No. 18-5475

IN THE SUPREME COURT OF THE UNITED STATES

JOHNATON SAMPSON GEORGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH 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 prior California convictions for robbery and first-degree burglary, and two California convictions for rape. Pet. App. A4-A5;[1] Presentence Investigation Report 5-6. He contends (Pet. 15-16) that a prisoner may invoke Johnson to collaterally attack his sentence in a motion under 28 U.S.C. 2255 without proving 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 contention does not warrant this Court's review. This Court has

[1] This brief cites the pages of the appendix to the petition for a writ of certiorari as if they were consecutively paginated.

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 brief in opposition to the petition for a writ of certiorari in Westover v. United States, No. 17-7607 (Mar. 29, 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, as imposed, in fact reflects Johnson error. To meet that burden, a defendant may point either to the sentencing record or to any case law in existence at the time of his sentencing proceeding that shows that it is more likely than not that the sentencing court relied on the now-invalid residual clause, as opposed to the enumerated-offenses or elements clauses. See id. at 9-15.[4]

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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); King v. United States, No. 17-8280 (Oct. 1, 2018); Couchman v. United States, No. 17-8480 (Oct. 1, 2018); Oxner v. United States, No. 17-9014 (Oct. 1, 2018); Safford v. United States, No. 17-9170 (Oct. 1, 2018); Perez v. United States, No. 18-5217 (Oct. 9, 2018); Murphy v. United States, No. 18-5230 (Oct. 29, 2018); Sailor v. United States, No. 18-5268 (Oct. 29, 2018); McGee v. United States, No. 18-5263 (Oct. 29, 2018).

[3] Another pending petition raises related issues. Jordan v. United States, No. 18-5692 (filed Aug. 20, 2018).

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

The decision below is therefore correct, and the result is consistent with cases from the First, Sixth, Tenth, and Eleventh 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); Beeman v. United States, 871 F.3d 1215, 1224 (11th Cir. 2017), petititon for cert. pending, No. 18-6385 (filed Oct. 16, 2018). As noted in the government's brief in opposition in Westover, 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 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 Westover 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 v. United States, 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, No. 17-1457, 2018 WL 3629060 (July 31, 2018) (per curiam), slip op. 4-6.

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 15-17, Westover, supra (No. 17-7607). Review would be especially unwarranted in petitioner's case because he could not prevail under the approach of any circuit. His claim failed in the Ninth Circuit because the sentencing court expressly relied on the elements clause in determining that petitioner's robbery conviction and two rape convictions were violent felonies under the ACCA. See Sent. Tr.

30-36. In rejecting petitioner's Section 2255 motion, the district court explained that "Johnson provides no relief to [petitioner] because the record conclusively shows that, in this case, the Court did not impose an increased sentence under the residual clause of the ACCA." Pet. App. A7. The court of appeals presumably would have allowed petitioner's appeal to proceed if "it [wa]s unclear whether [the] sentencing court relied on the residual clause in finding that [petitioner] qualified as an armed career criminal," Geozos, 870 F.3d at 896, but it declined to even grant a certificate of appealability, Pet. App. A1.

Because petitioner cannot show that his ACCA sentence "may have been" predicated on application of the residual clause, Geozos, 870 F.3d at 896 n.6 (citation omitted); Winston, 850 F.3d at 682; Peppers, 899 F.3d at 221-224; he would not qualify for relief under any circuit's approach. The court of appeals in Geozos, for example, explicitly recognized that a prisoner cannot establish that his claim "relies on" Johnson if the circumstances show that he was not in fact sentenced based on the residual clause. Geozos, 870 F.3d at 896; see Peppers, 899 F.3d at 224 (explaining that where "the record is clear that a defendant was not sentenced under the residual clause, either because the sentencing judge said another clause applied or because the evidence provides clear proof that the residual clause was not implicated," the court must dismiss the Section 2255 motion);

Raines, slip op. 5-6 (indicating district court's determination that the sentencing court had in fact relied on one of the ACCA's still-valid clauses would be entitled to deference). Accordingly, 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.