`

NO. 18-8309

IN THE SUPREME COURT OF THE UNITED STATES

Darwin Lee Zoch - Petitioner,

v.

United States of America - 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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When the sentencing record is silent, must a petitioner wishing to pursue successive 28 U.S.C. § 2255 relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), affirmatively prove that the district court more likely than not relied on the unconstitutional residual clause in imposing sentence, or is it sufficient for purposes of the gatekeeping requirement that a petitioner proves the district court may have relied on the unconstitutional residual clause? In its Brief in Opposition, the government acknowledges that "some inconsistency exists" amongst Circuit Courts of Appeal on this question. BIO p. 8. In fact, however, there is an entrenched circuit split, with three Courts of Appeals (the Third, Fourth, and Ninth) holding that a petitioner need only demonstrate that the sentencing judge "may have" relied on the residual clause, and six other Courts of Appeals (the First, Fifth, Sixth, Eighth, Tenth, and Eleventh) holding that a petitioner must demonstrate the sentencing judge "more likely than not" relied on the residual clause.[1] The issue is important and recurring, and should be resolved to avoid continued disparate impact on countless federal inmates nationwide.

[1] *Compare United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); *United States v. Peppers*, 899 F.3d 221 (3rd Cir. 2018); *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) *with Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018); *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019); *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018); *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018); *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017).

The government contends that there is no need to resolve this important question because: (1) the majority position of the Courts of Appeals – that 28 U.S.C. §§ 2244 and 2255 do not provide an avenue for relief unless a petitioner demonstrates that his sentence "in fact reflects *Johnson* error" (BIO p. 7) – is correct; and (2) Mr. Zoch's case is in unsuitable vehicle for review in any event. These arguments do not withstand scrutiny. Indeed, absent intervention, many federal prisoners will be unjustly forced to continue serving illegal sentences merely because of the happenstance of the geographical location where they were convicted and sentenced.

1. The government's merits argument largely states that the majority analysis is correct, with a cross-reference to its prior filings in *Couchman v. United States*, No. 17-8480, and *King v. United States*, No. 17-8280. *See* BIO 7–9. The majority position, however, improperly conflates the standard for assessing whether a successive § 2255 petition may be filed *at all* with the standard for analyzing the merits of the claim itself. According to the government, a § 2255 petitioner cannot bring a successive claim under *Johnson* unless he shows "it is more likely than not that the sentencing court relied on the now-invalid residual clause." BIO 7. That argument, however, is contrary to the plain text of the operative statutes, 28 U.S.C. §§ 2244 and 2255. Those provisions establish that a defendant may bring a successive § 2255 motion if: (1) his "claim" – not his sentence —"relies on" *Johnson*, 28 U.S.C. 2244(b)(4); (2) the sentencing court may have relied on the residual clause

in imposing sentence; and (c) the sentence cannot now be sustained on any other statutory basis. Mr. Zoch's motion satisfies each of these requirements.

The majority position requiring affirmative proof that the district court, in fact, relied on the unconstitutional residual clause in imposing sentence is wrong. As mentioned, it is contrary to the text governing the gateway § 2255 requirement, and additionally faults successive § 2255 petitioners for the sentencing judge's failure to make a clear record. The irony, of course, is that, before *Johnson*, there was virtually no reason for a sentencing judge to make specific findings as to which clause of the ACCA's "violent felony" definition it was relying on, and defendants had no incentive to request clarification given the exceedingly broad scope of the now unconstitutional residual clause. *See* Pet. pp. 9–11.

Adopting the majority position advocated by the government would lead to a bizarre and unjust result. A defendant whose ACCA sentence *could have* relied on a clause other than the residual clause would not be allowed to pursue a successive § 2255 petition where the sentencing judge made no record findings at all, whereas a similarly situated defendant would be allowed to pursue a § 2255 if the judge specified reliance on the residual clause. At the end of the day, the second defendant's § 2255 petition may ultimately be denied because another clause could sustain the ACCA finding, but this does not excuse the fact that the first defendant was denied at the outset from even asserting his claim. The focus must be on

whether the *claim* may properly be asserted under § 2255, not on whether the claim itself will ultimately be successful.

2. The government is also incorrect in its assertion that Mr. Zoch's case is an improper vehicle to consider the issue. First, it points out that the district court found it "apparent" from the sentencing record that the sentencing judge relied on the enumerated offense clause to categorize the burglary offenses as violent felonies. The district court's finding, however, merely highlights the arbitrariness of the majority position. Indeed, it is unclear how the district court could have so concluded in this case. The PSR writer actually provided an in-depth explanation of why the *residual* clause supports a finding that the Iowa burglaries were qualifying ACCA predicates. *See* Pet. p. 11. The PSR writer merely alluded, however, to the enumerated offense clause by citing *Taylor v. United States*, 495 U.S. 575 (1990), providing no comparative analysis of the elements of Iowa burglary and those of generic burglary. *See id.* The PSR writer's citation to *Taylor* is simply a suggestion made in preparation for sentencing; it does not demonstrate that the sentencing judge actually relied on – or even considered – the enumerated offense clause in finding that Mr. Zoch was subject to the ACCA. In fact, the record is completely silent on that issue, as neither the parties nor the sentencing judge made any comment at all regarding *how* Iowa burglary qualifies an ACCA predicate offense.

The government agrees that under *Mathis v. United States*, 136 S. Ct. 2243 (2016), Mr. Zoch's prior Iowa burglary convictions would not qualify as ACCA

predicates if he were being sentenced today. *See* BIO p. 10. It maintains, however, that "developments in statutory-interpretation case law years after petitioner's sentencing do not show that petitioner 'may have been' sentenced under the residual clause at the time of his original sentencing." *Id.* In making this argument, the government ignores the well-established principle of statutory construction articulated by the Supreme Court in *Rivers v. Roadway Express, Inc.*, that "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." 511 U.S. 298, 312–13, n.12 (1994) (emphasis added). Put simply, although decided after Mr. Zoch was sentenced, *Mathis* demonstrates that it was *always* illegal for Iowa burglary offenses to be considered "generic burglary" for purposes of the ACCA. *See* Pet. pp. 13–17. Thus, it is clear that the sentencing judge could not have legally relied on the enumerated offense clause in imposing sentence under the ACCA. Mr. Zoch's case is thus a suitable vehicle for review.[2]

CONCLUSION

For the foregoing reasons, Mr. Zoch respectfully requests that the Petition for Writ of Certiorari be granted.

[2] If this Court nevertheless finds Mr. Zoch's case unsuitable, it should hold this petition and grant certiorari instead in *Levert v. United States*, No. 18-1276, wherein there is no assertion that the sentencing court could have relied on any clause other than the residual clause.

RESPECTFULLY SUBMITTED,

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