No. 18-8125

IN THE
# Supreme Court of the United States

**DARRELL D. WALKER,**
**Petitioner,**
**v.**

**UNITED STATES,**
**Respondent.**

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

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

As the petition for certiorari explains, there is currently no valid legal basis for imprisoning petitioner under the Armed Career Criminal Act (ACCA). Indeed, the Government does not disagree that it is incarcerating Mr. Walker under a now-illegal sentence. Nor does the Government dispute it is imprisoning numerous other people without any legal basis under the ACCA—or that the same problem is unfolding under other statutory schemes as well.

The Government nevertheless opposes certiorari on the grounds that (1) 28 U.S.C. §§ 2244 and 2255 do not provide any avenue for prisoners in petitioner's position to secure their freedom; and (2) this case is an unsuitable vehicle for resolving the entrenched circuit split over how Sections 2244 and 2255 apply in this context—that is, whether and under what circumstances they authorize a successive claim invoking a new rule of constitutional law invalidating part of the statute under which the defendant was sentenced, where the sentencing record is silent as to whether the district court based the sentence on that now-invalid provision.[1] Neither of the Government's arguments withstands scrutiny.

1. The Government's merits argument is nothing more than a highly compressed summary of, and cross-reference to, its prior filings in *Couchman v.*

[1] After the petition for certiorari was filed, the Fifth Circuit deepened the split by adopting the position of the First, Sixth, Eighth, Tenth, and Eleventh Circuits, and expressly rejecting the holdings of the Third, Fourth, and Ninth Circuits. *See United States v. Clay*, 921 F.3d 550, 554–56 (5th Cir. 2019).

*United States*, No. 17-8480, and *King v. United States*, No. 17-8280. *See* BIO 11–12. Mr. Walker has already explained why those filings miss the mark. *See* Pet. 13–21. It therefore suffices here to reiterate that the Government continues to improperly conflate the gateway requirement for bringing a claim in a second or successive motion under Section 2255 with the standards governing whether such a claim is meritorious. The Government says a movant bringing a successive claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015), cannot obtain relief unless he shows "it is more likely than not that the sentencing court relied on the now-invalid residual clause." BIO 11. That argument ignores the plain text of the operative statutes. A defendant bringing a successive motion under Section 2255 may obtain relief if (a) his "claim"—not his sentence—"relies on" *Johnson*, 28 U.S.C. § 2244(b)(4); (b) it is possible the sentencing court relied on the residual clause; and (c) his sentence cannot now be sustained on any other statutory basis. *See* Pet. 14–18; Amicus Br. of FAMM & NACDL 7–10. Mr. Walker's motion satisfies each of these requirements.

Any other analysis would produce an intolerable anomaly. All agree that defendants whose sentences clearly rest on the residual clause may now obtain relief. *See, e.g.*, *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017) (noting that "the Government concedes" this). On the other hand, courts have held that defendants whose sentences clearly rested on *other* clauses of ACCA may obtain post-conviction relief whenever subsequent case law removes the basis for the enhancement. *See Brooks v. Wilson*, 733 F. App'x 137, 138 (4th Cir. 2018); *Hill v. Masters*, 836 F.3d 591,

597–99 (6th Cir. 2016); *Brown v. Rios*, 696 F.3d 638, 642–43 (7th Cir. 2012). Those two things being true, it cannot be that defendants whose sentences were necessarily enhanced in one of those two ways—but whose sentencing records do not reveal which invalid path the district court followed—cannot also obtain relief.

2. The Government's vehicle arguments are not convincing either. The Government first asserts that petitioner provides "no sound reason" for granting certiorari before the remand proceedings ordered by the Eighth Circuit play their way out. BIO 11. This assertion ignores Mr. Walker's contention that the Eighth Circuit's decision is keeping him imprisoned under an illegal sentence, whereas if this Court were to agree with him that the Third, Fourth, and Ninth Circuits have the better reading of Sections 2244 and 2255, Mr. Walker would be entitled to release—to his freedom—immediately. *See* Pet. 23–24. It is hard to imagine a more compelling reason for prompt review.[2]

That leaves the Government's contention that petitioner would not necessarily prevail under the approach that the Third, Fourth, and Ninth Circuits. This is so, the Government maintains, because "the legal landscape at the time of [petitioner's] sentencing" indicated his prior convictions were qualifying offenses under ACCA's enumerated-offenses clause. BIO 14. This contention, too, is misguided. Under the approach of the Third, Fourth, and Ninth Circuits, a defendant's ability to bring a

[2] If this Court nevertheless prefers a case that is completely final, it should hold this petition and grant certiorari instead in *Levert v. United States*, No. 18-1276, which is final but in all relevant respects identical to this case.

*Johnson* claim in a successive Section 2255 motion depends solely on his sentencing record—at least where, as here, no binding precedent at the time of sentencing established that the prior convictions were qualifying offenses based on a clause other than the residual clause. And where, as here, the sentencing court "did not specify" which clause of ACCA it believed was satisfied, the defendant may bring such a claim. *United States v. Peppers*, 899 F.3d 211, 224 (3d Cir. 2018); *see also Geozos*, 870 F.3d at 893, 895; *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017).[3] Furthermore, once through the successive motion gateway, a defendant's ability to obtain relief in those circuits turns on "the current state of the law," *not* the legal landscape at the time of sentencing. *Peppers*, 899 F.3d at 227–31; *see also Geozos*, 870 F.3d at 897–98 (law "as it *currently* stands controls"); *Winston*, 850 F.3d at 684 ("current legal landscape" controls).

Applying these principles, district courts in the Third, Fourth, and Ninth Circuits have granted relief—and immediate release—to numerous defendants in the same position as Mr. Walker. *See* Pet. 10 (citing several cases). Judges on the U.S. District Court of the District of Columbia have done the same. *See United States v.*

[3] The Government does not even assert on remand that binding precedent rendered Mr. Walker's prior convictions qualifying offenses at the time of sentencing under an ACCA clause other than the residual clause. Rather, it contends only, in light of related and conflicting case law, that precedent at the time sentencing "strongly indicates" the district court could have relied on the enumerated-offenses clause. *See* U.S. Mem. of Law Addressing the "Prevailing Legal Environment" Issue at 2, Doc. 29 (Feb. 19, 2019).

*Brown*, 2017 WL 1383640, at *3 (D.D.C. Apr. 12, 2017); *United States v. Booker*, 2017 WL 829094, at *4 (D.D.C. Mar. 2, 2017). This Court should follow that lead here.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,


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May 28, 2019