No. 18-5230

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PARKER MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH 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 emphasized 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 two prior convictions for burglary under Oregon law and one prior conviction for burglary under Wyoming law. Pet. App. A2; Presentence Investigation Report (PSR) ¶ 15. He contends (Pet. 7-16) 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 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. See Br. in Opp. at 13-

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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 issue, 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); Perez v. United States, No. 18-5217 (filed July 10, 2018); Sailor v. United States, No. 18-5268 (filed July 16, 2018).

18, King, supra (No. 17-8280); see also Br. in Opp. at 12-17, Couchman, supra (No. 17-8480).[3]

The decision below is therefore correct, and its approach is consistent with the First, Sixth, and Eleventh Circuits. See Dimott v. United States, 881 F.3d 232, 242-243 (1st Cir. 2018), cert. denied, No. 17-1251 (June 25, 2018); Potter v. United States, 887 F.3d 785, 787-788 (6th Cir. 2018); Beeman v. United States, 871 F.3d 1215, 1224 (11th Cir. 2017). As noted in the government's briefs in opposition in King and Couchman, however, some inconsistency exists in the approaches of different circuits to Johnson-premised collateral attacks like petitioner's. Those briefs explain that the Fourth and Ninth Circuits have 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 th[is] 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

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

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, 899 F.3d 211, 221-224 (2018), 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 224. Further review of inconsistency in the circuits' approaches remains unwarranted, however, for the reasons stated in the government's previous briefs. See Br. in Opp. at 16-18, King, supra (No. 17-8280); Br. in Opp. at 17-19, Couchman, supra (No. 17-8480).

Moreover, petitioner could not prevail even under the approach adopted by those circuits. Petitioner errs in characterizing (Pet. 15) his case as having an "ambiguous record" as to which clause of Section 924(e) the sentencing court relied upon to impose an ACCA sentence. In petitioner's presentence report, the Probation Office determined that petitioner was eligible for an ACCA sentence because three of his prior convictions were generic "burglar[ies]" within the meaning of Section 924(e), as defined by Taylor v. United States, 495 U.S. 575 (1990). PSR ¶ 16. Petitioner did not object to the PSR, and the government and petitioner "agreed at his sentencing hearing

that he was eligible for the ACCA enhancement because his previous convictions matched Taylor's definition of burglary." Pet. App. A2; see id. at B3; Sent. Tr. 4-7.

Furthermore, in his first Section 2255 motion, petitioner contended that he would not have received the ACCA enhancement had his counsel objected and urged the sentencing court to apply the categorical approach outlined in Taylor. The district court denied the motion on the ground that petitioner's previous convictions matched Taylor's definition of generic burglary because in all three he "made an unlawful or unprivileged entry into a building or structure, with the intent to commit a crime therein." 09-cv-156 D. Ct. Doc. 8, at 7 (Oct. 21, 2011).

Accordingly, in rejecting petitioner's second Section 2255 motion, the district court explained that petitioner could not raise a Johnson claim because "the record refutes any notion that the sentencing court relied on the residual clause in imposing an [ACCA] sentence" on petitioner. Pet. App. B6. The court of appeals likewise determined that "the record and relevant background legal environment demonstrate that the sentencing court's ACCA determination did not rest on the residual clause." Id. at A8; id. at A2 (petitioner "was sentenced under the ACCA's enumerated offense clause").

Because petitioner cannot show that his ACCA sentence "may have been" predicated on application of the residual clause,

Geozos, 870 F.3d at 896 n.6 (citation omitted); Winston, 850 F.3d at 682; Peppers, 899 F.3d at 221-224, he would not qualify for relief under any circuit's approach. Although he asserts (Pet. 9-11) that relief in his case would be consistent with some district court decisions in the Fourth Circuit, he does not identify any clear basis for concluding that the Fourth Circuit itself would countenance such a result. And the Ninth Circuit in Geozos explicitly recognized that a prisoner cannot establish that his claim "relies on" Johnson for purposes of filing a second-or-successive Section 2255 motion if the circumstances show that he was not in fact sentenced based on the residual clause. Geozos, 870 F.3d at 896; see Peppers, slip op. 20 (where "the record is clear that a defendant was not sentenced under the residual clause, either because the sentencing judge said another clause applied or because the evidence provides clear proof that the residual clause was not implicated," the court must dismiss the Section 2255 motion). Accordingly, the petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

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SEPTEMBER 2018

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