No. 19-6037

In the

Supreme Court of the United States

JOHN ANZURES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Reply Brief in Support of Petition for Writ of Certiorari

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Introduction

In his petition for a writ of certiorari, Anzures sought review of the Tenth Circuit Court of Appeals' denial of his request to apply for relief from his 15 year prison sentence under the Armed Career Criminal Act (ACCA) pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). Anzures pointed out that to determine whether a person was procedurally and substantively eligible for relief, the circuit courts had taken different approaches, with some focusing on the factual record, some focusing on the law at the time of sentencing, some focusing on the law as it currently stands, and most picking and choosing different combinations of these factors depending on the context. Because this state of the law leads to vastly inconsistent results and vexes judges, lawyers, and prisoners alike, he argued that a grant of certiorari is warranted.

The government's Brief in Opposition concedes that "some inconsistency exists" in the circuit courts' approaches to determining procedural and substantive eligibility for *Johnson* relief. Br. in Opp. at 10. Still, it discourages the Court from granting certiorari, claiming that Anzures "could not prevail under any circuit's approach" and that this Court has already denied certiorari in similar cases. Br. in Opp. at 12.

But Anzures's case illustrates why *Johnson* relief has become an absurd game of geographic and judicial chance, requiring courts to reconstruct the

state of the law at a moment frozen in time or tediously decode a judge's passing comments from decades ago, depending on the circuit and the stage of the analysis. This national inconsistency made all the difference in Anzures's case, as he would have been procedurally eligible for relief in the Third, Fourth, and Sixth Circuits (but not in the First, Fifth, Ninth, and Eleventh Circuits) and substantively eligible for relief in the First, Fourth, Sixth, Ninth, and Eleventh Circuits (but not in the Fifth and the Tenth Circuits). While the Court has denied certiorari in some cases presenting a similar issue, many of those denials involved cases that – unlike Anzures's – would not have benefitted from resolving these issues. To provide judges with necessary guidance on a widespread issue that, in Anzures's case, means he will remain in prison, doing more time than the law allows, the Court should grant certiorari.

Reply Argument

I. The Circuit split is too vast for this Court to ignore.

In his petition, Anzures explained that the courts of appeals employ exceedingly different methodologies to determine whether a petitioner is both procedurally and substantively eligible for *Johnson* relief. Pet. 7-11. For purposes of procedural eligibility (timeliness under 28 U.S.C. § 2255(f)(3) or second-or-successive petitions under 28 U.S.C. § 2255(h)(2)), the Fourth Circuit looks to the factual record, while the First, Fifth, and Eleventh

Circuits look to the law interpreting the crime's elements as it stood at the time of the petitioner's sentencing, and the Ninth Circuit looks to both.[1] But in deciding the merits of the claim, the Fourth and Ninth Circuits look to the law interpreting the crime's elements as it currently stands, the Eleventh Circuit looks to the factual record, and the Tenth Circuit looks to the factual record and the law at the time of sentencing.[2]

There are even splits within these splits. The First and Eleventh Circuits hold that where the record is silent, a petitioner cannot meet his burden to show that the claim relied on the residual clause.[3] But the Fourth, Ninth, and Tenth Circuits hold that in adjudicating the merits, a silent record will satisfy the threshold procedural requirements.[4] Additionally, half of these opinions included a dissent or concurrence that would have looked to a different source to determine procedural or substantive eligibility.[5]

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[1] *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *Dimott v. United States*, 881 F.3d 232, 241 (1st Cir. 2018); *United States v. Taylor*, 873 F.3d 476, 481 (5th Cir. 2017); *Beeman v. United States*, 871 F.3d 1215, 1220 (11th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017).

[2] *See Winston*, 850 F.3d at 684; *Geozos*, 870 F.3d at 897; *Beeman*, 871 F.3d at 1221; *United States v. Snyder*, 871 F.3d 1122, 1126, 1128-30 (10th Cir. 2017).

[3] *See Beeman*, 871 F.3d at 1222; *Dimott*, 881 F.3d at 237.

[4] *See Winston*, 850 F.3d at 682; *Geozos*, 870 F.3d at 895; *Snyder*, 871 F.3d at 1126.

[5] *See Snyder*, 871 F.3d at 1130-32 (McHugh, J., concurring); *Dimott*, 881 F.3d at 245 (Torruella, J., dissenting); *Beeman*, 871 F.3d at 1229 (Williams, J., dissenting).

As the government admits, in *United States v. Peppers*, 899 F.3d 211, 224, 230 (3d Cir. 2018) the Third Circuit joined the Fourth Circuit by looking to the factual record to determine procedural eligibility and then the Fourth and Ninth Circuits by looking to current law on the merits. Br. in Opp. at 11-12. It also acknowledges the Sixth Circuit has done the same. *Id.* at 12. According to *Raines v. United States*, 898 F.3d 680, 686, 688-90 (6th Cir. 2018), the Sixth Circuit expects affirmative evidence in the sentencing record (rather than silence) to establish procedural eligibility before looking to current law to adjudicate the merits. Adding to the confusion, the Sixth Circuit relies on the sentencing record only to determine procedural eligibility for second or successive petitions under § 2255(h)(2), not to determine timeliness under § 2255(f)(3)). *Id.* at 687.

The government brushes off this pointed conflict as an unimportant inconsistency in the circuits' analyses. Br. in Opp. 10, 12. It insists further review is unwarranted for the reasons stated in its prior brief in opposition to certiorari in *United States v. Casey*, 17-1251. Br. in Opp. 9-12. But its brief there was filed over 17 months ago, before the circuit split deepened further. And even when it filed its brief in *Casey*, the government was unable to coherently harmonize this jumble of decisions which drew from different sources to apply different rules to different procedural and substantive requirements. As Anzures has demonstrated the circuits have not resolved

these inconsistencies, they have only grown. Only this Court can resolve what has now become an intractable circuit split.

II. Contrary to the government's misstatement, Anzures would directly benefit from the Court's resolution of this circuit split.

Though it admits that "some inconsistency exists in the circuits' approach," the government insists this Court's review is unwarranted here because Anzures "could not prevail under any circuit's approach." Br. in Opp. at 12. It is unclear how the government comes to this conclusion. Anzures has demonstrated, even by the standard the government suggests he must meet for *Johnson* relief, that he is entitled to be unburdened from an ACCA sentence.

From certain circuit opinions, the government has distilled the means by which a petitioner can show *Johnson* error; " a defendant may point either to the sentencing record or to *any* case law in existence at the time of his sentencing proceeding that shows that it is more likely than not that the sentencing court relied on the now-invalid residual clause, as opposed to the enumerated-offenses or elements clauses. Br. in Opp. 9. (emphasis added). In his petition, Anzures identified in both the sentencing record and case law that it was more likely than not that the sentencing court relied on the defunct residual clause to find his commercial burglary conviction was a violent felony. Pet. at 17-23. The government ignores this point and thus cannot contest that in this context, Anzures has demonstrated that *Johnson*

entitles him to relief.

A. The government cannot deny that the sentencing record demonstrates it was more likely than not that the sentencing court relied on the defunct residual clause.

The probation office suggested Anzures's prior New Mexico convictions for commercial/automobile burglary and aggravated assault were violent felonies. However, when the district court sentenced Anzures, many offenses labeled "burglary" did not qualify as enumerated offenses under the violent felony definition. *See*, *e.g.*, *Taylor v. United States*, 495 U.S. 575, 592 (1990) (federal burglary definition is "independent of the labels employed by the various States' criminal codes"). And, as was often the case in ACCA sentencings, the court did not state on the record whether Anzures's prior commercial burglay came within the residual clause, the enumerated offenses clause or the force clause of the violent felony definition.

The court's silence works in Anzures's favor. If, as the government suggests, the court relied on *United States v. Ramon Silva*, 608 F.3d 663 (10th Cir. 2010), Br. in Opp. at 12, it would have mentioned the modified categorical approach, or the enumerated offense to find Anzure's commercial/automobile burglary conviction was a violent felony. This is because *Ramon Silva* held that New Mexico's commercial burglary statute was not categorically generic burglary. 608 F.3d at 665-66. Because, New Mexico commercial burglary, "contains a 'non generic' definition of burglary,"

the court "employ[ed] a modified categorical approach" with which a court "examine[s] [the] charging document, plea agreement, and plea colloquy to determine the character of [the] admitted burglary." *Id.* at 666. In other words, at the time Anzures was sentenced the sentencing court would have used the modified categorical approach to qualify his commercial burglary as a violent felony under the enumerated clause. The record is clear the Court did not do that.

At sentencing, the court did not mention the enumerated clause. The probation office also did not mention it at sentencing or in the presentence report. Nor did the probation office suggest using the modified categorical approach or present the limited documents allowed by that approach. The court also did not reference such documents. Nor did the government. The government does not explain how, without these documents, the court could have found Anzures's commercial burglary conviction was generic burglary. Although now it contends the documents it has retrieved show that conviction qualified as generic burglary, Br. in Opp. at 12-13, those documents were neither presented to nor considered by the court when Anzures was sentenced. From this record, the most logical and reasonable conclusion is that the court used the all-encompassing residual clause.

B. The government cannot deny that some case law when Anzures was sentenced demonstrates it was likely that the sentencing court relied on the defunct residual clause.

When Anzures was sentenced, *some* Tenth Circuit panels were using the modified categorical approach in a manner not established by this Court. Accordingly, in *United States v. King*, the court held New Mexico's commercial burglary statute was not categorically generic burglary because it proscribed conduct broader than generic burglary. 422 F.3d 1055, 1057 (10th Cir. 2005), (citing *Taylor*, 495 U.S. at 602). Only by going "beyond the mere fact of conviction" and considering the "charging papers and jury instructions" could the court conclude the offense was a violent felony. *Id.*; *see also United States v. Scoville*, 561 F.3d 1174, 1179-80 (10th Cir. 2009) (using the residual clause of the ACCA to find Ohio third degree burglary a violent felony after categorical and modified categorical approach failed to do so).

However, not every Tenth Circuit panel agreed with that approach. In *United States v. Zuniga-Soto*, 527 F.3d 1110, 1122 (10th Cir. 2008), the court limited its analysis to the categorical approach when the statute listed means not elements. It specifically noted there was intra-circuit conflict on use of modified categorical approach. *Id.* at 1121. Similarly in *United States v. King*, 979 F.2d 801, 802 (10th Cir. 1992), the court held it was mandated by *Taylor* to use an elements-based categorical approach. It said it would "not inquire into the particular factual circumstances" but instead would "look

'only to the fact of conviction and the statutory definition of the prior offense.'" *Id.* at 802 (quoting *Taylor*, 495 U.S. at 602). The court stressed that such a "formal categorical approach" was mandated by this Court to avoid "'the practical difficulties and potential unfairness of a factual approach'" to a prior conviction. *Id.* (quoting *Taylor*, 495 U.S. at 601). By looking "only to the elements of the conspiracy crime under New Mexico law," the Court found it was not a violent felony. *Id.* at 804.

As this earlier precedent was controlling when the court sentenced Anzures, *Zuniga-Soto* and *King* dictated its enumerated clause analysis, not *Ramon Silva*. Hence, the court never reviewed nor mentioned any documents associated with the modified categorical approach. From the record and the controlling case law, it is reasonable to infer that the only way then for the court to have found that New Mexico commercial burglary qualified as a violent felony was through the residual clause.

This Court's precedent then would have allowed it to use the residual clause to make that finding. Before *Johnson*, if a prior conviction "involve[d] conduct that present[ed] a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), it would necessarily have qualified under the residual clause. Accordingly, burglaries, robberies, assaults, batteries and other crimes that might have come within the alternative clauses of the ACCA's violent felony definition would have also qualified as

violent felonies under the residual clause.

As interpreted pre-*Johnson*, the residual clause was quite broad, encompassing crimes that were relatively minor. In the decade preceding *Johnson*, most ACCA litigation was focused on drawing the outer bounds of the residual clause. For example, this Court's pre-*Johnson* cases asked whether attempted burglary, *James v. United States*, 550 U.S. 192 (2007), driving under the influence of alcohol, *Begay v. United States*, 553 U.S. 137 (2008), failure to report, *Chambers v. United States*, 555 U.S. 122 (2009) and vehicular flight, *Sykes v. United States*, 564 U.S. 1 (2011), were ACCA violent felonies. The fact that such questions were posed to the Court illustrates the breadth of the residual clause.

As a result, there would have been no need to look to the other clauses for confirmation that a far more serious crime was a qualifying ACCA violent felony. For example, if attempted burglaries involved a "serious potential risk of physical injury," as held in *James*, it stands to reason that completed burglaries would also pose a similar risk, and thus would unquestionably qualify under the residual clause. *James*, 550 U.S. at 195.

The government presents nothing to contradict Anzures's argument. It offers no reason why the sentencing court would have relied on a clause narrower than the residual clause just because that clause was also available to it. Where the sentencing record is silent, it makes far more sense to

assume that most judges relied on the expansiveness of the residual clause rather than either of the other clauses, opting for the analytical path of least resistance. This is especially true here when the sentencing record shows a court adhering to controlling law could have used only the residual clause to find that New Mexico commercial burglary was a violent felony.

Conclusion

The Tenth Circuit's decision was incorrect. It conflated the statutory gateway for bringing a second or successive habeas claim with whether a claim has substantive merit and entitles the defendant to relief. It erroneously concluded that a *Johnson* petitioner's ACCA sentence can be set aside only if he proves that "it is more likely than not that the sentencing court relied upon the residual clause to enhance his sentence." The circuit's ruling penalizes Anzures for the district court's "discretionary choice not to specify" which clause it relied on. *Winston*, 850 F.3d at 682.

When a court decides the merits of a *Johnson* motion, the past legal environment must be irrelevant since the basis of the motion is that the environment has changed. As demonstrated here, the circuit's "relevant legal background" analysis is unworkable when a reviewing court ignores the actual background in favor of another that is not only unsound but in conflict with earlier relevant precedent. Anzures asks this Court to rule definitively that he must show only that according to the current state of the law post-

Johnson, a prior conviction does not come within the ACCA's remaining violent felony definitions. And when it is clear from binding case law the conviction is not captured by any of the remaining violent felony definitions in the ACCA, then the availability of the residual clause at the time of sentencing necessarily harmed him.

Anzures's case is an ideal vehicle for resolving the conflict over the question presented. Although the record here is silent as to whether the district court used the residual clause to find Anzures's commercial burglary conviction was a violent felony, it is reasonable to infer it did. Anzures's conviction does not fall under any provision of the ACCA as currently construed. Without this Court's intervention, Anzures is unjustly left without a way to set aside his unconstitutional sentence.

Anzures asks that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: January 30, 2020

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Certificate of Service

I, Alonzo J. Padilla, hereby certify that on January 30, 2020, a copy of the petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice,

Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

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DATED: January 30, 2020

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