . . . split on this question."); *Peppers*, 899 F.3d at 228 ("Lower federal courts are decidedly split"); *Raines v. United States*, 898 F.3d 680, 684 (6th Cir. 2018) ("The cases cited by the government reflect a circuit split"); Pet. 9 (citing three more examples from the First, Fifth, and Tenth Circuits). In short, the circuit conflict is mature, open, and intractable. Only this Court can resolve it.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

That conflict also warrants this Court's review. The government does not dispute that numerous federal prisoners sentenced under the ACCA brought § 2255 motions in the wake of *Johnson* and *Welch v. United States*, 578 U.S. __, 136 S. Ct. 1257, 1268 (2016) (declaring *Johnson* a "substantive decision" with "retroactive effect . . . in cases on collateral review"). Nor does it dispute that, following *Johnson*, many of those prisoners are now serving illegal sentences, exceeding the un-enhanced ten-year statutory maximum by at least five years. Pet. 17–18. Likewise, the government does not dispute that sentencing courts were not legally required to—and in fact rarely did—specify the clause upon which the ACCA enhancement depended. Thus, the question presented is a recurring one, as confirmed by the number of appellate cases around the country addressing it, as well as the number of petitions presenting it for review. *See* BIO 3 nn.1–2.

The question presented is not only recurring but important. As Petitioner's case illustrates, the strict burden of proof imposed by the Eleventh Circuit is the only obstacle standing between him and freedom from an unlawful sentence. Countless other federal prisoners are in the same position. Yet geography alone now determines whether they can remedy their illegal sentences. Prisoners in Boston, Cleveland, St. Louis, Denver, Atlanta, and Miami will be barred from doing so where, as will almost always be the case, they cannot prove that the sentencing court actually relied on the residual clause. Meanwhile, prisoners with identical criminal records and silent sentencing transcripts in Philadelphia, Charlotte, Phoenix, and Los Angeles will walk free. That disparity is untenable. The government fails to explain why this Court's review is not warranted to resolve a conflict affecting whether scores of federal prisoners can remedy illegal sentences.

III. UNLIKE OTHER RECENT PETITIONS, THIS ONE IS AN EXCELLENT VEHICLE

1. In an effort to shield this divisive and important question from review, the government observes that the Court has recently denied three petitions presenting a similar question. BIO 3 & n.1. But those petitions had numerous vehicle problems that do not exist here. Thus, they only reinforce the recurring nature of the question presented and the need for this Court to resolve it.

In both *Snyder v. United States*, No. 17-7157 (cert. denied Apr. 30, 2018) and *Westover v. United States*, No. 17-7607 (cert. denied Apr. 30, 2018), the lower courts expressly determined that, as a matter of historical fact, the record in that case reflected that the ACCA sentence had been based on the enumerated-offense clause,

not the residual clause. For that reason, and also because those cases involved initial rather than a successive § 2255 motions, they did not conflict with the Fourth Circuit's decision in *Winston* or the Ninth Circuit's decision in *Geozos*. *Snyder* BIO 9–11, 13–15, 17–20; *Westover* BIO 6–9, 12, 15–17. In addition, the parties in those cases disputed whether the movant's third ACCA predicate remained a violent felony under current law. That issue that remained an open question under circuit precedent, it ultimately depended on a question of state law, and it was procedurally defaulted in any event. *Snyder* BIO 20–24; *Westover* BIO 18–22.

Several vehicle problems also plagued *Casey v. United States*, No. 17-1251 (cert. denied June 25, 2018). There, the court of appeals resolved the case on timeliness grounds. *Casey* BIO 5–6, 8. That case also involved an initial, not successive, § 2255 motion, and thus did not directly conflict with *Winston* or *Geozos*. *Casey* BIO 13–15. Moreover, the legal background in that case indicated that Petitioner's ACCA sentence depended on the enumerated-offense clause rather than the residual clause. *Casey* BIO 9–11. And the government again had preserved its affirmative defense that the movant's *Johnson* claim had been procedurally defaulted. *Casey* BIO 16–17 & n.1.

2. Despite scouring the record to identify those vehicles problems in *Snyder*, *Westover*, and *Casey*, the government does not identify a single vehicle problem here. Thus, at no point does the government argue that this case would be a poor or unsuitable vehicle to resolve the question presented. There is a reason for that conspicuous omission: this case is an ideal vehicle. *See* Pet. 18–22.

Unlike *Snyder*, *Westover*, and *Casey*, this case is a successive, not an initial, § 2255 motion. And the government did not advance any affirmative defenses below. Rather, it argued only that Petitioner's § 2255 motion should be denied for failure to satisfy his burden to prove that the sentencing court relied on the residual clause. *See* Pet. 5, 20; Dist. Ct. Dkt. Entries, 10, 14, 19; Gov't C.A. Br. 14–47. As a result, that was the only issue at each stage of the litigation below and was the exclusive basis of the decisions of the district court and the court of appeals. Thus, there is no dispute that the question is squarely presented here. *See* Pet. 18–19.

Moreover, the government does not now dispute that Petitioner would prevail under the approach adopted in the Third, Fourth, and Ninth Circuits. *See* Pet. 21–22. Unlike the cases described above, the lower courts here did not find that the ACCA enhancement had in fact been based on the enumerated-offense clause. To the contrary, the record here is entirely silent. And, based on the law at the time of sentencing, both the district court and the court of appeals expressly recognized that Petitioner's Florida burglary convictions could have qualified as violent felonies under *either* the enumerated-offense or the residual clauses. Pet. App. 4a, 18a.

Because it was uncertain which clause the sentencing court relied upon, Petitioner was unable to meet his burden of proof under *Beeman*. But it is undisputed that the sentencing court here "may have" relied on the residual clause, which would suffice in the Third, Fourth, and Ninth Circuits. Indeed, the Magistrate Judge here specifically found that it was "possible that the ACCA enhancement rested on the residual clause," and the government expressly

"agree[d] with [that] factual finding" in its objection to the Report. Dist. Ct. Dkt. Entry 14 at 11 (citation omitted); *see id.* at 14 (repeating that Petitioner had shown a "possibility that [the sentencing] Court relied on the residual clause"); Gov't C.A. Br. 11 (recounting same). Neither the district court nor the court of appeals found otherwise. The government points to the Eleventh Circuit's statement that there was "little to suggest that the sentencing court relied solely on the residual clause." BIO 5 (quoting Pet. App. 9a). But the court did not foreclose that possibility. At no time did it conclude that the sentencing court did not in fact rely, or could not have legally relied, on the residual clause. Rather, it merely explained that Petitioner could not meet his burden to prove by a preponderance of the evidence that the sentencing court actually relied on the residual clause, as *Beeman* required. That is precisely why this case implicates the question on which the circuits have divided.

Finally, and once again unlike the petitions described above, it is undisputed that Petitioner's ACCA sentence is illegal today. Applying *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243 (2016), the Eleventh Circuit has squarely held that the Florida burglary statute upon which Petitioner's ACCA enhancement depended is indivisible; and, because that statute defines "dwelling" to include the curtilage, it is categorically overbroad vis-à-vis the enumerated-offense clause. *United States v. Esprit*, 841 F.3d 1235, 1239–41 (11th Cir. 2016). Thus, without the residual clause, Petitioner's Florida burglary offenses cannot be treated as violent felonies, and he is therefore no longer an armed career criminal.

That point was so clear that both the district court and the court of appeals went out of their way to recognize it. The district court said: "Undisputedly, if Perez was sentenced today, his Florida convictions for burglary of a dwelling would not qualify as violent crimes under the Act's elements or enumerated-offenses clause." Pet. App. 22a. And, even more striking, the court of appeals "recognize[d] that Perez's sentence is unconstitutional, since when we account for *Descamps* and *Mathis*, Perez's sentence now exceeds the maximum authorized punishment for his offense." Pet. App. 13a (citing *Esprit*, 841 F.3d at 1239–41). Despite that acknowledgment, the court of appeals refused to correct his illegal sentence. In a thorough 15-page opinion, it explained that, under *Beeman*, Petitioner could not prove that the sentencing court actually relied on the residual clause, and it refused to consider *Descamps* and *Mathis*. Pet. App. 6a–14a. Thus, the decision below perfectly tees up the question presented. Indeed, given its admission that Petitioner's sentence is unlawful, this Court will not find a better vehicle.

IV. THE DECISION BELOW IS WRONG

As mentioned at the outset, the government's only argument against review is that the majority approach is correct on the merits. BIO 3 (incorporating *King* BIO 13–18 and *Couchman* BIO 12–17). But that is no reason to deny review of an important federal question that has deeply divided the circuits. *See* Sup. Ct. R. 10. Indeed, if the government is right, then three circuits are prematurely releasing prisoners from custody. And, if the government is wrong, then five circuits are

improperly refusing to correct illegal sentences. Thus, regardless of which side is correct, this Court's review is warranted.

In any event, the government is wrong on the merits. The government's argument essentially elevates the interests in finality over all else, including the "equitable principles [that] have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quotation omitted). A federal prisoner's eligibility for § 2255 relief under *Johnson*—a new rule of constitutional law that this Court not only announced but expressly made retroactive—should not turn on the happenstance of what the sentencing judge said years or (as here) decades earlier. That method of adjudication is as arbitrary as it is inequitable: defendants with identical criminal histories will be treated differently based solely on what a sentencing judge happened to say at the hearing.

The government responds by faulting prisoners for silent sentencing records. But this overlooks that the residual clause itself was the very reason why they failed to object to the ACCA enhancement at sentencing. Because of that clause's all-encompassing breadth, any objection to the enhancement would have been futile before *Johnson*. It would be particularly unfair to now force prisoners to serve illegal sentences based on a silent record that was itself attributable to the very statutory provision that has since been retroactively invalidated by this Court.

Not only does the government's position neglect those weighty equitable considerations, but it improperly forbids successive movants from "rely[ing] on post-sentencing case law" in *Descamps* and *Mathis* "to prove [their] *Johnson* claim."

Peppers, 899 F.3d at 235 n.21. For example, "if a person serving an ACCA sentence can show that his prior conviction could not qualify as a 'violent felony' under either the enumerated offenses or the elements clauses of ACCA, the prior conviction must have been deemed a violent felony under the residual clause." *Beeman*, 899 F.3d at 1227 (Martin, J., dissenting from the denial of rehearing en banc). The decision below, however, refused to consider *Descamps* and *Mathis* because they did not announce "new rules of constitutional law," and thus do not independently satisfy the gatekeeping criteria in 28 U.S.C. § 2255(h)(2).

But while those decisions, unlike *Johnson*, cannot themselves be the basis of a second or successive motion, there is no reason why federal courts must ignore them when asking whether the ACCA enhancement implicated the residual clause. To the contrary, refusing to consider *Descamps* and *Mathis* in that context is legally improper because those decisions *do* have retroactive effect on collateral review. That is so because, "[a]s the Supreme Court and other circuits have recognized, *Descamps* did not announce a new rule—its holding merely clarified existing precedent" on how to apply the categorical approach. *Mays v. United States*, 817 F.3d 728, 733–34 (11th Cir. 2016). Indeed, in *Descamps* itself, the Court explained that its application of the categorical approach "is the only way we have ever allowed" since first adopting it in *Taylor v. United States*, 495 U.S. 575 (1990). 570 U.S. at 260–63. Because, "[a]s *Descamps* explains, the rules for evaluating predicate offenses—other than under the residual clause—are the same today as they always have been," *Beeman*, 899 F.3d at 1228 (Martin, J., dissenting from the

denial of rehearing en banc), "show[ing] that a conviction does not meet the definition of a 'violent felony' under the . . . enumerated offenses clauses" today constitutes "affirmative proof that the sentence was based on the now-defunct residual clause," *id.* at 1227. *Accord Peppers*, 899 F.3d at 230, 235 n.21.

The government's position, as illustrated by the decision below, requires federal courts to disregard rather than respect this Court's binding, retroactive ACCA precedents in *Descamps*/*Mathis*. And because those precedents merely clarified what the law always was, that position also requires federal courts to presume that the sentencing court misapplied the law. Where, as here, the record is silent, there is no basis for such a presumption. Meanwhile, doing so has the disturbing effect of forcing federal courts to condemn prisoners to serve sentences that they know to be unlawful. In practice, that means at least five additional years behind bars. *See Rosales-Mireles v. United States*, 585 U.S. __, 138 S. Ct. 1897, 1907 (2018) (recognizing that "any amount" of "additional time behind bars" "has exceptionally severe consequences for the incarcerated individual") (quotations and brackets omitted). There is no justification for that outcome, which contravenes the very purpose of § 2255: to remedy sentences "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a).

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Sowmya Bharathi
Counsel of Record
SOWMYA BHARATHI
ANDREW L. ADLER
ASS'T FED. PUBLIC DEFENDERS
150 W. Flagler St., Ste. 1700
Miami, FL 33130-1555
(305) 536-5900
Sowmya_Bharathi@fd.org

Counsel for Petitioner