
No. 17-6344

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY N. BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

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I. Motion to defer consideration of the certiorari petition, and motion to consolidate, based on the government’s concession that this case hinges on *Naylor* (and by implication *Sykes*).

This Court should defer consideration of the certiorari petition, because “the Government agrees that pending en banc [*Naylor*, 16-2047] proceedings in the Eighth Circuit may determine whether petitioner remains eligible for an ACCA sentence.” Solicitor’s brief, pg. 8. Based on this concession, it is respectfully submitted that this petition should be stayed, to wait for the Eighth Circuit’s decision in *Naylor*. If the defendant in *Naylor* prevails, then this matter should be remanded to the Eighth Circuit. However, if the defendant in *Naylor* were not to prevail in the Eighth Circuit, then both Mr. Naylor and Mr. Brown will appeal to this Court, so remanding Mr. Brown’s case now will not promote judicial economy.¹

Additionally, in seeking a remand now, the government neglects to analyze another key issue: that the case *Naylor* is reviewing, *Sykes v. United States*, 16-9604, has a pending certiorari petition before this Court. *Sykes* has been re-listed by this Court approximately twelve times, and is distributed for conference on February 16, 2018. This may be an indication that this Court will grant certiorari on the issue as a “merits case”, or may issue a per curiam order on the issue of whether Missouri burglary is divisible. If either scenario were to come to fruition prior to *Naylor* being decided by the Eighth Circuit, Mr. Brown’s case could (and

¹ Undersigned counsel has represented Mr. Naylor in all stages of the appellate proceedings before the Eighth Circuit, and continues to represent Mr. Naylor.

should) be decided by this Court along with *Sykes*. In any event, like the defendant in *Sykes* who filed a motion to defer consideration of the certiorari petition in September 2017, Mr. Brown believes that this Court may wait until the Eighth Circuit decides *Naylor* to take any action in this case.

A final reason to stay Mr. Brown's certiorari petition is because it is not clear what the Solicitor's suggested remand to the Eighth Circuit will entail. Simply put, if the defendant in *Naylor* succeeds and the Eighth Circuit concludes that Missouri burglary is indivisible, the Solicitor has apparently not ruled out fighting the merits of whether the antiquated Missouri burglary statute is divisible. *See* Solicitor's brief, pg. 14 ("If the en banc court of appeals determines that the statute is not divisible, petitioner's conviction under an earlier version of the Missouri burglary statute *might* not qualify as an ACCA predicate.") (emphasis added). Thus, based on the Solicitor's current suggested remand, there would be little or no benefit to Mr. Brown (or this Court) to remand this issue now to the Eighth Circuit.

II. Mr. Brown's petition for certiorari is a clean vehicle to decide whether the antiquated Missouri burglary statute is a "violent felony."

The government sets forth a number of reasons why this Court should not reach the merits of Mr. Brown's argument, but none of them have merit. The Solicitor General maintains that "the court of appeals correctly declined to issue a COA" pg. 8, yet still urges this Court to remand this case for further proceeding in a *merits* appeal. In requesting this remand, the Solicitor General is not only conceding error by the district court, but the Eighth Circuit as well.

A. The Eighth Circuit’s denial of a COA, does not prevent this Court from reaching the merits of the substantive issue regarding Missouri burglary.

The Solicitor General maintains “the posture of this case makes it a poor vehicle for resolving any issue beyond the narrow one of whether petition is entitled to a COA”, and “[p]lenary review is therefore unwarranted” because “the only question” is whether a COA should be granted. *See* Solicitor’s brief, pg. 8; 13. But this Court has a history in this specific context of not only granting a COA, but also reaching the merits of the substantive issue.

In *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016), this Court concluded that “[t]he narrow question here is whether the Court of Appeals erred in making that determination” of denying a COA. *Id.* “That narrow question, however, implicates a broader legal issue: whether *Johnson* is a substantive decision with retroactive effect in cases (like *Welch*'s) on collateral review.” *Id.* “If so, then on the present record reasonable jurists could at least debate whether *Welch* should obtain relief in his collateral challenge to his sentence.” *Id.* “On these premises, the Court now proceeds to decide whether *Johnson* is retroactive.” *Id.*

Just like in *Welch*, this Court should turn to the merits of the underlying issue in Mr. Brown’s petition for certiorari.

B. The government is incorrect that Mr. Brown’s §2255 motion is untimely, because it is mistaken that the Eighth Circuit’s “original decision . . . did not ever depend on [the void residual] clause” of the ACCA.

The government does not dispute that if *Johnson* is applicable to Mr. Brown’s case, than his §2255 motion is timely. Solicitor’s br, pg. 10-11 (quoting 28 U.S.C.

§2255(f)(3)). Because the Supreme Court made *Johnson* retroactive in *Welch*, 136 S. Ct. at 1265, Mr. Brown's §2255 petition is timely because the Eighth Circuit denied his direct appeal based on the void residual clause of the ACCA.

In responding to Mr. Brown's petition for certiorari, the government asserts that the Eighth Circuit's "original decision makes clear, his sentence did not ever depend on [the residual] clause." Solicitor's brief, pg. 13, fn (citing to *United States v. Brown*, 323 Fed.App. 479, 480 (8th Cir. 2009)). The government is mistaken.

In denying his direct appeal, the Eighth Circuit concluded that Mr. Brown's burglary conviction was a "violent felony" under § 924(e). 323 Fed.App. at 480. In so concluding, the Court of Appeals relied on the *entire* definition of a "violent felony", including the now void residual clause. *Id.* More importantly, in *Brown*, the Eighth Circuit relied on *United States v. Bell*, 445 F.3d 1086, 1090 (8th Cir. 2006), which, in turn, relied on the void residual clause. The Eighth Circuit concluded in *Bell* that "we are compelled to conclude *that any generic burglary, as that term was defined in Taylor, is a felony that 'otherwise involves conduct that presents a serious potential risk of physical injury to another.'*" 445 F.3d at 1090 (emphasis added). *Bell* highlights that Eighth Circuit's affirmance of Mr. Brown's sentence was inexorably intertwined with the void residual clause.

The Eighth Circuit's decision in *Brown* demonstrates that it was not until *Johnson* voided the ACCA's residual cause, that Mr. Brown's 28 U.S.C. § 2255 claim accrued. As long as the residual clause existed, Mr. Brown's ACCA status was

unchallengeable because, regardless of whether his burglary conviction was generic under *United States v. Taylor*, 110 S.Ct. 2143 (1990), it “otherwise” satisfied the void residual clause.

Accordingly, the government’s argument about *Mathis* retroactivity is a red herring, because the circuit cases the government cites to were apparently not infected by the residual clause, but instead the court’s analysis was confined to the enumerated offense clause. Solicitor’s br. pg. 11. The jurisdictional hook for purposes of §2255(f)(3) is *Johnson*, which this Court made retroactive in *Welch*.

C. The procedural issues were also either waived by the government in district court, or have been waived by the Solicitor General before this Court.

The Solicitor General attempts to create reasons why this case is a “poor vehicle”, but they are without merit.

Specifically, the government’s current objection that Mr. Brown’s § 2255 is untimely, does not sound in *Johnson*, and that *Mathis* is not retroactive – was not raised by the government in the district court. Nor did the government specifically object to the district court analyzing whether the burglary conviction was a “violent felony”, because it was “in the interest of achieving a just result.” DCD 17, at 2.

If the government did not waive those issues before the district court, they have apparently waived them now, by stating they “would not oppose relief, notwithstanding any timeliness or other procedural issues.” (Solicitor’s br, pg. 14) (string cite of waiver case law omitted). One reading of the Solicitor’s waiver would be that the waiver would only apply on remand (and not before this Court). But this

type of limited waiver would be unjust. “Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.” *Teague v. Lane*, 489 U.S. 288, 300 (1989).

III. The government does not dispute the merits of the issues raised in the petition for certiorari, which highlights why it should be granted.

Finally, the government has not disputed the central issue presented in the petition for certiorari, i.e. in Issue II: Should a certificate of appealability be issued to determine whether a Missouri burglary conviction from 1969 is a violent felony because, like the contemporary Missouri burglary statute, it is a fatally overbroad and indivisible statute?

It appears the government agrees the answer is yes, at least as it pertains to the issuance of a COA. But it is less clear what the government’s position is to Mr. Brown’s overarching argument that “*Mr. Brown’s burglary conviction from a 1969 Missouri statute is not a violent felony because, like the contemporary Missouri burglary statute, it is a fatally overbroad and indivisible statute.*” Brown’s petition for certiorari, pg. 13-19. Mr. Brown also analyzed why *Sykes* was wrongly decided in his Petition for Certiorari, something that the government remarkably fails to dispute in its response. Brown’s petition for certiorari, pg. 14-18. This is important, again, because *Sykes* has a pending petition for certiorari before this Court.

Mr. Brown’s substantive arguments have merit, thus his petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant the motion to defer consideration of the certiorari petition, until *Naylor* is decided. The Court should also grant the motion to consolidate this case with *Sykes*. Alternatively, the Court should grant the petition for certiorari, and reach this case's merits.

Respectfully submitted,

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