

No. 18-5263

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IN THE SUPREME COURT OF THE UNITED STATES

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BOBBY REE McGEE, JR. PETITIONER

v.

UNITED STATES OF AMERICA

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

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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.

Although petitioner's presentence report did not specify which of petitioner's prior convictions supported the ACCA sentence imposed by the district court, petitioner had prior convictions under Florida law for, inter alia, attempted robbery (Presentence Investigation Report (PSR) ¶ 29), resisting an officer with violence (PSR ¶¶ 43, 45), and delivery of cocaine (PSR ¶¶ 32, 39). He contends (Pet. 5-9) 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.<sup>1</sup> It should follow the same course here.<sup>2</sup>

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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<sup>1</sup> 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).

<sup>2</sup> 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); Murphy v. United States, No. 18-5230 (filed July 12, 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).<sup>3</sup>

The decision below is therefore correct, and its approach is consistent with the First, Sixth, and Tenth Circuits. See Dimott v. United States, 881 F.3d 232, 242-243 (1st Cir. 2018), cert. denied, 138 S. Ct. 2678 (2018); Potter v. United States, 887 F.3d 785, 787-788 (6th Cir. 2018); United States v. Snyder, 871 F.3d 1122, 1130 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018). 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 [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

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<sup>3</sup> We have served petitioner with a copy of the government's briefs in opposition in King and Couchman.

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, 899 F.3d 211, 221-224 (2018) (citation omitted), 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).

In any event, this case would be a poor vehicle in which to address the showing required to present a Johnson claim in a second or successive Section 2255 motion. The district court relied on the principle petitioner challenges only in the alternative (Pet. App. B6), and petitioner remains eligible for an ACCA sentence without regard to Johnson. Petitioner does not dispute that his two prior convictions for distribution of cocaine (PSR ¶¶ 32, 39) qualify as "serious drug offense[s]" under the ACCA. 18 U.S.C. 924(e)(1); see Pet. 3 n.3. Petitioner also has multiple convictions for resisting an officer with violence, in violation

of Fla. Stat. § 843.01 (1993). PSR ¶¶ 43, 45. He contends (Pet. 12-17) that those convictions do not qualify as violent felonies under the ACCA's elements clause. For the reasons stated in the government's brief in opposition (at 13-19) in Jones v. United States, No. 17-7667 (May 7, 2018), that contention is incorrect and does not itself warrant this Court's review.<sup>4</sup>

Petitioner additionally contends (Pet. 9-12) that his prior Florida conviction for attempted robbery was not a violent felony under the ACCA's elements clause. The Court is currently considering that question in Stokeling v. United States, cert. granted, No. 17-5554 (oral argument scheduled for Oct. 9, 2018). But even if petitioner's conviction for attempted robbery were not a conviction for a violent felony, petitioner would still have at least three ACCA predicate convictions. See pp. 5-6, supra. Thus,

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<sup>4</sup> We have served petitioner with a copy of the government's brief in Jones. This Court denied the petition for a writ of certiorari in Jones and other petitions raising the same or similar contentions. See Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667); Brewton v. United States, 137 S. Ct. 2264 (2017) (No. 16-7686); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756); Telusme v. United States, 137 S. Ct. 2091 (2017) (No. 16-6476).

the petition need not be held for the decision in Stokeling and should be denied.<sup>5</sup>

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General

SEPTEMBER 2018

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<sup>5</sup> The government waives any further response to the petition unless this Court requests otherwise.