

NO. _____
October Term, 2018

IN THE SUPREME COURT OF THE UNITED STATES

BRENT GALBREATH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

When a *Johnson v. United States*, 135 S.Ct. 2551 (2015), movant would not be an armed career criminal if sentenced today, how can he show that his sentence is infected with error under *Johnson* when the sentencing court did not specify which clause of the Armed Career Criminal Act's violent felony definition a prior conviction fell under at the time of his original sentencing?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) Reference to the Official and Unofficial Reports of any Opinions

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. *United States v. Galbreath*, No.17-6121 and 17-6122, ___ Fed.Appx. ___, 2018 WL 3385380 (10th Cir. July 11, 2018) (unpublished).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The unpublished Order and Judgment of the Tenth Circuit of which review is sought was filed July 11, 2018;

(ii) Date of any order respecting rehearing.

The Order denying rehearing was filed August 8, 2018;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is

a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

None.

(2) Statutes Involved:

18 U.S.C. § 924(e):

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

(A) the term “serious drug offense” means –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possession with intent to manufacture or distribute, a controlled substances (as defined in Section 201 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

OKLA. STAT. tit. 21, § 1435 (1961):

Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel, or other structure or erection, in which any property is kept, or breaks into or forcibly opens, any coin operated or vending machine or device with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree.

OKLA. STAT. tit. 21, § 751 (1910):

Every person who, with premeditated design to injure another, inflicts upon his person any injury which disfigures his personal appearance or disables any member or organ of his body or seriously diminishes his physical vigor, is guilty of maiming.

OKLA. STAT. tit. 21, § 1114 (1991):

A. Rape in the first degree shall include:

1. rape committed by a person over eighteen (18) years of age upon a person under fourteen (14) years of age; or

2. rape committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime; or

3. rape accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power

of execution regardless of the age of the person committing the crime; or

4. rape by instrumentation resulting in bodily harm is rape by instrumentation in the first degree regardless of the age of the person committing the crime; or

5. rape by instrumentation committed upon a person under fourteen (14) years of age.

B. In all other cases, rape or rape by instrumentation is rape in the second degree.

(3) Rules Involved: None.

(4) Other: None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of an order entered by a United States Court of Appeals, affirming the denial of relief under Title 28, United States Code, Section 2255. The jurisdiction of the District Court was invoked pursuant Title 28, United States Code, Section 2255. Mr. Galbreath sought review of the District Court's order denying Section 2255 relief. The Tenth Circuit Court of Appeals granted a Certificate of Appealability under Title 28, United States Code, Section 2253(c)(2). This petition is timely filed pursuant to Supreme Court Rule 13.1.

Facts Material to Consideration of Question Presented

After proceedings not relevant to the consideration of this petition, Mr. Galbreath waived jury trial and pled guilty to a single count of felon in possession of a firearm after having been convicted of a felony, in violation of Title 18, United States Code, Section 922(g)(1) on May 4, 2005. The Presentence Investigation Report concluded Mr. Galbreath qualified as an Armed Career Criminal as defined in Title 18, United States Code, Section 924(e)(2). It relied upon three separate Oklahoma offenses for ACCA enhancement: two convictions for Second Degree Burglary in violation of OKLA. STAT. tit. 21, § 1435 (1961); and a single conviction for Second Degree Rape in violation of OKLA. STAT. tit. 21, § 1114 (1991).¹ Mr. Galbreath also had a conviction for Maiming in violation of OKLA. STAT. tit. 21, § 751 (1910).

The district court agreed and sentenced Mr. Galbreath to 292 months incarceration. Mr. Galbreath attempted to appeal his judgment and sentence to the Tenth Circuit Court of Appeals but the Court granted the Government's motion to enforce the plea agreement. *United States v. Galbreath*, No. 05-6294 (10th Cir. filed Dec. 9, 2005). On November 6, 2006, Mr. Galbreath filed a motion to vacate his sentence under 28 U.S.C. §2255 which the district court denied. After promulgation of Amendment 750 to the United States Sentencing Guidelines, Mr. Galbreath filed

¹ In subsequent proceedings, the Government conceded Mr. Galbreath's second degree rape conviction qualified only under the residual clause.

a motion for a reduction of his prison sentence, and the district court reduced his sentence to 268 months. Mr. Galbreath appealed this sentence reduction to the Tenth Circuit Court of Appeal, arguing that his sentence should have been reduced even further. The Tenth Circuit Court of Appeals affirmed. *United States v. Galbreath*, 506 Fed.Appx. 736 (10th Cir. 2012).

On November 6, 2015, Mr. Galbreath filed another sentence reduction motion under 18 U.S.C. § 3582(c)(2) after the guidelines were again amended. It was during this time, before his second reduction motion was ruled upon and right after this Court invalidated the residual clause of the ACCA in *Johnson v. United States*, 135 S.Ct. 2551 (2015), that Mr. Galbreath requested authorization to file a second §2255 motion. The Tenth Circuit Court of Appeals granted the authorization and Mr. Galbreath filed the successive §2255 motion. The district court subsequently denied relief for both of Mr. Galbreath's motions. Mr. Galbreath was granted a certificate of appealability by the Tenth Circuit Court of Appeals for his §2255 motion and he moved to consolidate the appeals of both the denial of his sentence reduction and §2255 motions.

After examining the briefs, the Tenth Circuit Court of Appeals granted the motion to consolidate both matters and affirmed the district court's denial of relief in an unpublished Order and Judgment on July 11, 2018. *United States v. Galbreath*,

No. 17-6121 and 17-6122, ___ Fed.Appx. ___, 2018 WL 3385380 (10th Cir. July 11, 2018)(unpublished).

In relevant part, the Tenth Circuit Court of Appeals rejected Mr. Galbreath's argument that although his burglary convictions originally fell under the enumerated clause, it now failed to qualify because the Court should have applied *Mathis v. United States*, 136 S.Ct. 2243 (2016). Mr. Galbreath submitted the Oklahoma burglary statute included different "means" by which the offense could be committed rather than different "elements." These "means" listed in Section 1435 encompass conduct outside the generic scope of burglary as defined by *United States v. Taylor*, 495 U.S. 575 (1990). The Tenth Circuit had previously determined Oklahoma's second degree burglary does not qualify as a violent felony under the enumerated clause. *United States v. Hamilton*, 889 F.3d 688 (10th Cir. 2018).

In its Order affirming the denial of relief, the Tenth Circuit disagreed current case law should apply, and instead applying *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017). *Snyder* instructs courts to review the legal background at the time of sentencing when determining if there was a *Johnson* error. *Id.* at 1129. The Tenth Circuit concluded that when Mr. Galbreath was sentenced in 2005, Oklahoma second-degree burglary fell within the *Taylor*'s definition of enumerated burglary. Moreover,

the sentencing court's comments at sentencing indicated reliance on the residual clause.

As to Mr. Galbreath's maiming conviction, Mr. Galbreath argued the statute did not have a required physical force element. Mr. Galbreath further argued Oklahoma's maiming statute did not qualify under the force clause as described in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005). The sentencing court did not specify which clause applied.

The Tenth Circuit rejected these arguments. However, it acknowledged *Perez-Vargas* appeared on point with Mr. Galbreath, but noted a significant difference between the cases. The charging documents were not available in the *Perez-Vargas* case and were available and reviewed by the sentencing court in Mr. Galbreath's case. The Tenth Circuit determined that since the sentencing record and the legal background at the time suggested the maiming conviction was a crime of violence under the elements clause and not the residual clause, Mr. Galbreath's claims did not rely on *Johnson*. Interestingly, the Tenth Circuit also relied on cases decided *after* Mr. Galbreath's sentencing to conclude the residual clause did not play a role. *Galbreath*, 2018 WL 3385380, *5 (discussing *United States v. Pina-Nunez*, 167 Fed.Appx. 66

(10th Cir. 2006) and *United States v. Morales-Chavez*, 153 Fed.Appx. 540 (10th Cir. 2005).²

The Tenth Circuit affirmed the district court. Mr. Galbreath filed a petition for rehearing which was denied by the Tenth Circuit Court of Appeals on August 8, 2018. Mr. Galbreath's current projected release date is July 19, 2024.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

The Court should grant review in this case because the circuits are divided over how a movant can show *Johnson* error where the sentencing record is inconclusive as to which clause of the ACCA a sentencing court relied on when enhancing a person's sentence under section 922(g). This case presents a recurring issue of national importance that will likely affect hundreds of criminal defendants nationwide. This Court's prompt review is also warranted because of the important liberty interests at stake. Mr. Galbreath is serving a sentence that is illegal under today's law.

²In his petition for rehearing before the Tenth Circuit Court of Appeals, Mr. Galbreath noted *United States v. Paxton*, 422 F.3d 1203 (10th Cir. 2005), which was decided shortly after Mr. Galbreath's sentencing. In that case, the defendant presented arguments concerning the applicability of the sentencing guidelines's force clause to the statute at issue in *Perez-Vargas*. Importantly, the Tenth Circuit concluded the residual clause applied.

I. *Lower Courts Conflict Over How A Movant Can Demonstrate Johnson Error*

The federal courts of appeal apply different tests when resolving the question of how a movant can show *Johnson* error. *See, e.g., United States v. Taylor*, 873 F.3d 476, 480-81 (5th Cir. 2017) (collecting cases). The Court should grant review to resolve this split.

a. *The Tenth Circuit’s Test Directly Conflicts with the Fourth’s Circuit’s Test*

The decision below cited to *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017). The Tenth Circuit’s opinion in *Snyder* applies a “legal snapshot” inquiry to determine if a *Johnson* claim properly relies on the residual clause. *Snyder* reviews the “relevant background legal environment,” and asks whether a movant’s sentence could have rested on a clause other than the residual clause at sentencing. If not, a movant fails to demonstrate *Johnson* error. *Snyder*, 871 F.3d at 1130.

However, the Fourth Circuit approaches the inquiry differently. There, a *Johnson* movant need only show that his sentence “may have been predicated on application of the now-void residual clause, and therefore may be an unlawful sentence” in order to demonstrate *Johnson* error. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). In the Fourth Circuit, an inconclusive record is sufficient to show error. *See Cade v. United States*, 276 F.Supp.3d 502, 507-09 (D.S.C. 2017) (applying *Winston* and granting *Johnson* relief in spite of Government’s argument the

sentence rested on the enumerated clause); *Foster v. United States*, 2017 WL 2628887, **2-3 (W.D.Va. June 19, 2017) (same). Had *Cade* or *Foster* litigated their cases in the Tenth Circuit, *Snyder* would have foreclosed relief.

The Fourth Circuit’s test accounts for the common problem of ambiguous ACCA sentencing records. Indeed, it noted “[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence.” *Id.* (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus declines to “penalize a movant for a court’s discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony.” *Id.* *Winston* further criticized requiring a movant to show affirmative reliance on the residual clause because it would result in “‘selective application’ of the new rule of constitutional law announced in *Johnson*,” in violation of “‘the principle of treating similarly situated defendants the same.’” *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error.

The panel’s decision in this case applying *Snyder* is at odds with the *Winston* decision. Under the *Winston* rule, Mr. Galbreath would prevail because the sentencing court may have relied on the residual clause to classify his maiming convictions as a violent felony. Whereas the Fourth Circuit’s approach allows for the possibility of

unconstitutional reliance on the residual clause where there is ambiguity in the record, the decision below places a far higher burden on *Johnson* movants.

b. Two other Circuits have developed additional tests

The Eleventh and Ninth Circuits have applied different approaches for determining when a *Johnson* claimant has shown error. In a divided decision, a panel of the Eleventh circuit ruled that “[t]o prove a *Johnson* claim, the movant must show that – more likely than not – it was use of the residual clause that led to the sentencing court’s enhancement of his sentence.” *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017). In the Eleventh Circuit, a *Johnson* movant fails to meet their burden to demonstrate error if “it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement.” *Id.* at 1222. *But see id.* at 1225-31 (Williams, J., dissenting) (submitting the appropriate inquiry is whether a *Johnson* movant has demonstrated that his prior convictions could not possibly call under any clause but the residual clause under the legal framework that exists today).

The Ninth’s Circuit’s approach adds another test to the *Johnson* question. Applying *Stromberg v. California*, 283 U.S. 359 (1931), the Ninth Circuit held that “when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or

constitutionally invalid legal theory,” so an unclear record is sufficient for a movant to show *Johnson* error. *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). The *Geozos* panel ultimately decided that the alleged *Johnson* error was not harmless because the movant’s prior conviction for Florida robbery was no longer a violent felony under the current legal framework in that circuit.

In short, the circuits have offered and applied divergent legal tests for whether a *Johnson* movant has met his burden to demonstrate error. This Court should resolve this deepening divide. *Cf. Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (“Because uniformity among federal courts is important on questions of this order, we granted certiorari to end the division of authority.”).

Conclusion

The petition should be granted.

Respectfully submitted,



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(i) **Appendix.**

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Galbreath, No.17-6121 and 17-6122, ___ Fed.Appx. ___, 2018 WL 3385380 (10th Cir. July 11, 2018)(unpublished).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

Order denying Rehearing, United States v. Galbreath, No. 17-6121 and 17-6122 (10th Cir. August 8, 2018);

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

Order, dated April 6, 2017, United States District Court for the Western District of Oklahoma, CR-05-44-HE; CIV-16-632-HE (Docket Number 116);

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

None.