No. 18-5217

IN THE SUPREME COURT OF THE UNITED STATES

AUDY PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Armed Career Criminal Act of 1984 (ACCA) provides for enhanced statutory penalties for certain convicted felons who unlawfully possess firearms and whose criminal histories include at least three prior convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. 924(e)(1).

The ACCA defines a "violent felony" as an offense punishable by more than a year in prison that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

> presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii) (beginning with "otherwise") is known as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause is unconstitutionally vague, id. at 2557, but it explained that the decision "d[id] not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony," id. at 2563.

Petitioner was sentenced as an armed career criminal based on ten prior convictions for burglary under Florida law. Pet. App. 2a; Presentence Investigation Report (PSR) ¶¶ 14, 24-33. He contends (Pet. 9-18, 22-25) that this Court's review is warranted to address whether a prisoner seeking to challenge his sentence under Johnson in a second or successive motion under 28 U.S.C. 2255 must prove that he was sentenced under the residual clause that was invalidated in Johnson, as opposed to one of the ACCA's still-valid clauses. That issue does not warrant this Court's

review. This Court has recently denied review of similar issues in other cases.[1] It should follow the same course here.[2]

For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Couchman v. United States, No. 17-8480 (July 13, 2018), and King v. United States, No. 17-8280 (July 13, 2018), a defendant who moves to vacate his sentence on the basis of Johnson is required to establish, through proof by a preponderance of the evidence, that his sentence in fact reflects Johnson error. To meet that burden, a defendant may either point to the sentencing record or 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. See Br. in Opp. at 13-18, King, supra (No. 17-8280); see also Br. in Opp. at 12-17, Couchman, supra (No. 17-8480).[3]

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[1] See Casey v. United States, 138 S. Ct. 2678 (2018) (No. 17-1251; Westover v. United States, 138 S. Ct. 1698 (2018) (No. 17-7607); Snyder v. United States, 138 S. Ct. 1696 (2018) (No. 17-7157).

[2] Other pending petitions raise the same, or related issues. King v. United States, No. 17-8280 (filed Mar. 27, 2018); Couchman v. United States, No. 17-8480 (filed Apr. 10, 2018); Oxner v. United States, No. 17-9014 (filed May 17, 2018); Safford v. United States, No. 17-9170 (filed May 25, 2018).

[3] We have served petitioner with a copy of the government's briefs in opposition in King and Couchman.

In its briefs in opposition to the petitions filed in King and Couchman, the United States acknowledged that some inconsistency exists in the approaches of different circuits to Johnson-premised collateral attacks like petitioner's. Those briefs explained that the Fourth and Ninth Circuits had interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A) -- which provides that a claim presented in a second or successive post-conviction motion shall be dismissed by the district court unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable," ibid.; see 28 U.S.C. 2244(b)(4), 2255(h) -- to require only a showing that the prisoner's sentence "may have been predicated on application of the now-void residual clause." United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017); see United States v. Geozos, 870 F.3d 890, 896-897 (9th Cir. 2017).

After the government's briefs in those cases were filed, the Third Circuit interpreted the phrase "relies on" in Section 2244(b)(2)(A) in the same way, United States v. Peppers, No. 17-1029 (Aug. 13, 2018), slip op. 3, 15-21, and it found the requisite gatekeeping inquiry for a second or successive collateral attack to have been satisfied where the record did not indicate which clause of Section 924(e)(2)(B) had been applied at sentencing, id. at 21-22. Further review of inconsistency in the circuits'

approaches remains unwarranted for the reasons stated in the government's previous briefs in opposition. See Br. in Opp. at 16-18, King, supra (No. 17-8280); Br. in Opp. at 17-19, Couchman, supra (No. 17-8480).

Petitioner overreads the decisions below when he suggests (Pet. 21) that his case would be a good vehicle to address the question presented because "the district court and the court of appeals both observed that the law at the time of sentencing did not resolve" whether his prior convictions for Florida burglary qualified as ACCA predicates under the residual clause or the enumerated offenses clause. The court of appeals in fact observed that "[l]ooking to the law at the time of [petitioner's] 1995 sentencing, there is little to suggest that the sentencing court relied solely on the residual clause." Pet. App. 9a (citing United States v. Spell, 44 F.3d 936, 938-939 (11th Cir. 1995)). The petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

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[4] The government waives any further response to the petition unless this Court requests otherwise.