No. 18-8125

IN THE SUPREME COURT OF THE UNITED STATES

DARRELL D. WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner's motion under 28 U.S.C. 2255(a) to vacate his sentence based on Johnson v. United States, 135 S. Ct. 2551 (2015), on the ground that he failed to show that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) that was invalidated in Johnson, as opposed to the Act's still-valid enumerated-offenses clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 900 F.3d 1012. The order of the district court (Pet. App. 10a-11a) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 223 Fed. Appx. 516.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2018. A petition for rehearing was denied on November 26, 2018 (Pet. App. 12a). The petition for a writ of certiorari was

filed on February 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a 2004 jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on two counts of possession of a firearm by a felon and one count of possession of ammunition by a felon, all in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. The district court sentenced petitioner to 293 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 223 Fed. Appx. 516. In 2008, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). 02-cr-161 D. Ct. Doc. 171 (Oct. 27, 2008). The district court denied petitioner's motion and declined to issue a certificate of appealability (COA). 08-cv-807 D. Ct. Doc. 6 (Aug. 24, 2009). The court of appeals denied petitioner's application for a COA and dismissed his appeal. 08-cv-807 D. Ct. Doc. 13 (Feb. 3, 2010).

In June 2016, the court of appeals granted petitioner's application for leave to file a second Section 2255 motion to challenge his sentence based on Johnson v. United States, 135 S. Ct. 2551 (2015). Pet. App. 2a. The district court denied the motion and declined to issue a COA. Id. at 11a. The court of appeals granted a COA, vacated the district court's order, and remanded to the district court to determine in the first instance whether petitioner had shown by a preponderance of the evidence

that his successive Section 2255 claim relies on Johnson. Id. at 2a, 6a.

1. In January 2002, an undercover police detective approached Walker and attempted to talk to him. Presentence Investigation Report (PSR) ¶ 10. In response, petitioner raised his sweatshirt, put his hand on a gun, and began to draw it. Ibid. When other officers responded to the scene, petitioner dropped the gun on the ground, and the officers arrested him as he attempted to walk away. PSR ¶ 11. Nine months later, in the course of executing a federal arrest warrant on petitioner, federal agents found a loaded .45-caliber magazine in petitioner's pants pocket and a loaded handgun in petitioner's car. PSR ¶¶ 13-14. At the time of all of these events, petitioner was a convicted felon. See, e.g., PSR ¶ 59.

In 2003, a federal grand jury in the Western District of Missouri returned a superseding indictment charging petitioner with two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e), and one count of possession of ammunition by a felon, also in violation of 18 U.S.C. 922(g)(1) and 924(e). PSR ¶¶ 4-6. Following a jury trial, petitioner was convicted on all three counts. Judgment 1.

A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug

offense," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a range of 15 years to life imprisonment. See Logan v. United States, 552 U.S. 23, 26 (2007); Custis v. United States, 511 U.S. 485, 487 (1994).

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).

The Probation Office's presentence report informed the district court that petitioner's prior convictions included at least one prior Missouri conviction for first-degree burglary, see PSR ¶ 59, at least two prior Missouri convictions for second-degree burglary, see PSR ¶¶ 58, 62, and one prior Missouri conviction for sale of a controlled substance (crack cocaine), see PSR ¶ 61. The court agreed with the Probation Office's determination (see PSR ¶ 40) that petitioner's prior convictions qualified him for sentencing under the ACCA. See Statement of

Reasons 1. The court sentenced petitioner to 293 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 223 Fed. Appx. 516.

In 2008, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging that the federal government lacked authority to enact federal criminal firearm laws and that the district court lacked jurisdiction to enforce those laws in petitioner's case. 02-cr-161 D. Ct. Doc. 171; see 08-cv-807 D. Ct. Doc. 6, at 2. The district court denied petitioner's motion and declined to issue a COA. 08-cv-807 D. Ct. Doc. 6, at 2, 3. The court of appeals denied petitioner's application for a COA and dismissed his appeal. 08-cv-807 D. Ct. Doc. 13

2. In Johnson v. United States, supra, this Court concluded that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268. In June 2016, the court of appeals granted petitioner's application for leave to file a second Section 2255 motion to challenge his sentence in light of Johnson. Pet. App. 2a. Petitioner then filed his second Section 2255 motion in the district court, arguing that Johnson establishes that he was wrongly classified and sentenced as an armed career criminal. 02-cr-161 D. Ct. Doc. 202, at 3-6 (June 27, 2016). Petitioner argued that, under this Court's statutory interpretation decision in Descamps v. United States,

570 U.S. 254 (2013), Missouri burglary was not categorically a violent felony under the ACCA's elements clause or enumerated-offenses clause, and that Johnson precluded application of the residual clause. 02-cr-161 D. Ct. Doc. 202, at 4-6.

The district court denied petitioner's motion. Pet. App. 10a-11a. The court determined that petitioner's prior convictions for Missouri burglary qualify as violent felonies under the enumerated-offenses clause. Id. at 11a. The court therefore found that, "even without application of the residual clause," petitioner had "at least three previous qualifying felony convictions under the ACCA." Ibid. The court declined to grant petitioner a COA. Ibid.

3. The court of appeals granted a COA, vacated the district court's order denying petitioner's Section 2255 motion, and remanded the case to the district court. Pet. App. 1a-9a.

The court of appeals observed that, in order to satisfy Section 2255's requirements for successive motions, petitioner had to show that his second Section 2255 motion "relies on" Johnson's "new rule that the residual clause is unconstitutional." Pet. App. 4a; see id. at 3a. The court explained that petitioner therefore bore the burden of "show[ing] by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." Id. at 5a.

Describing that issue as "a factual question for the district court," the court of appeals stated that, "[w]here the record or

an evidentiary hearing is inconclusive, the district court may consider 'the relevant background legal environment at the time of . . . sentencing' to ascertain whether the movant was sentenced under the residual clause." Pet. App. 5a (citation omitted). "In some cases," the court of appeals observed, "the legal background at the time of sentencing will establish that the enhancement was necessarily based on the residual clause." Id. at 5a-6a. In contrast, the court stated, "if it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." Id. at 6a (quoting Beeman v. United States, 871 F.3d 1215, 1222 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019)) (brackets omitted).

The court of appeals then vacated the district court's order denying petitioner's second Section 2255 motion because the district court "did not determine whether the residual clause led the sentencing court to apply the ACCA enhancement." Pet. App. 6a. Recognizing that "[t]he original sentencing court did not specify whether the residual clause or another provision of the ACCA, such as the enumerated-offenses clause, provided the basis for [petitioner's] ACCA enhancement," id. at 4a, the court of appeals stated that the district court should "determine in the first instance whether [petitioner] has shown by a preponderance of the evidence that his successive § 2255 claim relies on

Johnson's new rule invalidating the residual clause," id. at 6a. The court of appeals directed the district court to "proceed to the merits only if [petitioner] is able to carry his burden." Ibid.

Judge Kelly filed an opinion concurring in part and dissenting in part. Pet. App. 7a-9a. Judge Kelly stated that she "would hold that a claim for collateral relief under Johnson should be granted so long as the movant has shown that his sentence may have relied on the residual clause, and the government is unable to demonstrate to the contrary," but believed that petitioner was entitled to relief on this record under either her approach or the court's. Id. at 8a-9a.

4. After the court of appeals issued its decision, the case returned to the district court, where petitioner and the government have each filed multiple briefs addressing "the 'prevailing legal environment' at the time of [petitioner's] sentencing." 16-cv-703 D. Ct. Doc. 29, at 1 (Feb. 19, 2019); see 16-cv-703 D. Ct. Doc. 30 (Feb. 21, 2019); 16-cv-703 D. Ct. Doc. 34 (Mar. 26, 2019); 16-cv-703 D. Ct. Doc. 36 (Apr. 16, 2019). The district court has set oral argument for May 20, 2019. 16-cv-703 Docket entry No. 37 (May 8, 2019).

ARGUMENT

Petitioner contends (Pet. 8-24) 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 v.

United States, 135 S. Ct. 2551 (2015), he must show that it is more likely than not -- rather than merely possible -- that the district court relied on the residual clause in sentencing him. That issue does not warrant this Court's review, and this case -- in which petitioner, as the prevailing party below, seeks interlocutory review based on speculation that he will not prevail on remand under the court's prescribed legal standard -- would be an unsuitable vehicle for such review in any event. This Court has recently and repeatedly denied review of similar issues in other cases.[1] It should follow the same course here.[2]

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[1] See Ezell v. United States, No. 18-7426 (Apr. 22, 2019); Garcia v. United States, No. 18-7379 (Apr. 15, 2019); Harris v. United States, No. 18-6936 (Apr. 1, 2019); Wiese v. United States, No. 18-7252 (Mar. 18, 2019); 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] Another pending petition raises the same issue or related issues. See Zoch v. United States, No. 18-8309 (filed Mar. 4, 2019).

1. The court of appeals vacated the district court's order denying petitioner's second Section 2255 motion and remanded this case to the district court for further proceedings. Pet. App. 6a. The court of appeals' decision is therefore interlocutory, which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); Stephen M. Shapiro et al., Supreme Court Practice § 4.18, at 282-283 & n.72 (10th ed. 2013) (noting that the Court routinely denies interlocutory petitions in criminal cases).

Petitioner may prevail in district court under the standard adopted by the court of appeals, as Judge Kelly believes he should, see Pet. App. 9a. If he does not, after a final adverse disposition of petitioner's second Section 2255 motion by the courts below, petitioner will have an opportunity to raise the claim pressed here, in addition to any claims arising from the remand proceedings, in a single petition for a writ of certiorari. See Hamilton-Brown Shoe Co., 240 U.S. at 258; see also Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

Petitioner provides no sound reason to depart in this case from this Court's usual practice of awaiting final judgment, or of declining to grant petitions for certiorari filed by parties who prevailed below. See Camreta v. Greene, 563 U.S. 692, 703-704 (2011). At this point, petitioner can only speculate that the standard set forth in the otherwise favorable decision below will harm him in this case, the only case in which he would have an interest in its application.

2. In any event, for the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Couchman v. 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] That approach makes sense because "Johnson does not reopen

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

all sentences increased by the Armed Career Criminal Act, as it has nothing to do with enhancements under the elements clause or the enumerated-crimes clause." Potter v. United States, 887 F.3d 785, 787 (6th Cir. 2018).

The decision below is therefore correct, and the result is consistent with cases from the First, Sixth, Tenth, and Eleventh 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); 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), cert. denied, 139 S. Ct. 1168 (2019). 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 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); 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 briefs. See Br. in Opp. at 16-18, King, supra (No. 17-8280); Br. in Opp. at 17-19, Couchman, supra (No. 17-8480).

3. This case would be an unsuitable vehicle for reviewing the question presented for the further reason that the question is unlikely to be outcome-determinative. If petitioner does not

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[4] Petitioner contends (Pet. 17) that the Seventh Circuit reached a similar conclusion "in equivalent circumstances" in Van Cannon v. United States, 890 F.3d 656 (2018). In Van Cannon, however, the government did not dispute that the Section 2255 movant's claim relied on Johnson. To the contrary, the government acknowledged in Van Cannon that two of the predicate convictions used to classify the Section 2255 movant as an armed career criminal "were residual-clause offenses and thus no longer qualified after Johnson," id. at 660, and the question on appeal was whether that conceded Johnson error entitled the movant to resentencing, see id. at 660-666. Van Cannon thus did not address the question presented here.

prevail in district court, it will likely indicate the district court's agreement with the government's assessment of the legal landscape at the time of his sentencing. On that assessment, petitioner's ACCA sentence was not based on the now-invalid residual clause under any circuit's approach.

Petitioner acknowledges (Pet. 5) that the predicate convictions used to classify him as an armed career criminal included "Missouri burglary convictions." The law was settled long before the time of petitioner's sentencing that first- and second-degree Missouri burglary qualified as "burglary" within the meaning of the enumerated-offenses clause. See, e.g., United States v. Croft, 908 F.2d 384, 385 (8th Cir.), cert. denied, 498 U.S. 989 (1990); United States v. Whitfield, 907 F.2d 798, 800 (8th Cir. 1990). Indeed, the district court viewed that to still be the case when it originally denied petitioner's current Section 2255 motion. Pet. App. 11a. As petitioner notes (Pet. 6, 17, 22), the court of appeals has now concluded that second-degree Missouri burglary does not qualify as generic burglary under the ACCA. See United States v. Naylor, 887 F.3d 397, 406-407 (8th Cir. 2018) (en banc). But developments in the case law more than a decade after petitioner's sentencing do not show that petitioner "may have been" sentenced under the residual clause at his original sentencing. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897. He thus could not prevail under any circuit's approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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