No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

KENNETH FLOYD PRUTTING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

In 1993, Mr. Prutting was convicted of possessing a firearm as a convicted felon and sentenced under the Armed Career Criminal Act ("ACCA") to 264 months' imprisonment. After this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), invalidating the ACCA's residual clause, Mr. Prutting moved to vacate his sentence under 28 U.S.C. § 2255. That motion was denied, and the Eleventh Circuit affirmed the denial because the 1993 sentencing record was silent on which provision of the ACCA's "violent felony" definition the district court relied on to enhance Mr. Prutting's sentence.

The question presented here is whether a § 2255 movant raising a *Samuel Johnson* claim can satisfy his burden of proof by showing his ACCA sentence may have been based on the residual clause, and under current law, he is not an armed career criminal.

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PETITION FOR A WRIT OF CERTIORARI

Kenneth Floyd Prutting respectfully petitions for a writ of certiorari to review the Eleventh Circuit's judgment affirming the denial of his motion for post-conviction relief under 28 U.S.C. § 2255, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, 723 F. App'x 886 (11th Cir. 2018), is provided in Appendix A. The order denying rehearing is found in Appendix B.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Prutting's case under 18 U.S.C. § 3231. The district court denied Mr. Prutting's 28 U.S.C. § 2255 motion on November 2, 2016. Mr. Prutting subsequently filed a notice of appeal and application for a certificate of appealability ("COA") in the Eleventh Circuit, which wasgranted on June 8, 2017. *See* Appendix A. On February 1, 2018, the Eleventh Circuit affirmed the district court's denial of Mr. Prutting's § 2255 motion. Appendix A. On April 26, 2018, the Eleventh Circuit denied Mr. Prutting's petition for rehearing en banc. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U. S. Const. amend. V

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), provides, in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

> (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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).

Connecticut defines robbery as follows:

> A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Conn. Gen. Stat. § 53a-133.[1] Such a robbery, without more, constitutes robbery in the third degree. Conn. Gen. Stat. § 53a-136.

At the time of Mr. Prutting's convictions, a third-degree robbery became a second-degree robbery if the offender either:

> (A) is aided by another person actually present; or (B) in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime displays or threatens the use of what he represents by his words or conduct to be a deadly weapon or a dangerous instrument.

Conn. Gen. Stat. § 53a-135.

[1] The definition of robbery found in § 53a-133 was enacted in 1971 and has remained unchanged, so it was in effect when Mr. Prutting committed his robberies.

First-degree robbery in Connecticut occurs if in the course of committing a robbery or immediate flight therefrom, the defendant or another participant in the crime:

> (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument ; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm . . . .

Conn. Gen. Stat. § 53a-134.

STATEMENT OF THE CASE

In 1993, Mr. Prutting was convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and sentenced to 264 months' imprisonment under the ACCA.[2] Without the ACCA enhancement, his statutory maximum would have been 120 months' imprisonment. The enhancement was based on three Connecticut convictions for robberies:

1. Second-degree robbery, in violation of Conn. Gen. Stat. § 53a-135(a)(1), committed in 1980, convicted on June 3, 1982, Connecticut Case No. CR27,989JD;

2. First-degree robbery, in violation of Conn. Gen. Stat. § 53a-134(a)(4), committed in 1981, convicted on June 3, 1982, Connecticut Case No. CR28,674JD;

3. First-degree robbery, in violation of Conn. Gen. Stat. § 53a-134(a)(4), committed in 1983, convicted on June 29, 1984, Connecticut Case No. CR7-79499JD.

[2] The instant federal sentence was imposed to run consecutively to a Connecticut sentence. Once Mr. Prutting finished serving the state sentence, he was returned to federal custody to serve the instant federal sentence. His projected release date is February 19, 2035. *See* www.bop.gov/inmatelocater (Register No. 37978-066), last accessed July 23, 2018.

Within one year of the decision in *Samuel Johnson*, Mr. Prutting filed his first (and only) motion to vacate his under 28 U.S.C. § 2255.[3] His sole ground for relief was that his prior Connecticut robbery convictions do not qualify as "violent felonies" now that the ACCA's residual clause has been found to be unconstitutional, and therefore his enhanced sentence should be vacated. In response, the government argued Mr. Prutting's claim was procedurally defaulted and meritless.

The district court declined to address the government's procedural default argument. In dismissing the § 2255 motion on the merits, the court relied on one unpublished Second Circuit decision and three district court decisions[4] to conclude that Connecticut robbery qualifies as an ACCA predicate offense under the elements clause. Ruling that *Samuel Johnson* afforded Mr. Prutting no relief, the district court dismissed his § 2255 motion as time-barred under § 2255(f)(1), because it was filed more than one year after his conviction became final, and *Samuel Johnson* did not apply to restart the one-year time limit under § 2255(f)(3). The district court also denied Mr. Prutting a COA.

The Eleventh Circuit, however, granted him a COA on the following issue:

> Whether the District Court erred in dismissing Mr. Prutting's 28 U.S.C. § 2255 motion on the ground that his 1980, 1981, and 1983 convictions under Conn. Gen. Stat. § 53a-133 qualify as violent felonies under the elements clause of the Armed Career Criminal Act.

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[3] In *Samuel Johnson*, this Court held the ACCA's residual clause is unconstitutionally vague. Subsequently, the Court held the new rule of constitutional law announced in *Samuel Johnson* applies retroactively on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

[4] *See United States v. Wiggan*, 530 F. App'x 51, 57 (2d Cir. 2013); *Williams v. United States*, No. 3:14-cv-866 (JBA), 2015 WL 1814436, at *2 (D. Conn. Apr. 17, 2015); *Harrington v. United States*, No. 3:08-cv-1864 (SRU), 2011 WL 1790175, at *6 (D. Conn. May 10, 2011); *Carter v. United States*, 731 F. Supp. 2d 262, 273 (D. Conn. 2010).

On appeal, Mr. Prutting argued that his robbery convictions no longer qualified as "violent felonies" since they do not categorically require the use of violent force against another person. The government disagreed and argued that Mr. Prutting's claim was procedurally defaulted.

On February 1, 2018, the Eleventh Circuit affirmed the lower court's dismissal of Mr. Prutting's § 2255 motion based on a ground not mentioned by either party—that Mr. Prutting could not satisfy his burden of proof in light of its decision in *Beeman v. United States,* 871 F.3d 1215 (11th Cir. 2017), because:

> [T]he District Court might have relied on either the elements clause or the residual clause in enhancing his sentence. The record does not reveal which one. It is just as likely that the District Court relied on the elements clause as the residual clause, especially since the Connecticut robbery statute plainly requires "the use of physical force upon another person." Therefore, Prutting has "failed to prove—that it was more likely than not—he in fact was sentenced as an armed career criminal under the residual clause." Because Prutting does not have a claim under *Johnson*, his challenge to the elements clause is time-barred.

Appendix A.

REASONS FOR GRANTING THE WRIT

There is a split in the circuits about a movant's burden of proof in § 2255 cases where the record is silent or ambiguous on whether a movant was sentenced under the residual clause of the ACCA. *Compare Beeman v. United States*, 871 F.3d 1221-22, *United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017), and *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018), *with United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017), *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *see also Dimott v. United States*, 881 F.3d 232, 241–43, 245 n.9 (1st Cir. 2018) (Torruella, J., joining in part and dissenting in part); *United States v. Taylor*, 873 F.3d 476 (5th Cir. 2017) (collecting cases). Mr. Prutting's case is a good vehicle to resolve how a movant can show *Samuel Johnson* error on a silent record because the judgment below cannot be affirmed on alternative grounds.

Mr. Prutting's claim was timely raised within one year of *Samuel Johnson*, and the court below did not pass on the government's procedural arguments (which were incorrect on the merits). Instead, the Eleventh Circuit affirmed the dismissal of Mr. Prutting's § 2255 motion based solely on the record being silent about which "violent felony" provision the district court relied on at his 1993 sentencing. Aside from the three robbery convictions, Mr. Prutting has no convictions that qualify as ACCA predicates. As a result, the failure of any one of the three convictions to qualify as a "violent felony" is sufficient, standing alone, to justify granting the motion to vacate.

A snapshot of the relevant legal background at the time of Mr. Prutting's 1993 sentencing does not resolve whether the district court relied on the enumerated crimes clause or residual clause. *See* Appendix A ("[T]he District Court might have relied on either the elements clause or the residual clause in enhancing his sentence. The record does not reveal which one."). There were simply no Eleventh Circuit cases addressing whether first or second-degree Connecticut robbery was an ACCA predicate.

Under current law, none of Mr. Prutting's robbery convictions qualify as an ACCA predicate offense.[5] Because there is no other basis to affirm the judgment below, Mr. Prutting's case makes an excellent vehicle to address the question presented.

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[5] Admittedly, after the Eleventh Circuit decided Mr. Prutting's appeal, the Second Circuit held that a conviction for first-degree robbery under Conn. Gen. Stat. § 53a-134(a)(4) qualifies as a "violent felony" under the elements clause because displaying or threatening to use a firearm implies a threat to commit violence. *United States v. Bordeaux*, 886 F.3d 189, 194 (2d Cir. 2018). Mr. Prutting maintains that *Bordeaux* was incorrectly decided. But even if Connecticut first-degree robbery qualifies as a "violent felony," Connecticut second-degree robbery does not. The only force required for a second-degree robbery is preventing or overcoming a victim's resistance. Thus, the type of force required for a second-degree robbery in Connecticut does not categorically require violent "physical force." Notably, this Court is currently considering *Stokeling v. United States*, No. 17-5554 (cert. granted Apr. 2, 2018), to decide whether Florida robbery, which also requires only enough force to overcome a victim's resistance, qualifies as a "violent felony" under the elements clause. Thus, at a minimum, this case should be held pending *Stokeling*, and if *Stokeling* is favorable to Mr. Prutting, the Court should grant this petition.

A § 2255 Movant Raising A *Samuel Johnson* Claim Can Satisfy His Burden of Proof By Showing His ACCA Sentence May Have Been Based On The Residual Clause And That Under Current Law, He Is Not An Armed Career Criminal.

The Eleventh Circuit relied on its decision in *Beeman*, which itself was a split decision with a dissent. The majority in *Beeman* concluded that a *Samuel Johnson* claim may be established only if it is "more likely than not" that his ACCA sentence was based on the residual clause. 871 F.3d at 1221–22. A movant cannot satisfy this burden if "it is just as likely that the sentencing court relied on the elements or enumerated crimes clause, solely or as an alternative basis for the enhancement." *Id*. at 1222. Characterizing the inquiry as one of "historical fact," the court stated:

> Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that [movant's prior conviction] no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact here: whether [at his original sentencing the movant] was, in fact, sentenced under the residual clause only.

Id. at 1224 n.5. Under the *Beeman* majority's standard, a silent record must be construed against a movant, and a movant may not rely on current law to establish that he was sentenced under the residual clause.

The *Beeman* dissent urged the court to adopt a rule that, when the sentencing record is inconclusive, *Samuel Johnson* error is established when the movant shows he could not be sentenced under any other clause of the "violent felony" definition. *Id*. at 1229–30. The dissent emphasized that under its rule, movants would still have to prove that they were more likely than not sentenced under the residual clause, but movants could satisfy that burden by establishing that,

if sentenced today, they could not be sentenced under the elements or enumerated-crimes clauses. *Id*.

In *Dimott*, the First Circuit adopted the Eleventh Circuit's approach and held, over dissent, that a § 2255 movant "bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause." 881 F.3d at 243. The court said this approach "makes sense" because any other rule would undercut the "presumption of finality" that is an "animating principle of AEDPA" and because "[p]etitioners . . . were certainly present at sentencing and knowledgeable about the conditions under which they were sentenced." *Id*. at 240. Like the Eleventh Circuit, movants in the First Circuit may not rely on current law to prove they were solely sentenced under the residual clause. *Id*. at 243 & n.8.

In *Snyder*, the Tenth Circuit adopted an approach that is effectively the same as the Eleventh Circuit approach. In that circuit, a movant must show that his prior convictions would not have satisfied the elements or enumerated crimes clauses under "the relevant background legal environment" at the time of his sentencing. 871 F.3d at 1130. The "relevant background legal environment" does not include post-sentencing court decisions, including clarifying decisions. *Id.* at 1129. As a result, movants in the Tenth Circuit may not rely on current law to prove they were sentenced under the residual clause.

In contrast, the Fourth Circuit adopted a standard that places a lower initial burden on movants. The Fourth Circuit requires a movant show only that his sentence "*may* have been predicated on application of the now-void residual clause, and therefore *may* be an unlawful sentence." *Winston*, 850 F.3d at 682. Once that threshold is crossed, the court asks whether the *Samuel Johnson* error was harmless. *Id*. at 682 n.4. To answer that question, the court applies

current law to determine whether the movant's prior convictions qualify as "violent felon[ies]." *Id*. Under the Fourth Circuit's standard, a silent record is construed in the movant's favor.

The Ninth Circuit also construes a silent record in the movant's favor. Borrowing a principle that originated from *Stromberg v. California*, 283 U.S. 359 (1931), that court concluded an unclear record establishes *Samuel Johnson* error because "when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Geozos*, 870 F.3d at 895. Like the Fourth Circuit, the Ninth Circuit applies current law to determine if the *Samuel Johnson* error is harmless. *Id*. at 897.

Winston, *Geozos*, and the *Beeman* dissent convincingly explain why the position adopted in *Beeman* (as well as *Dimott* and *Snyder*) is unworkable and unfair.

First, the *Beeman* standard disregards how ACCA sentencings are actually conducted. District courts need not, and routinely do not, disclose which clause or clauses they rely on when applying the ACCA. *See, e.g.*, *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) ("Nothing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence."). And to the extent a court stated which clause it was relying on, before *Samuel Johnson*, most courts simply relied on the expansive residual clause. The *Beeman* standard, in failing to account for this reality, effectively "penalize[s] a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Winston*, 850 F.3d at 682. Applying *Beeman* will lead to arbitrary results in individual cases and "selective application" of *Samuel Johnson*'s constitutional holding. *Id*. (citing *Chance*, 831 F.3d at 1341).

Second, by focusing solely on "historical facts" without considering intervening Supreme Court precedent, the *Beeman* standard deprives movants in silent-record cases of the only means

they may have to prove they were sentenced under the residual clause. In declining to consider intervening Supreme Court precedent—especially cases like *Descamps v. United States*, 133 S.Ct. 2276 (2013), which clarified what the "violent felony" definition always required—*Beeman* incorrectly characterized how movants raising *Samuel Johnson* claims were attempting to satisfy their burdens. As the *Beeman* dissent noted, there is a difference between raising a *Descamps* claim and relying on *Descamps* to establish that you must have been sentenced under the residual clause. 871 F.3d at 1226 (William, J., dissenting) ("The majority conflates Beeman's argument that he *could not have been sentenced* under the elements clause – made in the context of establishing his *Samuel Johnson* claim – with the argument that he *was improperly sentenced* under the elements clause – which would constitute an untimely *Descamps* claim."). Moreover, ignoring *Descamps* for "historical fact" effectively treats movants differently based on arbitrary factors. For example, movants with identical prior convictions will be treated differently based solely on when they were sentenced. *See Chance*, 831 F.3d at 1340 (noting the unfairness of ignoring intervening decisions of the Supreme Court for "a foray into a stale record").

Mr. Prutting respectfully maintains that the path set forth by *Winston*, *Geozos*, and the *Beeman* dissent strike the correct balance for determining how a movant in a silent-record case satisfies his burden to show *Samuel Johnson* error.

CONCLUSION

Because the issue presented by this petition divides the circuits and affects scores of prisoners across the nation, Mr. Prutting respectfully requests that this Court grant his petition.

Respectfully submitted,

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Appendix A

723 Fed.Appx. 886
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Kenneth Floyd PRUTTING, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 17-10028
|
Non-Argument Calendar
|
(February 1, 2018)

Synopsis

Background: Prisoner filed motion to vacate, set aside, or correct sentence for possession of firearm by convicted felon that was enhanced under Armed Career Criminal Act, based on predicate Connecticut convictions for first- and second-degree robbery. The United States District Court for the Middle District of Florida denied motion, and then denied certificate of appealability (COA). Prisoner obtained COA from member of Court of Appeals, and he appealed.

[Holding:] The Court of Appeals held that prisoner failed to prove that sentence was enhanced under provision of Act that was subsequently declared unconstitutional.

Affirmed.

West Headnotes (1)

[1] Criminal Law
Change in the law

Sentencing and Punishment
Particular offenses

Prisoner was not entitled to correction of sentence of 264 months, under Armed Career Criminal Act, for possession of firearm by convicted felon, based on assertion that sentence was enhanced due to predicate Connecticut robbery convictions under residual clause of Act that was subsequently held to be unconstitutionally vague; record did not indicate whether sentencing court relied on residual clause or elements clause as basis for enhancement, but in any case, first- and second-degree robbery under Connecticut law constituted "violent felony," within meaning of Act, as they had as element "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C.A. § 924(e); Conn. Gen. Stat. Ann. § 53a-133.

Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 924(e)

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:16-cv-01673-SCB-TGW, 8:92-cr-00271-SCB-TGW-1

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Colin P. McDonell, Michelle Thresher Taylor, Arthur Lee Bentley, III, Francis D. Murray, Gregory T. Nolan, U.S. Attorney's Office, Tampa, FL, for Respondent-Appellee

Before TJOFLAT, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Kenneth Prutting, a federal prisoner serving a 264-month sentence, appeals the District Court's dismissal of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On appeal, Prutting argues that he does not qualify as an armed career criminal because his robbery convictions under Connecticut law

fell under the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which the Supreme Court invalidated in *Johnson v. United States*, U.S. , 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). We hold that he has failed to prove that the sentencing court used the residual ***887** clause to enhance his sentence, and therefore that he cannot prevail on his *Johnson* claim. *Beeman v. United States*, 871 F.3d 1215, 1221 22 (11th Cir. 2017).

I.

Prutting has three prior convictions of robbery in Connecticut. He has one conviction of third-degree assault from 1982. In 1993, a jury convicted Prutting of being a convicted felon in possession of a firearm. 18 U.S.C. §§ 922(g), 924(e). The District Court determined that Prutting was an armed career criminal and sentenced him to 264 months of prison.

1 In 1982, Prutting was convicted of second degree robbery under Conn. Gen. Stat. § 53a 135(a)(1) and first degree robbery pursuant to Conn. Gen. Stat. § 53a 134(a)(4). In 1984, Prutting was once again convicted of first degree robbery under Conn. Gen. Stat. § 53a 134(a)(4).

In the aftermath of *Johnson*, Prutting moved the District Court to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255(a). He argued that his sentence enhancement relied on the residual clause and that his robbery convictions cannot fall under the elements clause. The District Court denied his § 2255 petition. It held that robbery, as defined in Connecticut law, constitutes a violent felony under the elements clause because it requires the use, attempted use, or threatened use of physical force against another person.

Prutting then moved for a certificate of appealability ("COA"), but the District Court denied the motion. Prutting, however, appealed and obtained a COA from a member of this Court.

II.

When we review a § 2255 claim, we review legal conclusions *de novo* and factual findings for clear error. *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). It is a question of law whether a conviction is a violent felony under the ACCA. *United States v. Seabrooks*, 839 F.3d 1326, 1338 (11th Cir. 2016). We are free to affirm on any ground supported by the record. *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016).

The ACCA provides that a defendant faces a mandatory minimum of fifteen years in prison when he or she is convicted of being a felon in possession of a firearm and has three or more prior convictions for a serious drug offense or a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" to mean any crime punishable by more than one year in prison and 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.

Id. § 924(e)(2)(B)(i)-(ii). We refer to the first prong of this definition as the "elements clause," while the second prong contains both an "enumerated crimes" clause and a "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). In *Johnson*, the Supreme Court struck down the residual clause as unconstitutionally vague. 135 S.Ct. at 2556. The holding in *Johnson* represents a new substantive rule that has retroactive application to cases on review. *Welch v. United States*, U.S. , 136 S.Ct. 1257, 1268, 194 L.Ed.2d 387 (2016).

To make out a successful claim under *Johnson*, a petitioner must establish that his sentence enhancement turned on the ***888** validity of the residual clause. *Beeman*, 871 F.3d at 1221. He must show that the residual clause "actually adversely affected the sentence he received." *Id.* Accordingly, the petitioner must prove that the residual clause "more likely than not" formed the basis for his sentence enhancement. *Id.* at 1221 22. "If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to the use of the residual clause." *Id.* at 1222. A petitioner cannot prevail if he or she fails "to prove that but for the residual clause he would have received a different sentence." *Id.* at 1225.

[1] In the present case, Prutting argues that he is not an armed career criminal because his ACCA enhancement rested on the residual clause. However, he offers no evidence that the District Court actually relied on the residual clause in enhancing his sentence. Prutting concedes that robbery convictions could, and have been held to, fall under the elements clause. True. *See United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002) (holding that robbery under Florida law is a violent felony under the ACCA). As a result, the District Court might have relied on either the elements clause or the residual clause in enhancing his sentence. The record does not reveal which one.[2] *Id.* at 1221. It is just as likely that the District Court relied on the elements clause as the residual clause, especially since the Connecticut robbery statute plainly requires "the use of physical force upon another person." Conn. Gen. Stat. § 53a-133; *cf. United States v. Vail-Bailon*, 868 F.3d 1293, 1302 (11th Cir. 2017) (holding that the ACCA requires only "violent force that is *capable* of causing physical pain or injury to another" (emphasis added)). Therefore, Prutting has "failed to prove that it was more likely than not he in fact was sentenced as an armed career criminal under the residual clause." *Beeman*, 871 F.3d at 1225. Because Prutting does not have a claim under *Johnson*, his challenge to the elements clause is time-barred. *See* 28 U.S.C. § 2255(f)(1). Accordingly, the decision of the District Court is

2 The Presentence Investigation Report ("PSI) does not state which clause of the ACCA supported an enhancement. In a sentencing hearing on September 7, 1993, the District Court stated that "the Defendant is an armed career criminal. It said no more on the matter.

AFFIRMED.

All Citations

723 Fed.Appx. 886

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Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10028-HH

KENNETH FLOYD PRUTTING,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

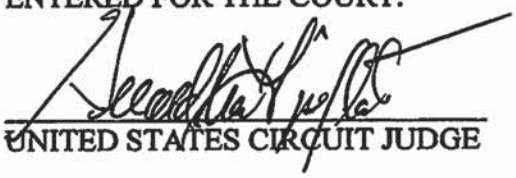
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42