No. 18-6096

IN THE
Supreme Court of the United States

MICHAEL JACKSON,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

I. The government concedes that the circuit courts are divided on this "silent record" issue, and also concedes a distinct and unique component of the circuit split regarding "factual remands."

The government has admitted here, and in other pending petitions for certiorari, that as it pertains to this "silent record" issue, "some inconstancy exists in the approaches of different circuits to *Johnson*-premised collateral attacks like petitioners." *Beeman v. United States*, 18-6385, government's BIO, pg. 10. Therefore, Mr. Jackson will not repeat his prior arguments that this circuit split warrants this Court's intervention, *see* Jackson petition for certiorari, pg. 6-8.

However, the circuit split has become more troubling without this Court's guidance, because a new and distinct component of the circuit split has emerged regarding "factual remands" on "silent records." Specifically, Mr. Jackson has highlighted that the Eighth and Eleventh Circuits are the only circuits to conclude that the "legal environment" test is "a factual question for the district court", and they are the only circuits that have remanded cases to the district court to decide this issue in the first instance. Jackson petition for certiorari, pg. 16.

Instead of addressing these novel and unique arguments as to why certiorari should be granted on this "factual remand" issue, the government instead cross-references arguments it made to oppose other petitions for certiorari. Gov't BIO, pg. 7; pg. 8; pg. 10 (citing to its briefs in *Couchman v. United States*, No. 17-8480; *King*

v. United States, No. 17-8280). While *Couchman* and *King* raise a "silent record" issue, those cases, critically, did not address the "factual remand" circuit split.

The government does not dispute that this "factual remand" split of authority exists. Nor does the government defend the flawed rationale for remanding cases to the district court for this "legal environment" test. We pointed out that the relevant "legal environment" test is a legal issue, because it is predicated on analyzing prior case law, as opposed to weighing disputed facts, because "the relevant legal background is, so to speak, a 'snapshot' of what the controlling law was at the time of sentencing.'" *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018). There is no reason why an appellate court would owe deference to a lower court in reviewing the relevant case law that existed at the time of the sentencing hearing.

The government also does not take issue with Mr. Jackson's argument that these "factual remands" are constitutionally problematic, in that they add another layer of arbitrariness in determining which § 2255 petitions are granted. "These 'factual' remands will create further inconsistency in how this determination is made by different district courts, in analyzing the same or similar 'legal environment' pertaining to Missouri burglary predicate convictions, as well as other predicate convictions." Jackson petition for certiorari, pg. 17. On remand some defendants will win regarding the same legal issue, while other similarly situated defendants will lose, in an arbitrary fashion that will evade meaningful appellate review because of the deferential standard of review for such a "factual issue." And

this is constitutionally problematic, because properly interpreting the burden of proof in a § 2255 motion, protects against this type of arbitrary law enforcement sought to be eradicated by this Court in voiding the residual clause of the ACCA in the first place.

The government's only response to this "factual remand" circuit split, is to maintain that Mr. Jackson "does not explain how that question would be outcome determinative in this or any other case." Gov't BIO, pg. 13. This is demonstrably incorrect, for the reasons highlighted above. We have also previously pointed out that Judge Kelly, in her dissenting opinion in *Walker*, highlighted why this would be outcome determinative: "I believe it is unnecessary to remand the case for factfinding because the relevant background legal environment at the time of [Walker's] sentencing is clear", and that therefore "Walker's claim merits relief" without any such remand. *Walker*, 900 F.3d at 1017. Had this view prevailed, Mr. Jackson would have already been re-sentenced without the ACCA enhancement.

II. The government is mistaken that Mr. Jackson is not entitled to relief under any circuit's approach.

The government maintains that *any* defendant whose "silent record" issue turns on a Missouri burglary conviction cannot challenge this issue because "[t]he law was settled long before the time of petitioner's sentencing that first- and second-degree Missouri burglary qualified as 'burglary' within the meaning of the enumerated-offenses clause." Gov't BIO, pg. 10. However, at the time Mr. Jackson was sentenced, Eighth Circuit case law had "consistently held that burglary was a

crime of violence, relying on the residual clause—or, in some other cases, relying on the breadth of the residual clause to avoid deciding which clause of the ACCA an offense satisfied." *Walker*, 900 F.3d at 1017 (Kelly, J., dissenting).

The government's argument is also not supported by the *Walker* majority opinion, because it did not reach the merits of this issue by analyzing the relevant "legal environment." 900 F.3d at 10175. Instead, the Eighth Circuit remanded the issue to the district court when there was no basis for such a remand on a "silent record", precisely because the evidentiary record is *silent*.

To support its Missouri burglary argument, the government resorts to cherry picking applicable Eighth Circuit precedent, while choosing to ignore the case law that supports Mr. Jackson's position. The Eighth Circuit, in upholding an ACCA sentencing enhancement for Missouri second-degree burglary, held that "second-degree burglary poses a 'serious potential risk of physical injury.'" *United States v. Nolan*, 397 F.3d 665, 666 (8th Cir. 2005). The government fails to address this case law, and other case law, that illustrates that the Eighth Circuit repeatedly relied on the residual clause to find that Missouri burglary was a qualifying predicate.

The government also fails to address this Court's case law that demonstrates that Missouri burglary was never a proper ACCA predicate offense. Just last month, this Court reiterated why a similar Missouri burglary statute, § 560.070, was likely never a qualifying predicate offense because in *Taylor v. United States*, 495 U.S. 575 (1990), this Court "did say that that particular provision was beyond

the scope of the federal Act." *United States v. Stitt*, 139 S.Ct. 399, 407 (2018) (concluding that § 560.070 "nowhere restrict[s] its coverage"). Mr. Jackson's predicate convictions for Missouri burglary under § 569.170 are not meaningfully distinct from the predecessor burglary statute in § 560.070.

The government acknowledges that the Eighth Circuit reversed course, concluding that second-degree burglary, § 569.170, does not qualify as generic burglary under the ACCA. BIO, pg. 11-12, citing *United States v. Naylor,* 887 F.3d 397 (8th Cir. 2018) (en banc). But the government's argument that *Naylor* is a "non-retroactive decision", and therefore cannot assist Mr. Jackson in his § 2255, is mistaken. *Id*. Just last year, in a § 2255 petition challenging whether a Missouri burglary conviction under § 560.070 was a qualifying predicate conviction, this Court entered a GVR remand to the "Eighth Circuit for further consideration in light of that court's opinion in *United States v. Naylor,* 887 F.3d 397 (CA8 2018)." *Brown v. United States*, 138 S. Ct. 1545 (2018). And there is no reason why a court should not use contemporaneous case law to decide the merits of a § 2255.

Mr. Jackson's claim "relies on" *Johnson* because his claim would not have been meritorious before the residual clause was held unconstitutional. Stated another way, if sentencing courts were consistently relying on a unconstitutional basis to find that Missouri burglary was a qualifying ACCA predicate (here, the residual clause), then it must follow that in correcting that mistake Mr. Walker "relies on" a new rule of constitutional law (here, *Johnson*).

The Third Circuit, in joining the Fourth and Ninth Circuits, concluded that statutory construction of AEDPA highlights that a movant "relies on" a new rule of constitutional law, and therefore "satisfies the gatekeeping requirements when he demonstrates that his sentence *may* be unconstitutional in light of the new rule of constitutional law." *United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018). Reaching a contrary conclusion reads into statute language that does not exist because it states that the defendant must demonstrate "that the claim relies on a new rule of constitutional law." 28 U.S.C. § 2244(b)(2)(A). The contrary interpretation adds language that cannot be found in the statute, elevating the standard so that the claim must *exclusively* rely on a new rule of constitutional law. However, if courts were consistently relying on a unconstitutional basis *sub silento* to find that Missouri burglary was an ACCA predicate, then it must follow that in correcting that mistake the defendant "relies on" a new rule of constitutional law.

III. Two brothers, two different outcomes: a case study as to how the "silent record" test is being arbitrarily applied throughout the nation.

Finally, the government concedes that Mr. Jackson's brother and co-defendant, Fabian Jackson, not only received a COA to appeal this issue, but his case was reversed by the Eighth Circuit for a "factual remand." Gov't BIO, pg. 12, citing *Fabian Jackson v. United States*, 745 Fed.Appx. 658 (8th Cir. 2018). Despite the fact that both cases analyzed the same Missouri burglary statute on a "silent record", the government maintains that these diametrically opposed outcomes on this issue is somehow explainable because "their postconviction proceedings have

diverged in relevant respects." Gov't BIO. pg. 12. However, the only way the postconviction proceedings have "diverged" is in their outcomes.

Both Mr. Jackson and Fabian Jackson filed a § 2255 in 2016, with the same attorney maintaining that their claims sounded in *Johnson*. The government, represented by the same prosecutor, argued before the district court that neither claim sounded in *Johnson,* and that both claims were therefore procedurally barred. Neither Jackson received a COA from the district court after their § 2255 motions were denied. Subsequently, both Michael Jackson and Fabian Jackson filed an application for a COA before the Eighth Circuit. This is when and where their cases "diverged": Michael was denied a COA in June 2017; Fabian was granted a COA in October 2017.

The government argues that its waiver of the procedural defense in Fabian Jackson's case warrants the divergent outcomes. Government BIO, pg. 12-13. However, two reasons highlight that the government's waiver made no difference before the Eighth Circuit. *First*, the government's waiver took place in May 15, 2018, but the COA determinations were made prior to that in 2017. *Second*, any notion that the government's waiver had any bearing on the Eighth Circuit's ultimate determination on the § 2255(h)(2) issue is rebutted by the *Fabian Jackson* opinion itself. 745 Fed.Apx. at 659 (noting government's waiver, but highlighting that "however, a movant first must meet certain threshold requirements in bringing a successive § 2255 motion.").

Thus, Michael and Fabian Jackson's cases illustrate why this petition for certiorari should be granted, because it is a case study as to how the "silent record" test is being arbitrarily applied throughout the nation. How the circuit split "silent record" issue is analyzed by courts depends on the fluke of geography. However, the arbitrariness does not end there, because in certain circuits (the Eighth and Eleventh Circuits), if your case has a "silent record", you must also withstand an additional "factual remand", which may turn on how the specific district court subjectively views the "legal environment." Finally, even if you have the same district court judge with the same relevant predicate convictions (like Michael and Fabian Jackson), there is still the likelihood that the "legal environment" test will cause inexplicably divergent results. Such systemic arbitrariness in determining *constitutional* rights should be ended by this Court.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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