No. 18-7426

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

TERRY LAMELL EZELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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A. Review Is Warranted Because The Lower Courts Remain Hopelessly Divided.

There can be no serious dispute that the lower courts are divided and in disarray regarding how to address 28 U.S.C. § 2255 claims seeking relief under *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), in cases in which the record is silent or unclear regarding whether the sentencing court relied on the residual clause of the Armed Career Criminal Act (ACCA). Yet, the government merely concedes that "*some inconsistency* exists in circuits' approach to *Johnson*-premised collateral attacks like petitioner's." *Memorandum in Opposition* at 5 (emphasis added). The government grossly understates the degree of division in the lower courts. In painstaking detail, the petitioner identified the divergent approaches taken by the circuit courts. *Certiorari Petition* at 12-25. Petitioner also detailed intra-circuit divisions, as reflected by compelling dissenting and concurring opinions. *Certiorari Petition* at 17, 19-23, 25, 28, 32-35. Yet, the government asks this Court to turn a blind eye to the fact that the lower courts are fractured regarding an important issue which impacts thousands of cases. The government also ignores Justice Alito's admonition that "[o]ne 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*, 139 S. Ct. 408, 408 (2018) (Thomas, J., joined by Alito, J., Gorsuch, J., dissenting from denial of certiorari) (citing Sup. Ct. R. 10(a) and *Thompson v. Keohane*, 516 U.S. 99, 106 (1995)).

The government argues that review should be denied in order to ensure uniformity in applying the burden of proof and finality of judgment standards. *Memorandum in Opposition* at 15. The government's professed interest in uniformity is belied by the fact that the lower courts are far from uniform in their approaches to addressing *Johnson* claims in cases in which the

record is silent or does not clearly establish whether the sentencing court relied on the residual clause of the ACCA. Currently, *Johnson* claims are determined by a range of arbitrary factors, such as in which circuit did the petitioner's sentencing took place and whether the sentencing court identified the clause or clauses on which the ACCA enhancement rested.

The government concedes that unlike a number of the other circuits, the Fourth Circuit in *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017), the Ninth Circuit's decision in *United States v. Geozos*, 870 F.3d 890, 896-97 892-93 (9th Cir. 2017), and the Third Circuit in *United States v. Peppers*, 899 F.3d 211, 217-20, 221-24 (3d Cir. 2018), adopted the rule that the petitioner need only show that the petitioner's sentence "may have" been predicated on the application of the ACCA's constitutionally infirm residual clause. *Memorandum in Opposition* at 4-5; *Opposition in Couchman* at 18-19.[1] Nevertheless, the government seeks to downplay the divisions between the circuits regarding whether the "may have" rule or the "actually depended" rule applies. The government argues that the "may have" rule no longer holds sway because the Fourth Circuit and Ninth Circuit relied on the Eleventh Circuit's dicta in *In re Chance*, 831 F.3d 1335 (2016), and because the Eleventh Circuit in *Beeman v. United States*, 871 F.3d 1215, 1228 n.3 (11th Cir. 2017), subsequently rejected the dicta in *Chance*. *Opposition in Couchman* at 19. The government's analysis lacks merit because the Fourth Circuit and Ninth Circuit never qualified their adoption of the "may have" test as constituting mere dicta, or rested their analyses solely on the Eleventh Circuit's decision in *Chance*. Nor have these circuits opted to change their positions since the Eleventh Circuit rejected *Chance* in its September 22, 2017 decision in

[1] In support of its opposition to Ezell's certiorari petition, the government relies on its briefs in opposition to the petitions for writs of certiorari in *Couchman v. United States*, *cert. denied*, No. 17-8480 (Oct. 1, 2018), and *King v. United States*, *cert. denied*, No. 17-8280 (Oct. 1, 2018). *Memorandum in Opposition* at 3. These related opposition briefs are cited herein as "Opposition in Couchman," and "Opposition in King."

Beeman. Moreover, the Third Circuit adopted the "may have" test without reliance on *Chance*. *United States v. Peppers,* 899 F.3d 211, 217-20, 221-24 (3d Cir. 2018).

The government argues that the Supreme Court should deny review in the case at bar because this Court denied review in numerous other cases. *Memorandum in Opposition* at 3. But the large number of certiorari petitions in other similar cases illustrates the pressing need for Supreme Court review. The issue has been thoroughly considered by the circuits. Yet, the circuits remain deeply divided.

Further, the government ignores that as to *Johnson* claims involving a silent or unclear sentencing record, there remain myriad related unsettled questions. *See Ezell's Certiorari Petition* at 26-31, 37-39.

B. Supreme Court Case Law, Statutes, And Principles Of Equity Compel The Conclusion That Review And Relief Arising From *Johnson* Claims Should Not Be Automatically Barred On Finality And Burden Of Proof Grounds Where The Sentencing Record Does Not Establish On Which ACCA Clause The Sentencing Court Relied.

The government argues that in light of the presumption of finality, *Johnson* claims must fail without review on the merits unless petitioners establish by a preponderance of the evidence that the sentencing court actually relied on the residual clause. *Opposition in King* at 12-13. The government disputes that requiring proof of actual reliance would impose an unfair burden on defendants, lead to inequitable results, and the selective application of *Johnson*. *Opposition in King* at 15. The government maintains that rather than leading to arbitrary results, treating *Johnson* claimants the same as other § 2255 movants maintains uniformity. *Id.* These arguments lack merit because they ignore Supreme Court precedent, statutory language, and matters of equity.

1. Responsibility For The Failure To Establish A Record Regarding The Basis Of An ACCA Determination Rests With The Government, And Not The Petitioner, Because The Government Bears The Burden To Prove The Basis Of An ACCA Enhancement.

Lost in the analysis concerning how to address *Johnson* claims in silent or ambiguous record cases is that the government bears the burden to prove at sentencing the basis for an ACCA determination. *E.g., United States v. Lee*, 586 F.3d 859, 866 (11th Cir. 2009). *See also United States v. McMahon*, 91 F.3d 1394, 1397 (10th Cir. 1996). The Seventh Circuit's approach to sentencing determinations based on ambiguous records is instructive. In *Kirkland v. United States*, 687 F.3d 878, 887-95 (7th Cir. 2012), where the *Shepard*-approved documents[2] were ambiguous as to whether the offenses occurred on different occasions, the Seventh Circuit remanded for resentencing in a § 2255 action because the government bore the burden to prove by a preponderance of the evidence the existence of the prior convictions for violent felonies and that the prior convictions occurred on different occasions. The Seventh Circuit held that an ambiguous record regarding whether a defendant actually had the opportunity "to cease and desist or withdraw from his criminal activity" does not suffice to support the ACCA enhancement. *Id.* at 895. Similarly, because the government bears to burden of proving the grounds of an ACCA enhancement, there is no basis to penalize defendants should the government fail to seek clarification regarding the clause(s) on which the ACCA determination rested.

2. Defendants Facing ACCA Enhancements Have No Incentive To Sandbag The Courts By Failing To Object To Rulings Applying The ACCA Enhancement.

In seeking to apply an inequitable and arbitrary standard for *Johnson* claims, the government maintains that applying the "may have" test adopted by the Fourth Circuit, Ninth

[2] *See Shepard v. United States*, 544 U.S. 13 (2005).

Circuit and Third Circuit would create anomalous results by incentivizing defendants facing ACCA sentencing to sandbag the courts by declining to object to the ACCA enhancement or seek clarification regarding the basis of the ACCA ruling. *Opposition in King* at 18. The government's suggestion is baseless. Not surprisingly, the government fails to explain why defendants would adopt a strategy to forego objecting to an ACCA enhancement or seeking clarification regarding the basis of an ACCA determination.

The government's assertion lacks merit because prior to *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), defendants had no incentive to seek clarification of an ACCA determination. Indeed, the residual clause was broad and open-ended, and the Supreme Court in *Sykes v. United States*, 564 U.S. 1 (2011), and *James v. United States*, 550 U.S. 192 (2007), had rejected suggestions that the residual clause was constitutionally infirm. *See Ovalles v. United States*, 905 F.3d 1231, 1275 (11th Cir. 2018) (en banc) (Martin, J., dissenting). Notably, in Ezell's § 2255 action, the district court rejected the government's argument that Ezell's *Johnson* claim is procedurally barred merely because Ezell did not assert at sentencing or on direct review that the residual clause was unconstitutionally vague. Pet. App. 14a-16a.

Further establishing that Ezell never sought to sandbag the court is that defense counsel during sentencing presented arguments in support of his objection to the ACCA enhancement. In his sentencing memorandum, Ezell's counsel, addressing the ACCA's residual clause, argued that under *Begay v. United States*, 128 S. Ct. 1581, 1583 (2008), an offense does not constitute a "violent felony" unless the conduct involved "purposeful, violent and aggressive behavior." Pet. App. 86a-87a, 98a-99a, 103a-104a. Defense counsel repeated this argument during the sentencing hearing. Pet. App. 61a-63a. There is no reason to doubt that had *Johnson* been

available at the time of sentencing, Ezell's counsel would have relied on *Johnson* to challenge the government's request for an ACCA enhancement.

3. Petitioners Seeking Relief Pursuant To *Johnson* Should Not Be Penalized For Silent Or Ambiguous Records Regarding The Basis Of An ACCA Determination Because Sentencing Courts Were Not Obliged To Specify On Which ACCA Clause Or Clauses The ACCA Enhancement Rested.

The government's analysis falls short because it does not address the fact that district courts were not legally obliged to specify the clause or clauses on which the ACCA enhancement rested. *See United States v. Peppers*, 899 F.3d 211, 217-20, 223-24 (3d Cir. 2018). Because courts were not required to specify the basis of the ACCA enhancement, it would inequitable and arbitrary to penalize § 2255 claimants for a silent or ambiguous record. Indeed, prior to *Johnson*, district courts routinely did not specify the ACCA clause upon which the enhancement rested. Also, the residual clause's broad and amorphous nature obviated the need to identify the clause(s) supporting an ACCA enhancement.

Because silent or ambiguous sentencing records leave doubt as to the basis of an ACCA enhancement, there can be no compelling interest in preserving the finality of judgments. Indeed, there is no clear "judgment" to preserve if the basis of the ACCA enhancement has never been expressly determined by the sentencing court. Notably, circuit courts routinely remand cases to require district courts to clarify insufficient sentencing determinations. *E.g., United States v. Gregory*, 345 F.3d 225, 230-31 (3d Cir. 2003). *See also United States v. Almeida-Perez*, 549 F.3d 1162, 1176 (8th Cir. 2008) (remand for clarification where the court failed to make required findings in support of offense level enhancement for possessing a firearm in connection with another felony offense). In short, the interest in the finality of judgments is significantly diminished where the basis of the sentence is uncertain. Because ACCA enhancements result in significantly higher sentences, there is an even greater urgency to ensure

that persons are not serving lengthy sentences based on the ACCA's constitutionally infirm residual clause.

4. The Government Ignores That Habeas Relief Is An Equitable Remedy.

The government argues that collateral relief is an "extraordinary remedy." *Opposition in Couchman* at 12. Yet, the government loses sight of the fact that habeas relief and relief under § 2255 are remedies which are equitable in nature. *See Schlup v. Delo*, 513 U.S. 298, 319 (1995) (habeas corpus is an equitable remedy to be administered with flexibility). Because it cannot be seriously argued that *Johnson* claimants are at fault for a silent or ambiguous sentencing record, it serves no equitable purpose to bar review and relief. Specifically, it serves neither the interests of equity nor the underpinnings of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to penalize *Johnson* claimants for failing to (1) be clairvoyant in foreseeing that years down the road the Supreme Court in *Johnson* would overrule *James* and *Sykes*, (2) carry the government's burden of proving the basis for an ACCA enhancement by seeking clarification of the grounds for the ACCA determination, and (3) ask the court to specify the applicable ACCA clause(s) even though the residual clause is broad and amorphous and the courts had no legal obligation to identify the applicable clauses.

It is incongruous to conclude that while Ezell has shown "cause and prejudice" for failing to raise the residual clause vagueness claim at sentencing and on direct review, the petitioner should nevertheless be barred from review and relief in seeking § 2255 relief under *Johnson* simply because, like countless other cases, the government and the district court never took action to clarify the basis of the ACCA determination. Under these circumstances, there is no basis to conclude that the "may have" test adopted by the Third Circuit, Fourth Circuit and Ninth Circuit would create anomalous or arbitrary results which unfairly penalizes the government.

This conclusion rings especially true because the government sought an ACCA enhancement, yet failed to ask the court to clarify the basis of the sentencing determination.

5. The Government Conflates The Threshold Inquiry For Review Of Successive § 2255 Motions With Standards For Reviewing The Merits Of § 2255 Claims.

The government's narrow focus on the finality of judgments and the burden of proof is flawed because the government ignores that the issue of whether to grant review of a successive motion based on *Johnson* is a *threshold* procedural gatekeeping inquiry under § 2255(h), rather than a determination on the merits. *See United States v. Peppers*, 899 F.3d 211, 217-20, 222-23 (3d Cir. 2018) (AEDPA "was not meant to conflate jurisdictional inquiries with analyses of the merits of a defendant's claims"). This threshold inquiry is simply to determine whether the defendant raised a claim based on a new rule of constitutional law which the Supreme Court made retroactive to cases on collateral review. *See* 28 U.S.C. §§ 2255(h)(2), 2244(b)(2).

Further, applying the "may have" test, and bifurcating the threshold jurisdictional inquiry from the merits inquiry in *Johnson* cases, would not free petitioners from carrying their burden to establish the merits of their claims. Nor would it mean that every *Johnson* claimant filing a successive § 2255 motion would be entitled to review or relief on the merits.

6. Denying Review And Relief Would Require Turning A Blind Eye To Supreme Court And Statutory Authority.

The government's analysis is flawed because it ignores the statutory language relevant to the threshold jurisdictional inquiry for successive § 2255 motions. The government fails to recognize that the plain language of 28 U.S.C. § 2255(h)(2) does not require that claims *solely* rely on retroactive Supreme Court precedent, but rather merely "contain" a new rule of constitutional law, made retroactive to cases on collateral review. Similarly, 28 U.S.C. § 2244(b)(2)(A) does not require that the claim *solely* "relies on" a new rule of constitutional law,

made retroactive to cases on collateral review by the Supreme Court. Further, by its plain terms, § 2255(f)(3) merely requires that the movant "asserted" the violation of a newly recognized and retroactive right.

Most importantly, the government's analysis constitutes an effort to eviscerate *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). The Supreme Court in deciding *Welch* already weighed finality concerns in determining to apply *Johnson* retroactively to cases on collateral review. Had this Court desired to narrowly circumscribe the reach of *Johnson* and *Welch* as the government suggests, there is no reason to assume that this Court would not have so stated. Moreover, the government ignores that the Supreme Court in *Welch* found that the petitioner had shown the denial of a constitutional right even though he challenged an ACCA enhancement as invalid for both constitutional and statutory reasons. Yet, the government in the case at bar seeks to subvert this Court's retroactivity determination by effectively foreclosing review in all but a very small number of cases.

The government also seeks to sidestep the Supreme Court's decision in *Stromberg v. California*, 283 U.S. 359 (1931). The government attempts to distinguish *Stromberg* by noting that it involved a direct appeal. *Opposition in King* at 15-16. The mere fact that *Stromberg* arose from a direct appeal does not mean that this Court's analysis in *Stromberg* necessarily holds no weight in collateral actions. The Supreme Court made no such limitation in *Stromberg*, and later considered *Stromberg* in a habeas action. *See Hedgpeth v. Pulido*, 555 U.S. 57, 58-62 (2008) (*Stromberg* error subject to harmless error review in a habeas action). Likewise, the Ninth Circuit in *United States v. Geozos*, 870 F.3d 890, 895-96 (9th Cir. 2017), applied *Stromberg* in addressing a *Johnson* claim in a collateral proceeding.

The government also argues that *Stromberg* does not apply because the jury's reasons for returning a guilty verdict typically cannot be examined after the verdict, while the basis for a district court's determination that a defendant's prior conviction qualifies as a violent felony under the ACCA can be determined after the fact by reference to the judge's own recollection, the record in the case, the relevant legal background, and an examination of the statute of conviction. *Opposition in Couchman* at 17. The government's argument is based on unrealistic optimism. Indeed, if it were so simple to recreate the past, there would not be a severe division in the lower courts regarding how best to address silent record cases. Efforts to recreate the legal landscape at the time of sentencing are difficult and often futile or misguided. Also questionable is whether district courts can accurately recall on which ACCA clause or clauses they relied after the passage of a significant period of time and hundreds of sentencing hearings.

The government further attempts to distinguish *Stromberg* by arguing that even *Stromberg* errors are subject to harmless-error review, meaning that reversal is not warranted based on the theoretical possibility that the jury relied on an improper ground. *Opposition in Couchman* at 17. The government's harmless error argument lacks merit because it ignores this Court's decision in *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995), which held that an error is not harmless, and habeas relief must be granted, when a court finds a constitutional trial error, but is in "grave doubt" about whether that error had a "substantial and injurious effect or influence in determining the jury's verdict." Placing the risk of doubt on the respondent, this Court in *O'Neal* instructed that the error is not harmless "if, in the judge's mind, the matter is so evenly balanced that he or she feels in virtual equipoise as to the error's harmlessness." *Id.* at 435-36, 439, 444. Surely, if *O'Neal* requires that habeas relief be granted where the court is in

"equipoise" regarding harmless error, review should not be foreclosed for claimants seeking relief under *Johnson* in silent or ambiguous record cases.

C. <u>Ezell's Case Presents An Ideal Vehicle To Resolve The Conflict Between The Circuits</u>.

The government argues that review is unwarranted because the petitioner could not prevail under the approach of any circuit. *Memorandum in Opposition* at 6. The government notes that Ezell's claim failed before the Ninth Circuit even though the Ninth Circuit applies the rule that relief could be granted if the sentence "may have" been predicated on the residual clause. *Id.* Also, the government maintains that Ezell "briefly asserts (Pet. 16-17) that he would have stated a valid claim in the Third and Fourth Circuits, but he identifies no decision of either court to support that assertion." *Id.* The government's position is perplexing as the petitioner set forth in detail the Third Circuit's decision in *United States v. Peppers,* 899 F.3d 211, 217-20, 222-23 (3d Cir. 2018), and the Fourth Circuit's decision in *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). *See Ezell's Certiorari Petition* at 12-13, 15-16.

The government fails to explain how Ezell would not prevail under the approaches taken by the Third Circuit and Fourth Circuit in *Peppers* and *Winston*. The government ignores that the Third Circuit in *Peppers* merely requires a showing that it was possible the sentencing court relied on the residual clause, and that such a showing may be overcome only upon clear proof. *See Peppers*, 899 F.3d at 224 & n.4. The government also ignores that the Third Circuit declined to limit the analysis to the law at the time of sentencing, and allows consideration of post-sentencing cases such as *Descamps*, *Johnson I*, and *Mathis*[3] "because they are Supreme Court cases that ensure we correctly apply the ACCA's provisions." *Peppers*, 899 F.3d 211, 227-30.

[3] *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Johnson v. United States*, 559 U.S. 133 (2010); *Mathis v. United States*, 136 S. Ct. 2243 (2016).

Similarly, the Fourth Circuit in *Winston* concluded that it suffices if the movant "relied to a sufficient degree on *Johnson II* to permit" review, and that current Supreme Court law may be considered in addressing the *Johnson II* claim's merits. *See Winston*, 850 F.3d at 682-85.

The government ignores that unlike the Ninth Circuit, in conducing procedural review, the Fourth Circuit and Third Circuit do not require consideration of the legal landscape at the time of sentencing. *See Winston*, 850 F.3d at 682; *Peppers*, 899 F.3d at 222-24. Moreover, the government does not address the fact that under the Ninth Circuit panel's analysis, Ezell would have been entitled to collateral relief but for the panel's reliance on *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1088-89 (9th Cir. 2005), in attempting to recreate the legal landscape at the time of sentencing. *See* Pet. App. 5a. The government does not challenge the petitioner's assertion that the Ninth Circuit improperly relied on *Hermoso-Garcia* where the government never cited that case during Ezell's sentencing proceedings and the district court made no mention of *Hermoso-Garcia*.[4] Further, the government does not address petitioner's assertion that *Hermoso-Garcia* may not constitute "binding circuit precedent" at the time of sentencing because it concerns USSG § 2L1.2, rather than the ACCA.[5]

The government also ignores the extensive evidence in the record of Ezell's sentencing proceedings indicating that the district court relied on the constitutionally infirm residual clause. The residual clause was cited or mentioned in the presentence report, and the parties repeatedly and extensively relied on the residual clause in the sentencing memoranda. *See* PSR ¶42; Pet. App. 127a, 130a, 132a-136a; Pet. App. 98a-99a, 103a-104a. The parties also relied on the residual clause during the sentencing hearing. Pet. App. 44a-45a, 48a-50a, 62a-63a. Significantly, the government ignores that the district court strongly indicated its reliance on the

[4] *Ezell's Certiorari Petition* at 17, 29-30.

[5] *Ezell's Certiorari Petition* at 39.

residual clause when it stated that it was imposing the ACCA and career offender enhancements "for the reasons basically set out in the probation officer's presentence report, and the government's memorandum." Pet. App. 74a.

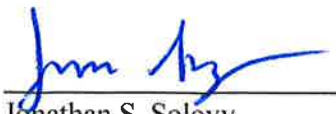
Relying on the concurrent sentence doctrine, the government maintains that the petitioner's ACCA enhancement had no practical effect on his sentence because the district court sentenced Ezell to a concurrent 262-month sentence as a career offender for the crack cocaine conviction. *Memorandum in Opposition* at 6-7. The government ignores that this Court in *Dean v. United States*, 137 S. Ct. 1170 (2017), established that courts are not bound to impose sentences by considering each count as independent sentencing packages. Similarly, in *United States v. Davis*, 854 F.3d 601 (9th Cir. 2017), the Ninth Circuit held that when a sentence on one count is vacated, the sentencing package becomes "unbundled" so that the district court may consider anew the proper sentence, even if the two counts of conviction originally resulted in concurrent sentences of the same length. Because the Supreme Court's holding in *Beckles v. United States*, 137 S. Ct. 886 (2017), rested on the advisory nature of the Guidelines, *Beckles* does not foreclose the district court's authority to resentence Ezell below his original 262-month Guidelines sentence. Moreover, in imposing a new sentence, courts may consider post-sentencing rehabilitation, which is especially important in Ezell's case because over nine years have transpired since his sentencing.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted. If this Court decides that one of the other pending cases is the ideal vehicle for resolving this issue instead of Mr. Ezell's case, Mr. Ezell requests that his case be held and remanded with

appropriate instructions if the decision in the other case is favorable to him.

Respectfully submitted,



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