NO. 18-9277

In The
Supreme Court of the United States

MELVIN MORMAN,
Petitioner,
v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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As Mr. Morman pointed out in his petition for a writ of certiorari, and as the government now agrees in its brief in opposition, the decisions of the federal Courts of Appeals are in conflict with one another concerning the question presented: that is, when the record is silent as to which enhancement clause led to application of the ACCA enhancement, what showing is a 28 U.S.C. § 2255 movant required to make to prove he is entitled to relief on the merits of his *Johnson*[1] claim? *See* BIO 10-12 (describing the various circuits' approaches as "inconsisten[t]"); Pet. 9-14. The government does not dispute that this question is of exceptional importance, and arises frequently in the lower courts. *See* Pet. 14-15. The government likewise does not contest that: (1) the sentencing court relied upon four prior convictions—two prior convictions for Alabama burglary, and two prior convictions for Georgia burglary (or one burglary and one aggravated assault)—in sentencing Mr. Morman as an armed career criminal[2]; and (2) two of these convictions (for Alabama burglary) no longer qualify as "violent felonies" under this Court's current precedent. *See* Pet. 5-7; BIO 13.

Nevertheless, the government contends that Mr. Morman and countless others should continue serving their illegal sentences, because the issue "does not warrant

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[1] *Johnson v. United States*, 135 S Ct. 2551 (2015).

[2] Specifically, the district court adopted the factual findings and guideline calculations contained in the presentence investigation report—including its determination that the ACCA enhancement applied based on Mr. Morman's prior felony convictions for "four burglaries and aggravated assault."

this Court's review." BIO 8. According to the government, the question presented is undeserving of further consideration, because: (1) the standard applied by the Eleventh Circuit in the proceedings below is more "correct" than the standards adopted by the Third, Fourth, and Ninth Circuits; and (2) this case presents two alleged vehicle problems. BIO 9-14. These contentions are without merit.

I. The decisions of the federal Courts of Appeals are in conflict with one another concerning the question presented, and regardless of which Circuit proves correct, this Court's review is necessary to resolve the circuit split.

The government acknowledges that the question presented in this case has resulted in an active circuit split, with the First, Eighth, Tenth, and Eleventh Circuits firmly entrenched in one camp, and the Third, Fourth, and Ninth Circuits hunkered down in the other. BIO 10-12 (explaining that "inconsistency exists in circuits' approach to *Johnson*-premised collateral attacks like petitioner's"). Under the majority approach, a § 2255 movant bears the burden of showing by a preponderance of the evidence that he was sentenced solely upon the residual clause, and he may only meet this burden by establishing what occurred as a matter of historical fact at his sentencing hearing. *See Dimott v. United States,* 881 F.3d 232, 243 (1st Cir. 2018); *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Walker v. United States,* 900 F.3d 1012 (8th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221-25 (11th Cir. 2017). In these circuits, a silent record is ordinarily fatal to a *Johnson* claim, and petitioners like Mr. Morman do not obtain relief.

However, a minority of Circuits have adopted an irreconcilably different standard. Specifically, in the Third, Fourth, and Ninth Circuits, a *Johnson* claimant faced with a silent record may nevertheless prevail on his § 2255 motion if he "may have" been sentenced based on the residual clause. *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017); *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). Notably, this approach allows the district court to consider modern, existing precedent—such as *Descamps v. United States,* 570 U.S. 254 (2013)—when ruling on the merits of a *Johnson* claim. *See id.* In these circuits, a federal prisoner similarly situated to Mr. Morman would obtain relief.

Accordingly, the government's first contention—that "[f]urther review of inconsistency in the circuits' approaches remains unwarranted" because the decision below is correct—is nothing more than a thinly disguised merits argument which is irrelevant and premature at this juncture. BIO 12. Regardless of whether the standard adopted by the Eleventh Circuit is right or wrong, it is hopelessly irreconcilable with the decisions of the Third, Fourth, and Ninth Circuits. And at this point, only this Court can resolve what has now become an intractable circuit split.

II. This case presents an ideal vehicle to resolve the conflict.

The government offers two reasons it believes Mr. Morman's case does not present a suitable vehicle for this Court's review. As discussed below, these arguments are equally unavailing.

A. Mr. Morman is entitled to relief on the merits of his *Johnson* claim in the Third, Fourth, and Ninth Circuits.

First, the government asserts that Mr. Morman "could not prevail under any circuit's approach." BIO 12. The government acknowledges that Alabama third degree burglary is now categorically disqualified as an ACCA predicate offense, but asserts that these "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.*

The government's argument does not reflect fair consideration of Third, Fourth, and Ninth Circuit precedent.

As Mr. Morman pointed out in his certiorari petition—and as the Eleventh Circuit specifically noted—the record is silent as to which enhancement clause the sentencing court relied upon. *Morman v. United States*, 2018 WL 9490361 (11th Cir. 2018) (unpublished). At the time of Mr. Morman's sentencing hearing, there was binding, Eleventh Circuit caselaw holding that a Florida conviction for burglary of the curtilage of a structure qualified as a violent felony under the residual clause, because it "otherwise involve[d] conduct presenting a serious potential risk of physical injury to another." *United States v. Matthews*, 466 F.3d 1271, 1276 (11th Cir. 2006). Likewise, in 2005, the Eleventh Circuit determined that attempted burglary qualified as a violent felony under the ACCA's residual clause. *See United States v. James*, 430 F.3d 1150, 1157 (11th Cir. 2005) ("an attempt to commit burglary . . . presents the potential risk of physical injury to another sufficient to

satisfy the ACCA's definition of 'violent felony'"). Although *Matthews* and *James* involved Florida law, there is no aspect of Alabama's burglary statute that would have taken it outside the holding of Matthews at the time of sentencing. *See United States v. Boggan*, 550 Fed. Appx 731, 737 (11th Cir. 2013) (unpublished) (finding it unnecessary to address whether a conviction for violation of Alabama's third degree burglary statute qualified as a violent felony under the enumerated offenses clause, because *Matthews* applied and it qualified under the residual clause); *see also Morman*, 2018 WL 9490361, *2 (acknowledging that Alabama's third degree burglary statute is "similarly worded to the Florida burglary statute" at issue in *Matthews*).

Or, put in slightly different terms, it is clear from Eleventh Circuit precedent that Mr. Morman "may have" been sentenced based upon the residual clause. *See Winston*, 850 F.3d at 682.[3] Therefore, in the Third, Fourth, and Ninth Circuits, the district and appellate courts would have been at liberty to consider this Court's

[3] In reaching a contrary conclusion, the government argues that "the Alabama burglary statute was viewed as 'unambiguously' satisfying the ACCA's enumerated offenses clause" at the time of sentencing. BIO 12. The only authority the government identifies in support of this conclusion is the Eleventh Circuit's *unpublished* panel opinion in *United States v. Moody*, 216 F. App'x 952, 953 (11th Cir. 2007) (unpublished). Unpublished opinions are not entitled to any precedential weight in the Eleventh Circuit. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent"). But regardless, given that it was crystal clear, per *Matthews*, that Alabama burglary qualified as a "violent felony" under the residual clause—and somewhat more complicated, whether, per *Taylor v. United States*, 495 U.S. 575, 598-99 (1990), the offenses would have also qualified as a generic burglary under the enumerated offense clause—it was certainly possible the sentencing court "may have" relied on the indisputably broader of the two enhancement provisions.

intervening precedent—such as *Descamps*—in ruling on the merits of Mr. Morman's *Johnson* claim. And, as the district court specifically determined in this case,[4] applying this Court's precedent in *Descamps* mandates the conclusion that Alabama's third-degree burglary statute is categorically eliminated as an ACCA violent felony, because it is both non-generic and indivisible. *See Descamps*, 570 U.S. 254; *Howard*, 742 F.3d 1334. Therefore, since the residual clause is unconstitutionally vague, two of the four predicate felonies relied upon by the district court to support application of the ACCA enhancement are eliminated as qualifying "violent felonies," and Mr. Morman's ACCA-enhanced, 188-month total sentence exceeds the ten-year statutory maximum penalty in § 924(a).

B. The record is clear that the sentencing court did not rely upon Mr. Morman's prior convictions for Alabama attempted assault when it applied the ACCA enhancement.

The government further contends that Mr. Morman's case is not a suitable vehicle for this Court's review, because "petitioner's prior conviction for Alabama attempted assault, PSR ¶ 42, satisfies the ACCA's elements clause under circuit precedent that he does not challenge here." BIO 13-14 (citing *In re Welch*, 884 F.3d 1319, 1325 (11th Cir. 2018)).

In this case, the presentence investigation report ("PSI") determined that Mr. Morman was subject to enhanced penalties under the ACCA and U.S.S.G. § 4B1.4

[4] *Morman v. United States*, 2018 WL 3552337, *7 n.6 (M.D. Ala. 2018) (unpublished) ("The court recognizes that, if Morman were sentenced today, his Alabama third-degree burglary convictions would not count as ACCA predicate offenses under the enumerated-offenses clause.").

based on his prior felony convictions for: (1) Alabama burglary, in 1990, in Case No. CC-90-135; (2) Alabama burglary third, in 1990, in Case No. CC-90-133; (3) the Georgia burglary that occurred on November 30, 1993 in Case No. 94-R-40; and (4) either the Georgia burglary or the Georgia aggravated assault that occurred on the same occasion on December 6, 1993, in Case No. 94-R-40. (*See* PSI ¶¶ 26, 39, 41, 43) (applying the ACCA enhancement based on "Four Burglaries and Aggravated Assault"). The sentencing court later adopted the factual findings and guideline calculations contained in the PSI, without further discussion of the ACCA enhancement. As a result, it is a matter of historical fact that the district court relied on these four felonies in sentencing Mr. Morman as an armed career criminal.

As noted previously, *supra,* Mr. Morman's two prior convictions for Alabama burglary: (1) may have qualified as "violent felonies" under the residual clause at the time of sentencing; and (2) no longer qualify as "violent felonies" under the enumerated offenses clause. Absent these convictions, Mr. Morman did not have at least three other felonies that could have qualified as valid ACCA predicates without regard to the residual clause.

It is clear from the record prior to and during sentencing that Mr. Morman's two prior convictions for Alabama attempted assault played no role in the application of the ACCA enhancement. As a result, these convictions are wholly irrelevant to whether Mr. Morman has established whether his sentence "may have" been based on the residual clause. *See Winston*, 850 F.3d at 682; *see also Beeman*, 871 F.3d at 1224 n.4 (noting that a § 2255 movant may prove his claim by comments and findings

by the sentencing judge, or circumstantial evidence in the PSI).

Thus, as the government acknowledges, the district court did not reach the issue of whether Mr. Morman's prior convictions for Alabama attempted assault potentially could have qualified as "violent felonies" under the elements clause. BIO 13. There is no reason for this Court to do so now, and this idiosyncratic aspect of Mr. Morman's criminal history does not present any barrier to this Court's review.

Therefore, both of the government's vehicle arguments are unavailing or unsupported by the record.

CONCLUSION

In light of the foregoing, and for the reasons set forth more fully in Mr. Morman's petition for a writ of certiorari, this Court should grant the petition and resolve the intractable circuit split.

Respectfully submitted,

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