No. 18-5398

IN THE

Supreme Court of the United States

KENNETH FLOYD PRUTTING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO THE UNITED STATES' MEMORANDUM IN OPPOSITION

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QUESTION PRESENTED

Whether a movant seeking post-conviction relief under 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*) can satisfy his burden of proof by showing (1) his Armed Career Criminal Act (ACCA) sentence may have been based on the now-invalidated residual clause and (2) under current law, he is not an armed career criminal.

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REPLY ARGUMENTS

In its memorandum in opposition ("MIO"), the government concedes that the circuits are divided on the question presented: how may a movant seeking relief from an ACCA enhancement in a 28 U.S.C. § 2255 motion show that his claim relies on *Samuel Johnson*? MIO 4–5. The government does not dispute that this question is recurring and important, affecting whether countless federal prisoners must serve sentences that *Samuel Johnson* rendered unlawful. Instead, the government argues that the circuits requiring movants to prove actual reliance on the residual clause are correct. MIO 3–4. But that merits argument is no reason to deny review of a circuit conflict on an important question of federal law. Moreover, that argument is wrong. This 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." MIO 4. That concession is correct, though it understates the depth and openness of the division.

As explained in Mr. Prutting's Petition, some circuits do not require movants to prove that the sentencing court actually relied on the residual clause. Instead, they grant § 2255 motions based on *Samuel Johnson* where the ACCA enhancement "may have" been based on the residual clause, and the movant is no longer subject to the enhancement. *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));*United States v. Peppers*, 899 F.3d 211, 216, 220–24, 227–30 (3d Cir. 2018).

By contrast, other circuit require movants to prove actual reliance on the residual clause. *See Dimott v. United States*, 881 F.3d 232, 240–43 (1st 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)); *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018).

The circuits are deeply divided on the question presented and 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*, 900 F.3d at 1015. They are effectively inviting this Court's intervention by continuing to highlight the circuit conflict. *See, e.g.*, *id.* at 1014 ("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"). 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 *Samuel Johnson* and *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (declaring *Samuel Johnson* a "substantive decision" with "retroactive effect . . . in cases on collateral review"). Nor does it dispute that, following *Samuel Johnson*, many of those prisoners are now serving illegal sentences, exceeding the un-enhanced ten-year statutory maximum by at least five years. 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* MIO 3 nn.1–2.

The question presented is not only recurring but important. As Mr. Prutting'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. This is an Excellent Vehicle

To shield this divisive and important question from review, the government argues this case is a poor vehicle for this Court's review of the question presented. MIO at 6–7. Contrary to the government's suggestion, this case is an ideal vehicle. *See* Pet. 6.

According to the government, this is a poor vehicle because Mr. Prutting procedurally defaulted on his claim. MIO at 6–7. However, neither the Eleventh Circuit nor district court passed upon that question. *See* Pet at 4–5. Because the lower courts did not pass upon this issue, it poses no barrier to this Court's review. If anything, the lower courts can resolve that issue on remand.

Moreover, contrary to the government's suggestion, Mr. Prutting can satisfy the "cause and prejudice" exception to the procedural-default rule. He can show cause for his default because his *Samuel Johnson* claim was not "reasonably available" before *Samuel Johnson*. *Reed v. Ross*, 468 U.S. 1, 17 (1984). Before *Samuel Johnson*, no court had held the ACCA's residual clause was unconstitutionally vague, though many—including this Court—held it was constitutional. When his Court decided *Samuel Johnson*, it overruled its own prior precedent as well as a long-standing practice uniformly adhered to by the lower courts. Thus, if Mr. Prutting failed to press this claim before *Samuel Johnson*, he can satisfy the "cause" standard to excuse such a default.

Mr. Prutting can also show prejudice. Indeed, there is more than a "reasonable probability" that the alleged error influenced the outcome of his sentencing because, if Mr. Prutting is correct, he has been sentence well-above his statutory maximum. *Strickler v. Greene*, 527 U.S. 263, 289 (1999); *United States v. Frady*, 456 U.S. 152, 170 (1982); *United States v. Snyder*, 871 F.3d 1122, 1127–28 (10th Cir. 2017). The government says otherwise, conclusory asserting that Mr. Prutting's "prior conviction are violent felonies even without the residual clause." MIO at 7. However, the government also acknowledges that whether his Connecticut conviction for second-degree robbery qualifies as a "violent felony" is an issue that will be directly affected by this Court's impending decision in *Stokeling v. United States*, No. 17-5554 (argued Oct. 9, 2018). *Id.* at 7 n.4; Pet. at 6 n.5. Thus, this case should be held pending *Stokeling*, and if *Stokeling* is favorable to Mr. Prutting, his case would indeed be an ideal vehicle for this Court's review of the question presented.

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. MIO 3–4. 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 some circuits are prematurely releasing prisoners from custody. And if the government is wrong, then other 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 finality interests 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 *Samuel Johnson* 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 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 *Samuel 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 this Court has since invalidated.

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 v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States* 136 S. Ct. 2243 (2016), "to prove [their *Samuel*] *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 *Samuel Johnson*, cannot themselves be the basis of a § 2255 motion, there is no reason 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* and

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. When, 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*,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 reasons stated above and in his petition, Mr. Prutting respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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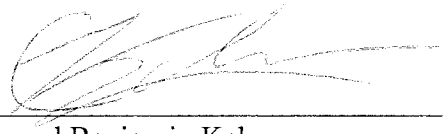

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