No. 18-5475

IN THE SUPREME COURT OF THE UNITED STATES

JOHNATON SAMPSON GEORGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In his petition for a writ of certiorari, Mr. George sought review of the Ninth Circuit Court of Appeals' denial of his request to apply for relief from his life sentence under the Armed Career Criminal Act ("ACCA") pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). Mr. George pointed out that to determine whether a person was procedurally and substantively eligible for relief, six courts of appeals had taken six different approaches, with some focusing on the factual record, some focusing on the law at the time of sentencing, some focusing on the law as it currently stands, and most picking and choosing different combinations of these factors depending on the context. Because this state of the law leads to absurdly inconsistent results and vexes judges, lawyers, and prisoners alike, he argued that a grant of certiorari is warranted.

The Solicitor General's Brief in Opposition to Mr. George's petition ("Brief") concedes that "some inconsistency exists" in the circuit courts' approaches to determining procedural and substantive eligibility for *Johnson* relief. Brief at 4. Nevertheless, it discourages the Court from granting certiorari, claiming that Mr. George "could not prevail under the approach of any circuit" and that this Court has already denied certiorari similar cases. Brief at 3, 5.

But Mr. George's case perfectly demonstrates why *Johnson* relief has become an almost laughable game of geographic and judicial chance, requiring courts to reconstruct the state of the law at a moment frozen in time or tediously decode a judge's passing comments from decades ago, depending on the circuit and the stage of the analysis. Not only have two more courts of appeals intensified the split since Mr. George filed his certiorari petition, this national inconsistency made all the difference in Mr. George's case, as he would have been *procedurally* eligible for relief in the Third, Fourth, and Sixth Circuits (but not in the First, Fifth, Ninth, and Eleventh Circuits) and *substantively* eligible for relief in the First, Fourth, Sixth, Ninth, and Eleventh Circuits (but not in the Fifth and the Tenth Circuits). While the Court has denied certiorari in some cases presenting a similar issue, many of those denials involved cases that—unlike Mr. George's—would *not* have benefited from resolution of these issues, and at a minimum, none of them involved a life sentence. To provide judges desperately-needed guidance on a widespread issue that, in Mr. George's case, carries the gravest of penalties, the Court should grant certiorari.

ARGUMENT

I. After Mr. George filed his petition for certiorari, two more courts of appeals intensified the circuit split.

In his petition, Mr. George explained that the courts of appeals employ vastly different methodologies to determine whether a petitioner is both procedurally and substantively eligible for *Johnson* relief. Pet. 7-11. For purposes of *procedural eligibility* (timeliness under § 2255(f)(3) or second-or-successive petitions under § 2255(h)(2)), the Fourth Circuit looks to the factual record, while the First, Fifth, and Eleventh Circuits look to the law interpreting the crime's elements as it stood at the time of the petitioner's sentencing, and the Ninth Circuit looks to both.[1] But in deciding the *merits* of the claim, the Fourth and Ninth Circuits look to the law interpreting the crime's elements as it currently stands, the Eleventh Circuit looks to the factual record, and the Tenth Circuit looks to the factual record *and* the law at the time of sentencing.[2] Meanwhile, the First and the Fifth Circuits have yet to take a position on the merits because the First Circuit has found every petition

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[1] *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *Dimott v. United States*, 881 F.3d 232, 241 (1st Cir. 2018); *United States v. Taylor*, 873 F.3d 476, 481 (5th Cir. 2017); *Beeman v. United States*, 871 F.3d 1215, 1220 (11th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017).

[2] *See Winston*, 850 F.3d at 684; *Geozos*, 870 F.3d at 897; *Beeman*, 871 F.3d at 1221; *United States v. Snyder*, 871 F.3d 1122, 1126, 1128-30 (10th Cir. 2017).

untimely, while the Fifth Circuit found that the petitioners had met the standard under any of the tests.[3]

There are even splits *within* these splits. The First and Eleventh Circuits hold that where the record is silent, a petitioner cannot meet her burden to show that the claim relied on the residual clause.[4] But the Fourth, Ninth, and Tenth Circuits hold that in adjudicating the merits, a silent record will satisfy the threshold procedural requirements.[5] And half of these cases were accompanied by a dissent or concurrence that would have looked to a different source to determine procedural or substantive eligibility.[6]

And in the three months since Mr. George filed his petition, the split has grown worse. In *United States v. Peppers*, the Third Circuit joined the Fourth Circuit by looking to the factual record to determine procedural eligibility and then the Fourth and Ninth Circuits by looking to current law on the merits. 899 F.3d 211, 224, 230 (3d Cir. 2018). The Sixth Circuit has done the same, though unlike the Fourth and Ninth it requires *affirmative* evidence in the sentencing record (rather

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[3] *See Dimott*, 881 F.3d at 243; *Taylor*, 873 F.3d at 481.

[4] *See Beeman*, 871 F.3d at 1222; *Dimott*, 881 F.3d at 237.

[5] *See Winston*, 850 F.3d at 682; *Geozos*, 870 F.3d at 895; *Snyder*, 871 F.3d at 1126.

[6] *See Snyder*, 871 F.3d at 1130-32 (McHugh, J., concurring); *Dimott*, 881 F.3d at 245 (Torruella, J., dissenting); *Beeman*, 871 F.3d at 1229 (Williams, J., dissenting).

than silence) to establish procedural eligibility before looking to current law to adjudicate the merits. *See Raines v. United States*, 898 F.3d 680, 686, 688-90 (6th Cir. 2018). To compound the confusion, the Sixth Circuit relies on the sentencing record only to determine procedural eligibility for second or successive petitions under § 2255(h)(2), not to determine timeliness under § 2255(f)(3)). *Id.* at 687.

If the courts of appeals had set out with the goal of forcing petitioners to navigate the most haphazard and inconsistent path imaginable, they could not have done a better job. With the addition of the Third and Sixth Circuits, the various approaches can now be summarized as follows:

Case	Factual Record	Law at Sentencing	Current Law
Dimott (majority) (1st) - procedural		X	
Dimott (dissent) (1st) - procedural	X		
Dimott (dissent) (1st) - merits			X
Peppers (3d) - procedural	X		
Peppers (3d) - merits			X
Winston (4th) - procedural	X		
Winston (4th) - merits			X
Taylor (5th) - procedural		X	
Taylor (5th) - merits		X	
Raines (6th) – procedural (§ 2255(h)(2))	X		
Raines (6th) – procedural (§ 2255(f)(3))			X
Raines (6th) - merits			X
Geozos (9th) - procedural	X	X	
Geozos (9th) - merits			X
Snyder (majority) (10th) - merits	X	X	
Snyder (concurrence) (10th) - procedural	X		
Snyder (concurrence) (10th) - merits		X	
Beeman (majority) (11th) - procedural		X	
Beeman (majority) (11th) - merits	X		
Beeman (dissent) (11th) - merits			X

In the understatement of the year, the Solicitor General concedes that "some inconsistency exists" in the approaches of the courts of appeals. Brief at 4. But it contends that further review is unwarranted for the reasons stated in its prior brief in opposition to certiorari in *United States v. Westover* (17-7607). Brief at 5. But the Government's brief in *Westover* was filed over seven months ago, before this circuit split deepened to more absurd proportions. Brief at 5. And even seven months ago the Government struggled mightily to harmonize this jumble of decisions drawing from different sources to apply different rules to different procedural and substantive requirements. Unfortunately, these inconsistencies will not cure themselves; they will only grow as the remaining circuits decide which theories to join and which to reject.

II. Contrary to the Solicitor General's misstatement, Mr. George would directly benefit from the Court's resolution of this circuit split.

Though it admits that "some inconsistency exists" in the circuits' approaches, the Government nevertheless claims that review is unwarranted in Mr. George's case because "he could not prevail under the approach of any circuit." Brief at 5. This is because, the Government claims, the sentencing court "expressly relied on the elements clause in determining that petitioner's *robbery* conviction" was a violent felony under ACCA. Brief at 5 (emphasis added).

But the Government tellingly says nothing about Mr. George's burglary conviction—the predicate crime the judge *actually* relied on. In imposing the ACCA enhancement, the district court first found that Mr. George's two prior sexual assault charges qualified as "violent felonies" because they had as an element the

use, attempted use, or threatened use of physical force. Sent. Transcript at 30-33. The judge then stated that Mr. George's conviction for California residential burglary "constitutes the third predicate conviction." Sent. Transcript at 33. To reach this conclusion, the court found that "there is a *risk* that, in the *course of committing the crime*," a burglar might encounter the lawful occupant and use force against them. Sent. Transcript at 34 (emphasis added).

This comment directly tracks the language of the residual clause in the career offender enhancement at the time, which involved "a substantial *risk* that physical force against the person or property of another may be used in the *course of committing the offense*." 18 U.S.C. § 16(b). In fact, it is a direct quote from *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990), which held that California residential burglary fell within this residual clause. *See Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) ("[I]n Becker, we held that California first-degree burglary under California Penal Code § 459 is categorically a 'crime of violence' under 18 U.S.C. § 16(b) because the crime inherently involves a substantial risk of physical force.") (citation and quotation omitted). At no point did the judge discuss whether Mr. George's conviction satisfied the generic definition of "burglary" or had an element of force—it simply found that it satisfied the residual clause and then repeated that this offense "constitutes the third predicate conviction." Sent. Transcript at 34.

Because the factual record shows that the sentencing court actually relied on the residual clause, Mr. George would be procedurally eligible for relief in the Third,

Fourth, and Sixth Circuits. But if case law at the time held that California burglary was categorically a "violent felony" under another clause, Mr. George would *not* have been procedurally eligible for relief in the First, Fifth, Ninth, and Eleventh Circuits. And because California residential burglary is no longer a "violent felony" under any clause, Mr. George would be eligible for relief on the merits in the First, Fourth, Sixth, Ninth, and Eleventh Circuits but not in the Fifth and the Tenth Circuits. It is difficult to imagine a more convoluted gauntlet through which to run petitioners, lawyers, and the hapless courts who must adjudicate these claims.

Although the sentencing court relied on the residual clause to impose Mr. George's ACCA enhancement, the Government is correct that the judge suggested in the alternative that Mr. George's conviction for California robbery might satisfy the elements clause. Sent. Transcript at 34-35. But even this would not doom Mr. George's petition in all circuits. At the time of Mr. George's sentencing, no case law held that California robbery satisfied the ACCA elements clause—in fact, the Ninth Circuit had repeatedly found it to be a crime of violence under the residual clause. *See United States v. McDougherty*, 920 F.2d 569, 574 (9th Cir. 1990). So in the First, Fifth, and Eleventh Circuits (where courts look to the law at the time of sentencing), Mr. George would be procedurally eligible for relief, while in the Third, Fourth, Sixth, Ninth, and Tenth Circuits (where courts look to the record), he would not. And as the law currently holds that California robbery

does *not* satisfy the elements clause,[7] Mr. George would be eligible for relief on the merits in all but the Eleventh Circuit.

This illogical and unworkable state of the law cannot continue. Not only do such inconsistencies hijack countless hours from well-meaning judges who must review the state of the law in numerous circuits and decide with whom to align, they demoralize defendants by suggesting that relief is a matter of geographic happenstance. As Justice Alito noted in *Johnson* itself, one of the Court's "chief responsibilities" is to resolve the courts of appeals' conflicting interpretations of a statute. 135 S. Ct. at 2576. No situation could be more in need of such resolution.

III. The Court's denial of other petitions for certiorari does not diminish the necessity of review.

Finally, the Government makes much of the fact that this Court has "recently denied review of similar issues in other cases." Brief at 3. But the Government's own reliance on cases like *Westover* reveals the irrelevance of these denials. In *Westover*, for instance, defense counsel, the Presentence Report, the prosecutor, and the judge all agreed that both the factual record *and* the law at the time would have supported the ACCA enhancement on grounds other than the residual clause. *See* Brief in Opposition, *United States v. Westover* (17-7607). Because of this, Mr. Westover would not have been procedurally eligible for relief in any circuit. This is a far cry from cases like Mr. George's (and thousands of others) where the

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[7] *See United States v. Dixon*, 805 F.3d 1193, 1197-98 (9th Cir. 2015); *United States v. Garcia-Lopez*, 903 F.3d 887, 893 (9th Cir. 2018).

record and the law at the time are confusing, ambiguous, or simply silent. It is these cases that Chief Judge Cole of the Sixth Circuit referred to when he explained that this Court did not issue *Johnson* "merely to tantalize habeas petitioners with the possibility of relief for an unconstitutional sentence." *Raines*, 898 F.3d 690. But if the Court continues to deny certiorari in cases presenting this type of confusion, ambiguity, or silence, "tantalize is all that *Johnson* . . . will do." *Id.*

Finally, it bears noting that in the 11 cases in which the Government notes this Court has denied certiorari, three of the petitioners have already been released.[8] Six petitioners will be released within the next five years.[9] The remaining two will be released in seven and fifteen years, respectively.[10] But Mr. George received a *life sentence* under ACCA. Declining to review this issue carries the gravest of consequences for him. While this Court may be weary of revisiting these issues, failure to finish what it started in 2015 will make *Johnson* available only in

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[8] *See United States v. Westover* (17-7607) (released Sept. 27, 2018); *United States v. Snyder* (17-7157) (released July 13, 2018); *United States v. Perez* (18-5217) (released June 2, 2017).

[9] *See United States v. Couchman* (17-8480) (release scheduled on January 29, 2022); *United States v. Oxner* (17-9014) (release scheduled for July 22, 2020); *United States v. Safford* (17-9170) (release scheduled for February 20, 2023); *United States v. Murphy* (18-5230) (release scheduled for October 17, 2021); *United States v. McGee* (18-5263) (release scheduled for September 19, 2022); *United States v. King* (17-8280) (release scheduled for July 12, 2020).

[10] *See United States v. Casey* (17-1251) (release scheduled for August 7, 2025); *United States v. Sailor* (18-5268) (release scheduled for August 5, 2033).

theory, rather than in practice, and send the unmistakable message that justice is no more than an empty promise.

CONCLUSION

On the basis of the foregoing, the Court should grant Mr. George's petition for a writ of certiorari.

Respectfully submitted,

Date: November 5, 2018

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Certificate of Service

I, Kara Hartzler, appointed to represent the petitioner under the Criminal Justice Act, certify that on November 5, 2018, one copy of this Reply to Brief in Opposition to the Petition for a Writ of Certiorari were served by first-class mail, postage prepaid, to respondent's counsel. I further certify that all parties required to be served have been served. Service was addressed as follows:

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