IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

NO. _____

ADAM WINARSKE, PETITIONER,

-vs.-

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), whether 28 U.S.C. § 2255 requires a *Johnson* petitioner to show by a preponderance of the evidence that the residual clause provided the basis for his Armed Career Criminal Act ("ACCA") enhancement?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court cases

Court of Appeals cases

Federal statutes

PETITION FOR A WRIT OF CERTIORARI

Adam Winarske respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The published order and judgment of the court of appeals denying the appeal is reprinted in Appendices A and B. The unpublished order and judgment of the district court is reprinted in Appendices C and D. The unpublished order denying rehearing *en banc* is reprinted in Appendix E.

JURISDICTION

The court of appeals entered judgment on January 14, 2019, and Winarske's timely petition for rehearing *en banc* was denied by the court of appeals on March 25, 2019. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

28 U.S.C. § 2255:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

18 U.S.C. § 924(e)(2)(B)(ii) states a "violent felony" is one that:

> . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .

STATEMENT OF THE CASE

1. Adam Winarske pleaded guilty to possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e) on March 13, 2012. On June 29, 2012, he was sentenced to the mandatory minimum of 180 months in prison.

2. Winarske received an enhanced sentence under the Armed Career Criminal Act ("ACCA") based on his prior North Dakota burglary offenses. These offenses were "violent felonies" solely as that term is defined by the residual clause of 18 U.S.C. § 924(e).

3. The residual clause of ACCA was invalidated as violating the Due Process Clause of the Constitution in *Johnson v. United States*, 135 S. Ct. 2551 (2015) on June 26, 2015.

4. On June 3, 2016, Winarske filed a petition seeking permission to file a successive habeas petition with the court of appeals arguing his ACCA-enhanced sentence was invalid under *Johnson*. The court of appeals granted his petition on June 21, 2016.

5. On June 22, 2016, Winarske filed a motion under 28 U.S.C. § 2255 with the district court arguing his ACCA-enhanced sentence was invalid under *Johnson*. The district court denied Winarske's 2255 motion on May 4, 2017, finding three of Winarske's five burglary offenses still qualified as ACCA predicates. The district

court granted a certificate of appealability to determine "whether Winarske qualifies as an armed career criminal under the ACCA in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015)."

6. Winarske timely filed a notice of appeal on June 16, 2017. While his appeal was pending, the court of appeals determined that North Dakota burglary does not count as an ACCA predicate. *See United States v. Kinney*, 888 F.3d 360 (8th Cir. 2018). On August 20, 2018, the court of appeals determined that a successive *Johnson* petitioner must show by a preponderance of the evidence that the residual clause provided the basis for his ACCA enhancement. *See United States v. Walker*, 900 F.3d 1012 (8th Cir. 2018), *cert. denied*, 2019 WL 936692 (June 17, 2019).

7. The court of appeals denied Winarske's appeal on January 14, 2019, because Winarske could not demonstrate by a preponderance of the evidence that the residual clause was the basis for his ACCA enhancement. Winarske timely filed a petition for rehearing *en banc* on February 26, 2019.

8. Winarske's petition for rehearing *en banc* was denied on March 25, 2019, citing no reasons. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The circuits are split as to the correct standard a *Johnson* petitioner must show under 28 U.S.C. § 2255, making Winarske's case ripe for review.

Under 28 U.S.C. § 2255(h), a successive movant must prove that he is entitled to relief by showing 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. *United States v. Walker*, 900 F.3d 1012, 1015 (8th Cir. 2018). It is undisputed that *Johnson v. United States*, 135 S.Ct. 2551 (2015) was a new rule of constitutional law made retroactive to cases on collateral review. *Winarske v. United States*, 913 F.3d 765, 768 (8th Cir. 2019). Winarske's claim "relies on" *Johnson* because his claim would not have been meritorious before the residual clause was held unconstitutional. *See Walker*, 900 F.3d at 1016-1017.

In a divided panel, the Eighth Circuit joined several sister circuits in holding that a *Johnson* petitioner must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Walker*, 900 F.3d at 1015; *see Dimott v. United States*, 881 F.3d 232, 242-43 (1st Cir. 2018). *cert. denied*, 138 S.Ct. 2678 (2018); *Potter v. United States*, 887 F.3d 785, 787-88 (6th Cir. 2018); *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019). If the sentencing record does not reveal which clause the

enhancement relied upon, then the case is remanded back to the district court to answer this question. *Walker*, 900 F.3d at 1015. But this heightened standard misses the mark as it essentially transforms 28 U.S.C. § 2255(h)'s gatekeeping requirement into a merits determination. *See United States v. Peppers*, 899 F.3d 211, 223 (3d Cir. 2018). Where there is a 50/50 draw between the residual clause and another clause, *Walker* holds the movant loses. *Walker*, 900 F.3d at 1015.

By contrast, the Third, Fourth, and Ninth Circuits require the movant to show the residual clause *may have* been the basis for an ACCA sentence. *See Peppers*, 899 F.3d at 211, *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). Three judges on the United States District Court for the District of Columbia have reached the same conclusion, as have other district courts. *See United States v. Wilson*, 249 F.Supp. 3d 305, 311-13 (D.D.C. 2017) (collecting cases).

The language of the statute itself supports the more flexible interpretation as Judge Kelly pointed out in her *Walker* dissent, "Under § 2255, a movant does not have to show that her claim is 'resolved by' a new and retroactive rule of constitutional law, but rather that her claim 'relies on' the same." *Walker*, 900 F.3d at 1016, *citing Winston*, 850 F.3d at 682. Nothing in § 2255 requires this rigid standard and it arbitrarily creates a barrier to remedying the very harm § 2255 targets: unlawful sentences.

As the Third and Ninth Circuits note, the Supreme Court supports the more flexible "may have" standard. *See Geozos*, 870 F.3d at 895-896, *Peppers*, 899 F.3d at 222-223; *cf Griffin v. United States*, 502 U.S. 46, 53 (1991). *Griffin* held that if a defendant is convicted in a general verdict by a jury instructed on multiple theories of liability, and one theory is later determined to be unconstitutional, the defendant's constitutional rights have been violated as the general verdict *may have* rested on that unconstitutional ground. *Peppers*, 899 F.3d at 222-23. (*citing Griffin*, 502 U.S. at 53) (emphasis added). That same principle should apply here in the sentencing context.

This circuit split is not only causing sentencing disparities amongst *Johnson* petitioners, but this same issue will arise for petitioners seeking relief based on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) and potentially with the Supreme Court's decision in *United States v. Davis*, No. 18-431 (oral argument held Apr. 17, 2019). Settling this circuit split would provide clarity to the lower courts on current and forthcoming cases and it would mean courts would not subject defendants to years of additional prison time based solely on geography.

Here the court of appeals affirmed without remanding Winarske's case back to the district court to determine whether it was more likely than not that his predicate offenses fell under the residual clause at the time he was sentenced, citing the district court's order denying Winarske's *first* § 2255 petition in July

2015. *Winarske*, 913 F.3d at 767-768. There the district court determined Winarske's prior convictions fell under the enumerated offense clause and Winarske did not object to this finding. *Winarske*, 913 F.3d at 767-768.

But the record is not as clear as the opinion suggests. Back when the district court originally sentenced Winarske it stated:

> And unfortunately for you, in this circuit burglary convictions are considered to be crimes of violence. It doesn't matter whether it's a burglary or a residential building or a commercial building. It doesn't matter whether it's a burglary of a vacant, abandoned building or not. If it's a burglary and you're convicted of a burglary, it is considered to be a crime of violence. Do I necessarily agree with that in all cases? No, but that is the law in the Eighth Circuit…

App. F. The sentencing court appears to reference case law where the Eighth Circuit held that any generic burglary is a crime of violence under the residual clause. *See United States v. Stymiest*, 581 F.3d 759, 768 (8th Cir. 2009) (*citing United States v. Bell*, 445 F.3d 1086, 1088 (8th Cir. 2006) (listing cases)). This passage indicates that at sentencing, the judge relied through reference on the residual clause.

CONCLUSION

This case presents an opportunity for the Court to resolve the circuit split on the proper standard a *Johnson* petitioner must show under 28 U.S.C. § 2255. Even under the heightened standard, dismissal of Winarske's appeal without a remand was inappropriate. Winarske's petition for certiorari should be granted.

Dated this 21st day of June, 2019.

Respectfully submitted,

/s/ Jason Tupman

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