No. 18-5692

IN THE SUPREME COURT OF THE UNITED STATES

MELVIN JORDAN, III, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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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.

This case involves a collateral attack to a sentencing that occurred in 2008, in which the sentencing court determined that petitioner had three prior Iowa convictions for burglary and one prior Iowa conviction for robbery that qualified as violent felonies under the ACCA. Pet. App. 10; Presentence Investigation Report ¶¶ 41, 50, 56, 62, 68. Petitioner contends (Pet. 9-21) that this Court's review is warranted to address whether a prisoner seeking to challenge his sentence under Johnson in a second or successive postconviction motion under 28 U.S.C. 2255 must prove that he was sentenced under the residual clause that was invalidated in Johnson, as opposed to one of the ACCA's still-valid clauses. That issue does not warrant this Court's review.

This Court has repeatedly and recently denied review of similar issues in other cases.[1] It should follow the same course here.[2]

For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Couchman v. United States, No. 17-8480 (July 13, 2018), and King v. United States, No. 17-8280 (July 13, 2018), a defendant who moves to vacate his sentence on the basis of Johnson is required to establish, through proof by a preponderance of the evidence, that his sentence in fact reflects Johnson error. To meet that burden, a defendant may point either to the sentencing record or to any case law in existence at the time of his sentencing proceeding that shows that it is more likely than not that the sentencing court relied on the now-invalid residual clause, as opposed to the enumerated-offenses or elements clauses. See Br. in Opp. at 13-

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[1] 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).

[2] Other pending petitions raise the same issue, or related issues. Murphy v. United States, No. 18-5230 (filed July 12, 2018); Sailor v. United States, No. 18-5268 (filed July 16, 2018); McGee v. United States, No. 18-5263 (filed July 16, 2018).

18, King, supra (No. 17-8280); see also Br. in Opp. at 12-17, Couchman, supra (No. 17-8480).[3]

The decision below is therefore correct, and its approach is consistent with 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). As noted in the government's briefs in opposition in King and Couchman, however, some inconsistency exists in the approaches of different circuits to Johnson-premised collateral attacks like petitioner's. Those briefs explain that the Fourth and Ninth Circuits have interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A) -- which provides that a claim presented in a second or successive post-conviction motion shall be dismissed by the district court unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on 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

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

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).[4]

After the government's briefs in those cases were filed, the Third Circuit interpreted the phrase "relies on" in Section 2244(b)(2)(A) in the same way, United States v. Peppers, 899 F.3d 211, 221-224 (2018) (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 the ACCA had been applied at sentencing, id. at 224. Further review of inconsistency in the circuits' approaches remains unwarranted, however, for the reasons stated in the government's previous briefs. See Br. in Opp. at 16-18, King, supra (No. 17-8280); Br. in Opp. at 17-19, Couchman, supra (No. 17-8480). In any event, this case would be an unsuitable vehicle for reviewing the question presented because the district court found it "apparent" from the record "that the [sentencing] court determined that [petitioner] qualified as an armed career criminal because each of his burglary convictions -- one in 1986 and two in 1993 -- qualified as an enumerated offense." Pet. App. 8; see id.

[4] Petitioner suggests (Pet. 11, 14) that the Fifth Circuit also adopted this approach in United States v. Taylor, 873 F.3d 476 (2017), but that court expressly declined to adopt any standard because it concluded that the petitioner in that case was entitled to relief under any circuit's approach. Id. at 481-482.

at 8-10. Petitioner would accordingly not be entitled to relief even if he had no affirmative burden to prove constitutional error.

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

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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