No. 18-7252

IN THE SUPREME COURT OF THE UNITED STATES

EDDIE RAY WIESE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), 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." 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). 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 Texas convictions for burglary (a violent felony) and one prior Texas conviction for possession of cocaine (a serious drug offense). See Presentence Investigation Report (PSR) ¶¶ 25-28, 31-39 (identifying 12 prior Texas burglary convictions and one prior Texas conviction for possession of cocaine); D. Ct. Doc. 18, at 1 (July 3, 2003) (sentencing enhancement information stating that petitioner "has at least three previous convictions for a violent felony or a serious drug offense" and listing three Texas burglaries and the cocaine-possession offense); Pet. App. 3a (stating that petitioner

admitted to having four ACCA predicates). He contends (Pet. 12-17) that this Court's review is warranted to address whether a prisoner seeking to challenge his sentence under Johnson in a second-or-successive motion under 28 U.S.C. 2255 must prove that his ACCA classification relied on the residual clause that was invalidated in Johnson, as opposed to one of the ACCA's still-valid clauses. 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 briefs in opposition to the petitions for writs of certiorari in Couchman v.

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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).

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 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]

The court of appeals in petitioner's case observed, but declined definitively to hold, that "the 'more likely than not' standard appears to be the * * * appropriate standard since it comports with the general civil standard for review and with the stringent and limited approach of [the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214] to successive habeas applications." Pet. App. 5a. That standard is consistent with the First, Sixth, Eighth, Tenth, and Eleventh

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

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); Beeman v. United States, 871 F.3d 1215, 1224 (11th Cir. 2017), petition for cert. pending, No. 18-6385 (filed Oct. 16, 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 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); see Gov't

Br. in Opp. at 16-18, King, supra (No. 17-8280); see also Gov't Br. in Opp. at 17-19, Couchman, supra (No. 17-8480).

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.[4] 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).

In any event, this case would be an unsuitable vehicle for reviewing the question presented. Although the court of appeals stated that "the 'more likely than not' standard appears to be the * * * appropriate standard," the court determined that it "need not conclusively decide that here" because even under the "may

[4] 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).

have" standard applied by some courts of appeals, "[petitioner] has not shown that the sentencing court 'may have' relied on the residual clause." Pet. App. 5a-6a; see also id. at 7a ("Even if we apply the less demanding 'may have relied' standard, there is no evidence that the sentencing court 'may have' relied on the residual clause."). The court of appeals explained that, in light of existing precedent at the time of sentencing, "there was absolutely nothing to put the residual clause on the sentencing court's radar." Id. at 6a. Accordingly, petitioner's case does not squarely present the question on which he urges review. Petitioner contends (Pet. 12-16) that the court of appeals erred in determining that petitioner did not meet the "may have" standard. But that factbound question does not warrant this Court's review. United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). Moreover, the court of appeals did not, as petitioner suggests (Pet. 15), base its decision solely on a silent sentencing record. The court analyzed the then-extant case law, and it further noted that the PSR identified "Burglary of a Habitation" as the predicate offense that triggered petitioner's classification as an armed career criminal, which the court found to be an indication that the sentencing court treated the prior conviction as generic burglary, rather than relying on

the residual clause. Pet. App. 6a ("[T]he actual charges that [petitioner] was convicted of did not present a situation where the residual clause would have, in any way, been considered as a basis for ACCA sentencing enhancement."). Further review is therefore unwarranted.

Respectfully submitted.

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