No. 18-9343

IN THE SUPREME COURT OF THE UNITED STATES

JOE CARROLL ZIGLAR, 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 affirmed 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. Ziglar, No. 05-cr-197 (Dec. 19, 2006)

Ziglar v. United States, No. 07-cv-632 (Dec. 21, 2010)

Ziglar v. United States, No. 16-cv-463 (Aug. 23, 2017)

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

Ziglar v. United States, No. 09-15742 (Apr. 19, 2010)

Ziglar v. United States, No. 10-15806 (Mar. 25, 2011)

In re Ziglar, No. 16-10305 (May 3, 2016)

Ziglar v. United States, No. 16-16055 (Dec. 11, 2018)

Ziglar v. United States, No. 17-13798 (Dec. 11, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A, at 1-11) is not published in the Federal Reporter but is reprinted at 757 Fed. Appx. 886. The opinion and order of the district court (Pet. App. 1B, at 1-35) are reported at 201 F. Supp. 3d 1315.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2018. On February 28, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and 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 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 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal his conviction or sentence. Pet. App. 1A, at 3. The district court later denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentence, and both the district court and the court of appeals declined to issue a certificate of appealability (COA). 07-cv-632 D. Ct. Doc. 64 (Oct. 22, 2009); 07-cv-632 D. Ct. Doc. 67 (Oct. 29, 2009); 09-15742 C.A. Order (Apr. 19, 2010). In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Pet. App. 1C, at 1-3. The district court denied the motion and granted petitioner a COA. Pet. App. 1B, at 1-35; 16-cv-463 D. Ct. Doc. 15 (Sept. 16, 2016). The court of appeals affirmed. Pet. App. 1A, at 1-11.

1. In 2005, a police officer in Montgomery, Alabama, stopped a vehicle with a burned-out headlight. Presentence Investigation Report (PSR) ¶ 4. Petitioner was the driver of the vehicle. Ibid. When he exited the vehicle at the officer's request, petitioner fell to the ground. Ibid. The officer detected a

strong odor of alcohol and arrested petitioner for driving under the influence. Ibid. During a search incident to arrest, the officer found a .38-caliber handgun under the driver's seat. Ibid. A federal grand jury in the Middle District of Alabama returned an indictment charging petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty. 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), prescribes 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 had four prior Alabama convictions for third-degree burglary. PSR ¶¶ 1, 17, 24, 26, 27, 29. The court determined that petitioner's prior convictions qualified him for sentencing under the ACCA. Pet. App. 1B, at 5. The court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal his conviction or sentence. Pet. App. 1A, at 3.

In 2007, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging that he had received ineffective assistance of counsel. 07-cv-632 D. Ct. Doc. 1, at 4-11 (July 11, 2007). The district court denied petitioner's motion, 07-cv-632 D. Ct. Doc. 64, and declined to issue a COA, 07-cv-632 D. Ct. Doc. 67. The court of appeals likewise declined to issue a COA. 09-15742 C.A. Order.

2. In 2015, this Court concluded in Johnson v. United States, supra, 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 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.

1C, at 1-3. Petitioner then filed a second Section 2255 motion in the district court, arguing that Johnson establishes that he was wrongly classified and sentenced as an armed career criminal. 16-cv-463 D. Ct. Doc. 1, at 4 (June 21, 2016). Petitioner contended that Alabama third-degree burglary is not a violent felony under the ACCA's elements clause or enumerated-offenses clauses, and that Johnson precluded reliance on the residual clause. Ibid. The government agreed that petitioner's motion should be granted and that he should be resentenced. 16-cv-463 D. Ct. Doc. 5, at 14 (July 18, 2016).

The district court denied petitioner's motion. Pet. App. 1B, at 1-35. The court found that petitioner had "not shown that his ACCA enhancement turns solely on the validity of the residual clause." Id. at 35. The court explained that, "at the time of sentencing in 2006," petitioner's Alabama third-degree burglary convictions "qualified as violent felonies under the ACCA's enumerated-crimes clause, which is unaffected by Johnson." Id. at 17. The court therefore determined that "the convictions do not fall within the scope of the new substantive rule in Johnson." Id. at 18. The court granted a COA, 16-cv-463 D. Ct. Doc. 15, and petitioner appealed.

3. While petitioner's appeal 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 second or successive 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 issuance of the mandate in Beeman, the court of appeals affirmed the district court's decision in petitioner's case. Pet. App. 1A, at 1-11.

The court of appeals observed that the district court had "applied the same test the panel applied in Beeman." Pet. App. 1A, at 7-8. And the court of appeals explained that, "[w]hen [petitioner] was sentenced in December 2006, [circuit] precedent indicated that prior convictions for Alabama third degree burglary could qualify under the enumerated crimes clause, if charging documents, transcripts, or undisputed facts in a defendant's [presentence report] showed that the defendant was convicted of 'generic' burglary." Id. at 8. The court found that "the undisputed facts" in petitioner's presentence report established that he had been convicted of "'generic' burglary offenses within the meaning of ACCA's enumerated crimes clause." Id. at 8-9. The court therefore determined that petitioner "cannot show that the district court more likely than not sentenced him under ACCA's residual clause." Id. at 9.

ARGUMENT

Petitioner contends (Pet. 14-24) that the court of appeals incorrectly affirmed the district court's denial of his second Section 2255 motion. 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 was based on the residual clause that Johnson invalidated.[1] 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.[2] It should follow the same course here.

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[1] 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); Morman v. United States, No. 18-9277 (filed May 10, 2019).

[2] See Walker v. United States, 139 S. Ct. 2715 (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).

1. For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Couchman v. United States, 139 S. Ct. 65 (2018) (No. 17-8480), and King v. United States, 139 S. Ct. 60 (2018) (No. 17-8280), a defendant who files a second or successive Section 2255 motion seeking to vacate his sentence based on 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 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, 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, 887 F.3d

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

at 787-788 (6th Cir.); 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). As noted in the government's briefs in opposition in Couchman and King, 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 also Br. in Opp. at 17-19, Couchman, supra (No. 17-8480); Br. in Opp. at 16-18, King, supra (No. 17-8280).

After the government's briefs in opposition 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. Further review of inconsistency in the circuits' approaches remains unwarranted, however, for the reasons stated in the government's previous briefs in opposition. See Br. in Opp. at 17-19, Couchman, supra (No. 17-8480); Br. in Opp. at 16-18, King, supra (No. 17-8280).

2. In any event, this case is not a suitable vehicle for this Court's review, for two reasons.

a. First, petitioner could not prevail under any circuit's approach. Petitioner acknowledges (Pet. 24) that the predicate convictions used to classify him as an armed career criminal were Alabama convictions for third-degree burglary. And "[w]hen [petitioner] was sentenced in December 2006, [circuit] precedent indicated that prior convictions for Alabama third degree burglary could qualify under the enumerated crimes clause, if charging documents, transcripts, or undisputed facts in a defendant's [presentence report] showed that the defendant was convicted of 'generic' burglary." Pet. App. 1A, at 8. Here, the "undisputed facts" in petitioner's presentence report show that his "burglary convictions stemmed from his breaking into three churches and a residence" and that petitioner therefore was convicted of "'generic' burglary offenses within the meaning of ACCA's enumerated crimes clause" under circuit precedent. Id. at 8-9; see PSR ¶¶ 24, 26, 27, 29.

Because the residual clause was so plainly unnecessary to support petitioner's sentence, he would not be entitled to relief even under the minority approach to the burden of proof to establish that a successive Section 2255 motion is premised on Johnson error. As petitioner notes (Pet. 24), the Eleventh Circuit has now concluded that 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. And a statutory-interpretation claim is not a valid basis for a second or successive Section 2255 motion. See 28 U.S.C. 2255(h); see also 28 U.S.C. 2244(b)(2).

b. Second, this case is not a suitable vehicle for reviewing the question presented because petitioner's term of imprisonment is scheduled to expire before this case could practicably be conferenced, briefed, argued, and decided. According to the Federal Bureau of Prisons, petitioner is projected to be released from prison on November 4, 2019. See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (last visited Aug. 19, 2019) (search for inmate register number 11780-002). Because petitioner's challenge affects only the length of his sentence rather than his underlying conviction, this case will become moot

on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "likely to be redressed by a favorable judicial decision," id. at 7 (citation omitted).

Petitioner cannot make that showing here. The only portion of petitioner's sentence to which he will still be subject following his release from prison is his term of supervised release. And in United States v. Johnson, 529 U.S. 53 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. Id. at 54. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term

of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." See 529 U.S. at 60. But, as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).[4]

[4] Other courts of appeals have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant's supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006). Those decisions, however, failed to address this Court's decision in Johnson. Regardless, the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the underlying question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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