No. 18-6807

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY M. SLUSSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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REPLY BRIEF OF PETITIONER

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ARGUMENT

The government contends that the circuits are not divided on whether a collateral-attack waiver bars a claim that a defendant's ACCA sentence exceeds the statutory maximum. The government is wrong. Courts in every other circuit have announced (and applied) a longstanding rule that would permit review of Mr. Slusser's claim on the merits. Pet. at 1–2 & nn.3–4. The Eighth Circuit has applied its rule in the ACCA context, while district courts in the Ninth Circuit have applied that court's rule in countless *Johnson* cases. The Seventh Circuit's recent deviation from its own rule in order to bar review of a *Johnson* challenge to an ACCA sentence only proves that this Court should now intervene.

I. The Circuits Are in Direct Disagreement on the Question Presented.

The government concedes that the Eighth Circuit in *DeRoo v. United States*, 223 F.3d 919 (8th Cir. 2000), refused to enforce a collateral-attack waiver because the ACCA sentence was illegal, following its rule that an appeal waiver cannot bar a challenge to an illegal sentence. *Id.* at 926. The government argues, however, that the error in *DeRoo* was different because it was "plain based on the text of Section 924(e) and the law at the time of sentencing, not based on a development in the law that occurred after the defendant's sentence became final." BIO at 15. This does not make the error different.

A sentence that is illegal now because it exceeds the statutory maximum was illegal when it was imposed, no matter when its illegality became known. By invalidating the residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015),

this Court did not suddenly make unconstitutional what was previously constitutional, but recognized—at long last—that the residual clause was void when Congress enacted it. *See Danforth v. Minnesota*, 552 U.S. 264, 271 (2008) ("[T]he source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law"; "the underlying right necessarily pre-exists [the Supreme Court's] articulation of the new rule."); *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (penalty imposed under residual clause "has not been authorized by any valid criminal statute"); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (Supreme Court has no power to change the law, but only "the power 'to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803)).[1] That an illegal sentence is final may say something about its redressability, but it says nothing about its illegality. *Danforth*, 552 U.S. at 271 & n.5.

While the government is correct that the court in *DeRoo* did not say whether DeRoo himself acknowledged the propriety of the ACCA in his plea agreement, BIO at 15, this means only that such acknowledgements are not relevant. As a matter of fact, DeRoo acknowledged that the ACCA applied in his case, no less than Mr. Slusser did. In his plea agreement, DeRoo agreed he was guilty as charged in an

[1] The Sixth Circuit, too, recognizes this fundamental precept. *Nichols v. United States*, 897 F.3d 729, 735–36 (6th Cir. 2018) (recognizing that the residual clause did not "suddenly bec[o]me vague as the Supreme Court penned *Johnson*," it was "unconstitutionally vague all along"; district court was thus without power to impose ACCA sentence in excess of the proper statutory maximum either now *or* then).

indictment that not only charged him with violating 18 U.S.C. § 922(g), but also specified the three prior offenses that qualified him for the ACCA's enhanced penalty. Plea Agreement at 2, *United States v. DeRoo*, No. 3:96-cr-39 (D.N.D. Apr. 14, 1997) (Doc. 24). DeRoo also agreed that he "understands" that the offense to which he pled guilty carries "[a] minimum penalty of 15 years," and elsewhere stipulated that he was subject to "a mandatory minimum sentence under [the ACCA] of 15 years to life." *Id.* at 2, 4. None of these acknowledgments meant that his appeal waiver was enforceable.

About the Ninth Circuit's rule, the government can only point out that *Bibler* did not involve an ACCA sentence and that the court ultimately enforced the waiver. BIO at 16 n.2. But sentencing courts in the Ninth Circuit have routinely applied *Bibler* to refuse to enforce a waiver in cases raising *Johnson*-based challenges. *E.g.*, *United States v. Cloud*, 197 F. Supp. 3d 1263 (E.D. Wash. 2016); Opinion and Order at 15–16, *United States v. Hoopes*, No. 3:11-cr-425-HZ (D. Or. July 5, 2016); Order at 4–5, *United States v. Rios*, No. 2:13-cr-2059 (E.D. Wash. Aug. 12, 2016). And the Ninth Circuit's rule—that the illegal-sentence exception encompasses any sentence that exceeds the statutory maximum *or* "violates the Constitution"—clearly covers a claim that an ACCA sentence exceeds the properly calculated statutory maximum. This Court has explained that an above-statutory-maximum sentence "denie[s] the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980).

The Seventh Circuit's decision in *United States v. Carson*, 855 F.3d 828 (7th Cir. 2017), is in direct conflict with the Eighth and Ninth Circuits. In *Carson*, the Seventh Circuit dismissed a defendant's challenge to his ACCA sentence, reasoning that it is "not possible to determine if Carson's sentence as an armed career criminal is illegal (or a miscarriage of justice) without resolving the merits of his appeal." *Id.* at 831. While *Carson* superficially appears to align with the Sixth Circuit's decision here, it cannot be squared with an earlier Seventh Circuit case, *United States v. Adkins*, 743 F.3d 176 (7th Cir. 2014).

In *Adkins*, the Seventh Circuit confirmed that an appeal waiver will not prevent a defendant from raising a limited set of claims sounding in due process, including a claim that "a sentence [] exceeds the statutory maximum for the defendant's particular crime." *Id.* at 192–93. It explained that "[t]here are multiple rationales for these exceptions, such as fundamental fairness to the particular defendant and the fundamental legitimacy of the judicial process generally." *Id.* at 193. The court in *Adkins* held that the waiver thre did not bar the defendant's claim that his condition of supervised release violated due process because it was unconstitutionally vague. *Id.*

Carson does not mention the earlier *Adkins*, or explain why fundamental rules of fairness and legitimacy would not apply in the ACCA context. Meanwhile, a later panel of the Seventh Circuit held that an appeal waiver's exception for a challenge to the sentence based on a "constitutionally impermissible factor" may reasonably be interpreted to include a claim that the sentence was based on the

mandatory Guidelines' unconstitutional residual clause. *Cross v. United States*, 892 F.3d 288, 299 (7th Cir. 2018). The government is correct that *Cross* reached this conclusion as a matter of contract interpretation, but it ignores the resulting mix of conflicting signals in the Seventh Circuit. If anything, *Adkins*, *Carson*, and *Cross* together reflect a growing incoherence in the Seventh Circuit when it comes to ACCA cases, and that this Court's swift guidance is needed.

II. The Cases the Government Cites Do Not Support Denying Review.

Contrary to the government's suggestion (and the Seventh Circuit's analysis in *Carson*), BIO at 11–12, the enforceability of Mr. Slusser's waiver does not depend on the merits of his *Johnson* claim. The question presented is whether his waiver is unenforceable because his claim falls in a category of claims that cannot be waived, not whether the waiver is unenforceable because his claim is meritorious. Pet. at ii. In any event, courts of appeals often choose to consider the merits of a claim before deciding whether to enforce the waiver. For example, in *United States v. Sampson,* 684 F. App'x 177 (3d Cir.), *cert. denied*, 137 S. Ct. 2147 (2017)—cited by the government, BIO at 14—the defendant claimed that the record lacked sufficient evidence to support the ACCA sentence because "the statutes under which he was previously convicted were never identified at sentencing." *Id.* at 179. The Third Circuit enforced the waiver against this evidentiary claim, but only after reviewing the record and concluding that enforcing the waiver did not work a miscarriage of justice because the statutes were in fact sufficiently identified at sentencing. *Id.* at 180–81; *see also United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016) ("We

address whether the sentence was lawful, and apply the appeal waiver if it was.").

The Tenth Circuit's decision in *United States v. Frazier-LeFear*, 665 F. App'x 727 (10th Cir. 2016), likewise does not support the government's position. That case does not involve a *Johnson* challenge to an ACCA sentence, but a *Johnson* challenge to the calculation of the defendant's advisory guideline range and the resulting sentence within the statutory limits. The Tenth Circuit otherwise *reaffirmed* that "[o]f course" sentences "exceeding statutory authorization are excluded from waiver under the [] miscarriage-of-justice exception set out in [*United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc)]." *Frazier-LeFear*, 665 F. App'x at 731 n.4; *see also id.* at 731 n.5.

The government also cites *Sanford v. United States*, 841 F.3d 578, 580 (2d Cir. 2016), and *United States v. Morrison*, 852 F.3d 488, 490 (6th Cir. 2017), but both likewise involved a defendant sentenced under the advisory guidelines who challenged the application of a guideline provision in determining the sentence within the statutory range. Moreover, the Second Circuit otherwise recognizes that an appeal waiver does not waive the right to appeal certain claims, *e.g.*, *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994) (holding that defendant's waiver of right to appeal sentence does not "waive[] the right to appeal from an arguably unconstitutional use of naturalized status as the basis for a sentence"), which the government has conceded includes the right to appeal sentence on the ground that it exceeds the statutory maximum, *United States v. Rosa*, 123 F.3d 94, 100 n.5 (2d Cir. 1997).

The Fourth Circuit in *United States v. Haskins*, 198 F. App'x 280 (4th Cir. 2006), enforced an appeal waiver in an ACCA case, but without addressing (or even mentioning) the possibility that the defendant's claim implicated a sentence potentially above the statutory maximum. And in 2016, the Fourth Circuit granted the government's motion to remand for resentencing in an ACCA case after the government conceded that under *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992), a defendant cannot waive a challenge to an ACCA sentence on the ground that it exceeds the statutory maximum. *See* Joint Motion to Remand for Resentencing at 2, *United States v. Crosby*, No. 15-4572 (4th Cir. Oct. 30, 2016) ("'[A] defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute[.]'" (quoting *Marin*, 961 F.2d at 496)). The Fourth Circuit's uneven approach, like the Seventh Circuit's, does not prove there is no disagreement, but proves the confusion and disparity.

Brady v. United States, 397 U.S. 742 (1970), also does not involve a § 2255 challenge to a sentence above the statutory maximum. There, the petitioner was sentenced upon a plea of guilty to fifty years in prison for federal kidnapping (later lowered to thirty years)—well below what was understood then to be the statutory maximum penalty (death). *Id.* at 743. The Supreme Court later held that this particular death penalty provision was unconstitutional because it could only be imposed by a jury, making the risk of death the price of a jury trial. *Id.* at 746. The petitioner sought § 2255 relief on the theory that the erroneous presence of the

death penalty operated to coerce his guilty plea. *Id.* at 744. The Supreme Court rejected his claim, holding that the petitioner had entered the plea voluntarily and intelligently. *Id.* at 758. While *Brady* addresses the voluntariness of a plea in light of a later judicial decision, Brady himself was not sentenced to death. His sentence was not later deemed unconstitutional and so above the statutory maximum. *Brady* thus says nothing about the enforceability of a § 2255 waiver when the sentence imposed actually exceeds the statutory maximum in light of a later Supreme Court decision, as here.

III. The Government Offers No Other Good Reason To Deny Review.

The government emphasizes the "mutual benefits of appeal and categorical attack waivers," contending that Mr. Slusser's case illustrates these mutual benefits. BIO at 9. But it does not. Mr. Slusser received no benefit from his collateral-attack waiver, much less one that could justify denying his right to challenge the sentence—imposed at great cost to his liberty—on the ground that it exceeds the statutory limits set by Congress.

Mr. Slusser received no benefit because his agreed-upon sentence of 180 months is the same sentence he would almost have certainly received had he pled guilty without a plea agreement. The sentence was understood by the parties to be both the mandatory minimum sentence and within his guideline range of 168 to 210 months (before it was truncated at the bottom by the mandatory minimum). (Sent'g Tr. at 6–7**,** Doc. 54.) True, the government agreed not to oppose the two levels off for acceptance of responsibility, and agreed to move for the third level off, U.S.S.G.

§ 3E1.1(b)—but it gave up nothing. It had no basis to oppose the two levels or to fail to move for the third, as Mr. Slusser pled guilty less than six weeks after he was indicted, "thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources." *Id.* § 3E1.1(b) cmt.(n.6) ("The government should not withhold such a motion based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal.").

True, too, Mr. Slusser's agreed-upon sentence prevented the district court from imposing a sentence *longer* than 180 months once it accepted the agreement, BIO at 9, but nothing in the record suggests the district court had any reason to impose a longer sentence in its absence. (*See* Sent'g Tr. at 8–13, Doc. 54 (explaining why 180-month sentence was appropriate in light of mandatory minimum, guideline range, and sentencing purposes at 18 U.S.C. § 3553(a).) Moreover, judges rarely impose a sentence above the guideline range in ACCA cases, doing so in fewer than 2% of cases. U.S. Sent'g Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 287 (2011). Even if it could be said that Mr. Slusser received a benefit from the plea agreement beyond the certainty of a precise sentence within his guideline range, the miscarriage-of-justice exception is just that: an exception to that benefit. *DeRoo*, 223 F.3d at 923, 926.

In the end, the government essentially admits that it exercises unchecked power in the Sixth Circuit to decide who may test the legality of an ACCA sentence when there is an appeal waiver. BIO at 16. It suggests that this power is

acceptable because it decides for itself all relevant legal and factual questions. *Id.* But the result is that in some circuits, defendants have the right to a judicial determination of their claims, but in others they are at the mercy of their adversary. The inevitable disparity should not be tolerated.

Finally, this is an excellent vehicle for resolving the question presented. The answer does not depend on the merits of Mr. Slusser's *Johnson* claim, and the question is squarely presented. The Sixth Circuit relied solely on the waiver without addressing the merits of Mr. Slusser's *Johnson* claim, establishing a firm rule of uncluttered clarity. In *Class v. United States*, 138 S. Ct. 798 (2018), this Court held that a guilty plea does not bar a defendant from appealing his conviction on the ground that the statute is unconstitutional. *Id.* at 805. It did not address the merits of the defendant's claim, but decided the waiver question based on its categorical nature. *Id.* at 807. It can do the same here.

In any event, the effect of this Court's decision in *United States v. Stitt*, 139 S. Ct. 399 (2018), decided after Mr. Slusser filed his petition, is not as clear as the government suggests. BIO at 7, 16. While Mr. Slusser has five prior convictions for Tennessee aggravated burglary, the government acknowledges that the district court at sentencing specifically identified only one of those convictions as a qualifying ACCA predicate. *Id.* at 4. More important, the district court's ruling on the merits of Mr. Slusser's § 2255 claim expressly did not depend on *any* of Mr. Slusser's Tennessee aggravated burglary convictions. Pet. App. at 15a. The government did not appeal that ruling or otherwise contest it in the court below.

Meanwhile, the elements of generic burglary remain unsettled even after *Stitt*. *Stitt* addressed only generic burglary's "building or structure" element. As shown in the pending petitions for certiorari in *Moore v. United States*, No. 17-8153, and *Ferguson v. United States*, No. 17-7496, the outcome in *Quarles v. United States*, No. 17-778 (cert. granted Jan. 11, 2019), will shed light on whether a variant of Tennessee burglary sweeps more broadly than generic burglary with respect to generic burglary's intent element. Given the still-evolving law on burglary, and the state of the proceedings below, the question whether Mr. Slusser is entitled to relief on his *Johnson* claim would best be left to the lower court even if this Court grants review.

In short, the uncertain impact of *Stitt* on the merits of Mr. Slusser's claim is no reason to decline review of this narrow question of exceptional importance.

CONCLUSION

For the reasons set forth above and in his petition, Larry M. Slusser requests that the petition for certiorari be granted.

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