No. 18-9277

IN THE SUPREME COURT OF THE UNITED STATES

MELVIN SCOTT MORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability from the denial of petitioner's motion to vacate his sentence based on Johnson v. United States, 135 S. Ct. 2551 (2015), where the district court found that petitioner had failed to show that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which was invalidated in Johnson, as opposed to the ACCA's still-valid enumerated-offenses clause.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Ala.):

United States v. Morman, No. 06-cr-175 (Mar. 27, 2007)

Morman v. United States, No. 16-cv-483 (July 24, 2018)

United States Court of Appeals (11th Cir.):

Morman v. United States, No. 18-13593 (Dec. 11, 2018)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1A, at 1-4[1]) is unreported. The opinion and order of the district court (Pet. App. 1B, at 1-23) are not published in the Federal Supplement but are available at 2018 WL 3552337.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2018. On March 5, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and

[1] Although the appendices to the petition for a writ of certiorari are not labeled, this brief adopts the labels used in the petition. See Pet. 1.

including May 10, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Alabama, petitioner was convicted on two counts of stealing a firearm from a licensed dealer, in violation of 18 U.S.C. 922(u), and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal his convictions or sentence. Pet. App. 1B, at 4. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. 16-cv-483 D. Ct. Doc. 1 (June 22, 2016). The district court denied petitioner's motion and declined to issue a certificate of appealability (COA). Pet. App. 1B, at 1-23. The court of appeals likewise declined to issue a COA. Pet. App. 1A, at 1-4.

1. In 2005, a police officer in Headland, Alabama, approached a car that he had seen drive by several area businesses. Presentence Investigation Report (PSR) ¶ 10. The car, driven by petitioner, sped off and eventually collided with a parked 18-wheel trailer. Ibid. Petitioner exited the car and fled on foot, dropping a pistol while running. Ibid. Police officers apprehended petitioner and determined that the pistol had been stolen from a pawn shop the day before. PSR ¶¶ 9, 10. Petitioner

admitted to taking firearms from that pawn shop and one other. PSR ¶ 11; see PSR ¶¶ 8-9.

A federal grand jury in the Middle District of Alabama returned an indictment charging petitioner with two counts of stealing firearms from a licensed dealer, in violation of 18 U.S.C. 922(u), and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-4. Petitioner and the government entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Plea Agreement 3. Petitioner agreed to plead guilty to all counts and stipulated to a 188-month sentence. Id. at 3-4. The district court accepted the plea. Plea Tr. 16.

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 determined that petitioner was subject to an enhanced sentence under the ACCA. PSR ¶ 26. Its presentence report identified "[f]our [b]urglaries and [a]ggravated [a]ssault" as ACCA predicate offenses, ibid. -- namely, two convictions for Alabama third-degree burglary, PSR ¶¶ 39, 41, Pet. App. 1B, at 3 n.1; a conviction for Georgia burglary, PSR ¶ 43; and a second conviction for Georgia burglary, committed on the same occasion as a Georgia aggravated assault, ibid. The presentence report also informed the district court that petitioner's criminal history included a conviction for Alabama attempted assault. PSR ¶ 42.

The district court sentenced petitioner to 188 months of imprisonment on the felon-in-possession count and 120 months of imprisonment on each of the Section 922(u) counts, all to run concurrently. Judgment 2. Petitioner did not appeal his convictions or sentences. Pet. App. 1B, at 4.

2. In 2015, this Court concluded in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is

unconstitutionally vague. Id. at 2557. The 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 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, arguing that Johnson established that he was wrongly classified and sentenced as an armed career criminal. 16-cv-483 D. Ct. Doc. 1, at 3. Petitioner did not dispute that his two prior convictions for Georgia burglary qualified as ACCA predicates. See id. at 1-4. Petitioner contended, however, that his two prior convictions for Alabama third-degree burglary were not convictions for violent felonies under the ACCA's elements clause or enumerated-offenses clause, and that Johnson precluded reliance on the residual clause. Id. at 2-3.

While petitioner's motion was pending, the court of appeals decided Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019), in which it determined that a defendant who files a Section 2255 motion seeking to vacate his sentence based on Johnson must establish that his sentence more likely than not was premised on the residual clause that Johnson invalidated. Id. at 1224. Following the court of appeals' decision in Beeman, the government argued that petitioner could not establish that the district court had relied on the residual clause to classify his two prior convictions for Alabama third-degree burglary as convictions for violent felonies. 16-cv-483

D. Ct. Doc. 21, at 8 (Jan. 26, 2018). The government contended that "[t]he state of the law in 2007 reveals that it is just as likely -- if not more likely than not -- that the district court relied on the enumerated offenses clause to treat the third-degree burglary convictions as ACCA predicates." Id. at 9. The government further contended that petitioner had three ACCA predicates in any event, because his conviction for Alabama attempted assault qualified as a violent felony under the ACCA's elements clause. Id. at 10-14.

The district court denied petitioner's motion. Pet. App. 1B, at 1-23. The court found "no dispute that, at the time of his sentencing, [petitioner] had two prior convictions that qualified as ACCA predicates (namely, the two Georgia burglary convictions)." Id. at 14. And the court determined that petitioner "cannot show that the sentencing court relied solely on the residual clause when it adopted the [presentence report's] finding that the Alabama burglary convictions were ACCA predicate convictions." Id. at 20. The court explained that, at the time of sentencing in 2007, "a sentencing court could have found that an Alabama third-degree burglary conviction qualified as a violent felony under the enumerated-offenses clause based upon a categorical approach." Id. at 17. Having determined that petitioner's two Alabama third-degree burglary convictions and two Georgia burglary convictions "add up to four violent felonies under the ACCA," id. at 21, the court found it unnecessary to address

whether petitioner's conviction for Alabama attempted assault also "could have qualified as an ACCA violent felony under the elements clause," id. at 22. The court declined to issue a COA. Id. at 23.

3. The court of appeals likewise declined to issue a COA. Pet. App. 1A, at 1-4. The court determined that "[t]he district court did not err by denying [petitioner's] § 2255 motion because he did not meet his burden of showing that the sentencing court relied solely on the residual clause." Id. at 3 (citing Beeman, 871 F.3d at 1221). The court of appeals observed that "the sentencing record does not indicate which ACCA clause the [sentencing] court relied on." Ibid. And the court of appeals explained that "there was no case in th[e] Circuit, at the time, holding that Alabama third-degree [burglary] qualified as a violent felony only under the ACCA's residual clause." Id. at 4. The court therefore determined that "reasonable jurists would not debate that [petitioner] failed to make the requisite showing in his § 2255 motion." Ibid.

ARGUMENT

Petitioner contends (Pet. 9-18) that the court of appeals incorrectly declined to grant him a COA. In his view, the district court erred in requiring him, as a prerequisite for relief on a claim premised on Johnson v. United States, 135 S. Ct. 2551 (2015), to show that his ACCA enhancement more likely than not was based

on the residual clause that Johnson invalidated.[2] That issue does not warrant this Court's review, and the unpublished disposition below does not provide a suitable vehicle for such review in any event. This Court has recently and repeatedly denied review of similar issues in other cases.[3] It should follow the same course here.

1. a. A federal prisoner seeking to appeal the denial of a motion under Section 2255 to vacate his sentence must obtain a

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[2] Other pending petitions for writs of certiorari raise similar issues. See Zoch v. United States, No. 18-8309 (filed Mar. 4, 2019); Levert v. United States, No. 18-1276 (filed Apr. 5, 2019); Ziglar v. United States, No. 18-9343 (filed May 10, 2019).

[3] See Walker v. United States, 139 S. Ct. 2715 (2019) (No. 18-8125); Ezell v. United States, 139 S. Ct. 1601 (2019) (No. 18-7426); Garcia v. United States, 139 S. Ct. 1547 (2019) (No. 18-7379); Harris v. United States, 139 S. Ct. 1446 (2019) (No. 18-6936); Wiese v. United States, 139 S. Ct. 1328 (2019) (No. 18-7252); Beeman v. United States, 139 S. Ct. 1168 (2019) (No. 18-6385); Jackson v. United States, 139 S. Ct. 1165 (2019) (No. 18-6096); Wyatt v. United States, 139 S. Ct. 795 (2019) (No. 18-6013); Curry v. United States, 139 S. Ct. 790 (2019) (No. 18-229); Washington v. United States, 139 S. Ct. 789 (2019) (No. 18-5594); Prutting v. United States, 139 S. Ct. 788 (2019) (No. 18-5398); Sanford v. United States, 139 S. Ct. 640 (2018) (No. 18-5876); Jordan v. United States, 139 S. Ct. 593 (2018) (No. 18-5692); George v. United States, 139 S. Ct. 592 (2018) (No. 18-5475); Sailor v. United States, 139 S. Ct. 414 (2018) (No. 18-5268); McGee v. United States, 139 S. Ct. 414 (2018) (No. 18-5263); Murphy v. United States, 139 S. Ct. 414 (2018) (No. 18-5230); 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).

COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted). Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), this Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," and that any procedural grounds for dismissal were debatable, ibid. (citation omitted). Petitioner failed to make that showing.

b. 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 who files a 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 Gov't Br. in Opp. at 7-9, 11-13, Casey, supra (No. 17-1251).[4] That approach makes sense because "Johnson does not reopen 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, Tenth, and Eleventh Circuits, all of which indicate that petitioner's Section 2255 motion should be dismissed as either untimely (because 28 U.S.C. 2255(f)(3) creates a new limitations period in light of Johnson only for claims of Johnson error) or meritless (because petitioner cannot show Johnson error). 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), cert. denied, 139 S. Ct. 2715 (2019); United States v. Snyder, 871 F.3d 1122, 1130 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018); see also Gov't Br. in Opp. at 15-16, Casey, supra (No. 17-1251). As noted in the government's brief in opposition in Casey, however, some inconsistency exists in circuits' approach to Johnson-premised collateral attacks like petitioner's. That brief explains that the Fourth and Ninth Circuits have interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A) -- which provides

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

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); Gov't Br. in Opp. at 13, Casey, supra (No. 17-1251). As the government explained in its brief in opposition in Casey, because "Winston and Geozos interpreted a threshold statutory requirement for obtaining second-or-successive Section 2255 relief," neither decision "directly addressed the question presented in this case," which involves the merits of a prisoner's first Section 2255 motion. Gov't Br. in Opp. at 14, Casey, supra (No. 17-1251).

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), 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. Like Winston and Geozos, Peppers involved the threshold statutory requirement for obtaining

second-or-successive Section 2255 relief, so it did not directly address the question presented here. See Gov't Br. in Opp. at 14-15, Casey, supra (No. 17-1251).

The Sixth Circuit, however, has required a showing of reliance on the residual clause for second or successive, but not initial, collateral attacks. But further review of inconsistency in the circuits' approaches remains unwarranted. See Gov't Br. in Opp. at 15, Casey, supra (No. 17-1251).

2. In any event, this case would be an unsuitable vehicle for reviewing the question presented. Petitioner could not prevail under any circuit's approach. When petitioner was sentenced in March 2007, 06-cr-175 Docket entry No. 34 (Mar. 20, 2007), the court of appeals had determined, in an unpublished opinion, that the Alabama burglary statute under which petitioner was convicted -- which "defines third-degree burglary as 'knowingly enter[ing] or remain[ing] unlawfully in a building with intent to commit a crime,'" United States v. Moody, 216 Fed. Appx. 952, 953 (11th Cir. 2007) (per curiam) (quoting Ala. Code § 13A-7-7 (1982)) (brackets in original) -- "unambiguously includes the elements of 'generic burglary,'" ibid. Although Moody was an unpublished decision, it shows that the language of the Alabama burglary statute was viewed as "unambiguously" satisfying the ACCA's enumerated-offenses clause. Ibid. And given that view, petitioner would not be entitled to relief even under the minority approach to the burden of proof to establish that a Section 2255 motion is

premised on Johnson error. The Eleventh Circuit has now concluded that, under more recent precedent regarding application of the modified categorical approach, a conviction for Alabama third-degree burglary does not satisfy the ACCA's enumerated-offenses clause. United States v. Howard, 742 F.3d 1334, 1342-1349 (2014). But developments in statutory-interpretation case law years after petitioner's sentencing do not show that petitioner "may have been" sentenced under the residual clause at the time of his original sentencing. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897.

Moreover, petitioner would not be entitled to relief even if this Court agreed with his position on the question presented, because he would have three ACCA predicates even without considering his two prior convictions for Alabama third-degree burglary. Although the district court did not reach the issue, see Pet. App. 1B, at 22, petitioner's prior conviction for Alabama attempted assault, PSR ¶ 42, satisfies the ACCA's elements clause under circuit precedent that he does not challenge here, see In re Welch, 884 F.3d 1319, 1325 (11th Cir. 2018). The Alabama assault statute provides that "[a] person commits the crime of assault in the first degree if * * * [w]ith intent to cause serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument." Ala. Code § 13A-6-20(a)(1) (1982). The state-court documents that the government attached to its opposition to petitioner's Section

2255 motion show that petitioner pleaded guilty in Alabama court to "attempt[ing] to intentionally cause serious physical injury to another person," 16-cv-483 D. Ct. Doc. 9-9, at 2 (Aug. 30, 2016), and petitioner therefore was convicted of a violation of Ala. Code § 13A-6-20(a)(1) (1982). An attempt to commit first-degree assault under that provision categorically requires "the use, attempted use, or threatened use of physical force against the person of another" within the meaning of the ACCA's elements clause. 18 U.S.C. 924(e)(2)(B)(i); see Welch, 884 F.3d at 1325.

Petitioner argued below that the district court could not rely on his prior conviction for Alabama attempted assault in denying his Johnson claim because the state-court documents pertaining to that conviction had not been before the sentencing court. 16-cv-483 D. Ct. Doc. 22, at 14-15 (Jan. 26, 2018). But even assuming petitioner were correct, his prior conviction for Alabama attempted assault would mean that he would still have three ACCA predicates for purposes of any resentencing that might follow the grant of relief under Section 2255. Petitioner would still be classified as an armed career criminal, and he offers no reason why, under Rule 11(c)(1)(C), the original 188-month sentence specified in the plea agreement would not remain binding at any new sentencing proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2019