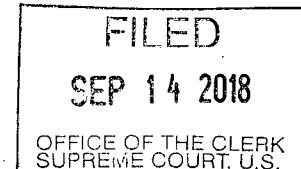


18-7127
No. 18A141

IN THE
SUPREME COURT OF THE UNITED STATES

Christopher French,
petitioner,



versus

United States of America,
respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One

The district court imposed a mandatory sentence based on a Tennessee Aggravated Burglary conviction. The Tennessee aggravated burglary statute, however, is an indivisible statute, which identifies a non-generic crime of burglary. See **United States v. Stitt**, 860 F.3d 854 (6th Cir. 2017)(cert. granted No. 17-765, April 23, 2018).

Can a Tennessee Aggravated Burglary conviction serve as an armed Career Criminal Act predicate?

Question Two

The rules governing 28 U.S.C. § 2255 proceedings provide that a § 2255 movant's allegations are presumed true. 28 U.S.C. § 2255(b). Although the Eleventh Circuit reversed the district court's denial of the § 2255 motion, when the appeals court remanded the case it ordered the district court to apply a new threshold test that alters the § 2255 movant's burden of proof from that set forth in the statute.

May a federal circuit court change a statutory burden of proof?

LIST OF PARTIES

All parties appear in this case are on the cover page.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, 2018 U.S. App. LEXIS 11763 (11th Cir. May 3, 2018), appears at Appendix "1".

The opinion of the United States District Court for the Middle District of Florida, Tampa Division, 2016 U.S. Dist. LEXIS 107532 (Aug. 15, 2016), appears at Appendix "2".

JURISDICTION

The Eleventh Circuit Court of Appeals opinion was decided on May 3, 2018, and an extension of time was granted until September 15, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional provisions. The underlying statute is 18 U.S.C. §§ 922(g)(1), 924(e)(2)(B).

§ 922(g)(1):

It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; and

§ 924(e)(1):

In the case of a person who violates section 922(g) of this title and have three previous convictions by any court referred to in section 922(g)(1)...such person shall be fined under the title and imprisoned not less than fifteen years....

STATEMENT OF THE CASE
(Procedural History)

On January 12, 2010, the United States District Court for the Middle District of Florida, Tampa Division accepted Christopher French's guilty plea of to one count of possession of a firearm by a convicted felon, a violation of 18 U.S.C. § 922(g)(1). Thereafter, the district court sentenced Mr. French under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), The district court imposed the mandatory minimum sentence of fifteen years of imprisonment.

The district court based its ACCA sentence on four Tennessee aggravated burglary convictions. (Appendix "1"). See generally, Tenn. Code § 39-14-403.

In June 2015, this Court held that the residual clause of the ACCA is unconstitutionally vague. **Johnson v. United States**, 135 S. Ct. 2551, 2563 (2015).

In October 2015, Mr. French filed a pro se motion to correct his sentence under 28 U.S.C. § 2255. He argued that his ACCA sentence was invalid in light of **Johnson** and that he no longer has the qualifying predicates needed to uphold his sentence or the conviction.

In June 2016, this Court found that the vagueness holding applied retroactively to cases on collateral review. **Welch v. United States**, 136 S. Ct. 1257, 1268 (2016). Nonetheless, the district court dismissed Mr. French's § 2255 motion. The district court found that the § 2255 motion did not actually rely on the **Johnson** decision, thus § 2255(f)(3) did not apply, correspondingly the motion was untimely. Moreover, the district court determined that **Johnson** did not affect Mr. French's sentence because his Tennessee convictions for aggravated burglary qualified as ACCA predicates under the "enumerated clause," citing a Sixth Circuit decision, **United States v. Priddy**, 808 F.3d 676, 684 (6th Cir. 2015), issued after Mr. French was sentenced in 2010. (Appendix "1").

Mr. French appealed. The Eleventh Circuit Court of Appeals granted a certificate of appealability on the question of whether the district court erred in dismissing Mr. French's § 2255 motion as time-barred. While the appeal was pending the Sixth Circuit overturned **Priddy**. (Appendix "1") (citing **United States v. Stitt**, 860 F.3d 854 (6th Cir. 2017) (en banc) (holding that the Tennessee aggravated burglary statute is broader than generic burglary and does not qualify as an ACCA predicate.).

During the pendency of Mr. French's appeal the Eleventh Circuit announced a new analytic methodology for determining timeless under § 2255(f)(3) (Appendix "1"). See **Beeman v. United States**, 871 F.3d 1215 (11th Cir. 2017). The appellate court applied the new procedure, and concluded that Mr. French's motion was timely because he sufficiently raised a **Johnson** claim. (Appendix "1"). And, in dicta, the Eleventh Circuit recognized that after **Stitt**, Mr. French had no qualifying ACCA predicates. (Appendix "1" at 2). But because the sentencing record was silent as to whether the (now voided) ACCA residual clause was the "sole source" of the original judgment, Mr. French was not yet entitled to relief. (Appendix "1"). The Eleventh Circuit reversed the district court's decision, remanded the case back to the district court with instructions to apply the **Beeman** methodology. (Appendix "1").

Mr. French argues the **Beeman** rule violates the very *res judicata* principles the Eleventh Circuit used to create the rule. Thus, although prevailing in the court below, he seeks certiorari in this Court. Further validating Mr. French's course of action, this Court granted certiorari to the United States in its petition from the Sixth Circuit's en banc decision in **Stitt**, this Court consolidated **Stitt** with **United States v. Sims**, S.Ct. No. 17-766 (April 23, 2018). The Sixth and Eighth Circuit cases present the same question that is at the core of this case.

Accordingly, Mr. French's appeal is in part linked to the outcome of Mr. Stitt's petition. This petition ensued. Mr. French sought certiorari in order for this Court to address both whether Tennessee aggravated burglary qualifies as an ACCA predicate under the enumerated clause, and whether the Eleventh Circuit's "historic fact" rule (use of law at the time of decision, rather than review) violates this Court's precedent.

He now shows why the writ should issue.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit recognized the Sixth Circuit's en banc ruling disqualified the Tennessee aggravated burglaries as ACCA predicates. (Appx. "1" at __). This Court subsequently granted certiorari on the very Sixth Circuit case upon which the Eleventh Circuit relied. **United States v. Stitt**, S.Ct. No. 17-765 (April 23, 2018). Hence, as to Mr. French's first question, in order to avoid inconsistent results, this Court should grant certiorari and hold Mr. French's petition in abeyance pending the outcome or consolidate it with **Stitt** (17-765) and **Sims** (17-766) for which oral arguments are scheduled on October 9, 2018.

As for the second question presented, this Court should grant certiorari, invalidate the Eleventh Circuit's "historical fact analysis" rule, and bring the Eleventh Circuit back in line with both this Court's precedent as well as, and other circuits in the Court of Appeals.

The Eleventh Circuit held that to determine if a **Johnson**-related § 2255 motion is timely under **28 U.S.C. § 2255(f)(3)**, a two-part analysis must occur: (1) did the movant plead that the **Johnson** rule (invalidating the ACCA residual clause) applied to his claims; and (2) did the movant prove as a matter of historic fact that the district court relied solely upon the invalidated ACCA residual clause. **Beeman**, 871 F.3d at 1220-21. That holding's consequence—as

the Eleventh Circuit sees it—is that a **Johnson-based** § 2255 motion is untimely if the § 2255 claim record shows that the district court did not rely solely on the invalidated provision (here the ACCA residual clause). This rule, however, generates an intuitively unfair result, since it does not matter if the district court's earlier finding was correct or erroneous. For example, where the record reveals that a district court relied on some other provision, such as the ACCA's "elements clause," then the § 2255 motion is untimely even if the "elements clause" ruling was erroneous.

The Eleventh Circuit's rule however, ignores this Courts principle announced in **Henderson v. United States**, 568 U.S. 266 (2013)(plain error is decided at the time of review and the principles announced in **Buck v. Davis**, 137 S. Ct. 759 (2017)(i.e. first things first, or make the procedural rulings first, then allow the parties to be heard on the merits, then decided the merits)).

Here, the Eleventh Circuit explained that in this circumstance the district court's original-proceedings decision (residual clause or otherwise) was based "historical facts." **Beeman**, 871 F.3d at 1124, n.5.. That is, the district court either did or did not use the invalidated rule at the original sentencing. Essentially reaching the merits under the guise of deciding whether the alternative limitations period applies. In order to obtain relief, the § 2255 must show that it is more likely than not that the original sentence rested solely on the invalidated provision, here the ACCA residual clause. **Id.** at 1221-22. Although Mr. French comprehends that if the original court's decision rested solely on a reason that was not implicated by the retroactively-applicable rule, then the alternative limitations period would not apply (the alternative scenario reasoning may have been implicated) then the limitations period should be activated in order to allow a comprehensive merits argument.

Mr. French presents five reasons for granting this writ and four reasons for rejecting the Eleventh Circuit's rule.

1. **This Court granted certiorari in another case, which presents one of the same questions presented in this petition: Does a Tennessee aggravated burglary conviction qualify as an Armed Career Criminal Act predicate. *United States v. Stitt*, No. 17-765 (April 23, 2018).**

The Eleventh Circuit Court of Appeals reversed and remanded the district court's order denying Christopher French's 28 U.S.C. § 2255 motion. The Eleventh Circuit predicated its opinion in part on the Sixth Circuit en banc decision that abrogated the Sixth Circuit panel's decision that the Tampa district court relied upon. (Appendix "1") (citing to both **United States v. Priddy**, 808 F.3d 676, 684 (6th Cir. 2015) and **United States v. Stitt**, 860 F.3d 854 (6th Cir. 2017) (en banc) (holding that the Tennessee aggravated burglary statute is broader than the definition of generic burglary and does not qualify as an ACCA predicate)).

On April 23, 2018, this Court granted certiorari in two cases that were consolidated for oral arguments on October 9, 2018. One of those two cases is the aforementioned Sixth Circuit en banc decision (**Stitt**). See **United States v. Stitt**, No. 17-765 (S.Ct. April 23, 2018).^{1/}

The crux of Mr. French's case relies upon the same question as that of Mr. Stitt's: whether burglary of a non-permanent or mobile structure, as defined by Tennessee aggravated burglary statute, qualifies as an ACCA predicate. Accordingly, because of the inextricable overlap between the two cases Mr. French requests that this Court grant him certiorari on this question and hold this question in abeyance pending the outcome of this Court's consolidated proceedings.

^{1/} The other case arises from the Eighth Circuit and addresses the same question, albeit arising from different burglary statute. **United States v. Sims**, No. 17-766 (S.Ct. April 23, 2018).

2. The Eleventh Circuit's rule departs from the principle that only active controversies should be tried and that piecemeal litigation should be avoided when possible.

The Eleventh Circuit's "historical fact analysis" rule promotes unneeded prophylactic litigation. In other words, at the time of the original proceedings, a litigant must raise speculative challenges that could affect the outcome of these proceedings. By example, even if a then valid ACCA residual clause made it irrelevant whether a burglary conviction qualified under the enumerated clause (that is the burglary would qualify under the ACCA's residual clause regardless of whether it qualified under the ACCA's enumerated clause), the litigant would still raise the futile challenge to the enumerated clause qualifications. Since, in the light of the Eleventh Circuit's "historical fact" rule, if the futile challenge is not raised, then it is foreclosed in the future it ever becomes valid. A reasonable attorney would present a futile challenge to the predicate's qualification in order to protect against the **Beeman** test, the attorney must challenge the conviction under the elements test, the enumerated test, and any other imaginable test to ensure that if, someday in the future, a circuit court or the Supreme Court disqualifies one portion of the statute or another, then the meritorious challenge is not lost because a past fact cannot be ascertained (such as what a sentencing judge was thinking), thus there was no practical reason to challenge the basis for the district court's determination that the Tennessee aggravated burglary qualified as an ACCA predicate.

In **Massaro v. United States**, 538 U.S. 500 (2003), this court recognized a comparable problem with ineffective assistance of counsel claims. There, this court identified that applying the procedural default doctrine to foreclose unripe ineffectiveness claims was senseless and unfair. *Id.* This Court realized if the procedural default doctrine applied, then in order to forestall its

application, defendants would be required to raise speculative (and often specious) claims on direct appeal. Thereby, needlessly wasting the court's and the parties's resources.

The Eleventh Circuit's historical fact rule generates the same needless waste of resources. Under the rule, the rational course of action for every defendant is to engage in a sequential challenge of every basis for qualifying any factual predicates, since failure to present the futile sequence dooms any future challenge, even a challenge based on a new rule of law expressly made retroactive by this Court.

Here, the Eleventh Circuit rule could be preclude Mr. French from obtaining relief even though objectively his aggravated burglary convictions do not qualify as an ACCA predicates and his conviction his unlawful in that it exceeds the statutory maximum.

Effectively, the Eleventh Circuit condemns Mr. French to five or more extra years in prison because he lacked the ability to see the future. This Court should grant the writ of certiorari and return a measure of sanity to the Eleventh Circuit's analytic procedures.

3. The Eleventh Circuit announced a rule for determining timeliness that effectively requires a reviewing court to determine plain error based upon the law at the time of the error, rather than the time of review. A position diametrically opposite to the principles announced by this Court. This Court should grant certiorari to correct the Eleventh Circuit's departure from the ordinary and usual course of judicial proceedings concerning review of unpreserved error.

In **United States v. Henderson**, 568 U.S. 266 (2013), this Court concluded that a reviewing court should determine whether an error was plain based upon the law governing at the time of review. That is, this Court realized that the law is the law and that an earlier misinterpretation was not made right merely through the passage of time. Hence, even an innocent mistake in the past must be corrected in the present when the opportunity to

make the correction is available. A position echoed most recently by the Third Circuit. **In re Peppers**, No. 17-1029 (3d Cir., Aug. 20, 2018). The Eleventh Circuit has taken the opposite philosophy when deciding whether erroneous ACCA qualifications may be corrected.

The Eleventh Circuit holds, "that, like any other § 2255 movant, a **Johnson**-based § 2255 claimant must prove his claim." **Dimott v. United States**, 881 F.3d 232, 240 (1st Cir. 2018)(quoting **Beeman v. United States** 871 F.3d 1215, 1221 (11th Cir. 2017)). In other words, "[a]s the proponent of collateral review, [the petitioner must] produce evidence demonstrating the entitlement to relief." **United States v. DiCarlo**, 575 F.2d 952, 954 (1st Cir. 1978); see **In re Moore**, 830 F.3d 1268, 1272 (11th Cir. 2016)(collecting cases from seven circuits dating to 1956 that agree the burdens of production and persuasion are the § 2255 movant's). In sum, the Eleventh Circuit requires a § 2255 movant asserting a vagueness claim, based on **Johnson v. United States**, 135 S. Ct. 2551 (2015) to prove that the sentencing court relied solely upon the ACCA's residual clause to qualify the prior convictions at the original sentencing. See, e.g., **Curry v. United States**, 714 Fed. Appx. 968 (11th Cir. 2018).

The **Beeman** reasoning generated a two part analysis:

1. Did the petitioner allege that he was sentenced under the ACCA's residual clause; and
2. did the sentencing court rely upon the ACCA residual clause to qualify the conviction as an ACCA predicate.

If the answer to either inquiry is no, then the petitioner, § 2255 motion is either untimely or outside the ambit of § 2255(h) or both, which means the § 2255 motion may not proceed. The Eleventh Circuit refers to this as the "historical fact test."

The problem with the "historic fact test" methodology is that factual claims, like logic, do not fit neatly into an artificially constructed silo. At the test's threshold, the question is whether the facial claims are reasonably consistent with the new constitutional rule, not whether the claim is meritorious. Once a preliminary jurisdictional (or here a quasi-jurisdictional timeliness analysis) determination is made, then the parties should have an opportunity only thereafter should a court assess the merits, Cf. generally **Buck v. Davis**, 137 S. Ct. 759 (2017) (holding that a premature merits determination always violates due process and may violate a court's subject-matter jurisdiction based on the current laws, the same as any other plain-error adjudication).

A very common sense reason exists for this rule. If a petitioner somehow clears the time-bar with an unmeritorious claim, then § 2255 court will decide against relief, and the only harm will be a small consumption of resources.

On the other hand, if a marginal timeliness claim passes through the procedural gateway by mistake, and it turns out that under current law the substantive claim (which should not have been heard) is meritorious, then equity and justice are done—even if justice is accomplished by procedural error.

American tradition had long echoed the belief that it is better for 99 guilty persons to be set free, than for 1 innocent person to be imprisoned. The tradition applies to this circumstance it is better 99 unmeritorious, untimely claims are reviewed, than one meritorious claim denied because of a technicality.

4. The Eleventh Circuit historical fact rule inverts the burden of persuasion at the preliminary stage of a § 2255 proceeding. And ignores the statutory presumption in favor of the § 2255 movant at the preevidentiary stage. Thereby, placing the Eleventh Circuit in conflict with its sibling circuits, this Court, and the controlling statute.

The Eleventh Circuit of the Court of Appeals created a rule of law that defies common human experience, habeas tradition, and traditional American concepts of fairness. The Eleventh Circuit found that the timeliness of a § 2255(f)(3) motion depends on the petitioner proving a historical fact. (Appx. "A" at 8)(citing **Beeman v. United States**, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017)). In the context of the Armed Career Criminal Act, the "historical fact" rule requires a § 2255 "petitioner to show it is more likely than not that he was sentenced solely under the residual clause...." (Appx. "A" at 8)(citing **Beeman**, 871 F.3d at 1221, 22). The Eleventh Circuit applies this rule to Mr. French stating that "a remand is appropriate, notwithstanding the government's claim that French cannot carry his burden under **Beeman**." (Appx. "A" at 8).

Although the Eleventh Circuit's remand to the district court is appropriate, the imposition of the **Beeman** holding is not.

The Eleventh Circuit's rule distorts the principles and presumptions governing the § 2255 motion. At the initial stages of a § 2255 motion, the movant's allegations are presumed true unless conclusively refuted by the record. **28 U.S.C. § 2255(b)**. See generally, **Conaway v. Polk**, 453 F.3d 567, 587 (4th Cir. 2006)("[i]n assessing whether a federal habeas corpus petition was properly dismissed without an evidentiary hearing or discovery, we must evaluate the petition under the standards governing motions to dismiss, "thus" we are obligated to accept a petitioner's well pleaded allegations as true....") Under these presumptions, a silent record cannot conclusively refute anything except lack of silence or the absurd, thus the presumption should favor the movant on this issue of timeliness.

The Eleventh Circuit inverts that statutorily assigned burden of persuasion and the attendant presumptive standards for its historical fact timeliness inquiry. The district court should look no further than the § 2255 movant's allegations, and if the record does not conclusively refute those allegations, then the movant is entitled to either proceed generally or an evidentiary hearing on the timeliness question.

Stated otherwise, at the pre-evidentiary stage of a § 2255 proceeding, a § 2255 movant's allegations meet the burden if the existing record is silent, since a silent record cannot conclusively refute a well-pleaded claim that a criminal judgment relied upon the residual clause. Essentially, § 2255 places the burden of persuasion on the government at the threshold stage.

Historically, "where...the evidence does not clearly explain what happened...the party with the burden" loses. **Romine v. Head**, 253 F.3d 1349, 1357 (11th Cir. 2001); see also, **Schaffer v. Weast**, 546 U.S. 49, 56 (2005)(explaining that the term "burden of persuasion" means that the party with the burden "loses if the evidence is closely balanced").

Therefore, although a § 2255 movant ultimately bears the burden of proof as to the threshold timeliness issue under 28 U.S.C. § 2255(f)(3), by statute, the government bears the burden of persuasion. 28 U.S.C. § 2255(b). This Court should grant the writ, vacate not only the Eleventh Circuit's order, but also its rule that shifts the burden of persuasion on timeliness when the record is inconclusive.

5. **Armed Career Criminal Act** factual criteria are constituent parts of a distinct offense, rather than sentencing factors for crimes involving an unauthorized person's possession of an unauthorized weapon. Consequently, the disqualification of an ACCA predicate equates to actual innocence and animates the miscarriage of justice doctrine, thereby generating an equitable exception to the statute of limitations. The Eleventh Circuit rule departs from this Court's miscarriage of justice decision.

The Armed Career Criminal Act creates separate offenses for persons who unlawfully possess a weapon based on their criminal history. Mr. French recognizes that the Eleventh Circuit adopts the opposite rule. As long ago as 1990, "the appeals court said, "[b]ecause 18 U.S.C. § 924(e)(1) does not create a separate offense, but is merely a sentence enhancement provision." **United States v. McGatha**, 891 F.2d 1520, 1527 (11th Cir. 1990). The Eleventh Circuit echoes the rule as recently as 2016 when it states that the § 2241 movant challenge his sentence rather than his conviction. See, e.g., **William v. Warden**, 713 F.3d 1332, 1350 (11th Cir. 2013).

The Eleventh Circuit rule, however, collides with a different line of authority from its own authority that suggests the opposite rule is appropriate. See, e.g., **United States v. Hubert**, 883 F.3d 1319 (11th Cir. 2018); **United States v. Gundy**, 842 F.3d 1156, 1163 (11th Cir. 2016)(if alternative facts carry different penalties, then the facts are elements of the distinct crimes.). These decisions suggest that the ACCA's factual criteria are substantively elements of distinct crimes rather than sentencing factors for unlawful-weapon-possession convictions.

The later position is consistent with a line of this Court's authority that undermine the **McGatha** rule to the point of abrogation. This Court concludes that any fact which changed the range or type of prescribed penalty constituted an element of a crime. See **Mathis v. United States**, 136 S. Ct. 2243, 2256 (2016) ("If statutory alternatives carry different punishment, then...they must be elements."). Relatedly, this Court recognizes that a single statute may comprise several crimes." **Nijhawan v. Holder**, 557 U.S. 29, 41 (2009); see **United States v. O'Brien**, 130 S. Ct. 2149 (2010) (describing § 924(c)'s various weapon types as elements). The ACCA does just that. If a felon carries a firearm he is subject to imprisonment for zero to ten years. If the government proves two other facts (three or more qualifying

convictions and that the offenses occurred on separate occasions) then the punishment changes to a minimum of fifteen years up to life imprisonment.

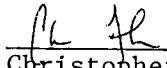
In sum, the ACCA criteria are elements of a crime distinct from that of an unlawful possession of a weapon by a felon, since the finding of those facts alters the prescribed punishment. that is, 18 U.S.C. §§ 922(g)(1), §924(a)(2) are substantively different from 18 U.S.C. §§ 922(g)(1), 924(e)(2).

And, from this view, the Eleventh Circuit's timeliness concerns are overridden by the miscarriage of justice doctrine, since Mr. French and any similarly situated person is factually innocent of the ACCA violation. Which in turn overrides the statute of limitations bar. See **McQuiggin v. Perkins**, 133 S. Ct. 1924 (2013).

This Court should grant the writ of certiorari and reform the Eleventh Circuit's historical fact analysis rule to exclude situations like Mr. French's where the uncorrected errors result in a miscarriage of justice.

CONCLUSION

Mr. French's case presents this Court with an identical question as that for which this Court has granted certiorari in two other cases. Plus, the case identifies a circuit split on whether the Armed Career Criminal Act requires application of the law at the time of review. See, e.g. **In re Pepper**, No. 17-1029 (3d Cir. Aug. 20, 2018); **United States v. Orr**, 685 Fed. Appx. 263 (4th Cir. 2017). This Court should grant the writ of certiorari and hold Mr. French's petition until **Stitt** and **Sims** have been resolved, or consolidated with those cases. And this Court should grant Mr. French's petition with regard to the second question and bring uniformity to the law on the standard for plain error review.


Christopher French