No. 18-5821

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LEE FARMER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that he no longer has three qualifying predicate convictions under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), where petitioner is serving concurrent life sentences on non-ACCA counts that the district court lacked jurisdiction to address in this proceeding.

2. Whether the court of appeals erred in determining that petitioner was not entitled to review, in a second or successive collateral attack under 28 U.S.C. 2255, of a claim that his life sentences under 18 U.S.C. 3559(c) are invalid because his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are no longer "serious violent felon[ies]" under 18 U.S.C. 3559(c)(2)(F).

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1) is unreported. The order of the district court (Pet. App. 3-4) is unreported. A prior decision of the court of appeals is reported at 73 F.3d 836.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2018. A petition for rehearing was denied on May 29, 2018 (Pet. App. 2). The petition for a writ of certiorari was filed on August 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 3559(c) (1994); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 18 U.S.C. 3559(c) (1994); possession of a firearm by a felon, in violation of 18 U.S.C. 2, 922(g)(1), and 924(a)(2); and using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Judgment 1; see Superseding Indictment 1-5; 73 F.3d 836, 839. He was sentenced to life imprisonment on the Hobbs Act counts, a concurrent term of 327 months of imprisonment on the Section 922(g)(1) count, and a consecutive term of five years of imprisonment on the Section 924(c) count, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, 73 F.3d at 839, and this Court denied certiorari, 518 U.S. 1028.

In 1997, petitioner filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255. 94-cr-2020 D. Ct. Doc. 191 (June 23, 1997). The district court denied the motion. 94-cr-2020 D. Ct. Doc. 196 (Aug. 13, 1998). In 2016, petitioner applied to the court of appeals for leave to file a second Section 2255 motion to challenge his sentences on every count in light of Johnson v. United States, 135 S. Ct. 2551 (2015). 16-2448 C.A. Appl. 1-4 (May 27, 2016). The court granted authorization for

petitioner to challenge only his 327-month sentence on the Section 922(g)(1) conviction. 16-2448 C.A. Judgment 1 (Oct. 6, 2016). The district court denied petitioner's second Section 2255 motion and declined to issue a certificate of appealability (COA). Pet. App. 3-4. The court of appeals likewise denied petitioner's application for a COA. Id. at 1.

1. In September 1994, petitioner and two co-conspirators robbed a Hy-Vee Food Store in Des Moines, Iowa, stealing more than $10,000 in cash and other property at gunpoint. Presentence Investigation Report (PSR) ¶ 17. The following month, petitioner and three co-conspirators traveled to Waterloo, Iowa, in anticipation of robbing a second Hy-Vee Food Store. PSR ¶¶ 18-20, 24. In preparation for that robbery, petitioner and his co-conspirators stole a car, procured and programmed a police scanner to detect Waterloo police calls, purchased masks and gloves for use in the robbery, and formulated a getaway plan. PSR ¶¶ 20-27.

On October 8, 1994, petitioner and his three co-conspirators entered the Hy-Vee store. PSR ¶ 28. One of the co-conspirators carried a pistol-grip shotgun, and the co-conspirator brandished and displayed the gun in a threatening manner to force the employees to come to the front of the store and lie on the floor. Ibid. When the employees were unable to open the store's safe, petitioner urged the co-conspirator with the gun to "shoot 'em." Ibid. Another co-conspirator hit, kicked, and injured a customer

in the store. Ibid. After learning from the police scanner that officers were en route to the store, petitioner and his co-conspirators fled in the stolen car without obtaining any money. PSR ¶¶ 29-30.

2. a. A federal grand jury in the Northern District of Iowa charged petitioner with attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951; conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; possession of a firearm by a felon, in violation of 18 U.S.C. 2, 922(g)(1), and 924(a)(2); and using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Superseding Indictment 1-5.

The government filed an information setting forth its intent to seek mandatory life sentences under 18 U.S.C. 3559(c) (1994) for all four counts. 94-cr-2020 Am. Information 1-2. Section 3559(c) requires a mandatory life sentence for a defendant whose current federal offense is a "serious violent felony" and who has at least two prior convictions in federal or state court for "serious violent felonies." 18 U.S.C. 3559(c)(1)(A)(i); see Torres v. Lynch, 136 S. Ct. 1619, 1631-1632 (2016). The statute defines a "serious violent felony" to include:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in [18 U.S.C.] 1111); * * * robbery (as described in [18 U.S.C.] 2111, 2113, or 2118); * * * or attempt, conspiracy, or solicitation to commit any of the above offenses; and

> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

18 U.S.C. 3559(c)(2)(F) (1994). The information stated that petitioner had three prior Iowa state-court convictions that the government intended to rely on to seek life sentences under Section 3559(c): a 1971 conviction for second-degree murder, a 1979 conviction for first-degree robbery, and a 1983 conviction for conspiracy to commit murder. 94-cr-2020 Am. Information 1-2. The information also provided notice of the government's intent to rely on the same three prior convictions to seek enhanced penalties under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), for the Section 922(g)(1) count. 94-cr-2020 Am. Information 2.

Petitioner proceeded to trial, and the jury found him guilty on all counts. 73 F.3d at 839. At sentencing, the district court determined that petitioner's convictions for attempted Hobbs Act robbery and Hobbs Act conspiracy were serious violent felonies under Section 3559(c)(2)(F) and that Section 3559(c) mandated life sentences on those counts because petitioner had three prior convictions for serious violent felonies. Sent. Tr. 54-58, 61-66, 70, 84. The court found that petitioner was "well-deserving" of a life sentence, observing that "he has led his entire[] adult

life engaged in serious criminal conduct." Id. at 83. In addition, the court determined that petitioner was subject to an enhanced sentence under the ACCA for his Section 922(g)(1) conviction. Id. at 69-70. The court also found that, under the then-mandatory Sentencing Guidelines, petitioner's offense level for the Section 922(g)(1) count was 34 and his criminal history category was VI, which yielded a sentencing range of 262 to 327 months of imprisonment on that count. Id. at 70. The court elected to impose the maximum sentence of 327 months on that count and ordered that sentence to run concurrently with petitioner's life sentences on the Hobbs Act robbery counts. Id. at 84. The court also imposed a consecutive sentence of five years of imprisonment on the Section 924(c) count. Ibid.

b. The court of appeals affirmed. 73 F.3d at 839-845. As relevant here, the court rejected petitioner's contention that Section 3559(c) did not apply to him. Id. at 841-843. The court found it "clear" that petitioner's Hobbs Act convictions qualified as serious violent felonies under Section 3559(c)(2)(F)(ii) and thus declined to decide whether those convictions were also serious violent felonies under Section 3559(c)(2)(F)(i). Id. at 842.

3. In 1997, petitioner filed a motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. 2255. 94-cr-2020 D. Ct. Doc. 191 (June 23, 1997). The district court denied the motion. 94-cr-2020 D. Ct. Doc. 196 (Aug. 13, 1998).

Federal defendants who have previously filed a Section 2255 motion may not file a "second or successive" Section 2255 motion without obtaining pre-filing authorization from the court of appeals. See 28 U.S.C. 2255(h), 2244(b)(3)(A); Burton v. Stewart, 549 U.S. 147, 152 (2007) (per curiam). On May 27, 2016, petitioner requested permission from the court of appeals to file a second Section 2255 motion to challenge his sentences on every count based on Johnson, supra, which had held the residual clause of the ACCA's definition of "violent felony" to be unconstitutionally vague. 16-2448 C.A. Appl. 1-4. As relevant here, petitioner contended that his life sentences for his Hobbs Act convictions should be vacated on the theory that the "substantial risk" clause of Section 3559(c)(2)(F)(ii) is unconstitutional in light of Johnson. Id. at 2-3. Petitioner further contended that his ACCA-enhanced sentence of 327 months on the Section 922(g)(1) count should be vacated in light of Johnson. Ibid.

The court of appeals authorized petitioner to file a successive Section 2255 motion only on the issue of whether his sentence on the Section 922(g)(1) count was valid under the ACCA. 16-2448 C.A. Judgment 1. The court stated, however, that the "district court's attention is particularly directed to United States v. Smith, 601 F.2d 972, 973-74 (8th Cir. 1979) and similar cases." Ibid. In United States v. Smith, 601 F.2d 972 (8th Cir.), cert. denied, 444 U.S. 879 (1979), the court of appeals had

explained that, under the concurrent-sentence doctrine, "an appellate court may, in its discretion, decline to review the validity of a defendant's conviction where (a) the defendant has received concurrent sentences on plural counts of an indictment, (b) a conviction on one or more of those counts is unchallenged or found to be valid, and (c) a ruling in the defendant's favor on the conviction at issue would not reduce the time he or she is required to serve under the sentence for the valid conviction(s)." Id. at 973. Smith had added, however, that "[a] reviewing court will not * * * apply the concurrent sentence rule in cases where its application would be substantially prejudicial to a defendant or expose him to a substantial risk of adverse collateral consequences that might flow from an invalid but unreversed conviction." Id. at 973-974 (citation and internal quotation marks omitted).

4. Petitioner filed a second Section 2255 motion that challenged his ACCA sentence on his Section 922(g)(1) conviction. 16-cv-2056 D. Ct. Doc. 9, at 1-19 (May 22, 2017). Petitioner argued that, in light of Johnson, his prior Iowa convictions for robbery and conspiracy to commit murder could no longer qualify as violent felonies under the ACCA and that his 327-month sentence on Count 4 should thus be vacated. Id. at 4-15. Petitioner further argued that the district court should not apply the concurrent-sentence doctrine because this Court might someday hold that

Section 3559(c)(2)(F)(ii) is unconstitutionally vague based on the reasoning of Johnson. Id. at 15-18.

In its response to petitioner's motion, the government conceded that petitioner's prior Iowa conviction for conspiracy to commit murder is no longer a violent felony under the ACCA. 16-cv-2056 D. Ct. Doc. 9, at 8. The government argued, however, that the district court should apply the concurrent-sentence doctrine and decline to review petitioner's challenge to his ACCA sentence in light of petitioner's concurrent life sentences on the Hobbs Act robbery counts. Id. at 8-19.

The district court denied petitioner's successive Section 2255 motion. Pet. App. 3-4. The court determined that it was "appropriate to apply the concurrent sentence doctrine." Id. at 3. The court found that petitioner's assertions about the possibility of future relief from his life sentences under Section 3559(c) were "too speculative" and, thus, that petitioner had "failed to show that he would be substantially prejudiced or exposed to a substantial risk of adverse collateral consequences if his concurrent sentence of 327 months imprisonment * * * is not corrected." Id. at 4. The court further noted that "procedural obstacles" prevented petitioner from bringing non-ACCA claims. Id. at 4 n.1. And the court declined to issue a COA. Id. at 4.

5. Petitioner asked the court of appeals to issue a COA both on his ACCA claim and on his constitutional challenge to Section 3559(c)(2)(F)(ii). Pet. C.A. Appl. for COA 7-24. With respect to the latter challenge, petitioner acknowledged that his authorization to file a successive Section 2255 motion encompassed only his challenge to his ACCA sentence. Id. at 13 n.3. Petitioner argued, however, that the district court's fleeting assertion that petitioner could not advance other claims due to "procedural obstacles" could constitute "an alternate finding" regarding the constitutionality of Section 3559(c)(2)(F)(ii). Id. at 13 (citation omitted); see id. at 13-24. Petitioner suggested that the court of appeals could either "find that the district court did not have jurisdiction to make any findings on the merits of [petitioner's] challenges to his sentences on any of the other counts" or could "retroactively expand" its prior authorization for a successive Section 2255 motion "by granting a COA on this issue." Id. at 13 n.3.

Stating that it had "carefully reviewed the original file of the district court," the court of appeals summarily denied a COA and dismissed petitioner's appeal. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 10-13) that the court of appeals should have granted a COA because, in petitioner's view, the district court erred in denying his successive Section 2255 motion

based on the concurrent-sentence doctrine. Petitioner additionally contends (Pet. 13-23) that his life sentences under the federal three-strikes law, 18 U.S.C. 3559(c) (1994), are invalid because the "substantial risk" clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2251 (2015). The court of appeals correctly denied a COA, and petitioner identifies no conflict between its decision and any decision of this Court or another court of appeals. In addition, petitioner's case presents a poor vehicle for addressing the constitutionality of Section 3559(c)(2)(F)(ii), both because the court of appeals declined to authorize petitioner to raise that claim in his second Section 2255 motion and because that issue was not squarely addressed by the parties or the courts in the proceedings below. Further review is unwarranted.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

Petitioner contends (Pet. 12) that the court of appeals erred in declining to issue a COA "[i]f" that court based its decision on the concurrent-sentence doctrine, which petitioner "presum[es]" the court did. Even assuming that the court of appeals' denial of petitioner's application for a COA was in fact premised on that discretionary doctrine, it does not warrant this Court's review. Under the concurrent-sentence doctrine, an appellate court may decline to review a claim on collateral review if the defendant is serving an uncontested concurrent sentence that is greater than or equal to the challenged sentence. See, e.g., United States v. Lampley, 573 F.2d 783, 788 (3d Cir. 1978) ("[A]n appellate court may avoid the resolution of legal issues affecting less than all of the counts in an indictment where at least one count has been upheld and the sentences are concurrent."). Here, petitioner is serving life sentences for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. Accordingly, vacating petitioner's 327-month ACCA sentence for possession of a firearm by a felon would not shorten his time in prison. Under the circumstances, the court of appeals had the discretion to decline to consider petitioner's ACCA claim based on the concurrent-sentence doctrine, and petitioner identifies no court of appeals that would have precluded application of that discretionary doctrine in this context.

Petitioner contends that the concurrent-sentence doctrine should not apply in his case because, he claims, vacating his ACCA sentence would require the resentencing court to consider his contention that his life sentences under Section 3559(c) are invalid in light of Johnson and Sessions v. Dimaya, 138 S. Ct. 1204 (2018), among other cases. The court of appeals declined to authorize petitioner to assert a challenge to Section 3559(c) in his successive Section 2255 motion, however, and it is far from clear that it would fall within the scope of any resentencing proceeding following the vacatur of his sentence on the felon-in-possession count. Petitioner identifies no court that has adopted his view that a successive Section 2255 movant who secures a resentencing may use that proceeding to raise additional collateral claims that the court of appeals declined to authorize in his successive Section 2255 motion. In any event, as explained at pp. 17-18, infra, petitioner's challenge to his life sentences lacks merit, and petitioner thus has not shown that vacating his ACCA sentence would shorten his total term of imprisonment even if his challenge to Section 3559(c) were to become part of his collateral proceedings.

Petitioner argues (Pet. 13) that the Court should nevertheless presume that his ACCA sentence is causing him continuing collateral consequences, citing this Court's "willing[ness] to presume that a wrongful criminal conviction"

carries such consequences even after the convict's sentence has expired. Spencer v. Kemna, 523 U.S. 1, 8 (1998). When a defendant challenges only his sentence, however, no such presumption applies. See id. at 7-8, 12. Furthermore, petitioner identifies no court that has applied a presumption that an ACCA sentence causes continuing collateral consequences to a defendant who is serving a valid concurrent sentence that is greater than or equal to the ACCA sentence.

2. The court of appeals also did not err in declining to review petitioner's claim that the "substantial risk" clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague in light of Johnson and that petitioner's life sentences under Section 3559(c) are thus invalid.

a. As previously noted, the court of appeals declined to authorize petitioner to challenge the constitutionality of Section 3559(c)(2)(F)(ii) in this second Section 2255 motion. 16-2448 C.A. Judgment 1. Under 28 U.S.C. 2255(h), a federal inmate may file a second or successive collateral attack under Section 2255 only if a court of appeals certifies it to contain newly discovered persuasive evidence of factual innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The district court lacks jurisdiction over any claim in a second or successive Section 2255 motion that does not receive such

authorization. See Burton v. Stewart, 549 U.S. 147, 153 (2007) (per curiam) (treating authorization under parallel and overlapping scheme for second or successive state habeas petitions as jurisdictional prerequisite).

Petitioner appears to contend (Pet. 13-20) that the court of appeals erred in determining that his challenge to Section 3559(c)(2)(F)(ii) did not rely on a new retroactive rule of constitutional law, taking the view that Johnson necessarily invalidated not only the ACCA's residual clause but Section 3559(c)(2)(F)(ii) as well. But he cannot seek this Court's review of that determination. Had he challenged the denial of authorization to raise his Section 3559(c) claim in a second or successive collateral attack, the Court would have lacked jurisdiction over the petition for a writ of certiorari. See 28 U.S.C. 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."); see also 28 U.S.C. 2255(h). And to the extent that he may be seeking review of the court of appeals' denial of a COA on his unauthorized claim, such review would be an end-run around Congress's jurisdictional limitations in respect to the court of appeals' gatekeeping decisions on second or successive Section 2255 motions.

Any review of issues relating to Section 3559(c) would be unwarranted for the related reason that such issues were not squarely raised or addressed below. In his Section 2255 motion, petitioner argued that the district court should not deny his ACCA challenge based on the concurrent-sentence doctrine because "a future Supreme Court decision may find the reasoning in Johnson applicable to the three-strikes statute," which in turn would "likely" enable petitioner to challenge his life sentences. 16-cv-2056 D. Ct. Doc. 9, at 17-18. Petitioner did not, however, address whether Johnson itself renders the "substantial risk" clause in Section 3559(c)(2)(F)(ii) unconstitutionally vague, see id. at 15-19, or whether Johnson's reasoning would require that result, and the district court likewise did not address those issues, see Pet. App. 3-4. Nor did the court of appeals address them in denying petitioner's application for a COA. See id. at 1.

b. In any event, a challenge to the constitutionality of Section 3559(c)(2)(F)(ii) would not result in any relief in this case.

Petitioner seeks to challenge (Pet. 13-23) his life sentences for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery, arguing that neither offense is eligible for a sentence under Section 3559(c). Specifically, petitioner contends that neither Hobbs Act conviction qualifies as a "serious violent felony" under Section 3559(c)(2)(F)(i) or the first clause of

Section 3559(c)(2)(F)(ii) and that the "substantial risk" clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague in light of Johnson and Dimaya.

As a threshold matter, even if provisionally authorized by the court of appeals, a legal claim in a second or successive habeas application "shall [be] dismissed" if it does not in fact rely on a retroactive rule of constitutional law. 28 U.S.C. 2244(b)(4), 2255(h). Because Johnson and Dimaya did not invalidate any part of Section 3559(c)(2)(F), those cases did not announce a "new rule of constitutional law" that would entitle petitioner to relief. 28 U.S.C. 2255(h). Nor does petitioner identify any other decision adopting his view that the second clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague.

Furthermore, even assuming the "substantial risk" clause of Section 3559(c)(2)(F)(ii) were unconstitutional, petitioner's Hobbs Act convictions would nevertheless qualify as serious violent felonies under Section 3559(c)(2)(F)(i). That provision defines a "serious violent felony" to include "a Federal or State offense, by whatever designation and wherever committed, consisting of * * * robbery (as described in [18 U.S.C.] 2111, 2113, or 2118); * * * or attempt, conspiracy, or solicitation to commit any of the above offenses." 18 U.S.C. 3559(c)(2)(F)(i) (1994). Section 2111, in turn, describes robbery, for purposes of criminalizing it within the special maritime and territorial

jurisdiction of the United States, as "by force and violence, or by intimidation, tak[ing] or attempt[ing] to take from the person or presence of another anything of value." 18 U.S.C. 2111. That description of robbery encompasses Hobbs Act robbery, which requires "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. 1951(b)(1); see 18 U.S.C. 1951(a). Attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery thus qualify as serious violent felonies under Section 3559(c)(2)(F)(i), and petitioner identifies no court that has held otherwise. Accordingly, petitioner's Hobbs Act convictions would qualify for life sentences under Section 3559(c) even if the "substantial risk" clause of Section 3559(c)(2)(F)(ii) were unconstitutionally vague.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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