No. _____

In the Supreme Court of the United States

October Term, 2018

RANDY DEMPSEY, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

When a federal prisoner demonstrates that the Armed Career Criminal Act's residual clause was a basis for enhancing his sentence, but fails to show that the sentencing judge actually relied on the residual clause, does he satisfy the requirements for a successive motion to vacate under 28 U.S.C. § 2255?[1]

[1] This issue is already before the Court in *Wiese v. United States*, No. 18-7252. The petition for writ of certiorari was filed on December 26, 2018.

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Petitioner Randy Dempsey asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 31, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The denial of the motion for certificate of appealability by the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered the judgment in Petitioner's case on October 31, 2018. This petition is filed within 90 days after entry of the judgment. *See* SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

These statutes are reproduced in Appendix B:

- 18 U.S.C. § 922(g)(1)
- 18 U.S.C. § 924(a)(2)
- 18 U.S.C. § 924(e) (Armed Career Criminal Act)
- 28 U.S.C. § 2244
- 28 U.S.C. § 2255

STATEMENT

A. Statutory framework.

The Armed Career Criminal Act (ACCA) increases the penalties for certain felons who unlawfully possess firearms. The maximum penalty for being a felon in possession of a firearm is generally 10 years' imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2). But if the defendant has at least three prior convictions for a "violent felony," a "serious drug offense," or both, the ACCA increases the penalty to a minimum of 15 years in prison and a maximum of life. 18 U.S.C. § 924(e)(1). Also, the maximum term of supervised release increases from three years to five years. *See* 18 U.S.C. §§ 3559(a)(1), (3); 3583(b)(1), (2).

A violent felony is "any crime punishable by imprisonment for a term exceeding one year" that:

- "has as an element the use, attempted use, or threatened use of physical force against the person of another"—the force-element clause;
- "is burglary, arson, or extortion, [or] involves use of explosives"—the enumerated-offenses clause; or
- "otherwise involves conduct that presents a serious potential risk of physical injury to another"—the residual clause.

18 U.S.C. § 924(e)(2)(B). In *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015) (*Johnson* II), this Court held that the residual clause is unconstitutionally vague, and that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." In *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court made that rule retroactive to cases on collateral review.

B. Factual and procedural background.

In 2005, Randy Dempsey was charged in a one-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The Government filed an information providing notice of its intent to seek an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), based on one prior Texas conviction for aggravated robbery and two prior Texas burglary convictions. The two burglary convictions were under Texas Penal Code § 30.02(a)(3), which criminalizes a person entering a building or habitation and attempting to commit or committing a felony, theft, or an assault. Because of these prior convictions, Dempsey was determined to be an armed career criminal, and his sentencing Guidelines range was 188 to 235 months. On August

25, 2006, the district court sentenced Dempsey to 188 months' imprisonment, to be followed by a five-year term of supervised release.

In 2016, in the wake of *Johnson* and *Welch*, the Fifth Circuit granted Dempsey authorization to file a second § 2255 motion challenging his sentence. The motion claimed that Dempsey's sentence was imposed in violation of the Constitution and laws of the United States, and exceeded the statutory maximum, because his prior burglary and aggravated robbery convictions no longer qualified as violent felonies under the ACCA post-*Johnson*. In particular, Dempsey argued that his prior burglary convictions did not qualify as ACCA predicates because the offense lacked an element of force and because the Texas burglary statute was indivisible and encompassed some conduct that was outside the generic definition of the enumerated offense of burglary.

The district court examined *Shepard*[2] documents submitted by the Government. Those documents confirmed that the two burglary convictions relied upon to sentence Dempsey were under

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[2] *Shepard v. United States*, 544 U.S. 13 (2005).

Texas Penal Code § 30.02(a)(3), which the Fifth Circuit had previously held was broader than generic burglary. *See United States v. Constante*, 544 F.3d 584, 586–87 (5th Cir. 2008).[3] The documents also revealed that Dempsey had two other prior burglary convictions, under Texas Penal Code § 30.02(a)(1), which criminalizes a person entering a building or habitation with intent to commit a felony, theft or an assault. The Fifth Circuit had previously held that this offense qualified as generic burglary. *See United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992).

The district court denied Dempsey's § 2255 motion on the merits and denied a certificate of appealability. The court held that the two other prior burglary convictions qualified as ACCA predicates under the enumerated-offenses clause. The court concluded that Dempsey's divisibility and overbreadth arguments on Texas burglary were foreclosed by Fifth Circuit precedent. *See United States v. Uribe*, 838 F.3d 667 (5th Cir. 2016).

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[3] A related issue is currently pending before this Court in *Quarles v. United States*, No. 17-778, in which certiorari was granted on January 11, 2019.

The question presented is: Whether *Taylor*'s [*v. United States*, 495 U.S. 575 (1990)] definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure.

Dempsey appealed. He argued that the Fifth Circuit should grant him a certificate of appealability because he could make a "substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2). Dempsey argued that reasonable jurists would find the district court's resolution debatable in light of *Johnson* and the Fifth Circuit's recent en banc decision in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018), which overturned *Uribe*.

In *Herrold*, the en banc court held that Texas burglary, under Texas Penal Code § 30.02, did not qualify as generic burglary for purposes of the ACCA. *Id.* at 531. The *Herrold* court held that the Texas burglary statute was an indivisible statute. *Id.* at 522–23, 529. The court reaffirmed its earlier holding that the Texas burglary statute was broader than generic burglary. *Id.* at 529–36 ("We decline to retreat from our previous holding that Texas Penal Code § 30.02(a)(3)—Texas's burglary offense allowing for entry and subsequent intent formation—is broader than generic burglary."). The en banc court concluded that Herrold's burglary convictions did not qualify as predicate violent felonies under the ACCA. *Id.* at 541–42.

The Fifth Circuit denied Dempsey a certificate of appealability, holding that he had not "demonstrate[ed] that jurists of reason

could disagree with the district court's resolution of his constitutional claims." App. A (citing *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003)). The court of appeals gave no further explanation.

The Fifth Circuit had recently addressed the identical issue in a second or successive § 2255 regarding prior Texas burglary convictions in *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018). In a published opinion, issued before the denial in Dempsey's case, the Fifth Circuit had held that the district court lacked jurisdiction to reach the merits of the petitioner's *Johnson* claim. *Wiese*, 896 F.3d at 721–22. In the Fifth Circuit's view, "[t]he dispositive question for jurisdictional purposes" was "whether the sentencing court [at the original sentencing hearing] relied on the residual clause in making its sentencing determination." *Id.* at 724.

The Fifth Circuit noted a circuit split on how to determine whether the original sentencing court relied on the residual clause, with some circuits applying a "more likely than not" standard. 896 F.3d at 724. (citing *United States v. Washington*, 890 F.3d 891, 897–98 (10th Cir. 2018), *cert. denied* 2019 WL 113224 (Jan. 7, 2019); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir.), *cert. denied sub nom. Casey v. United States*, 138 S. Ct. 2678 (2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017), *petition for*

cert. filed, No. 18-6385 (Oct. 16, 2018)). Other circuits require only that the sentencing court "may have" relied on the residual clause. *Id.* (citing *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017)).

The Fifth Circuit suggested that "more likely than not" is the correct standard, but declined to decide that question because it believed that Wiese could not satisfy the more lenient "may have" standard because Fifth Circuit precedent, at the time of his sentencing, held that his predicate burglary offense qualified as generic burglary, and thus, qualified under the ACCA's enumerated offense clause. *Id.* at 726.

Under that analysis, the district courts did not have jurisdiction to reach the merits of either Wiese's or Dempsey's claims. *See also United States v. Winterroth*, ___ F. App'x ___, 2019 WL 151332 (5th Cir. Jan. 9, 2019) (same).

REASON FOR GRANTING THE WRIT

The Court Should Grant Certiorari to Consider to Resolve a Circuit Split and Clarify the Standard by Which a Defendant Meets His Burden, in a Successive Motion Under 28 U.S.C. § 2255, To Prove His Claim Relies on the Rule in *Johnson*.

The federal courts of appeals are not in agreement on what a defendant must show in a second or successive motion under 28 U.S.C. § 2255 to prove error under *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, this Court held that the residual clause of the Armed Career Criminal Act (ACCA) is unconstitutionally vague. The Court made that rule retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

These decisions opened the door for prisoners to challenge their ACCA sentences under 28 U.S.C. § 2255(a) on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States … or that the sentence was in excess of the maximum authorized by law." A prisoner who wants to file a second or

successive motion under § 2255 must pass through two "gates" before a court may reach the merits of his claim. *Reyes-Requena v. United States*, 243 F.3d 893, 896–99 (5th Cir. 2001).[4]

First, the "motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain … a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2); *Reyes-Requena*, 243 F.3d 897–99. To obtain this certification, a defendant must make "a 'prima facie showing' that his or her motion satisfies § 2255's requirements for a second or successive motion." *Id.* at 898–99 (holding that "prima facie" standard of 28 U.S.C. § 2244(b)(3)(C) has been incorporated into § 2255(h)). As relevant here, a defendant must "show[ ] that [his] claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" 28 U.S.C. § 2244(b)(2)(A) (emphasis added).

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[4] *Accord e.g., Darnell Moore v. United States*, 871 F.3d 72, 85 (1st Cir. 2017); *Massey v. United States*, 895 F.3d 248, 250–51 (2d Cir. 2018); *United States v. Peppers*, 899 F.3d 211, 220 (3d Cir. 2018); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016); *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997); *Kamil Johnson v. United States*, 720 F.3d 720, 720–21 (8th Cir. 2013); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000); *United States v. Murphy*, 887 F.3d 1064, 1067–68 (10th Cir.), *cert. denied*, 139 S. Ct. 414 (2018); *In re Jasper Moore*, 830 F.3d 1268, 1271–72 (11th Cir. 2016).

Second, after the court of appeals authorizes the filing of a second or successive § 2255 motion, the district court must also determine whether the defendant's claim "relies on" the previously unavailable new retroactive rule. *See* 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."); *Reyes-Requena*, 243 F.3d at 899. "The district court then is the second 'gate' through which the petitioner must pass before the merits of his or her motion is heard." *Reyes-Requena*, 243 F.3d at 899.

The circuits are divided over what a defendant must show to pass through the "relies on" gate in § 2244(b)(2)(A). Some say that a defendant must show that it is "more likely than not" that the sentencing court based the ACCA enhancement on the residual clause. Others say that a defendant need only show that his sentence "may have" rested on the residual clause.

The Fifth Circuit has declined to pick a side in that split, reasoning that, in cases in which the record is silent as to whether the sentencing court relied on the residual clause, the petitioners cannot satisfy even the minimal "may-have" standard. *Wiese*, 896 F.3d at 724–25; *Winterroth*, 2019 WL 151332, at *2–3. That is because

Fifth Circuit law at the time of sentencing held that Texas burglary under § 30.02 of the Penal Code qualified as generic "burglary" under the ACCA's enumerated-offenses clause. *Wiese*, 896 F.3d at 724–25; *Winterroth*, 2019 WL 151332, at *2–3.

But the Fifth Circuit's approach conflicts with the "may-have relied upon" approaches applied by the Third, Fourth, and Ninth Circuits in *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018), *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), and *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017).

In *Peppers*, the Third Circuit held that "when [a defendant] demonstrates that his sentence may be unconstitutional in light of the new rule of constitutional law[,]" he has satisfied the § 2244(b)(2)(A) relies-on gatekeeping requirement. 899 F.3d at 223. Peppers carried that burden by showing that he was sentenced under the ACCA "because the district court and the parties believed he had at least three prior convictions qualifying as violent felonies under that statute[,]" and the district court "did not specify the clauses under which those prior convictions qualified as violent felonies." *Id.* at 224. Under the may-have relied on standard as applied by the Third Circuit, Dempsey's claim "relies on" *Johnson*'s new rule.

Under the Fourth Circuit's approach, in *Winston*, Dempsey could satisfy his burden to show the district court may have relied on the residual clause at his sentencing. In *Winston*, that court addressed a second or successive § 2255 motion denied by the district court. 850 F.3d 677, 681–82 (4th Cir. 2017). The sentencing record, like Dempsey's, was silent as to whether the sentencing judge had relied on the residual clause in counting Winston's convictions under the ACCA. *Id.* at 682. The government argued that with this silent record, the defendant failed to overcome § 2255(h)(2)'s gatekeeping function to prove that his claim relied on *Johnson*. *Id.* The Fourth Circuit disagreed because "[n]othing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence." *Id.* It held this: "[W]hen an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in *Johnson* II, the inmate has shown that he 'relied on' a new rule of constitutional law." *Id.*

Likewise, under the Ninth Circuit's approach, in *Geozos*, Dempsey could satisfy his burden to show the district court may have relied on the residual clause. The court cited *Winston* and held "that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an

armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson* II." 870 F.3d at 896 & n.6 (noting that the ACCA provenance is "unclear" when the sentencing record is silent and there is no binding circuit precedent at the time of sentencing).

Among the circuits' approaches to this question, the Third, Fourth, and Ninth Circuits' approaches are the most faithful to the statutory text. But even those approaches may be asking the wrong question. Decisions requiring a defendant to show that the sentencing court may have relied on—and certainly decisions requiring that it was more likely than not that the district court relied on the residual clause—are untethered from the text of the applicable statutes. Nothing in § 2244 or § 2255 suggests, much less compels, a conclusion that a defendant must show that he was sentenced under the residual clause to have his *Johnson* claim considered on the merits. All the statutes require is that a defendant's claim "relies on" the retroactive new rule under which he claims relief. *See* 28 U.S.C. §§ 2244(b), 2255(h)(2).

Under an approach faithful to the texts of § 2244 or § 2255, Dempsey should prevail. As the dissent in *Beeman* argued, "In the case of *Johnson*, the plain language of the decision makes clear

that relief under the holding is not predicated upon a specific finding at sentencing, but rather the absence of a constitutional basis for the sentence imposed." 871 F.3d at 1229 n.5 (Williams, J., dissenting) (citing and quoting *Welch*, 136 S. Ct. at 1265: "*Johnson* establishes, in other words, that 'even the use of impeccable fact-finding procedures could not legitimate' a sentence based on that clause.").Thus,

> [i]n a case like this, where a movant attempts to satisfy the first prong of the *Johnson* inquiry through circumstantial evidence by demonstrating that he could not have been properly sentenced under any other portion of the statute, the first and second prongs for success on the merits coalesce into a single inquiry. … [A defendant's] showing that he could not have been convicted under the elements clause of the ACCA is therefore proof of both requirements for success on the merits of a *Johnson* claim: first, that he was sentenced under the residual clause, and second, that his predicate offenses could not qualify under the ACCA absent that provision.

Welch, 136 S. Ct. at 1230.

The circuit split over this question is mature and intractable, and affects many prisoners who have raised *Johnson* claims in successive § 2255 motions. The Court should resolve it.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Judy Fulmer Madewell
JUDY FULMER MADEWELL
Assistant Federal Public Defender

Attorney for Defendant-Appellant

DATED: January 29, 2019.