No. 18-5398

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH FLOYD PRUTTING, 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 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 under Connecticut law for first-degree robbery and one Connecticut conviction for second-degree robbery. Pet. App. A2 n.1; Presentence Investigation Report (PSR) ¶¶ 28, 31, 34; see PSR ¶ 20. He contends (Pet. 5-10) that this Court's review is warranted to address whether a prisoner seeking to challenge his sentence under Johnson in a motion for post-conviction relief 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, in order for a motion filed within one year of Johnson (but more than one year after his conviction became final) to be considered timely

under 28 U.S.C. 2255(f)(3). That issue does not warrant this Court's review. This Court has recently and repeatedly denied review of similar issues in other cases.[1] It should follow the same course here.[2]

Although the Court's invalidation of the ACCA's residual clause in Johnson announced a new constitutional rule that applies retroactively to cases that were final before the decision was announced, see Welch, 136 S. Ct. at 1265, it has neither the procedural nor substantive effect of permitting collateral attacks by defendants who were not sentenced under that clause. See 28 U.S.C. 2255(f)(3). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Casey v. United States, No. 17-1251, a defendant seeking to avail himself of Section 2255(f)(3) is required to establish, through proof by a preponderance of the evidence, that his sentence in

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[1] See Sailor v. United States, No. 18-5268 (Oct. 29, 2018); McGee v. United States, No. 18-5263 (Oct. 29, 2018); Murphy v. United States, No. 18-5230 (Oct. 29, 2018); Perez v. United States, No. 18-5217 (Oct. 9, 2018); Safford v. United States, No. 17-9170 (Oct. 1, 2018); Oxner v. United States, No. 17-9014 (Oct. 1, 2018); Couchman v. United States, No. 17-8480 (Oct. 1, 2018); King v. United States, No. 17-8280 (Oct. 1, 2018); 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. George v. United States, No. 18-5475 (filed July 19, 2018); Jordan v. United States, No. 18-5692 (filed Aug. 20, 2018); Sanford v. United States, No. 18-5876 (filed Aug. 30, 2018).

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 7-9, 11-13, Casey, supra (No. 17-1251).[3]

The decision below is therefore correct, and the result is consistent with cases from 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 brief in opposition in Casey, however, some inconsistency exists in the approaches of different circuits to Johnson-premised collateral attacks like petitioner's. That brief explains 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

[3] We have served petitioner with a copy of the government's brief in opposition in Casey.

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 brief in Casey was 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. Additionally, the Sixth Circuit recently held that its decision in Potter, supra, stands for the proposition that a movant seeking relief under Johnson must prove that he was sentenced under the residual clause only if (1) the movant is bringing a second or successive motion and (2) there is some evidence that the movant was sentenced under a clause other than the residual clause. Raines v. United States, 898 F.3d 680, 685-686 (6th Cir. 2018) (per curiam). Further review of inconsistency in the circuits' approaches remains unwarranted, however, for the reasons stated in the government's previous brief. See Br. in Opp. at 13-16, Casey, supra (No. 17-1251).

In any event, this case would be a poor vehicle for reviewing the question presented. Petitioner procedurally defaulted his claim by failing to raise it at sentencing or on direct appeal. See D. Ct. Doc. 11, at 3-5 (Sept. 12, 2016) (government's response to petitioner's Section 2255 motion). A prisoner may not obtain collateral review of a defaulted claim unless he shows "cause" for the default and "actual prejudice" from any error, or that he is "actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted).

Petitioner cannot demonstrate "cause" for his default. Johnson applied well-established constitutional vagueness principles, 135 S. Ct. at 2556-2557, and petitioner thus cannot show that a challenge to the residual clause based on vagueness would have been "so novel" at the time of his direct appeal "that its legal basis wa[s] not reasonably available" to him. Bousley, 523 U.S. at 622 (citation omitted). Even if it were unlikely that petitioner's challenge would have succeeded, this Court has long held that "futility cannot constitute cause." Id. at 623 (citation omitted).

Nor can petitioner show "actual prejudice" from his default. Bousley, 523 U.S. at 622 (citation omitted). Petitioner was not prejudiced because his Connecticut robbery convictions were properly characterized as ACCA predicate offenses under the elements clause. See D. Ct. Doc. 12, at 3-4 (Nov. 2, 2016)

(district court opinion); D. Ct. Doc. 11, at 5-15. The same is true of the "actual innocence" exception to procedural default. Even assuming that a prisoner could in some circumstances be "actually innocent" of a noncapital sentence, cf. Dretke v. Haley, 541 U.S. 386, 391-392 (2004) (declining to resolve that question), petitioner cannot make such a showing because his prior convictions are violent felonies even without the residual clause.[4]

[4] Petitioner errs in contending (Pet. 6 & n.5) that "none of [his] robbery convictions qualify as an ACCA predicate offense." He acknowledges that the Second Circuit has recently held that Connecticut first-degree robbery qualifies as a violent felony under the elements clause, ibid. (citing United States v. Bordeaux, 886 F.3d 189, 194 (2d Cir. 2018)), but he contends that second-degree robbery does not satisfy the elements clause because it requires no more force than necessary to overcome the victim's resistance, ibid. This Court has granted certiorari in Stokeling v. United States, No. 17-5554 (argued Oct. 9, 2018), to address that issue in the context of Florida's robbery statute. Holding this case for Stokeling is unnecessary. Regardless of how the Court ultimately resolves the statutory question in Stokeling, it would not suggest that petitioner's sentence in 1993 was premised on constitutional error under Johnson. In any event, the need for petitioner to prevail on both the question presented and a separate question about the classification of Connecticut's burglary statute illustrates that this is an unsuitable vehicle for review of the question presented.

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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