No. 18-6096

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL JACKSON, 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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QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner's request for a certificate of appealability to vacate his sentence based on Johnson v. United States, 135 S. Ct. 2551 (2015), on the ground that petitioner had failed to show that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), that was invalidated in Johnson, as opposed to the Act's still-valid clauses.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is unreported. The order of the district court (Pet. App. C1-C2) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2017. A petition for rehearing was denied on July 12, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed on September 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2002, following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 327 months of imprisonment, to be followed by five years of supervised release. 365 F.3d 649, 651. The court of appeals affirmed. Id. at 656. This Court granted petitioner's petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of United States v. Booker, 543 U.S. 220 (2005). See 543 U.S. 1103. On remand, the court of appeals reaffirmed petitioner's sentence. 163 Fed. Appx. 451 (per curiam). In 2005, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 (2000). 05-cv-261 D. Ct. Doc. 1 (Mar. 21, 2005). The district court denied petitioner's motion and declined to issue a certificate of appealability (COA). 05-cv-261 D. Ct. Doc. 9 (Sept. 15, 2005); 05-cv-261 D. Ct. Doc. 14-1 (Nov. 9, 2005). The court of appeals declined to issue a COA and dismissed petitioner's appeal. 05-cv-261 D. Ct. Doc. 17 (Sept. 12, 2006).

In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of Johnson v. United States, 135 S. Ct. 2551 (2015). 15-3472 Order (May 3, 2016). The district court denied the motion and declined to issue a COA. Pet. App. C1-C2. The court of

appeals likewise declined to issue a COA, and it dismissed petitioner's appeal. Id. at A1.

1. On March 1, 2002, petitioner and his brother Fabian Jackson were in the process of burglarizing a residence in Clinton County, Missouri, when the owner returned home. 365 F.3d at 651-652. As soon as they were discovered, petitioner and his brother got into a truck and drove away. Ibid. The homeowner reported the incident to local authorities, who located the truck and, following a chase, apprehended petitioner and Fabian. Id. at 652. A search of the truck led to the discovery of a rifle. Ibid. Subsequent investigation revealed that petitioner and Fabian were convicted felons. Ibid. A federal grand jury in the Western District of Missouri returned an indictment charging petitioner and Fabian with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). 365 F.3d at 652. Following a jury trial, both men were convicted on the Section 922(g)(1) charge. Ibid.

A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug offense," committed on separate occasions, then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a range of 15 years to life imprisonment. See Logan v. United States, 552

U.S. 23, 26 (2007); Custis v. United States, 511 U.S. 485, 487 (1994).

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).

The Probation Office's presentence report informed the district court that petitioner had nine prior convictions for first- and second-degree burglary under Missouri law. Presentence Investigation Report (PSR) ¶¶ 31, 46-48, 54, 56, 61, 63. The court determined that, based on his prior convictions, petitioner was subject to an ACCA sentence for his Section 922(g)(1) conviction. PSR ¶ 40, 93. The court sentenced petitioner to 327 months of imprisonment, to be followed by five years of supervised release. 365 F.3d at 651.

2. The court of appeals affirmed petitioner's conviction and sentence. 365 F.3d 649. In 2005, this Court granted a petition

for a writ of certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of Booker. 543 U.S. 1103. On remand, the court of appeals reaffirmed petitioner's 327-month sentence. 163 Fed. Appx. 451. Petitioner subsequently moved to vacate his sentence under 28 U.S.C. 2255 (2000). 05-cv-261 D. Ct. Doc. 1. The district court denied the motion and declined to issue a COA. 05-cv-261 D. Ct. Docs. 9, 14-1. The court of appeals declined to issue a COA and dismissed petitioner's appeal. 05-cv-261 D. Ct. Doc. 17.

3. In Johnson, this Court held that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268. On October 30, 2015, petitioner sought permission from the court of appeals under 28 U.S.C. 2255(h)(2) to file a second Section 2255 motion to vacate his sentence based on Johnson. 15-3472 Pet. Appl. for Leave to File a Second or Successive Mot. to Vacate, Set Aside, or Correct Sentence. The court of appeals granted the application. 15-3472 Order. Petitioner thereafter filed a second Section 2255 motion in the district court, arguing that Johnson establishes that he was wrongly classified and sentenced as an armed career criminal because none of his prior burglary convictions qualify as violent felonies under current law. 16-cv-557 D. Ct. Doc. 1, at 2-6 (June 10, 2016). The government opposed petitioner's motion, explaining

that Johnson did not call into question, and in fact expressly reaffirmed, the constitutional validity of the ACCA's enumerated-offenses and elements clauses, and that, under longstanding circuit precedent, petitioner's prior burglary convictions qualified as violent felonies under the ACCA's still-valid enumerated-offenses clause. 16-cv-557 D. Ct. Doc. 5, at 5-9 (July 13, 2016). The court denied petitioner's motion, agreeing with the government that nothing in Johnson called into question the ACCA's enumerated-offenses clause, and that, "under the facts of this case -- and even without the residual clause -- [petitioner] ha[d] three qualifying ACCA convictions." Pet. App. C2. The court declined to issue a COA. Ibid.

4. The court of appeals declined to issue a COA and dismissed petitioner's appeal. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 4-18) that the court of appeals incorrectly declined to grant him a COA. In his view, the district court erred in requiring him, as a prerequisite to relief on a claim premised on Johnson v. United States, 135 S. Ct. 2551 (2015), to prove that his ACCA sentence had been based on the residual clause that Johnson invalidated. That issue does not warrant the Court's review. This Court has recently and repeatedly denied

review of similar issues in other cases.[1] It should follow the same course here.[2]

1. 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 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

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[1] See Wyatt v. United States, No. 18-6013 (Jan. 7, 2019); Washington v. United States, No. 18-5594 (Jan. 7, 2019); Prutting v. United States, No. 18-5398 (Jan. 7, 2019); Curry v. United States, No. 18-229 (Jan. 7, 2019); Sanford v. United States, No. 18-5876 (Dec. 10, 2018); Jordan v. United States, No. 18-5692 (Dec. 3, 2018); George v. United States, No. 18-5475 (Dec. 3, 2018); 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, 139 S. Ct. 323 (2018) (No. 18-5217); Safford v. United States, 139 S. Ct. 127 (2018) (No. 17-9170); Oxner v. United States, 139 S. Ct. 102 (2018) (No. 17-9014); Couchman v. United States, 139 S. Ct. 65 (2018) (No. 17-8480); King v. United States, 139 S. Ct. 60 (2018) (No. 17-8280); 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).

[2] Another pending petition raises a related issue. See Beeman v. United States, No. 18-6385 (filed Oct. 16, 2018).

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).[3] That approach makes sense because "Johnson does not reopen all sentences increased by the [ACCA], as it has nothing to do with enhancements under the elements clause or the enumerated-crimes clause." Potter v. United States, 887 F.3d 785, 787 (6th Cir. 2018).

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, 887 F.3d at 787-788; 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, No. 18-6385 (filed Oct. 16, 2018); see also Walker v. United States, 900 F.3d 1012, 1015 (8th Cir. 2018). As noted in the government's briefs in opposition in King and Couchman, however, some inconsistency exists in circuits' approaches 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

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

applicant shows 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).

After the government's briefs in those cases were filed, the Third Circuit interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A) in the same way, United States v. Peppers, 899 F.3d 211, 221-224 (2018), 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. Additionally, the Sixth Circuit recently held that its decision in Potter, supra, stands for the proposition that a movant seeking relief under Johnson must affirmatively 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, 898 F.3d 680, 685-686 (2018) (per curiam). 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).

2. In any event, this case would be an unsuitable vehicle for reviewing the question presented. Under any circuit's approach, reasonable jurists would not debate that petitioner's ACCA sentence was not based on the now-invalid residual clause. Petitioner acknowledges (Pet. 2) that the predicate convictions used to classify him as an armed career criminal "were all Missouri burglary convictions." The law was settled long before the time of petitioner's sentencing that first- and second-degree Missouri burglary qualified as "burglary" within the meaning of the enumerated-offenses clause. See, e.g., United States v. Croft, 908 F.2d 384, 385 (8th Cir.), cert. denied, 498 U.S. 989 (1990); United States v. Whitfield, 907 F.2d 798, 800 (8th Cir. 1990).

Petitioner contends (Pet. 17) that "[a]t the time [he] was sentenced," the court of appeals had "extensively relied on the residual clause to find that Missouri burglary was a qualifying predicate conviction, placing the residual clause squarely on the sentencing court's radar." The cases he cites (Pet. 17-18), however, hold that burglary of a commercial structure qualified as a "crime of violence" under the residual clause contained in the then-current version of Section 4B1.2 of the Sentencing Guidelines. United States v. Mohr, 382 F.3d 857, 860-861 (8th Cir. 2004), vacated and remanded for further consideration in light of United States v. Booker, 543 U.S. 220 (2005)), 543 U.S. 1181

(2005); United States v. Blahowski, 324 F.3d 592, 593-594 (8th Cir.), cert. denied, 540 U.S. 934 (2003); United States v. Hascall, 76 F.3d 902, 905-906 (8th Cir.), cert. denied, 519 U.S. 948 (1996). At the time, unlike the enumerated offenses clause of the ACCA, that Guideline "specifically designate[d] 'burglary of a dwelling' as a crime of violence, but d[id] not refer to burglary of a commercial building." Blahowski, 324 F.3d at 594. Accordingly, the court of appeals had relied on the residual clause in Guidelines § 4B1.2 to determine that burglary of a commercial dwelling was also a crime of violence for purposes of the Guidelines. Id. at 594-595. In those cases, however, the court of appeals specifically set forth its view that "[b]urglary, whether of a dwelling or a commercial building, has as its elements the 'unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime,'" which is the definition of generic "burglary" under the ACCA. Mohr, 382 F.3d at 860 (citation omitted); see also Hascall, 76 F.3d at 905. The district court at petitioner's sentencing thus had no reason to rely on the residual clause to classify his burglary convictions as ACCA predicates.

Petitioner notes (Pet. 3) that the court of appeals recently concluded, in light of more recent decisions of this Court interpreting the ACCA, e.g., Mathis v. United States, 136 S. Ct. 2243 (2016), that second-degree Missouri burglary does not qualify as generic burglary under the ACCA. See United States v. Naylor,

887 F.3d 397, 406-407 (8th Cir. 2018) (en banc). But developments in the case law based on non-retroactive decisions of this Court from more than a decade after petitioner's sentencing do not show that petitioner "may have been" sentenced under the residual clause at his original sentencing. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897. He thus could not prevail under any circuit's approach.

3. In a supplemental brief, petitioner observes (at 1) that the court of appeals recently issued a decision in Fabian's case vacating the district court's order denying his successive Section 2255 motion and remanding to allow the district court to decide, in the first instance, whether Fabian met his burden of proving by a preponderance of the evidence that his classification and sentence as an armed career criminal was based on the residual clause invalidated by Johnson's new constitutional rule. See Fabian Jackson v. United States, No. 17-1623, 2018 WL 6681458, at *1 (8th Cir. Dec. 19, 2018) (per curiam). Although Fabian was also sentenced under the ACCA based in part on prior Missouri burglary convictions, see 365 F.3d at 651-652, their postconviction proceedings have diverged in relevant respects.

The court of appeals explained that "the district court's order denying [Fabian] Jackson's successive [Section] 2255 claim does not state whether or not the residual clause led the sentencing court to apply the ACCA enhancement." Ibid. That is because the district court had dismissed Fabian's Section 2255

petition on grounds of procedural default, 16-cv-1186 D. Ct. Doc. 7 (Jan. 24, 2017) -- a defense that the United States expressly withdrew and abandoned on appeal, Jackson, 2018 WL 6681458, at *1. Petitioner's case, however, presents no similar issue. See Pet. App. C1-C2.[4] Furthermore, any difference in the outcome of Fabian's case and petitioner's case would not justify this Court's intervention. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2019

[4] Petitioner contends (Pet. 8-10) that the courts of appeals are in conflict on the question whether evaluation of the legal landscape at the time of sentencing is a legal question or a factual question. Petitioner does not explain how that question would be outcome determinative in this or any other case.