NO. 18-9343

In The
Supreme Court of the United States

JOE CARROLL ZIGLAR,
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. Ziglar 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 satisfy the requirements of § 2255(h)(2) and prove he is entitled to relief on the merits of his *Johnson*[1] claim? *See* BIO 9-10 (describing the various circuits' approaches as "inconsisten[t]"); Pet. 14-20. The government does not dispute that this question is of exceptional importance, and arises frequently in the lower courts. *See* Pet. 20-21. The government likewise does not contest that *none* of Mr. Ziglar's prior convictions qualify as "violent felonies" under this Court's current precedent. *See* Pet. 24; BIO 11.

Nevertheless, the government contends that Mr. Ziglar and countless others should continue serving their illegal sentences, because the issue "does not warrant this Court's review." BIO 7. 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 8-13. These contentions are without merit.

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

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, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits firmly entrenched in one camp, and the Third, Fourth, and Ninth Circuits hunkered down in the other. BIO 9-10 (explaining that "inconsistency exists in circuits' approach to *Johnson*-premised collateral attacks like petitioners"). 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. Ziglar do not obtain relief.

However, a minority of Circuits have adopted an irreconcilably different standard, both with respect the gatekeeping requirements in § 2255(h)(2), and the relevance of modern existing precedent. Specifically, in the Third, Fourth, and Ninth Circuits, a *Johnson* claimant faced with a silent record satisfies the

requirements of § 2255(h)(2) 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). Then, because the prisoner has successfully passed through the gatekeeping mechanism in § 2255(h)(2), the court may 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 identically situated to Mr. Ziglar 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. 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. Ziglar's case does not present a suitable vehicle for this Court's review. As discussed below, these arguments are equally unavailing.

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

First, the government asserts that Mr. Ziglar "could not prevail under any circuit's approach." BIO 10. According to the government, the undisputed facts contained in Mr. Ziglar's presentence report "show that his burglary convictions stemmed from his breaking into three churches and a residence," and this circumstance—standing alone—compels the conclusion that: (1) Mr. Ziglar was convicted of generic burglary within the meaning of the enumerated offenses clause under Eleventh Circuit precedent; and (2) the residual clause was "plainly unnecessary to support petitioner's sentence." BIO 10-11. The government contends that, in light of these conclusions—neither of which follow from the stated premise—Mr. Ziglar "would not be entitled to relief even under the minority approach to the burden of proof to establish that a successive 2255 motion is premised on *Johnson* error." BIO 11. 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. Ziglar 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, and it was "possible the district court may have skipped

this analysis [pertaining to the enumerated offenses clause] and deemed Ziglar's convictions to qualify as ACCA predicates under the catchall residual clause." *Ziglar v. United States*, 757 F. App'x 886, 890 (11th Cir. 2018) (unpublished) (citing *United States v. Matthews*, 466 F.3d 1271, 1275 (11th Cir. 2006).[2] Or, put in slightly different terms, Mr. Ziglar "may have" been sentenced based upon the residual clause. *See Winston*, 850 F.3d at 682. Therefore, in the Third, Fourth, and Ninth Circuits, Mr. Ziglar's *Johnson* claim would have passed successfully through the gatekeeping mechanism in § 2255(h)(2), and the court could have been at liberty to

[2] At the time of Mr. Ziglar's sentencing hearing in December 2006, 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). As a result, the law is clear that Mr. Ziglar's four prior convictions for Alabama burglary qualified as "violent felonies" under the residual clause at the time of the sentencing hearing. Therefore, 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*, 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.

consider this Court's intervening precedent—such as *Descamps*—in ruling on the merits of Mr. Ziglar's *Johnson* claim. And, as both the district court and the appellate court specifically determined in this case, 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, Mr. Ziglar does not have the requisite three predicate felonies necessary to trigger the ACCA enhancement, and his 180-month sentence exceeds the ten-year statutory maximum penalty in § 924(a).

B. Mr. Ziglar's § 2255 motion is not moot.

The government further contends that Mr. Ziglar's case is not a suitable vehicle for this Court's review, because Mr. Ziglar is scheduled to be released from the Bureau of Prisons—and begin serving his term of supervised release—on November 4, 2019. BIO 11-13. Perplexingly, the government claims that this circumstance will render the case moot. *Id.*

In 2006, the district court sentenced Mr. Ziglar to 180 months' imprisonment, to be followed by *five years' supervised release*. Without the ACCA enhancement, possession of a firearm by a convicted felon carries a statutory maximum sentence of ten years' imprisonment and *three years' supervised release*. See 18 U.S.C. §§ 924(a), 3583(b)(2), 3559(a)(3). Thus, as the government fails to acknowledge, it is not only Mr. Ziglar's custodial sentence that exceeds the statutory maximum penalty if he is

not an armed career criminal; his term of supervised release does as well.

Morever, as the government itself has argued in a case presenting similar circumstances:

> Petitioner's release does not moot his petition for a writ of certiorari because petitioner met Section 2255(a)'s "custody" requirement "at the time his petition [was] filed." *Maleng v. Cook*, 490 U.S. 488, 490-491 (1989) (per curiam). Additionally, a defendant remains "in custody" if, like petitioner, he is subject to supervised release. *See Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994) (per curiam). And petitioner's five-year term of supervised release exceeds the three-year maximum that would apply if he were not subject to the ACCA. See 18 U.S.C. 3559(a) and 3583(b).

Levert v. United States, No. 18-1276, BIO n.1. Regardless, "a habeas appeal does not become moot merely because a prisoner is released from physical confinement to serve a term of supervised release, because supervised release is part of the sentence and carries liberty restrictions with it." *See United States v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997) (summarizing the holding of *Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir. 1995); *see also Jones v. Cunningham*, 371 U.S. 236, 240-43 (1963); *United States v. Essig*, 10 F.3d 968, 970 n. 3 (3d Cir.1993); *Kusay v. United States*, 62 F.3d 192, 193 (7th Cir.1995). Therefore, both of the government's vehicle arguments are unavailing and unsupported by the record.

CONCLUSION

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

Respectfully submitted,

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