No. 18-5268

IN THE

Supreme Court of the United States

JEREMIAH T. SAILOR,

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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1. In its brief in opposition (BIO), the government concedes that "inconsistency exists in the approaches of different circuits" with regard to a defendant's burden when filing - successive § 2255 motions seeking collateral relief based on *Johnson v. United States,* 135 S. Ct. 2551 (2015). (BIO 4). That acknowledged circuit conflict has deepened since the filing of Mr. Sailor's petition.

The Third, Fourth, and Ninth Circuits hold that a successive movant is entitled to relief where the ACCA sentence may have been based on a now-invalid residual clause, and current law demonstrates he is no longer subject to the enhancement. *United States v. Peppers,* 899 F.3d 211, 222-24, 227-30 (3d Cir. 2018); *United States v. Winston,* 850 F.3d 677, 681-82 & n.4 (4th Cir. 2017); *United States v. Geozos,* 870 F.3d 890, 894-96 & n.6 (9th Cir. 2017).

By contrast, the First, Sixth, Eighth, Tenth, and Eleventh Circuits require proof that the sentencing court actually relied on the residual clause. *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); *Walker v. United States,* 900 F.3d 1012, 1014 (8th Cir. 2018); *United States v. Driscoll,* 892 F.3d 1127, 1135 & n.5 (10th Cir. 2018); *Beeman v. United States,* 871 F.3d 1215, 1221-25 (11th Cir. 2017); *but see Walker,* 900 F.3d at 1016-17 (Kelly, J., concurring in part and dissenting in part) (agreeing with other circuits).

Lower courts and judges continue to acknowledge this circuit conflict. *See, e.g.*, *Peppers*, 899 F.3d at 228 ("Lower federal courts are decidedly split"); *Walker*, 900 F.3d

at 1014 ("Our sister circuits disagree on how to analyze this issue."); *Raines v. United States*, 898 F.3d 680, 684 (6th Cir. 2018); *Beeman v. United States*, 899 F.3d 1218, n.2 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing en banc) ("The circuits are … split on this question."). Thus, absent intervention by this Court, geography alone will continue to determine whether federal prisoners must serve illegal sentences in light of *Johnson*. And the government does not dispute that because this question affects countless numbers of federal prisoners around the country, it is recurring, important, and warrants review.

The government nonetheless seeks to shield that important question from review, arguing that the majority view is correct on the merits. (BIO 4-5). But this is no reason to deny review in light of the glaring circuit conflict. Indeed, if the government is right, then prisoners in three circuits are being released from custody prematurely. Regardless of which side is correct this Court's review is warranted.

2. The government also takes issue with Mr. Sailor's request that the Court hold his petition in abeyance until it has rendered a decision in *Stokeling v. United States,* 684 F. App'x 870 (11th Cir. 2017), *cert. granted*, (No. 17-5554) (oral argument scheduled for Oct. 9, 2018). According to the government, the outcome of *Stokeling* will have no bearing on Mr. Sailor's case because he has still failed to "satisf[y] the gatekeeping inquiry for filing a second or successive Section 2255 motion …" (BIO 7-8). Mr. Sailor maintains, however, that the fact that the status of the Florida robbery as violent felony is unclear, is exactly why he is unable to satisfy the burden as it is articulated by the government.

The Ninth Circuit held that a Florida robbery does not qualify as a violent felony according to the elements clause because it does not require *violent* force. *United States v. Geozos,* 870 F.3d 890, 898-901 (9th Cir. 2017). The Fourth Circuit has held the similar Virginia and North Carolina robbery statutes are also not violent felonies. *United States v. Winston,* 850 F.3d 677, 683-86 (4th Cir. 2017); *United States v. Gardner,* 823 F.3d 793 (4th Cir. 2016). The Eleventh Circuit, however, continues to hold that the elements of Florida robbery do in fact amount to the "violent force" as contemplated by the ACCA. *See, e.g., King v. United States,* 721 F. App'x 913 (11th Cir. 2018), *petition for cert filed* (U.S. Apr. 27, 2018) (No. 17-8280).

This circuit split is at issue in *Stokeling*. The outcome could be determinative of Mr. Sailor's petition. If the Court were to side with the Ninth and Fourth Circuits, and in doing so decide that a Florida robbery is not a "violent felony" according to elements clause, this would mean the offense would only qualify as a predicate offense pursuant to the now-void residual clause. A decision of that nature would mean that not only could Mr. Sailor show his ACCA enhancement rested on the residual clause, but also that in light of *Johnson,* 135 S. Ct. 2551 (2015), his ACCA sentence is unconstitutional.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should, at the very least, be held in abeyance pending resolution of *Stokeling*.

Respectfully submitted,

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