No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHNATON SAMPSON GEORGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

To establish both procedural and substantive eligibility for habeas relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), a petitioner must show that a claim relies on the legal holding of *Johnson*—i.e., that the petitioner's sentence implicated the "residual clause" of the Armed Career Criminal Act. But the courts of appeals are mired in a six-way split on the issue of *how* one must show that a claim relied on the residual clause. Thus, the question presented is whether courts should look to (1) the factual record, (2) the law at the time of sentencing, (3) the law as it currently stands, or (4) a combination of these factors to decide whether a petitioner's claim relies on *Johnson* such that she or he is eligible for relief?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Federal Cases

Federal Statutes

State Statutes

Other

IN THE SUPREME COURT OF THE UNITED STATES

JOHNATON SAMPSON GEORGE,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner Johnaton Sampson George respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on April 20, 2018.

OPINION BELOW

The Court of Appeals denied Mr. George's request for a certificate of appealability from the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2255 in an unpublished order. *See United States v. George*, No. 17-55916, 2018 WL 3201851 (9th Cir. Apr. 20, 2018) (attached here as Appendix A).

JURISDICTION

On April 20, 2018, the Court of Appeals denied Mr. George's request for a certificate of appealability from the denial of his petition for a writ of habeas corpus. *See* Pet. App. 1a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent statute, 18 U.S.C. § 924(e)(2)(B) states:

(B) The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . 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.

STATEMENT OF FACTS

In 1992, a jury found Mr. George guilty of one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g) and one count of escape under 18 U.S.C. § 751(a). While a conviction for felon in possession of a firearm normally carries a ten-year statutory maximum, the Presentence Report ("PSR") contended that Mr. George qualified for a sentencing enhancement under the Armed Career Criminal ("ACCA"). This enhancement carries a mandatory minimum of fifteen years and a statutory maximum of life in prison for defendants who have previously been convicted of three "violent felonies." *See* 18 U.S.C. § 924(e)(1).

The sentencing court agreed with the PSR that Mr. George had been convicted of three "violent felonies" such that he was subject to an ACCA sentencing enhancement. In a written decision, the court correctly recited the statutory language showing the various ways a prior offense may qualify as a "violent felony," such as an offense requiring the "use, attempted use, or threatened use of physical force" or an offense that "involves conduct that presents a serious potential risk of

physical injury to another." 18 U.S.C. § 924(e)(2)(A)(i). But in the very next paragraph, the court confusingly stated that "[u]nder section 924(e)(2)(A)(i), applicable offenses are limited to those that, as an element of the offense, require the use, threatened use, or attempted use of physical force." Not only was this incorrect (as the ACCA statute does *not* limit "violent felonies" to offenses that require the "use, threatened use, or attempted use of physical force"), but the subsection the court cited defines a "serious drug offense," rather than a "violent felony." *See* 18 U.S.C. § 924(e)(2)(A)(i).

The sentencing court then found that Mr. George was an armed career criminal because he had "at least three prior convictions for a 'violent felony.'" First, the court held that Mr. George's two 1977 rape convictions under Cal. Penal Code § 261 qualified as ACCA predicates. Relying on documents in the record of conviction, the court found that Mr. George was convicted under a subsection of § 261 that required the rape to be accomplished "by means of force, violence, or fear of immediate and unlawful bodily injury," which rendered it a "violent felony."

Next, the sentencing court held that Mr. George's 1977 conviction for California burglary qualified as an ACCA predicate because "the Ninth Circuit has concluded a conviction for first degree burglary under Penal Code Section 460 qualifies as a predicate offense." To reach this conclusion, the court relied on *United States v. Becker*, quoting its language that:

> Any time a burglar enters a dwelling with felonious or larcenous intent *there is a risk that in the course of committing the crime* he will encounter one of its lawful occupants, and use physical force against

> that occupant either to accomplish his illegal purpose or to escape apprehension.

919 F.2d 568, 571 (9th Cir. 1990) (emphasis added). The court concluded: "The court, therefore, finds the defendant was convicted of first degree burglary and that *this conviction constitutes the third predicate conviction.*" (emphasis added).

In the alternative, the sentencing court then found that Mr. George "has been convicted of yet another crime that would qualify as a violent felony." The court cited Mr. George's 1975 conviction for robbery under Cal. Penal Code § 211, stating—with no supporting authority—that the statute "requires, as an element, the use of force or threat of force." The court then concluded, "[t]his robbery, therefore, *could constitute* a fourth predicate conviction." (emphasis added).

As a result of the ACCA enhancement, the court sentenced Mr. George to life in prison on the felon-in-possession charge and a concurrent sentence of five years on the escape count. Had the ACCA enhancement not applied, the court could have imposed a maximum sentence of ten years for his felon-in-possession conviction. *See* 18 U.S.C. § 924(a)(2).

On June 26, 2015, this Court in *Johnson v. United States* struck down the "residual clause" of the Armed Career Criminal Act ("ACCA") as void for vagueness. 135 S. Ct. 2551 (2015). Within one year, Mr. George filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. In this motion, Mr. George argued that his prior convictions for California rape, burglary, and robbery did not qualify as ACCA predicates in light of *Johnson*'s holding that the ACCA residual clause was unconstitutional.

In its opposition to Mr. George's § 2255 motion, the Government did not argue that California burglary and California robbery fall under the "elements clause" in that they actually contain an element of the use, attempted use, or threatened use of physical force. Instead, the Government argued only that *Johnson* did not apply to Mr. George's case, pointing to the district court's confusing statement at sentencing that "applicable offenses are limited to those that, as an element of the offense, require the use, threatened use, or attempted use of physical force." Relying on this, the Government argued that the district court "never relied on the residual clause" but instead "expressly found that at least three predicate convictions qualified under the element clause."

The district court denied Mr. George's § 2255 petition, echoing the Government's argument. The court stated that a review of the record showed that it had "expressly relied on the force clause of the ACCA at sentencing" and that nothing in the record "makes express reference to the residual clause." In a footnote, the court noted that even if its reference to *Becker* meant that it had relied on the residual clause, any such error was "harmless" because it had also relied on Mr. George's California robbery conviction. Furthermore, the court denied Mr. George a certificate of appealability, concluding that "reasonable jurists would not find the Court's assessment of Defendant's claims debatable or wrong."

Mr. George timely filed a motion to the Ninth Circuit requesting a certificate of appealability. On April 20, 2018, the Ninth Circuit denied this request, stating only that Mr. George "has not made a 'substantial showing of the denial of a

constitutional right.' 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)." Pet. App. 1a. This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

For the following reasons, this Court should grant Mr. George's petition for a writ of certiorari.

First, six circuit courts have taken six different approaches to determining whether a claim implicates the residual clause by looking to (1) the factual record, (2) the law at the time of sentencing, (3) the law as it currently stands, or (4) a combination of these factors. Thus, the circuits are hopelessly split on this issue and must be reconciled.

Second, this question should be swiftly resolved because it affects thousands of *Johnson* petitioners nationwide who may be serving unconstitutional sentences.

Third, Mr. George's case squarely presents this issue and provides an ideal vehicle to resolve it.

Fourth, the Ninth Circuit's decision was incorrect because courts should apply current law interpreting the elements of the offense to adjudicate both the procedural and substantive issues in *Johnson* claims.

REASONS FOR GRANTING THE PETITION

I.

Six Courts of Appeals Have Taken Six Different Approaches to Determining Whether a Petitioner Satisfies the Procedural and Substantive Requirements for Relief Under *Johnson*.

To date, every circuit court to have decided the issue of whether a claim implicated the residual clause has employed a different approach to this inquiry. This hodge-podge of conflicting methodologies is unsustainable and must be resolved by this Court.

Adjudicating a *Johnson* claim first requires a court to consider whether any procedural hurdles exist to granting relief. These procedural hurdles may include whether a petition is timely under 28 U.S.C. § 2255(f)(3) and whether a second or successive petition relies on a "new rule of constitutional law" under § 2255(h)(2) or § 2244(b)(2)(A).

But to adjudicate these procedural questions, the courts of appeals have looked to different sources to determine whether a claim implicates *Johnson* and the residual clause. For instance, the Fourth Circuit, the first to decide the question, looked to the *factual record*—in particular, whether the district court expressly stated that it was relying on a legal basis other than the residual clause to find the predicate offense a "violent felony." *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). By contrast, the First, Tenth, and Eleventh Circuits looked, not to what happened at the sentencing hearing, but to the law interpreting the crime's elements *as it stood at the time of the petitioner's sentencing*. *See*

Dimott v. United States, 881 F.3d 232, 241 (1st Cir. 2018); *United States v. Taylor*, 873 F.3d 476, 481 (5th Cir. 2017); *Beeman v. United States*, 871 F.3d 1215, 1220 (11th Cir. 2017). And in the context of a second or successive habeas under § 2255(h)(2), the Ninth Circuit has looked to *both* of these sources. *See United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (holding that a claim does not rely on Johnson if "it is possible to conclude, using both the record before the sentencing court and the relevant background legal environment at the time of sentencing, that the sentencing court's ACCA determination did not rest on the residual clause").

The courts of appeals have come no closer to unanimity on the merits of *Johnson* claims. The Fourth and Ninth Circuits, both of which looked to the factual record on the procedural issues, switched to looking at the law interpreting the crime's elements *as it currently stands* when addressing the merits of the claim. *See Winston*, 850 F.3d at 684 ("Accordingly, we now must consider under the current legal landscape whether Virginia common law robbery qualifies as a violent felony under the ACCA's force clause.") (emphasis added); *Geozos*, 870 F.3d at 897 (stating that, to decide the merits, "we look to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing"). On the merits, the Eleventh Circuit switches from looking at the law at the time of sentencing to the factual record. *See Beeman*, 871 F.3d at 1221. While finding that a petitioner's assertion of *Johnson* is enough to satisfy the threshold procedural requirements, the Tenth Circuit adjudicates the merits by looking to both the

factual record and the law at the time of sentencing. *See United States v. Snyder*, 871 F.3d 1122, 1126, 1128-30 (10th Cir. 2017). Meanwhile, the Fifth Circuit has yet to take a position, finding that the petitioner had met the standard under any of those tests. *See Taylor*, 873 F.3d at 481. And the First Circuit has yet to decide what controls on the merits of the claim because it has so far found the petitions untimely. *See Dimott*, 881 F.3d at 243.

As if these divergent approaches were not enough, the circuits are also split on whether a sentencing court's failure to designate the particular clause on which it relied means that the petitioner has satisfied her burden or not. The First, Tenth, and Eleventh Circuits have held that where the record is silent, a petitioner cannot meet her burden to show that the claim relied on the residual clause. *See Beeman*, 871 F.3d at 1222 (holding that petitioners cannot meet their burden to demonstrate Johnson error 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"). By contrast, the Fourth and Ninth Circuits hold that in adjudicating the merits, a silent record will satisfy the threshold procedural requirements. *See Winston*, 850 F.3d at 682 (declining to "penalize 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"); *Geozos*, 870 F.3d at 895 (holding that "when it is unclear from the record whether the sentencing court relied on the residual clause," courts resolve the ambiguity in favor of the petitioner). So even where two circuits may agree on which source controls the inquiry, their approaches

may nevertheless lead to inconsistent results depending on whether a silent record may establish a petitioner's eligibility for relief or not.

What's more, this widespread judicial disagreement is further evidenced by the fact that three of the six cases discussed here were accompanied by a dissent or concurrence that would have looked to a different source. For instance, Judge McHugh's concurrence to the Tenth Circuit's decision would have looked only to the factual record on procedural issues and the law at the time of sentencing on the merits, even though the majority analyzed both on the merits. *See Snyder*, 871 F.3d at 1130-32. For procedural issues, Judge Torruella's dissent in *Dimott* would have looked to the factual record, even though the majority looked to the law at the time of sentencing. *See Dimott*, 881 F.3d at 245. And the dissents in *Dimott* and *Beeman* would have both looked to current law for the merits. *See Dimott*, 881 F.3d at 246 (finding that the application of current law is "necessary to decide this case") (Torruella, J., joining part and dissenting in part); *Beeman*, 871 F.3d at 1229 (stating that the majority's approach "not only would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court") (Williams, J., dissenting).

The following chart summarizes the approaches taken by the six circuit courts and their accompanying concurrences and dissents:

Case	Factual Record	Law at Sentencing	Current Law
Winston - procedural	X		
Winston - merits			X
Geozos - procedural	X	X	
Geozos - merits			X
Snyder (majority) - merits	X	X	
Snyder (concurrence) - procedural	X		
Snyder (concurrence) - merits		X	
Beeman (majority) - procedural		X	
Beeman (majority) - merits	X		
Beeman (dissent) - merits			X
Taylor - procedural		X	
Taylor - merits		X	
Dimott (majority) - procedural		X	
Dimott (dissent) - procedural	X		
Dimott (dissent) - merits			X

As this chart shows, it would be difficult to imagine a *more* fractured approach than that currently taken by circuit courts adjudicating the issues at stake in *Johnson* claims. A grant of certiorari is thus not only necessary, but virtually inevitable.

II.

This Question Affects Thousands of *Johnson* Petitioners Nationwide Who May Be Currently Serving Unconstitutional Sentences.

The Court should grant Mr. George's petition for certiorari without delay because this case presents a recurring issue of national importance. As this Court is well aware, thousands of individuals sentenced under identical or similarly-worded "residual clauses" have filed *Johnson*-based motions seeking relief in districts throughout the country. Without prompt resolution of this issue, the disparate approaches of the circuits detailed above will lead to inconsistent and unfair results for similarly-situated individuals.

The ubiquity of these *Johnson* claims stems from the fact that for decades, the residual clause acted as a catch-all provision, reaching nearly all crimes that would have also satisfied an alternative definition contained in the "violent felony" or "crime of violence" definition. *See* 18 U.S.C. § 924(e)(2)(B) (ACCA); U.S.S.G. § 4B1.2(a) (career offender Guideline); 18 U.S.C. § 924(c)(3) (committing an offense "in furtherance of" a crime of violence). Because of the "catch-all" nature of the residual clause, sentencing courts seldom explained their rationale or legal thought processes at sentencing, since the identity of the clause upon which they relied made no difference to the outcome. And because this failure to explain made no difference to the outcome, defense counsel had no incentive to object or clarify on the record the particular legal basis for the sentencing court's decision. As a result, inconclusive records are common—if not the norm—in *Johnson* litigation, and thousands of petitioners and reviewing courts are currently trying to make sense of ambiguous records when looking retrospectively at original sentencing proceedings.

This is precisely what happened in Mr. George's case, where the 1993 written sentencing decision is riddled with ambiguities as to which "violent felony" definition the district court relied on. For instance, to find California burglary a "violent felony," the sentencing court stated that "'[a]ny time a burglar enters a dwelling with felonious or larcenous intent *there is a risk that in the course of committing the crime* he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension.'" This quote comes directly from *Becker*, 919 F.2d at 571, which is

uniformally regarded as the case that determined California burglary fell within the residual clause of 18 U.S.C. § 16(b). *See Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) ("[I]n Becker, we held that California first-degree burglary under California Penal Code § 459 is categorically a 'crime of violence' under 18 U.S.C. § 16(b) because the crime inherently involves a substantial risk of physical force.") (citation and quotation omitted); *United States v. Ramos-Medina*, 706 F.3d 932, 937 (9th Cir. 2013) (same); *Chuen Piu Kwong v. Holder*, 671 F.3d 872, 878 (9th Cir. 2011) (same). So while the district court now claims that it made no "express reference to the residual clause," its original legal analysis plainly incorporated it.

Urgent review is also warranted because many *Johnson* movants may be serving sentences far higher than they would have otherwise received. In some cases, for instance, a grant of relief under *Johnson* would subject a petitioner to a lower statutory maximum, such as a person subject to a fifteen-year mandatory minimum under the Armed Career Criminal Act who would only face a statutory maximum of ten years if granted *Johnson* relief. *See* 18 U.S.C. § 924(e)(1). Here, for instance, the application of an ACCA enhancement catapulted Mr. George's felon-in-possession sentence from a maximum sentence of ten years to a sentence of *life in prison*. Thus, any delay in adjudicating these important cases will unquestionably lead many defendants to continue to serve unconstitutional sentences.

III.

Mr. George's Case Squarely Presents This Question.

As previously explained, courts have looked to a variety of factors to determine whether a sentence "relied on" *Johnson*, including (1) the factual record, (2) the law at the time of sentencing, (3) the law as it currently stands, or (4) a combination of these factors. But here, had the Ninth Circuit looked to current law, as other circuits and jurists have urged, the outcome would have been different. *See Winston*, 850 F.3d at 684 ("Accordingly, we now must consider under the current legal landscape whether Virginia common law robbery qualifies as a violent felony under the ACCA's force clause."); *see also Dimott*, 881 F.3d at 246 (Torruella, J., joining part and dissenting in part); *Beeman*, 871 F.3d at 1229 (Williams, J., dissenting). Indeed, had the Ninth Circuit been deciding Mr. George's petition on the merits, rather than on a procedural issue, it would have reached the opposite conclusion, since current law holds that neither California burglary nor California robbery is "violent felony" under an alternate definition. *See, e.g.,* D*escamps v. United States,* 570 U.S. 254 (2013) (holding that California burglary cannot satisfy the generic definition of "burglary"); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) (holding that California robbery does not have an element of the use of force). Because the outcome of Mr. George's § 2255 petition thus depended on the sheer happenstance of his location, the Court should resolve these inconsistencies as expeditiously as possible.

IV.

Courts Should Apply Current Law to Adjudicate Both the Procedural and Substantive Issues in *Johnson* Claims.

By looking to the factual record to determine whether Mr. George's petition relied on *Johnson*, the Ninth Circuit erred. The correct approach to resolving both the procedural and substantive questions involved in *Johnson* claims is to look to the law as it currently interprets the elements of an offense, which avoids: (1) inequitable and inconsistent results between similarly-situated defendants; and (2) the complicated task of recreating the legal landscape at the time of a defendant's case.

First, applying current law to both the procedural and substantive requirements avoids inequitable and inconsistent results between similarly-situated defendants. For instance, had another defendant with the same conviction as Mr. George been sentenced the same day before a judge who did *not* mention the force clause in passing, as Mr. George's judge did, that defendant would have been eligible for relief. *See In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) (rejecting the position that a defendant cannot show eligibility for relief "unless the sentencing judge uttered the magic words 'residual clause'"). As *Winston* held, this would "result in 'selective application'" of *Johnson* and "violat[e] 'the principle of treating similarly situated defendants the same.'" 850 F.3d at 682 (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)).

Second, a court's reliance on the "relevant background legal environment" is directly at odds with this Court's rule that "[a] judicial construction of a statute is

an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction." *Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994) (emphasis added). Declining to apply changes in the law would "not only would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court." *Beeman*, 871 F.3d at 1229 (Williams, J., dissenting). For instance, the Court's decisions in *Descamps*, 570 U.S. 254, and *Mathis v. United States*, 136 S. Ct. 2243 (2016), recently clarified that the modified categorical approach only applies when a statute contains "alternative elements." Yet courts looking to the law at the time of sentencing would seemingly have to dig up decades-old conviction documents to apply the modified categorical approach, even though we now recognize that such an inquiry would be legally incorrect.

In sum, attempts to scour the record and recreate the law at the time of sentencing not only embarks on a tedious and improper inquiry, it also leads to inconsistent results completely divorced from the merits of the claim. Because of this, "considerations of public policy weigh strongly in favor of applying current law." *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016). Thus, the Ninth Circuit erred in looking to the factual record and the law at the time of sentencing to determine whether Mr. George is eligible for *Johnson* relief.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: July 19, 2018

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

APPENDIX A

FILED

APR 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNATON SAMPSON GEORGE, Defendant-Appellant.	No. 17-55916 D.C. Nos. 3:16-cv-01624-H 3:92-cr-00396-H-1 Southern District of California, San Diego ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Johnaton Sampson George

Plaintiff,

V.

USA

Defendant.

Civil Action No. 16-cv-01624-H

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

The Court denies Defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. In addition, the Court denies Defendant a certificate of appealability.

Date: 6/27/17

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ A. Garcia
A. Garcia, Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHNATON SAMPSON GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No.: 92-cr-00396-H
16-cv-01624-H

ORDER:

(1) DENYING MOTION TO VACATE, SET ASIDE, OR CORRECT THE SENTENCE; AND

[Doc. No. 160 in 92-cr-396.]

(2) DENYING CERTIFICATE OF APPEALABILITY

On June 23, 2016, Petitioner/Defendant Johnaton Sampson George, represented by counsel, filed in the United States District Court for the Southern District of California a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence by a person

in federal custody.[1] (Doc. No. 160.) On February 3, 2017, the Court took the matter under submission. (Doc. No. 167.) On March 21, 2017, the Government filed a response in opposition to Defendant's motion. (Doc. No. 170.) To date, Defendant has not filed a reply. For the reasons discussed below, the Court denies Defendant's § 2255 motion.

Background

On October 15, 1992, a grand jury returned a second superseding indictment charging Defendant with: (1) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) in Counts 1 and 3; and (2) escape from custody in violation of 18 U.S.C. § 751(a) in Count 2. (Doc. No. 33; Doc. No. 171-1, Ex. 1.) Defendant proceeded to trial. (Doc. No. 69, 76, 80-82.) On June 11, 1993, a jury found Defendant guilty of Count 1, being a felon in possession of a firearm, and the Court found Defendant guilty of Count 2, escape from custody. (Doc. Nos. 69, 83; Doc. No. 160, Ex. A.) Count 3 was subsequently dismissed without prejudice. (Doc. No. 160, Ex. A.)

On September 24, 1993, the Court sentenced Defendant to life in prison for Count 1, felon in possession of a firearm, with a concurrent sentence of sixty months for Count 2, escape from custody. (Doc. No. 117; Doc. No. 160, Ex. A; Doc. No. 171-2, Ex. 2 at 75-76; Doc. No. 171-3, Ex. 3.) At sentencing, the Court determined that Defendant was subject to sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e), on the basis of his prior convictions for four violent felonies: specifically, a 1975 conviction for robbery, two 1977 convictions for rape, and a 1977 conviction for first degree burglary. (Doc. No. 160, Ex. A; Doc. No. 171-2, Ex. 2 at 30-36; Doc. No. 171-3, Ex. 3 at 10-12, 15-19.) Defendant appealed his conviction and sentence. (Doc. No. 120.)

On June 2, 1995, the Ninth Circuit Court of Appeals affirmed Defendant's conviction but reversed his sentence and remanded for resentencing. United States v. George, 56 F.3d 1078, 1087 (9th Cir. 1995). Although the Ninth Circuit reversed

---

[1] The Court takes judicial notice that the Defendant is subject to a state death penalty sentence currently pending automatic appeal before the California Supreme Court. See People v. Johnaton Sampson George, Cal. Case No. S047868.

Defendant's sentence, the Ninth Circuit specifically rejected Defendant's challenge to the Court's application of the ACCA at sentencing and held that Defendant was properly "subject to sentencing under the ACCA." Id. at 1085 ("As an initial matter, this court finds no merit in George's argument that the ACCA, as codified at 18 U.S.C. § 924(e)(1), is unconstitutionally vague as applied to him. The four predicate convictions relied on by the district court in sentencing George stemmed from offenses that occurred at different times and on different dates, in three separate locations, and involving three separate victims. He was thus subject to sentencing under the ACCA.").

On November 1, 1996, the Court resentenced Defendant to life in prison for Count 1, felon in possession of a firearm, with a concurrent sentence of sixty months for Count 2, escape from custody.[2] (Doc. No. 171-5, Ex. 5 at 15.) At resentencing, the Court again determined that Defendant was subject to sentencing under the ACCA. (Id. at 2-3.) Defendant again appealed, and his sentence was affirmed by the Ninth Circuit on October 15, 1997. United States v. George, 127 F.3d 1107, 1997 WL 659799, at *1 (9th Cir. 1997).

On June 23, 2016, Defendant filed the present motion pursuant to 28 U.S.C. § 2255 to vacate and correct his federal prison sentence. (Doc. No. 160.) In the motion, Defendant argues that his sentence should be vacated because under the Supreme Court's recent decision in Johnson v. United States, 135 S. Ct. 2551 (2015), his prior convictions no longer qualify as "violent felonies" under 18 U.S.C. § 924(e)(2)(B) and, therefore, he should not have been subjected to sentencing under the ACCA. (Id. at 1-2, 5-17.)

---

[2] Defendant did not attend the resentencing hearing. On appeal, the Ninth Circuit summarized the facts related to this as follows:

> At the resentencing hearing at San Quentin prison, a correctional officer testified he had personally informed the defendant of the sentencing hearing and that all of the requisite parties, including the judge, were in the boardroom at San Quentin. The defendant twice refused to attend. The court then started the hearing, but stopped again a short time later to give a correctional officer a third opportunity to check with the defendant and see if he wished to attend. The sergeant reported back that the defendant again refused."

United States v. George, 127 F.3d 1107, 1997 WL 659799, at *1 (9th Cir. 1997).

Discussion

I. Legal Standards

A sentencing court may "vacate, set aside or correct the sentence" of a federal prisoner if it concludes that "the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for relief under § 2255 must be based on a constitutional or jurisdictional error, "'a fundamental defect which inherently results in a complete miscarriage of justice,'" or a proceeding "'inconsistent with the rudimentary demands of fair procedure.'" United States v. Timmreck, 441 U.S. 780, 783-84 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). A district court may deny a § 2255 motion without holding an evidentiary hearing if "the petitioner fails to allege facts which, if true, would entitle him to relief, or the petition, files and record of the case conclusively show that he is entitled to no relief." United States v. Rodriguez-Vega, 797 F.3d 781, 792 (9th Cir. 2015); see 28 U.S.C. § 2255(b); United States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986) ("Where a prisoner's [§ 2255] motion presents no more than conclusory allegations, unsupported by facts and refuted by the record, an evidentiary hearing is not required.").

II. Analysis

In Johnson, the Supreme Court considered the constitutionality of the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). See Johnson, 135 S. Ct. at 2555. "Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a 'violent felony,' a term defined" by 18 U.S.C. § 924(e)(2)(B). Id. 18 U.S.C. § 924(e)(2)(B) provides:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . 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[.]

Under § 924(e)(2)(B)(ii)'s residual clause, the ACCA defined the term "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B); accord Johnson, 135 S. Ct. at 2555–56. The Supreme Court held the provision void for vagueness, and, therefore, also held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Johnson, 135 S. Ct. at 2563 ("We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law."). Subsequently, in Welch v. United States, 136 S. Ct. 1257, 1268 (2016), the Supreme Court held that "Johnson announced a substantive rule that has retroactive effect in cases on collateral review."

Nevertheless, Johnson provides no relief to Defendant because the record conclusively shows that, in this case, the Court did not impose an increased sentence under the residual clause of the ACCA. A review of the record in this case shows that the Court expressly relied on the force clause of the ACCA at sentencing in determining that Defendant's prior convictions qualified as violent felonies under the ACCA.[3] (See Doc.

---

[3] The Court specifically notes that both the transcript from Defendants' sentencing hearing and the Court's Order and Memorandum Decision Regarding Sentencing of Defendant only expressly references the force clause of the ACCA. (See Doc. No. 171-2, Ex. 2 at 30-36; Doc. No. 171-3, Ex. 3 at 10-11, 15-19.) Neither the transcript nor the order makes express reference to the residual clause. (See id.) In addition, the Court at the sentencing hearing and in its sentencing order cited to the Ninth Circuit's decision in United States v. Potter, 895 F.2d 1231, 1236-37 (9th Cir. 1990), which contains an analysis of California Penal Code § 261(2) under the ACCA's force clause and an analysis of California Penal Code § 460 under the ACCA's enumerated offenses clause. (Doc. No. 171-2, Ex. 2 at 30-33; Doc. No. 171-3, Ex. 3 at 16-17.)

The Court notes that at sentencing, it also cited to the Ninth Circuit's decision in United States v. Becker, 919 F.2d 568 (9th Cir. 1990). (Doc. No. 171-2, Ex. 2 at 33; Doc. No. 171-3, Ex. 3 at 16-17.)

No. 171-2 at 30-36; Doc. No. 171-3 at 10-11, 15-19.) In Johnson, the Supreme Court explained that its "decision does not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Johnson, 135 S. Ct. at 2563; see also United States v. Jenkins, 849 F.3d 390, 393 (7th Cir. 2017), cert. denied, No. 16-9166, 2017 WL 2189105 (U.S. June 19, 2017) ("There is no question as to the constitutionality of the Force Clause."); In re Hires, 825 F.3d 1297, 1299 (11th Cir. 2016) ("The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated clause of the ACCA's definition of a violent felony."). Thus, Johnson is inapplicable to Defendant's sentence, and Defendant has failed to show that he is entitled to relief. See United States v. Ruiz-Diaz, 668 F. App'x 289, 290 (9th Cir. 2016) (Because the enhancement was not predicated on a residual clause like the one struck down in Johnson, there is no arguable issue as to whether Ruiz–Diaz's sentence is illegal."); Smith v. United States, 671 F. App'x 523 (9th Cir. 2016) ("'[B]ecause the record shows that petitioner's sentence was not enhanced by the residual clause of the Armed Career Criminal Act, Johnson does not apply.'"); In re Hires, 825 F.3d 1297, 1299 (11th Cir. 2016) ("Federal prisoners who were sentenced under the elements or enumerated clauses, without regard to the residual clause at all, of course, do not fall within the new substantive rule in Johnson and thus do not make a prima facie claim involving this new rule."); United States v. Wilfong, No. 16-6342, 2017 WL 1032571, at *3 (10th Cir. Mar. 17, 2017), holding affirmed on reh'g, No. 16-6342, 2017 WL 1371299 (10th Cir. Apr. 14, 2017) ("[W]e agree

---

The Ninth Circuit's decision in Becker references the residual clause of the ACCA in analyzing whether California Penal Code § 460 qualifies as a violent felony under the ACCA. See 919 F.2d at 571. But even assuming that by citing to Becker, the Court was relying on the residual clause of ACCA at sentencing, any such error was harmless. A defendant may be sentenced under the ACCA "if he has three or more previous convictions for a 'violent felony.'" Johnson, 135 S. Ct. at 2555. At sentencing, the Court expressly determined that Defendants' two prior convictions for rape and his prior conviction for robbery qualified as violent felonies under the ACCA's force clause. (See Doc. No. 171-2, Ex. 2 at 30-34; Doc. No. 171-3, Ex. 3 at 16-18.) Thus, Defendant would still have been subject to sentencing under the ACCA in light of those three convictions for violent felonies even if the Court had determined that Defendant's burglary conviction did not qualify as a violent felony under the ACCA.

with the district court that Johnson is not implicated because the sentencing court concluded that [defendant]'s § 844(e) conviction is a violent felony under the elements clause, not the residual clause. . . . Thus, Johnson does not afford [defendant] the relief he seeks."); see also, e.g., Stanley v. United States, 827 F.3d 562, 565 (7th Cir. 2016); Holt v. United States, 843 F.3d 720, 723 (7th Cir. 2016); United States v. Villella, No. CR 06-06, 2017 WL 1519548, at *5-6 (W.D. Pa. Apr. 27, 2017); Kane v. United States, No. 1:16-CV-00146-MR, 2016 WL 7404720, at *3 (W.D.N.C. Dec. 21, 2016). Accordingly, the Court denies Defendant's § 2255 motion.

III. Certificate of Appealability

An appeal cannot be taken from the district court's denial of a § 2255 motion unless a certificate of appealability is issued. See 28 U.S.C. § 2253(c)(1); Muth v. Fondren, 676 F.3d 815, 818 (9th Cir. 2012). A certificate of appealability may issue only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has denied the claims in a § 2255 motion on the merits, a defendant satisfies the above requirement by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The Court concludes that reasonable jurists would not find the Court's assessment of Defendant's claims debatable or wrong. Accordingly, the Court declines to issue a certificate of appealability.

Conclusion

For the reasons above, the Court denies Defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. In addition, the Court denies Defendant a certificate of appealability.

IT IS SO ORDERED.

DATED: June 27, 2017

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT