NO: 20-5030

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JIMMY LEE FRANKLIN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant moving for relief under 28 U.S.C. § 2255, based on a retroactive constitutional decision invalidating a federal statutory enhancement provision, can satisfy his burden of proof by showing that his sentence may have been based on the unconstitutional provision, and his sentence exceeds the statutory maximum under current law.

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REPLY ARGUMENT

The circuits are intractably divided on an important and recurring question as to a § 2255 movant's burden of proof in challenging a concededly-illegal ACCA sentence after *Johnson*

The government correctly concedes that the circuits are in conflict with regard to the burden of proof in a collateral attack premised upon *Samuel Johnson v. United States*, 135 S.Ct. 2552 (2015). Brief in Opposition ("BIO") at 11-13. However, the government incorrectly argues that Petitioner's case is not a "suitable vehicle" to resolve the circuit conflict as to how to interpret the requirement in 28 U.S.C. § 2255(h)(2) and § 2244(b)(2)(A) that Petitioner prove his claim "relies upon a new rule of constitutional law," because he could not have met the burden of proof in ***any*** circuit – even under the approach of the minority of courts that require a defendant to merely prove he "may have been sentenced" under the now-unconstitutional residual clause. BIO at 13-14

According to the government, Petitioner cannot meet the "may have been sentenced" standard of ***any*** circuit because five months before he was sentenced, the Eleventh Circuit held in *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197 (11th Cir. 2007) that a Florida conviction for battery on a pregnant woman (a different offense that had simple battery as an element), qualified as a "crime of violence" within the elements clause of U.S.S.G. § 2L1.2(b)(1)(A)(ii). BIO at 13-14. But notably, there is no indication of record that the district court was even aware of this decision at the time of Petitioner's sentencing, let alone applied it to a different battery offense under the ACCA. And in fact, the district judge conceded

when specifically asked over a decade later, that she had no actual recollection of Petitioner's sentencing. However, she stated, she "would not have ignored" binding circuit precedent on the elements clause at the time, even though some of her colleagues on the court had conceded that the "default rule" was then to impose the enhancement under the all-inclusive residual clause. While such a post-hoc statement might now be sufficient to preclude relief in some circuits, in at least two circuits it most definitely would ***not***.

Contrary to the government's mistaken suggestion, the approach of the three circuits that have applied the "may have been sentenced" standard, is ***not*** monolithic. Closest to the approach of the Eleventh Circuit, the Ninth Circuit has held that a defendant cannot establish that he "may have been sentenced" under the residual clause if there exists binding circuit precedent at the time of sentencing that the defendant's offense qualified as a violent felony under the elements clause. *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017).

However, in direct contrast to the Ninth Circuit, the Third and Fourth Circuits have squarely refused to find the "legal landscape" at the time of sentencing determinative of whether the defendant "may have been sentenced" under the residual clause. Rather, the Third Circuit has explained, it would only be "clear" that an ACCA sentence was ***not*** imposed under the residual clause where "the sentencing judge said another clause applied or because the evidence provides clear proof that the residual clause was not implicated." *United States v. Peppers*, 899 F.3d 211, 224 (3rd Cir. 2018). If neither of those scenarios is present – and

indeed, if as here, the parties were in agreement that the defendant had three qualifying convictions (for whatever reasons, not stated of record), and due to the parties' agreement the court "stop[ped] its analysis" and concluded that the ACCA applied – a defendant in the Third Circuit has sufficiently established that he "may have been sentenced under the residual clause. *Id.*

The same is true for a defendant in the Fourth Circuit. *See United States v. Winston*, 850 F.3d 677, 682-83 (4th Cir. 2017) (finding that despite binding circuit precedent at the time of sentencing that Virginia common law robbery qualified as a violent felony under the elements clause, because the district court failed to specify the basis of the ACCA enhancement, the defendant established that his sentence "may have been predicated on application of the now-void residual clause," and he had sufficiently met his burden of showing that he "relie[d] on" a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A)).

Neither the Third or Fourth Circuits would preclude relief to a defendant like Mr. Franklin, illegally sentenced as an Armed Career Criminal, simply because the district court – without any recollection of what actually occurred at sentencing – stated over a decade later that she "would not have ignored" binding circuit precedent. Because Mr. Franklin would have easily secured § 2255 relief in the Third and Fourth Circuits, and would not be serving an illegal supervised release term at this time, his case presents a perfect vehicle to resolve the circuit conflict, and clarify the movant's actual burden of proof in a silent record case.

CONCLUSION

For the reasons stated in the Petition and above, Mr. Franklin respectfully requests that the Court grant certiorari and resolve this long-standing circuit conflict in his case.

Respectfully submitted,

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