No. 18-6385

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY BERNARD BEEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255(a), based on Johnson v. United States, 135 S. Ct. 2551 (2015), on the ground that he failed to prove that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), as opposed to the Act's still-valid elements clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 871 F.3d 1215. The order of the district court (Pet. App. 23-59) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2017. A petition for rehearing was denied on August 14, 2018 (Pet. App. 13-22). The petition for a writ of certiorari was filed on October 16, 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 Georgia, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1; see Pet. App. 25-26. The district court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. 386 Fed. Appx. 827 (per curiam). In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion but granted his request for a certificate of appealability (COA). Pet. App. 23-59. The court of appeals affirmed. Id. at 1-12.

1. On December 7, 2007, police officers searched petitioner's residence pursuant to a search warrant based on information they received from a concerned citizen indicating that petitioner was dealing drugs. Presentence Investigation Report (PSR) ¶¶ 9-10. During the search, officers uncovered, among other things, illegal drugs, drug paraphernalia, firearms, and 31 rounds of ammunition. PSR ¶ 11; Pet. App. 13.

A federal grand jury in the Northern District of Georgia returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); possession

of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c); and possession of ammunition by a felon, in violation of 18 U.S.C. 922(g). Second Superseding Indictment 1-3. A jury found petitioner guilty on the Section 922(g)(1) counts and the drug-trafficking count, but it found petitioner not guilty of the Section 924(c) charge. Pet. App. 25-26; Judgment 1-2.

A conviction for violating Section 922(g)(1) ordinarily carries a 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," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires 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 court that petitioner had a prior Georgia conviction for aggravated assault and two prior Georgia convictions for possession of cocaine with intent to distribute. PSR ¶¶ 40-42; Pet. App. 1. The Probation Office determined that petitioner's aggravated-assault conviction was a "violent felony," that his drug convictions were "serious drug offenses," and that petitioner was therefore subject to an ACCA sentence for his Section 922(g)(1) convictions. PSR ¶ 46. The district court sentenced petitioner to 210 months of imprisonment on each of his Section 922(g) convictions and 210 months of imprisonment on his drug-trafficking conviction, all to run concurrently, to be followed by five years of supervised release. Judgment 3-4.

2. On direct appeal, petitioner contended that (1) the district court erred in allowing the government to present evidence at trial of his prior convictions under Federal Rule of Evidence 404(b); (2) the district court improperly instructed the jury when it failed to limit the jury's consideration of the Rule 404(b) evidence to the drug-trafficking count; and (3) the evidence was insufficient to sustain his convictions. The court of appeals rejected those arguments and affirmed. 386 Fed. Appx. 827.

3. 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. This Court has held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268. Just under a year after Johnson was decided, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a), alleging that his sentences for his Section 922(g) convictions were erroneously enhanced under the ACCA. D. Ct. Doc. 102, at 1-26. He contended that (1) Johnson invalidated his ACCA sentences because when he was sentenced in 2009, his aggravated-assault conviction would have qualified as a violent felony under the ACCA's now-invalid residual clause; (2) his aggravated-assault conviction was not a violent felony under the enumerated offenses clause because assault is not included in that list of crimes; and (3) a conviction under Georgia's aggravated assault statute does not qualify as a violent felony under the elements clause following Descamps v. United States, 570 U.S. 254 (2013), in which this Court held that "sentencing courts may not" consider the particular form of an offense reflected in a prior conviction "when the crime of which the defendant was convicted has a single, indivisible set of elements." Id. at 258. D. Ct. Doc. 102, at 5-23. Accordingly, petitioner contended that he no longer had three qualifying prior convictions necessary to support his classification and sentence as an armed career criminal. Ibid.

The district court denied petitioner's motion as untimely and, alternatively, on the merits. Pet. App. 23-59. The court determined that petitioner's motion was untimely because he filed it more than one year after his judgment of conviction became final. Id. at 30-32; see 28 U.S.C. 2255(f)(1). The court rejected petitioner's argument that the petition was timely because it was filed within one year of the Court's decision in Johnson. Pet. App. 31. The court explained that petitioner failed to raise a true Johnson claim that could restart the applicable one-year limitations period under 28 U.S.C. 2255(f)(3), which allows a petition to be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Ibid.; see Pet. App. 31. The court explained that petitioner's motion, "at its core," relied on Descamps, which was a rule of statutory interpretation. Pet. App. 31. Alternatively, the court determined that even in light of Descamps, a Georgia conviction for aggravated assault qualifies as a violent felony under the ACCA's elements clause. Id. at 46-56. The court granted a COA on both the timeliness and merits issues. Id. at 57-58.

4. The court of appeals affirmed. Pet. App. 1-12. The court concluded that petitioner had alleged a Johnson claim and that his Section 2255 motion was therefore timely because it satisfied Section 2255(f)(3)'s requirements and was filed less than one year

after this Court's decision in Johnson. Id. at 4. The court explained that petitioner's allegations -- namely, that "Georgia aggravated assault, which was one of his three qualifying ACCA convictions, historically qualified as an ACCA predicate under [the ACCA]'s residual clause" -- alleged a claim under Johnson that could be reviewed on the merits. Ibid. (internal quotation marks omitted; brackets in original; internal quotation marks omitted).

Turning to the merits, the court observed that, as the moving party, petitioner bears the burden of proving that his sentence was based on the now-invalid residual clause, as opposed to one of the still-valid clauses defining a violent felony. Pet. App. 4. And the court explained that to meet that burden, petitioner had to show that it was "more likely than not" that the sentencing court relied on the residual clause, rather than one of the other clauses, when it classified his aggravated-assault conviction as a violent felony. Id. at 4-5. The court disagreed with petitioner's argument that he could meet his burden by showing only that it was "merely possible" that the sentencing court relied on the residual clause. Id. at 6.

Applying those principles, the court concluded that petitioner had not met his burden on the merits. Pet. App. 6-7. The court observed that petitioner had pointed to "nothing in the record" to indicate that the sentencing court had relied only on the residual clause and that he had identified no precedent from

2009 holding that a violation of Georgia's aggravated assault statute could only be deemed a violent felony under the ACCA's residual clause. Id. at 6. The court explained that, "[w]here, as here, the evidence does not clearly explain what happened . . . the party with the burden loses." Ibid. (citation omitted).

Judge Williams, sitting by designation, dissented. Pet. App. 7-12. In her view, notwithstanding the absence of evidence in the record that the sentencing court relied on the residual clause, petitioner could carry his burden of proof by demonstrating, as she believed he had, that it was "likely" that his aggravated assault conviction does not qualify as an ACCA predicate under the elements clause in light of Descamps. Id. at 12 n.8.

5. The court of appeals denied rehearing en banc. Pet. App. 13-22. Judge Martin, joined by Judge Jill Pryor, dissented. Id. at 17-22. In her view, petitioner had met his burden of proving that he may have been sentenced under the residual clause because he "has a good argument" that, under current law, his 1990 Georgia conviction for aggravated assault is not an ACCA predicate under the elements clause. Id. at 20.

ARGUMENT

Petitioner contends (Pet. 25-27) that the court of appeals erred in determining that, to meet his burden of proving that his sentence is tainted by a constitutional error under Johnson v. United States, 135 S. Ct. 2551 (2015), petitioner must show that it is more likely than not -- rather than merely possible -- that

the district court relied on the residual clause. That issue does not warrant this Court's review, and this case would be an unsuitable vehicle for such review in any event. 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 brief in opposition to the petition for a writ of certiorari in Casey v. United States, 138 S. Ct. 2678 (2018) (No. 17-1251), a defendant seeking to avail himself of Section 2255(f)(3) 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

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[1] See 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, 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).

[2] Other pending petitions raise the same issue, or related issues. Prutting v. United States, No. 18-5398 (filed July 25, 2018); Washington v. United States, No. 18-5594 (filed Aug. 13, 2018); Wyatt v. United States, No. 18-6013 (filed Sept. 14, 2018); Curry v. United States, 18-229 (filed Aug. 20, 2018).

court relied on the now-invalid residual clause, as opposed to the enumerated-offenses or elements clauses. See Gov't Br. in Opp. at 7-9, 11-13, Casey, supra (No. 17-1251).[3]

The decision below is therefore correct, and the result is consistent with cases from the First, Sixth, Eighth, and Tenth 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); Walker v. United States, 900 F.3d 1012, 1015 (8th Cir. 2018); United States v. Snyder, 871 F.3d 1122, 1130 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018).[4] As noted in the government's brief in opposition in Casey, however, 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

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

[4] Petitioner contends (Pet. 4) that the Fifth Circuit also adopted this approach in United States v. Wiese, 896 F.3d 720 (5th Cir. 2018), but that court expressly declined to adopt any standard because it concluded that the prisoner in that case was not entitled to relief under any circuit's approach. Id. at 724-725.

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 Casey 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) (citations 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, 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 (6th Cir. 2018) (per curiam). Further review of inconsistency in the circuits' approaches remains unwarranted, however, for the reasons stated in the government's previous brief. See Gov't Br. in Opp. at 13-16, Casey, supra (No. 17-1251).

2. In any event, this case would be an unsuitable vehicle for reviewing the question presented. Petitioner contends (Pet.

24-25) that his aggravated assault conviction "likely" does not count as an ACCA predicate under the elements clause. That is incorrect, as the district court determined, Pet. App. 46-56, and as the government explained in detail below. Gov't C.A. Br. 12-28. The Georgia aggravated assault statute under which petitioner was convicted in 1990 provides that aggravated assault is an assault (1) "[w]ith intent to murder, to rape, or to rob"; or (2) "[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." Ga. Code Ann. § 16-5-21(a) (1988). An "assault" occurs when someone (1) "[a]ttempts to commit a violent injury to the person of another"; or (2) "[c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury." Id. § 16-5-20(a) (1988).

Defendant's prior conviction was for assault with a deadly weapon under Section 16-5-21(a)(2). See PSR ¶ 40 (explaining that petitioner "shot Parrish Mitchell with a shotgun"). Aggravated assault under that provision categorically requires "the use, attempted use, or threatened use of physical force against the person of another" within the meaning of the ACCA's elements clause. 18 U.S.C. 924(e)(2)(B)(i). By requiring that the defendant place another person in fear of "immediately receiving a violent injury" with the use of a deadly weapon, Ga. Code Ann. §§ 16-5-20(a), 16-5-21(a)(2) (1988), the Georgia aggravated

assault statute necessarily entails the "threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i); cf. United States v. Silva, 608 F.3d 663, (10th Cir. 2010) ("Threatening or engaging in menacing conduct toward a victim, with a weapon capable of producing death or great bodily harm, threatens the use of 'violent force' because[,] by committing such an act, the aggressor communicates to his victim that he will potentially use 'violent force' against the victim in the near future.") (emphasis omitted).

In taking the view that petitioner has a "good argument" that his Georgia aggravated assault conviction is not an ACCA predicate under the elements clause, Judge Martin (in her dissent from denial of rehearing en banc) stated that under the Georgia assault statute, "reasonable apprehension" is determined solely based on the victim's viewpoint and does not necessarily require any knowing or intentional conduct by the defendant. Pet. App. 20 (citing Dunagan v. State, 502 S.E.2d 726, 730 (Ga.), overruled on other grounds by Parker v. State, 507 S.E.2d 744, 747 (Ga. 1998), overruled by Linson v. State, 700 S.E.2d 394 (Ga. 2010)). That observation fails to take into account that under Georgia law, conviction for assault with a deadly weapon requires the State to prove that the defendant acted with an intent to injure with a deadly weapon. See Guyse v. State, 690 S.E.2d 406, 409 (Ga. 2010).

Furthermore, 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 convicted 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) and (2). Pursuant to the ACCA, petitioner received two concurrent 210-month sentences for his Section 922(g) convictions. Judgment 3. But in addition to his ACCA sentences, petitioner also received a third concurrent sentence of 210 months of imprisonment for his conviction for possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Judgment 3. The statutory maximum for that offense is 20 years of imprisonment, see PSR Pt. D (Sentencing Options); 21 U.S.C. 841(b)(1)(C), and petitioner's sentence therefore remains within the authorized statutory range, even if his ACCA sentences were invalid.

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 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 a concurrent sentence of 210 months -- the same length as his ACCA sentences -- on an unrelated count.

The decision below accordingly does not warrant this Court's review, and the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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