No. 18-6013

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD CARL WYATT, 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

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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 under the ACCA. Pet. App. 4.[1] He contends (Pet. 6-19) that this Court's review is warranted to address whether a prisoner seeking to challenge his sentence under Johnson in a second or successive

[1] It is not clear from the presentence report or the sentencing transcript which convictions the sentencing court relied on to impose an ACCA sentence. The presentence report lists one Kansas bank robbery conviction and two federal bank robbery convictions in petitioner's criminal history, see Presentence Investigation Report (PSR) ¶¶ 115-116, 118, and also includes a conviction for three counts of bank larceny, see PSR ¶ 117. Petitioner contends (Pet. 20-21) that his 1998 bank robbery conviction cannot count as an ACCA predicate because the conviction occurred after he violated Section 922(g)(1). That objection to his ACCA sentence appears for the first time in the petition for a writ of certiorari, it is not based on Johnson, and it is therefore procedurally defaulted and time-barred.

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 recently and repeatedly 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 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 files a second or successive Section 2255 motion seeking 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

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[2] 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).

[3] 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); Prutting v. United States, No. 18-5398 (filed July 25, 2018); Washington v. United States, No. 18-5594 (filed Aug. 13, 2018).

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 13-18, King, supra (No. 17-8280); see also Br. in Opp. at 12-17, Couchman, supra (No. 17-8480).[4]

The approach reflected in 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), petition for cert. pending (filed Oct. 16, 2018). 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

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

that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by th[is] 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).[5]

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).

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[5] 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 prisoner in that case was entitled to relief under any circuit's approach. Id. at 481-482.

In any event, this case would not be a good vehicle in which to address the question presented because petitioner's ACCA enhancement had no practical effect on his sentence. An ACCA sentence raises the default statutory sentencing range for a conviction for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), from zero to ten years of imprisonment, to 15 years to life imprisonment. Compare 18 U.S.C. 924(a)(2), with 18 U.S.C. 924(e)(1)-(2). Pursuant to the ACCA, petitioner received a 180-month sentence for his Section 922(g) conviction. Judgment 2-3. But in addition to his ACCA sentence, petitioner also received a concurrent sentence of 300 months of imprisonment for bank robbery, in violation of 18 U.S.C. 2113(a); and five concurrent sentences of 240 months of imprisonment for five additional bank robbery convictions, in violation of 18 U.S.C. 2113(a). Judgment 2-3.[6] The ACCA therefore had no practical effect on petitioner's sentence.

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 ACCA sentence. See, e.g., United States

[6] Petitioner also received a consecutive sentence of 65 months of imprisonment for another bank robbery conviction, in violation of 18 U.S.C. 2113(a) and (d), and a consecutive sentence of 60 months of imprisonment for using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1). Judgment 2-3.

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."). That is the case here, where petitioner received concurrent sentences of 300 and 240 months. Any error in the decision below accordingly does not warrant this Court's review, and the petition for a writ of certiorari should be denied.[7]

Respectfully submitted.

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