No. 18-6989

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE LEE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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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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 one 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 based on at least three prior Georgia convictions -- a burglary conviction and two robbery convictions. Presentence Investigation Report ¶¶ 15, 17-18, 27. He contends (Pet. 7-28) 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, petitioner must show that it is more likely than not -- rather than merely possible -- that the district court relied at the time of sentencing on the residual clause. 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]

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 the special statute of limitations under 28 U.S.C. 2255(f)(3) for new retroactive constitutional rules, or to show that his sentencing proceeding was unconstitutional, 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

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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] Other pending petitions raise the same issue or related issues. See Jackson v. United States, No. 18-6096 (filed Sept. 21, 2018); Beeman v. United States, No. 18-6385 (filed Oct. 16, 2018); Wiese v. United States, No. 18-7252 (filed Dec. 26, 2018).

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 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.), 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

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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. 18) that the Fifth Circuit also adopted this approach in United States v. Wiese, 896 F.3d 720 (2018), petition for cert. pending, No. 18-7252 (filed Dec. 26, 2018), but that decision expressly declined to adopt any standard because it determined that the prisoner in that case was not entitled to relief under any circuit's approach. Id. at 724-725.

on a new rule of constitutional law, made retroactive to cases on collateral review by [this] 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 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) some evidence exists 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 brief. See Gov't Br. in Opp. at 13-16, Casey, supra (No. 17-1251).

In any event, this case would be an unsuitable vehicle for reviewing the question presented. Petitioner contends (Pet. 24-25) that his Georgia robbery convictions "likely" do not count as ACCA predicates under the elements clause. That is incorrect, as the district court determined, Pet. App. 13a-16a, and as the government explained in detail below, Gov't C.A. Br. 17-30. The robbery statute under which petitioner was convicted provides that: "A person commits robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another: (a) by use of force; (b) by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or (c) by sudden snatching." Ga. Code Ann. § 29-1901 (Harrison 1972).

Petitioner acknowledged below that the robbery statute is divisible into crimes with separate elements and that he was convicted of either robbery by force or robbery by intimidation. See Gov't C.A. Br. 18-19. Both types of robbery qualify as violent felonies under the ACCA's elements clause, which encompasses any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). Robbery by force satisfies the elements clause because, under Georgia law, the crime requires "personal violence"

such as injury to the victim or a struggle to retain possession of the property. Henderson v. State, 70 S.E.2d 713, 714 (Ga. 1952); see Stokeling v. United States, 139 S. Ct. 544, 548 (2019) (holding that Florida robbery, which has as an element the use of force sufficient to overcome a victim's resistance, categorically requires the use of "physical force" within the meaning of the elements clause). Robbery by intimidation also satisfies the elements clause. Under Georgia law, robbery by intimidation requires proof that a theft was "attended with such circumstances of terror -- such threatening by word or gesture, as in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person." Long v. State, 12 Ga. 293, 321 (1852) (emphasis omitted). The offense therefore requires the "threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

In support of his argument that Georgia robbery "likely" does not qualify as an ACCA predicate, petitioner cites two district court orders. In United States v. North, No. 06-cr-300 Docket entry No. 66 (N.D. Ga. Mar. 30, 2017), a district court concluded that the Georgia robbery statute set forth a single indivisible crime that can be committed in alternative ways; that "sudden snatching" did not require use of force sufficient to satisfy the elements clause, and that the statute therefore did not categorically qualify as a crime of violence. Id. at 17; see id.

at 17-29. Petitioner here, however, has conceded that the statute is divisible and that he was not convicted of a sudden snatching offense. See p. 6, supra. In United States v. Harrison, 08-cr-32 Docket entry No. 215 (N.D. Ga. Dec. 19, 2016), a district court concluded that robbery by intimidation under Georgia law does not satisfy the elements cause because a defendant may be found guilty of the offense "simply by looking intimidating or frightening" and the statute therefore "does not require that a defendant have an active, volitional intent to injure and aims only at the subjective perception of the victim." Id. at 19. That decision is incorrect. Under Georgia law, the "circumstances of terror" inherent in robbery by intimidation must be accompanied by "a felonious intention" on the part of the defendant. Long, 12 Ga. at 321. Conviction for intimidation-based Georgia robbery thus categorically requires the "threatened use of physical force" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). Because petitioner qualifies as an armed career criminal even under current law, resolution of the question presented would not affect the outcome of his case. Further review is unwarranted.

Respectfully submitted.

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