No. 18-6385

IN THE
Supreme Court of the United States

JEFFREY BERNARD BEEMAN,

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 IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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A. The government has taken aim at the wrong target.

The government answers a question that Mr. Beeman did not ask. The government has recast Mr. Beeman's issue this way: "Petitioner contends that the court of appeals erred in determining that, to meet his burden of proving that his sentence is tainted by constitutional error under *Johnson* . . ., petitioner must show that it is more likely that not—rather than merely possible—that the district court relied on the residual clause." *Brief in Opposition* at 8-9. This is not all what Mr. Beeman says.

In his petition, Mr. Beeman embraces this § 2255 burden of proof. He simply objects to the obstacles the Eleventh Circuit throws in his path as he strives to meet that burden. This is how Mr. Beeman expressed his issue:

> Under 28 U.S.C. § 2255, when a defendant collaterally attacks his sentence under *Johnson*, he bears the burden of proving that the sentence was based upon the now-forbidden residual clause. But how may he meet that burden?"
>
> May a § 2255 defendant, faced with a silent record below, prove that his ACCA-enhanced sentence was indeed based upon the residual clause through a process of elimination or, put another way, may he show that a predicate offense does not fit within the statute's alternative sources: the elements and enumerated crimes clauses? And may he prove his

> case by surveying post-sentencing case law, including this Court's decisions clarifying the meaning of those alternative ACCA clauses?

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In its brief, the government writes almost nothing at all on this topic. The government simply repeats the Eleventh Circuit's position that a defendant may meet his burden only by pointing to "the sentencing record or to any case law in existence at the time of his sentencing proceeding." *Brief in Opposition* at 9. But why must a § 2255 defendant be barred from relying on recent Supreme Court cases to prove his claim? The government never tells us.

Indeed the correctness of this "historical-fact" rule (and the relevance of post-sentencing case law) was the principle topic in both Mr. Beeman's panel opinion and the order denying rehearing en banc. *Beeman v. United States*, 871 F.3d 1218, 1224 n.5 (11th Cir. 2018); *id.* at 1225, 1230 (Williams, J., sitting by designation, dissenting); *Beeman v. United States*, 899 F.3d 1218, 1223 (11th Cir. 2018) (Carnes, J., concurring in denial of rehearing en banc); *id.* at 1227-28 (Martin, J., dissenting from denial of rehearing en banc). Yet on this debate, a debate at the center of Mr. Beeman's petition, the government says nothing.

B. The government concedes that the circuit courts are divided on this question.

Well, sort of. It admits this: "[S]ome inconsistency exists in the approaches of different circuits to *Johnson*-premised collateral attacks like petitioner's." *Brief in Opposition* at 10. That is a steep understatement. The question has

fractured the courts and there is no end in sight. "One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee v. Planned Parenthood*, 586 U.S. —, 139 S. Ct. 408, 408 (2018) (Thomas, J., joined by Alito, J., Gorsuch, J., dissenting from denial of certiorari). The question here is just such an issue. In light of this deep circuit split, the outcome of any *Johnson*-based § 2255 motion now depends most of all upon the fluke of geography. This Court must intervene to remedy that inequity.

The government suggests that the silent-record issue is fading from view: "This Court has recently and repeatedly denied review of similar issues in other cases." *Brief in Opposition* at 9 & n.1. But many of these cases relied upon *Beeman* or had other deficits that *Beeman* lacks. Of the 14 cases listed here, six came from the Eleventh Circuit and simply applied that court's *Beeman* rule, five were from the Tenth Circuit and applied *United States v. Snyder* (and its similar *Beeman* rule), and the remaining three were flawed in other ways.[1]

What's more, the high volume of petitions filed in this Court shows just how widespread this problem has become.

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[1] The government also cites several, but not all, of the then-pending petitions, *Brief in Opposition* at 9 n.2, but this Court has since denied each. *Prutting v. United States*, No. 18-5398 (denied Jan. 7, 2019); *Curry v. United States*, No. 18-229 (denied Jan. 7, 2019); *Washington v. United States*, No. 18-5594 (denied Jan. 7, 2019); *Wyatt v. United States*, No. 18-6013 (denied Jan. 7, 2019). *Prutting* and *Curry* came from the Eleventh Circuit; *Washington* arose from the Tenth.

Nearly two dozen defendants, and counting, have arrived in this Court seeking redress. Indeed every circuit but two—the Seventh and the D.C. Circuits—has weighed in on this *Johnson*, silent-record puzzle.

The time has come for this Court to step in. And Mr. Beeman's case is the best instrument through which to settle the silent-record debate. The *Beeman* opinion is not merely the leading case in the Eleventh Circuit, it offers the most thorough exploration of the silent-record question in all the land. The case includes both a panel opinion and a lengthy order denying rehearing en banc. Both provide thoughtful, competing concurrences and dissents. And the other circuits have either relied heavily on *Beeman* or have engaged with it by rejecting it. The silent-record question is as well-ventilated here in this case as it will ever be.

C. Mr. Beeman's case is the ideal vehicle to resolve the circuit split.

In the spite of *Beeman's* prominence in this national debate, the government insists the case is a poor vehicle. The government mistakenly argues that Mr. Beeman's ACCA predicate offense, the Georgia aggravated assault conviction, fits safely within the ACCA's elements clause. *Brief in Opposition* at 11-13. But the government's confidence is misplaced. The Eleventh Circuit has never held that this crime is an ACCA violent felony, in spite of many opportunities to do so. And of the three judges who wrote on this very question in Mr. Beeman's own case, all opine that the government's view is likely wrong.[2]

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[2] The dissent from the panel opinion: "Beeman's [Georgia] aggravated assault predicate likely would not

But the government asks this Court to ignore the views of these judges and instead to make a merits determination on the spot, without an opinion by the court below and without briefing by the parties here. The Court should decline the invitation.

D. The unlawful ACCA enhancement drove the outcome of Mr. Beeman's sentence not only on the firearms counts, but also on the concurrent drug count.

The government ends with a final parry. It claims that Mr. Beeman's "ACCA enhancement had no practical effect on his sentence" because the district court also imposed a concurrent sentence of equal length on the drug count. *Brief in Opposition* at 13-14. But the concurrent-sentence doctrine has no place here. Neither the district court nor the appeals court relied upon this ground at all. In fact, the government never raised this objection at all until now.

In any event, the government is wrong. The concurrent sentence on the drug count is no obstacle to *Johnson* relief

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qualify as a crime of violence under the elements clause." *Beeman*, 871 F.3d at 1230 n.8 (Williams, J., sitting by designation, dissenting). And the dissent (by two more judges) from the order denying rehearing en banc: "Mr. Beeman has a good argument that a Georgia conviction for aggravated assault did not require the type of intent necessary for it to serve as an ACCA predicate offense." *Beeman*, 899 F.3d at 1230 (Martin, J., joined by Jill Pryor, J., dissenting from denial of rehearing en banc).

on the unlawful ACCA sentence. This Court itself has noted that the concurrent sentence doctrine has been applied "haphazardly," at best. *Benton v. Maryland*, 395 U.S. 784, 789 (1969). In the end, the concurrent-sentence bar must be applied sparingly and only as a last resort.[3]

Once Mr. Beeman's ACCA enhancement is washed away, the district court will surely reduce the sentence on all counts, including the drug count. How can we be so sure? When the court grants § 2255 relief on the ACCA challenge, the "sentencing package" will be unbundled. *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 2006). The court will be empowered to impose a fresh sentence not only on the firearm counts, but also on the drug count. *United States v. Fowler*, 749 F.3d 1010, 1016 (11th Cir. 2014) ("where one or more counts of conviction are set aside in a § 2255 proceeding, the district court has the authority to resentence the defendant on the remaining counts of conviction").

Although the district court imposed upon Mr. Beeman a concurrent sentence of 210 months on the two ACCA firearm counts and the one drug count, that common number was driven entirely by the now-unlawful ACCA enhancement. At the original sentencing hearing, the total guideline range was 210-262 months imprisonment. That

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[3] *See, e.g., United States v. Ray*, 481 U.S. 736, 737 (1987) (concurrent sentence doctrine does not apply when defendant would suffer additional $50 special assessment on each count); *Benton*, 395 U.S. at 791 (rejecting government's invocation of concurrent sentence doctrine even where "possibility of collateral consequences is . . . remote").

range was based solely on the ACCA enhancement. In contrast, the guideline range on the drug count alone was merely 41-51 months, according to the presentence report. Yet the court chose, in the end, to elevate the sentence on that drug count simply to match the low-end sentence of 210 months on the pair of firearm counts.

If Mr. Beeman wins the ACCA challenge here, the district court's ensuing sentence will surely look much different. The gun counts will then carry a maximum of 10 years in prison. And the drug sentence, so long tethered to the guns counts, will surely drop, too. *Cf. Peugh v. United States*, 569 U.S. 530, 544 (2013) ("when a Guidelines range moves up or down, offenders' sentences [tend to] move with it"). The drug sentence, as it stands now, cannot shield review of Mr. Beeman's unlawful ACCA sentence.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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