No. 18-7379

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD BRUNO GARCIA, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-7379

EDWARD BRUNO GARCIA, 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

The Armed Career Criminal Act of 1984 (ACCA) provides for enhanced statutory penalties for certain convicted felons who unlawfully possess ammunition and whose criminal histories include at least three prior convictions for a "serious drug offense" or a "violent felony" committed on separate occasions. 18 U.S.C. 924(e)(1).

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 under the ACCA after the district court found that he had prior Florida convictions for burglary of a structure, carrying a concealed firearm, trafficking in cocaine, conspiracy to traffic in cocaine, and conspiracy to traffic in cannabis; two prior Florida convictions for possession of cannabis with intent to distribute; and three prior Florida convictions for possession of a controlled substance with intent to distribute. Presentence Investigation Report (PSR) ¶¶ 54-58; 12/14/06 Tr. 4-5; Pet. App. 2. He contends (Pet. 10-15) 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 raising a Johnson claim and seeking to avail himself of the special statute of

---

[1] See Jackson v. United States, No. 18-6096 (Feb. 19, 2019); Beeman v. United States, No. 18-6385 (Feb. 19, 2019); 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 Ezell v. United States, No. 18-7426 (filed Jan. 11, 2019); Harris v. United States, No. 18-6936 (filed Dec. 3, 2018); Wiese v. United States, No. 18-7252 (filed Dec. 26, 2018).

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 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, Eighth, and Tenth Circuits. See Dimott v. United States, 881 F.3d 232, 242-243 (1st Cir.), cert. denied, 138 S. Ct. 2678 (2018); Walker v. United States, 900 F.3d 1012, 1015 (8th Cir. 2018), petition for cert. pending, No. 18-8125 (filed Feb. 22, 2019); United States v. Snyder, 871 F.3d 1122, 1130 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018). 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

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

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 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. And the Sixth Circuit has held that a movant seeking relief under Johnson must affirmatively prove that he was sentenced under the residual clause 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, Potter v. United States, 887 F.3d 785 (2018), but is not otherwise

required to do so. 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).

In any event, this case would be an unsuitable vehicle for reviewing the question presented. As the district court explained, it denied petitioner's Section 2255 motion because it determined that "[p]etitioner's ACCA enhancement was based on his conviction for serious drug offenses," not "based on the residual clause."[4] 16-cv-1620 D. Ct. Doc. (D. Ct. Doc.) 28, at 1-2 (June 1, 2017). Although petitioner contends that "his ACCA sentence may have been based on his prior conviction for burglary or for carrying a concealed firearm," Pet. 14, the district court found "no support" in the record for that "unproved premise," D. Ct. Doc. 24, at 4 (Mar. 20, 2017). Petitioner thus cannot satisfy the "may have" standard that he asks this Court to adopt.

Furthermore, petitioner's ACCA enhancement had no practical effect on his sentence. In addition to his 200-month ACCA sentence, petitioner also received a concurrent sentence of 200

---

[4] Petitioner appears to contend (Pet. 4-5 & n.3) that he did not have three qualifying prior convictions for serious drug offenses on the theory that some of his drug convictions were for offenses committed on the same occasion, but the district court found that he has procedurally defaulted that claim, 16-cv-1620 D. Ct. Doc. (D. Ct. Doc.) 24, at 6-7 (Mar. 20, 2017); D. Ct. Doc. 28, at 2 & n.2 (June 1, 2017).

months of imprisonment for his conviction for conspiracy to possess with intent to distribute 500 grams or more of cocaine and a quantity of 3,4-methylenedioxymethamphetamine (MDMA). Judgment 1-2. The statutory maximum for that offense is life imprisonment in light of petitioner's prior drug convictions, see PSR ¶ 109; 21 U.S.C. 841(b)(1)(B) (2006) and 21 U.S.C. 846, and petitioner's sentence therefore remains within the authorized statutory range, even if his ACCA sentence was 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 200 months -- the same length as his ACCA sentence -- 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.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MARCH 2019