No. _____

In the Supreme Court of the United States

October Term, 2018

ALAN WADE JOHNSON, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

When a federal prisoner demonstrates that, due to a silent record and the relevant legal background, the sentencing court may have relied on the Armed Career Criminal Act's residual clause to enhance his sentence, does he satisfy the requirements for a successive motion to vacate under 28 U.S.C. § 2255(h)(2)?

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Petitioner, Alan Wade Johnson asks that a writ of certiorari issue to review the order entered by the United States Court of Appeals for the Fifth Circuit on November 6, 2018, denying certificate of appealability.

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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A copy of the Fifth Circuit's order denying a certificate of appealability and its order denying reconsideration were unpublished and are attached as Appendices A and B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit denied a certificate of appealability on November 6, 2018. Pet. App. A. Johnson timely filed a motion for reconsideration, which the Fifth Circuit denied on December 31, 2018. Pet. App. B; *see* Fed. R. App. P. 40(a)(1)(A) & 5th Cir. R. 27.2 (providing for panel reconsideration of single-judge orders). This petition is filed within 90 days after the denial of Johnson's motion for reconsideration. *See* Sup. Ct. R. 13.1, 13.3, 30.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

These statutes are reproduced in the Appendix:

- 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 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 *Samuel Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015), 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.

These decisions allowed 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).[1]

First, the motion must be certified as provided in 28 U.S.C. § 2244 by the 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);

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[1] *Accord 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).

Reyes-Requena, 243 F.3d at 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.[2] *Reyes-Requena*, 243 F.3d at 898–99 ("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).[3]

Even 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

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[2] A "prima facie showing" is "'simply a sufficient showing of possible merit to warrant a fuller explanation by the district court.'" *Reyes-Requena*, 243 F.3d at 899 (quoting *Bennett*, 119 F.3d at 469).

[3] Johnson filed a motion for authorization to file a successive petition under § 2255 with the Fifth Circuit, in light of *Samuel Johnson* and *Welch v. United States*, 136 S. Ct. 1257 (2016). The court granted authorization to file a successive petition and transferred proceedings to the district court. Thus, Johnson passed the first jurisdictional hurdle to having his § 2255 motion heard on the merits. *United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018), *as revised* (Aug. 14, 2018) (discussing jurisdictional requirements of § 2255(h)(2)).

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.

In this petition, Johnson asks the Court to resolve a circuit split and clarify the standard under which a defendant meets his "second-gate" burden to show that his claim "relies on" a previously unavailable new rule of constitutional law.

B. Factual and procedural background.

In 1994, Johnson was found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He was sentenced under the ACCA, based on four prior convictions in Texas: two convictions for aggravated robbery,[4] one for aggravated rape, and one for aggravated sexual abuse.

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[4] Johnson has four aggravated robbery convictions, but the government conceded that the three of them appear to arise from one transaction. Thus, only one of these three convictions can be used as a § 924(e)(1) violent felony. *See United States v. Washington*, 898 F.2d 439, 441 (5th Cir. 1995).

In June 2016, in the wake of *Samuel Johnson* and *Welch*, Johnson received authorization from the Fifth Circuit to file a successive § 2255 motion challenging his sentence.[5] The motion claimed that Johnson's sentence was imposed in violation of the Constitution and laws of the United States because his convictions did not qualify as "violent felonies" under the ACCA's force-elements clause or its enumerated-offenses clause. Because the convictions only satisfied the ACCA's now-void residual clause, Johnson argued his 288-month sentence was unconstitutional.

The district court denied the motion on the merits. It concluded that, under the force-element clause in the violent felony definition, Johnson's prior aggravated robbery and aggravated sexual abuse convictions still qualified as ACCA predicates post-*Samuel Johnson*. The court did not address § 2255(h)(2)'s second-gate jurisdictional requirement. The court also denied a certificate of appealability.

Johnson moved the Fifth Circuit for a certificate of appealability, arguing reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong. *See Mil-*

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[5] Johnson filed his first § 2255 motion in 1998 based on ineffective assistance of counsel, and it was denied.

ler-El v. Cockrell, 537 U.S. 322, 336, 338 (2003) (discussing standard for certificate of appealability). The Fifth Circuit denied the motion, finding Johnson did not make the required showing and citing *United States v. Wiese*, 896 F.3d 720, 724–26 (5th Cir. 2018). Pet. App. A.

Wiese held that, for a defendant pursuing a *Johnson* claim in a successive § 2255 motion, the "dispositive question" is "whether the sentencing court relied on the residual clause in making its sentencing determination[.]" 896 F.3d at 724. And in answering that question, a court "must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause or the residual clause." *Id.*

Johnson filed a motion for panel reconsideration of the single-judge order denying the certificate of appealability. He argued the sentencing record did not show that the district court relied on the force-element clause, as opposed to the residual clause, in sentencing him. Under Fifth Circuit precedent at the time Johnson was sentenced, his convictions were violent felonies under both the force-element and residual clauses. Thus, Johnson showed, at a minimum, that the court may have relied on the residual clause in sentencing him.

Johnson also argued another basis upon which to conclude that he satisfied the "relies-on" second-gate requirement. He argued that, regardless of which of the ACCA's clauses the court relied on at sentencing, he could satisfy the second-gate requirement because he could demonstrate that, under current law, his sentence may be unconstitutional in light of *Samuel Johnson*. Simply put, Johnson's claim depends on the new rule in *Samuel Johnson* because he would have no relief if the residual clause were still valid.

The Fifth Circuit denied Johnson's motion for panel reconsideration of the denial of a certificate of appealability. Pet. App. B.

REASONS FOR GRANTING THE WRIT

The Court Should 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 *Samuel Johnson*.

The Fifth Circuit found that Johnson did not make the required showing to obtain a certificate of appealability, citing a case holding that the "dispositive question for jurisdictional purposes" is "whether the sentencing court relied on the residual clause in making its sentencing determination[.]" *Wiese*, 896 F.3d at 724. The *Wiese* court did not decide which standard—"may have" or "more likely than not"—applies to a prisoner's burden to show that the sentencing court relied on the residual clause. *Id.* But it held that, based on statements in the presentence report and existing case law, the sentencing court relied on the enumerated-offenses clause, even though the burglary offenses satisfied the residual clause as well. *Id.* at 725. That approach conflicts with the approaches of the Third, Fourth, and Ninth Circuits and implicates a broader split over the standards for evaluating *Samuel Johnson* claims.

The circuits are divided over what a prisoner must show to pass through the "relies on" gate in § 2244(b)(2)(A). *Id.* at 724. 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. *Id.* Others say that a defendant need only show that his sentence "may have" rested on the residual clause. *Id.*

The Fifth Circuit has declined to pick a side in that split, but nevertheless determined that reasonable jurists could not even debate whether Johnson could satisfy the minimal may-have relied on standard. Pet. App. A; *see Wiese*, 896 F.3d at 724–25. The record is silent as to which definitional clause the district court actually relied on in sentencing Johnson. At the time of Johnson's 1994 sentencing, the Fifth Circuit had held that Texas aggravated rape was a violent felony under the force-element clause. *United States v. Rodolfo Martinez*, 962 F.2d 1161, 1168 (5th Cir. 1992). But it had not ruled on Johnson's other Texas convictions of aggravated robbery and aggravated sexual abuse. Yet it had held that in-person confrontation always creates a serious potential risk of physical injury to another. *See United States v. Guadardo*, 40 F.3d 102, 104 (5th Cir. 1994) (quoting *United States v. Flores*, 875 F.2d 1110, 1113 (5th Cir. 1989)); *United States v. Martinez*, 954 F.2d 1050, 1054 (5th Cir. 1992). The aggravated robbery, rape, and sexual abuse offenses all involved in-person confrontations and thus were violent felonies under the residual clause.

The Fifth Circuit's approach conflicts with the "may-have relied upon" approaches applied by the Third, Fourth, and Ninth Circuits. *See United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); *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, Johnson's claim "relies on" *Samuel Johnson*'s new rule.

Under the Fourth Circuit's approach in *Winston*, Johnson could satisfy his burden to show the district court may have relied on the residual clause at his sentencing. In *Winston*, the court addressed a second or successive § 2255 motion denied by the district court. 850 F.3d at 682. The sentencing record, like Johnson'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 *Samuel Johnson*. 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.* at 682. It held: "[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.* Given the district court's silence, Johnson has shown that his sentence may have been predicated on the application of the now-void residual clause.

Likewise, under the Ninth Circuit's approach, in *Geozos*, Johnson 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 *Samuel 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. § 2244(b) (emphasis added); *see* § 2255(h)(2).

Johnson's claim relies on *Samuel Johnson* because, without it, he would have no claim for relief. His prior convictions would still be violent felonies under the residual clause, and his sentence would be lawful. He had no claim for relief until the Supreme Court decided *Samuel Johnson* and *Welch*. Thus, his claim relies on that new constitutional rule, and the district court had jurisdiction to reach the merits of his § 2255 motion. *See Peppers*, 899 F.3d

at 222 ("a motion relies on a qualifying new rule where the rule substantiates the movant's claim … even if the rule does not conclusively decide the claim") (cleaned up).

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

CONCLUSION

FOR THESE REASONS, the Court should grant the petition.

Respectfully submitted.

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