No. 18-7426

IN THE SUPREME COURT OF THE UNITED STATES

TERRY LAMELL EZELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

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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 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 two Washington convictions for second-degree burglary; one Washington conviction for intentional assault resulting in substantial bodily harm (second-degree assault); and one Washington conviction for first-degree burglary involving second-degree assault. Pet. App. 9a-10a; see Presentence Investigation Report (PSR) ¶¶ 43, 106-109. He contends (Pet. 11-40) that this Court's review is warranted to address whether a prisoner seeking to collaterally attack 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. United States, cert. denied, No. 17-8480 (Oct. 1, 2018), and King v. United States, cert. denied, No. 17-8280 (Oct. 1, 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

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[1] See Beeman v. United States, No. 18-6385 (Feb. 19, 2019); Jackson v. United States, No. 18-6096 (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 Walker v. United States, No. 18-8125 (filed Feb. 22, 2019); Garcia v. United States, No. 18-7379 (filed Jan. 9, 2019); Harris v. United States, No. 18-6936 (filed Dec. 3, 2018); Wiese v. United States, No. 18-7252 (filed Dec. 26, 2018).

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 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), 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 briefs in opposition in King and Couchman, however, some inconsistency exists in circuits' approach 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

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

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 Br. in Opp. at 16-18, King, supra (No. 17-8280); see also 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 Section 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

[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 indicates that the movant was sentenced under a clause other than the residual clause. Raines v. United States, 898 F.3d 680, 685-686 (6th Cir. 2018) (per curiam).

briefs. See Br. in Opp. at 16-18, King, supra (No. 17-8280); Br. in Opp. at 17-19, Couchman, supra (No. 17-8480).

Review would be especially unwarranted in this case, because petitioner could not prevail under the approach of any circuit. Petitioner cannot show that his ACCA sentence "may have been" predicated on application of the residual clause. Geozos, 870 F.3d at 896 n.6 (citation omitted); see Winston, 850 F.3d at 682; Peppers, 899 F.3d at 221-224. Petitioner's claim failed in the Ninth Circuit, which applies that approach, because that court determined that "the district court did not rely on the residual clause for three predicate offenses." Pet. App. 5a. It follows a fortiori that petitioner would not qualify for relief under an approach requiring him to affirmatively show that he was sentenced under the residual clause. He briefly asserts (Pet. 16-17) that he would have stated a valid claim in the Third and Fourth Circuits, but he identifies no decision of either court to support that assertion.

Furthermore, petitioner's ACCA enhancement had no practical effect on his sentence. An ACCA sentence raises the default statutory sentencing range for a conviction for possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1), from zero to ten years of imprisonment, to 15 years to life imprisonment. Compare 18 U.S.C. 924(a)(2), with 18 U.S.C. 924(e)(1) and (2). Pursuant to the ACCA, petitioner received a

262-month sentence for his firearm conviction. Am. Judgment 1-2. But in addition to that sentence, petitioner also received a concurrent sentence of 262 months of imprisonment for his conviction for possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B)(iii) (2000). Am. Judgment 1-2. The statutory maximum for that offense is 40 years of imprisonment, see PSR ¶ 168; 21 U.S.C. 841(b)(1)(B)(iii) (2000), and is unaffected by his ACCA classification.

Under the concurrent-sentence doctrine, an appellate court may decline to review a sentencing claim on collateral review if the defendant is serving an uncontested concurrent sentence that is greater than or equal to the challenged 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 262 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.[5]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MARCH 2019

[5] The government waives any further response to the petition unless the Court requests otherwise.