

No. 17-8280

IN THE
Supreme Court of the United States

GREGORY KING,
Petitioner,

v.

UNITED STATES OF AMERICA,
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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REPLY BRIEF FOR PETITIONER

1. In its brief in opposition, the government concedes that “inconsistency exists” among the circuits, which are now “appl[ying] different standard[s]” to evaluate successive 28 U.S.C. § 2255 motions under *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). BIO 10, 16–18. That admitted circuit conflict has only grown deeper since the filing of the petition.

The Third, Fourth, and Ninth Circuits hold that a successive movant is entitled to relief where the ACCA sentence may have been based on the now-invalid residual clause, and current law demonstrates that he is no longer subject to the enhancement. *United States v. Peppers*, __ F.3d ___, 2018 WL 3827213, at *1, *7–9, 11–13 (3d Cir. Aug. 13, 2018); *United States v. Winston*, 850 F.3d 677, 681–82 & n.4 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 894–96 & n.6 (9th Cir. 2017).

By contrast, the First, Sixth, Eighth, Tenth, and Eleventh Circuits require proof that the sentencing court actually relied on the residual clause. *Dimott v. United States*, 881 F.3d 232, 240–43 (1st Cir. 2018); *Potter v. United States*, 887 F.3d 785, 787–89 (6th Cir. 2018); *Walker v. United States*, __ F.3d ___, 2018 WL 3965725, at *2–3 (8th Cir. Aug. 20, 2018); *United States v. Driscoll*, 892 F.3d 1127, 1135 & n.5 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–25 (11th Cir. 2017); *but see Walker*, __ F.3d at ___, 2018 WL 3965725, at *4 (Kelly, J., concurring in part and dissenting in part) (agreeing with the other circuits).

Lower courts and judges continue to acknowledge this circuit conflict. *See, e.g., Walker*, __ F.3d at ___, 2018 WL 3965725, at *2 (“Our sister circuits disagree on

how to analyze this issue.”); *Beeman v. United States*, __ F.3d __, 2018 WL 3853960, at *9 n.2 (11th Cir. Aug. 14, 2018) (Martin, J., dissenting from the denial of rehearing en banc) (“The circuits are . . . split on this question.”); *Peppers*, __ F.3d at __, at 2018 WL 3827213, at *12 (“Lower federal courts are decidedly split”); *Raines v. United States*, 898 F.3d 680, 684 (6th Cir. 2018) (“The cases cited by the government reflect a circuit split”); Pet. 8–9. Thus, absent intervention by this Court, geography alone will continue to determine whether federal prisoners must serve illegal sentences in light of *Johnson*. And the government does not dispute that, because this question affects countless numbers of federal prisoners around the country, it is recurring, important, and warrants review. *See* Pet. 16–17.

2. The government nonetheless seeks to shield that important question from review, arguing that the majority view is correct on the merits. BIO 12–16. But that is no reason to deny review in light of the circuit conflict. Indeed, if the government is right, then prisoners in three circuits are being released from custody prematurely. Regardless of which side is correct, this Court’s review is warranted.

In any event, the government is wrong on the merits. The dispute ultimately boils down to whether successive movants “may rely on post-sentencing case law”—including this Court’s decisions in *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243 (2016) and *Descamps v. United States*, 570 U.S. 254 (2013)—“to prove [a] *Johnson* claim.” *Peppers*, __ F.3d at __, 2018 WL 3827213, at *18 n.21. While those precedents are not new rules of constitutional law and thus do not independently satisfy the gatekeeping criteria in § 2255(h)(2), they nonetheless have retroactive

effect because they simply clarified how to apply the categorical approach, explaining what the law always was. *Id.* at *13. Indeed, “[a]s *Descamps* explains, the rules for evaluating predicate offenses—other than under the residual clause—are the same today as they always have been.” *Beeman*, __ F.3d at __, 2018 WL 3853960, at *10 (Martin, J., dissenting from the denial of rehearing en banc). Where, as here, this Court’s retroactive decision in *Descamps* makes clear that the sentencing court *legally* could have only relied on the residual clause to impose the enhancement, the movant meets his burden to establish a *Johnson* claim. *Id.* at *9.

The government fails to explain why lower courts should disregard this Court’s retroactive ACCA precedents and thereby immunize illegal sentences. Its contrary position would require federal courts to remain idle while federal prisoners serve sentences that all agree are illegal and exceed the statutory maximum. Yet it is well-established that federal prisoners whose sentences were “imposed in violation of the Constitution or laws of the United States” are entitled to relief. 28 U.S.C. § 2255(a). Condemning prisoners like Petitioner to serve illegal sentences contravenes the core remedial purpose of § 2255, as enacted by Congress.

The government’s argument, in essence, elevates the interests in finality over all else, including the “equitable principles [that] have traditionally governed the substantive law of habeas corpus.” *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quotation omitted). At no point does the government attempt to explain why a federal prisoner’s eligibility for § 2255 relief under *Johnson*—a new rule of constitutional law that this Court not only announced but expressly made

retroactive—should turn on the happenstance of what the sentencing judge said years or even decades earlier. That method of adjudication is as arbitrary as it is inequitable: defendants with identical criminal histories will be treated differently based solely on what a sentencing judge happened to say at the hearing, not on whether the prisoner is serving an illegal sentence.

While the government faults prisoners for silent sentencing records due to their failure object to the enhancement, it neglects that the residual clause itself was the very reason why they failed to object. Because of that clause’s all-encompassing breadth, any objection to the ACCA enhancement would have been pointless. In other words, the silent record was attributable to the very provision that now renders the sentence illegal. It would be fundamentally unfair and circular to force prisoners to serve illegal sentences based on a silent record that was itself attributable to the very provision that now renders the sentence illegal.

3. In a further effort to shield the question presented from review, the government observes that this Court has recently denied review in three other cases presenting a similar question. BIO 10–11. But those petitions had numerous vehicle problems that do not exist here. Thus, they only serve to reinforce the recurring nature of the question presented and the need for this Court to resolve it.

In both *Snyder v. United States*, No. 17-7157 (cert. denied Apr. 30, 2018) and *Westover v. United States*, No. 17-7607 (cert. denied Apr. 30, 2018), the lower courts expressly determined that, as a matter of historical fact, the record in that case reflected that the ACCA sentence had been based on the enumerated-offense clause,

not the residual clause. For that reason, and because the § 2255 motions were initial rather than successive motions, those cases did not directly conflict with the Fourth Circuit's decision in *Winston* and the Ninth Circuit's decision in *Geozos*. *Snyder* BIO 9–11, 13–15, 17–20; *Westover* BIO 6–9, 12, 15–17. In addition, the parties in that case disputed whether the movant's third ACCA predicate remained a violent felony under current law, an issue that remained an open question in the circuit, was procedurally barred, and ultimately depended on a question of state law. *Snyder* BIO 20–24; *Westover* BIO 18–22.

Several vehicle problems also plagued *Casey v. United States*, No. 17-1251 (cert. denied June 25, 2018). There, the court of appeals resolved the case on timeliness grounds, not on the merits. *Casey* BIO 5–6, 8. The legal background in that case strongly indicated that Petitioner's ACCA sentence depended on the enumerated-offense clause rather than the residual clause. *Casey* BIO 9–11. That case involved an initial, not successive, § 2255 motion, and thus did not directly conflict with *Winston* or *Geozos*. *Casey* BIO 13–15. And the government preserved its affirmative defense that the movant's *Johnson* claim had been procedurally defaulted. *Casey* BIO 16–17 & n.1.

None of those vehicles problems exist here. This case involves a successive, not an initial, § 2255 motion. There is no dispute that, in light of *Descamps*, the Florida burglary offense upon which the ACCA enhancement depends is no longer a violent felony after *Johnson*. *United States v. Esprit*, 841 F.3d 1235, 1239–41 (11th Cir. 2016); Pet. 18. There was no factual finding by the courts below that the

sentencing court had in fact relied on the enumerated-offense clause rather than the residual clause; the record was silent and unclear. And the government did not preserve any affirmative defenses below; rather, it argued exclusively that the § 2255 motions should be denied for failure to satisfy the burden of proof. Thus, while *Snyder*, *Westover*, and *Casey* presented poor vehicles for resolving the question presented here, the same is not true here.

4. The government does not argue otherwise. Instead, it weakly asserts only that the question presented would not be outcome-determinative here because the district court found that Petitioner had two qualifying drug offenses instead of one. BIO 14, 18–19. But not only does the government decline to defend that determination, it took a contrary position below. Before making its burden-of-proof argument, the government expressly conceded that Petitioner had only one “controlled substance offense” and thus was entitled to relief. Dist. Ct. Dkt. 8 at 2; *see* Pet. 5–6. And the court of appeals agreed when authorizing the § 2255 motion, expressly recognizing that his drug “convictions only count as a single ACCA predicate offense.” Pet. App. 5a; *see* Pet. 5 & n.3. As a result, the question presented would be dispositive here. Were the Court to agree with Petitioner on that question, he would simply ask the Eleventh Circuit to correct the district court’s manifestly-erroneous drug determination on remand. In short, the question presented here stands between Petitioner and freedom from his illegal sentence.¹

¹ To the extent the Court grants review in another case presenting this question, Petitioner requests that the Court hold this case.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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