No. 18-5268

IN THE SUPREME COURT OF THE UNITED STATES

JEREMIAH T. SAILOR, 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 "serious drug offense[s]" or "violent felon[ies]" that were "committed on occasions different from one another." 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.

1. Petitioner was sentenced as an armed career criminal based on prior convictions under Florida law for aggravated assault with a deadly weapon, robbery, sale of cocaine, and possession with intent to distribute cocaine. PSR ¶¶ 43, 47, 51.[1] He contends (Pet. 7-14) that this Court's review is warranted to address whether a prisoner seeking to challenge his sentence under Johnson

[1] The government has acknowledged that petitioner's two drug convictions were not "committed on occasions different from one another" and count only as one violent felony under the ACCA. 18 U.S.C. 924(e); see D. Ct. Doc. 213 (Aug. 15, 2016).

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.[2] It should follow the same course here.[3]

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

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[2] 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).

[3] 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).

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).[4]

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, No. 17-1251 (June 25, 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

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

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, 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).

In any event, this case would not be a good vehicle in which to address the question presented because petitioner's ACCA enhancement had no practical effect on his sentence. An ACCA sentence raises the default statutory sentencing range for a conviction for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), from zero to ten years of imprisonment, to 15

years to life imprisonment. Compare 18 U.S.C. 924(a)(2), with 18 U.S.C. 924(e)(1)-(2). Petitioner, however, was already exposed to a life sentence based on another conviction. In addition to his Section 922(g)(1) conviction, petitioner was convicted of conspiracy with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1), and 846, and possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Judgment 1. Based on the quantities of drugs involved and a prior felony drug conviction, see D. Ct. Doc. 67 (July 19, 2007) (jury verdict), petitioner's statutory sentencing range on the conspiracy count was zero to 30 years of imprisonment, and his statutory sentencing range on the possession-with-intent-to-distribute count was ten years to life imprisonment. PSR ¶ 73; Sent. Tr. 103 (see D. Ct. Doc. 167 (Nov. 10, 2008)); 21 U.S.C. 841(b)(1)(B)(i), (B)(iii), and (C). Accordingly, this is not a case in which the ACCA exposed a defendant to a sentence above the statutory maximum that would otherwise apply.

Moreover, petitioner's base offense level under the Sentencing Guidelines was 40 due to his drug convictions and other sentencing enhancements. PSR ¶¶ 30-34. The Probation Office did not even include the ACCA enhancement when it calculated petitioner's advisory guidelines range because the ACCA-enhanced

offense level of 34 was lower than the otherwise-applicable offense level of 40. PSR ¶ 38. Petitioner's guidelines range, based on offense level of 40 and criminal history category VI, was 360 months to life imprisonment. PSR ¶ 74. And he was sentenced to 360 months of imprisonment on each count, to run concurrently. Judgment 2. The ACCA therefore had no practical effect on petitioner's sentence. Indeed, under the concurrent-sentence doctrine, an appellate court may decline to review a claim on collateral review if the defendant is serving an uncontested concurrent sentence that is greater than or equal to the challenged ACCA sentence. See, e.g., United States v. Lampley, 573 F.2d 783, 788 (3d Cir. 1978) ("[A]n appellate court may avoid the resolution of legal issues affecting less than all of the counts in an indictment where at least one count has been upheld and the sentences are concurrent."). That is the case here, where petitioner received three concurrent sentences of 360 months.

2. Petitioner correctly observes (Pet. 14-15) that this Court is currently considering the question whether Florida robbery is a violent felony under the ACCA's elements clause in Stokeling v. United States, cert. granted, No. 17-5554 (oral argument scheduled for Oct. 9, 2018). Because petitioner has not shown that his sentence reflects Johnson error, however, he has not satisfied the gatekeeping inquiry for filing a second or

successive Section 2255 motion and the Court's decision in Stokeling will not affect the outcome of his case. Accordingly, the petition should be denied and need not be held pending the decision in Stokeling.[5]

Respectfully submitted.

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SEPTEMBER 2018

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