No. 18-6608

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM CHARLES O'NEIL, PETITIONER

v.

FCC COLEMAN, WARDEN

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that show factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." The United States has filed

a petition for a writ of certiorari in United States v. Wheeler, No. 18-420 (filed Oct. 3, 2018), seeking this Court's resolution of a circuit conflict regarding whether the portion of Section 2255(e) beginning with "unless," known as the saving clause, allows a defendant who has been denied Section 2255 relief to later file a habeas petition that challenges his conviction or sentence based on an intervening change in the judicial interpretation of a statute. Petitioner seeks review of a similar question, but the circumstances of his case would not lead to relief under any circuit's interpretation of the saving clause. The petition for a writ of certiorari should therefore be denied and need not be held pending the disposition of the petition in Wheeler.

1. In 2004, petitioner pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3). Presentence Investigation Report (PSR) ¶ 1. Petitioner had numerous prior convictions, including three Florida convictions for battery on a law enforcement officer, in violation of Fla. Stat. §§ 784.03 and 784.07 (1989), and three Florida convictions for resisting an officer with violence to his person, in violation of Fla. Stat. § 843.01 (1989). PSR ¶¶ 32-51; see Pet. App., D. Ct. Op. 2. At sentencing, petitioner did not dispute that his prior convictions triggered an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). See Pet. App., D. Ct. Op. 2.

That statute requires a minimum sentence of 15 years of imprisonment for a defendant who has been convicted of violating section 922(g) following three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). Petitioner was sentenced to 240 months of imprisonment. Pet. App., D. Ct. Op. 2.

After petitioner's conviction and sentence became final, he filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255, claiming that he should not have been sentenced under the ACCA. See Pet. App., D. Ct. Op. 2. Petitioner argued that his prior convictions for battery on a law enforcement officer did not qualify as convictions for "violent felon[ies]" under the ACCA. He relied on this Court's decisions in Begay v. United States, 553 U.S. 137 (2008), which construed the definition of "violent felony" in the ACCA's residual clause, see 18 U.S.C. 924(e)(2)(B)(ii) (defining "violent felony" to include an offense that "involves conduct that presents a serious potential risk of physical injury to another"), and in Johnson v. United States, 559 U.S. 133 (2010) (Curtis Johnson), which construed the ACCA's elements clause, see 18 U.S.C. 924(e)(2)(B)(i) (defining "violent felony" to include an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). The district court denied the motion. See Pet. App., D. Ct. Op. 2-3. The court determined that even if petitioner's convictions for battery on a law enforcement officer

did not qualify as convictions for a "violent felony," petitioner nonetheless had three prior convictions for resisting an officer with violence to his person, in violation of Fla. Stat. § 843.01 (1989), and neither Begay nor Curtis Johnson affected the classification of those convictions as violent felonies under the ACCA. See Pet. App., D. Ct. Op. 2-3. The district court and the court of appeals denied petitioner's application for a certificate of appealability, id. at 3, and this Court denied a petition for a writ of certiorari. 566 U.S. 924 (No. 11-7140).

In 2011, petitioner filed a habeas petition under 28 U.S.C. 2241, arguing that the district court had erred by imposing an enhanced sentence under the ACCA because a prior conviction for battery on a law enforcement officer "d[oes] not constitute a violent felony for purposes of the ACCA." Pet. App., D. Ct. Op. 3. The court dismissed the habeas petition for lack of jurisdiction, determining that it was foreclosed by the saving clause of 28 U.S.C. 2255(e). Pet. App., D. Ct. Op. 4-5. The court also explained that even if it possessed jurisdiction, the habeas petition would fail on the merits for the same reasons that the court had denied petitioner's motion for collateral relief under 28 U.S.C. 2255. Pet. App., D. Ct. Op. 5.

Petitioner subsequently filed a motion under Federal Rule of Civil Procedure 60(b), seeking relief from the denial of his habeas petition. See D. Ct. Doc. 45 (Jan. 6, 2016). In support of his motion, petitioner relied on this Court's decision in Johnson v.

United States, 135 S. Ct. 2551 (2015), which invalidated the ACCA's residual clause, and on the Eleventh Circuit's decision in United States v. Braun, 801 F.3d 1301 (2015), which concluded that battery on a law enforcement officer does not qualify as a violent felony under the ACCA after Johnson's invalidation of the residual clause. See D. Ct. Doc. 45, at 1-2. The district court denied the motion, explaining that "[n]othing in Johnson or Braun demonstrates infirmity in the Court's judgment at the time it was entered," id. at 2, and also that petitioner "failed to demonstrate the extraordinary circumstances required to justify relief" under Rule 60(b), id. at 3.

The court of appeals affirmed. Pet. App., C.A. Op. 1-4. Relying on its prior decision in McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 502 (2017), the court determined that petitioner was not eligible for habeas relief under the saving clause because "a § 2255 motion was not inadequate or ineffective to test the legality of his sentence." Pet. App., C.A. Op. 4. The court also found that petitioner's Rule 60(b) motion was properly denied because it "raised the same type of challenges to the legality of his ACCA-enhanced sentence." Ibid. Judge Rosenbaum concurred, expressing her view that McCarthan was wrongly decided. Id. at 5-6.

2. Petitioner contends (Pet. 5-6) that his sentence should not have been enhanced under the ACCA because he did not have three

prior "violent felon[ies]" at the time of his sentencing. He further contends (Pet. 4-6) that the saving clause of 28 U.S.C. 2255(e) permits him to raise that claim in a habeas petition under 28 U.S.C. 2241.

As noted above, the United States has filed a petition for a writ of certiorari in United States v. Wheeler, No. 18-420, asking this Court to resolve a circuit conflict regarding whether the saving clause allows a prisoner who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation. The Court need not hold the petition in this case pending Wheeler, however, because petitioner would not be entitled to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

Even in circuits that construe the saving clause to permit relief based on an intervening decision of statutory interpretation, petitioner's habeas petition would not qualify. The circuits that have given Section 2255(e) the broadest interpretation generally have granted relief only when a prisoner can show (1) that the prisoner's claim was foreclosed by (erroneous) precedent at the time of the prisoner's first motion under Section 2255; and (2) that an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner is in custody for an act that the law does not make criminal, has been sentenced in excess

of an applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., Hill v. Masters, 836 F.3d 591, 595-596, 598-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012); Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001).

Petitioner does not identify any intervening decision of statutory interpretation establishing his ineligibility for an enhanced sentence under the ACCA. Notwithstanding the Eleventh Circuit's conclusion in Braun that battery on a law enforcement officer does not qualify as a violent felony under the ACCA, petitioner still has three qualifying prior offenses: his three Florida convictions under Fla. Stat. § 843.01 (1989) for resisting an officer with violence to the officer's person. Petitioner argues (Pet. 5-6) that those offenses are not violent felonies, but the Eleventh Circuit has repeatedly determined that a conviction under § 843.01 "categorically qualifies as a violent felony under the elements clause of the ACCA." United States v. Hill, 799 F.3d 1318, 1322 (2015); see, e.g., Colon v. United States, 899 F.3d 1236, 1238 n.1 (11th Cir. 2018) (per curiam) ("There is no question that Colon's Florida conviction for resisting an officer with violence is a qualifying felony under the ACCA's elements clause."), petition for cert. pending, No. 18-6711 (filed Nov. 13, 2018); United States v. Joyner, 882 F.3d 1369, 1378 (11th Cir. 2018) (reaffirming that a conviction under § 843.01

qualifies as a violent felony under the ACCA's elements clause), petition for cert. pending, No. 17-9128 (filed May 23, 2018). Thus, petitioner would not be entitled to seek relief under the saving clause of Section 2255(e) in any circuit. And even if the district court had jurisdiction under the saving clause to consider petitioner's challenge to his ACCA sentence, he would remain subject to the ACCA and would not be entitled to relief on the merits.*

This Court has denied petitions for writs of certiorari in cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some statutory challenges to a conviction or sentence under the saving clause. See, e.g., Br. in Opp. at 24-27, Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141); Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct. 648 (2018) (No. 17-6099). The Court should follow the same course

* In United States v. Lee, 701 Fed. Appx. 697 (2017), the Tenth Circuit determined that a Florida conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01, does not qualify as a violent felony under the ACCA's elements clause, although the court found the issue to be a "close call." Id. at 701. That unpublished decision is not binding in any court, much less in the Eleventh Circuit, where petitioner was convicted and is currently incarcerated. In any event, the procedural posture of this case would make it an unsuitable vehicle for addressing any disagreement on the ACCA classification of this Florida offense. And no sound reason exists to deviate from this Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," Bowen v. Massachusetts, 487 U.S. 879, 908 (1988), which in this case would be the Eleventh Circuit.

here, and the petition for a writ of certiorari need not be held for Wheeler.[†]

Respectfully submitted.

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JANUARY 2019

[†] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.