No. 18-9807

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WILSON, JR., 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 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 and elements clauses.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Iowa):

United States v. Wilson, No. 04-cr-1004 (July 5, 2005)

Wilson v. United States, No. 11-cv-1014 (June 6, 2011)

Wilson v. United States, No. 16-cv-1020 (Mar. 26, 2019)

United States Court of Appeals (8th Cir.):

United States v. Wilson, No. 05-2973 (Aug. 10, 2006)

United States v. Wilson, No. 07-1306 (Feb. 5, 2010)

Wilson v. United States, No. 16-2435 (Nov. 1, 2017)

Wilson v. United States, No. 18-3319 (Mar. 26, 2019)

Supreme Court of the United States:

Wilson v. United States, No. 07-10481 (Oct. 6, 2008)

Wilson v. United States, No. 09-10546 (June 14, 2010)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 21) is unreported. The order of the district court (Pet. App. 1-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2019. The petition for a writ of certiorari was filed on June 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of Hobbs Act robbery, in violation of 18 U.S.C. 1951; using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1 (July 5, 2005). The district court sentenced petitioner to concurrent terms of life imprisonment on the Hobbs Act robbery and Section 922(g)(1) counts, with a consecutive term of life imprisonment on the Section 924(c) count, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed petitioner's convictions but vacated his sentences. 449 F.3d 904, 913-914.

On remand, the district court resentenced petitioner to concurrent terms of 240 months of imprisonment on the Hobbs Act robbery count and 360 months of imprisonment on the Section 922(g)(1) count, with a consecutive term of 84 months of imprisonment on the Section 924(c) count, to be followed by five years of supervised release. Am. Judgment 2-3 (Jan. 23, 2007). The court of appeals affirmed. 254 Fed. Appx. 561, 562. After this Court granted certiorari, vacated the judgment, and remanded for further consideration in light of Gall v. United States, 552 U.S. 38 (2007), see 555 U.S. 801, the court of appeals again affirmed, 364 Fed. Appx. 312, 313.

The district court later denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentences and declined to issue a certificate of appealability (COA). 11-cv-1014 D. Ct. Doc. 18 (Nov. 8, 2013). In 2017, 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). 16-2435 C.A. Order (Nov. 1, 2017). The district court denied the motion and declined to issue a COA. Pet. App. 1-20. The court of appeals likewise denied a COA. Id. at 21.

1. In 2003, petitioner and an accomplice entered a convenience store in Dubuque, Iowa. Presentence Investigation Report (PSR) ¶¶ 3, 21. Petitioner forced the store clerk to the ground at gunpoint and stole $565 in cash from the store's bank bag and cash register. PSR ¶ 21. Petitioner and his accomplice then left the store and divided the robbery proceeds. Ibid. The robbery was captured by the store's video surveillance system, and acquaintances identified petitioner as one of the robbers in the video. PSR ¶¶ 23, 27-28. A month later, police officers observed petitioner exit a vehicle and conceal a pistol in his pants. PSR ¶ 30. The officers arrested him. Ibid.

A federal grand jury in the Northern District of Iowa returned a three-count indictment charging petitioner with one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951; one count of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and one count of

possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-4. Following a jury trial, petitioner was convicted on all counts. Judgment 1.

2. A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); 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 classified petitioner as an armed career criminal. PSR ¶ 67. The presentence

report determined that petitioner had "at least three prior convictions for 'violent felonies,'" identifying a 1988 Illinois conviction for residential burglary, a 1992 Illinois conviction for armed robbery, a 2000 Iowa conviction for domestic-abuse assault with injury, and a 2001 Iowa conviction for assault causing serious injury. Ibid.; see PSR ¶¶ 79, 80, 85, 87. The presentence report also determined that petitioner was subject to a mandatory life sentence on the Hobbs Act robbery and Section 924(c) counts under 18 U.S.C. 3559(c)(1)(A)(i), because he had at least two prior convictions for "serious violent felonies," ibid. -- namely, his 1998 Illinois conviction for residential burglary and his 1992 Illinois conviction for armed robbery. Addendum to PSR 1-2.

The district court adopted the presentence report's determinations, Pet. App. 1-2, and sentenced petitioner to concurrent terms of life imprisonment on the Hobbs Act robbery and Section 922(g)(1) counts, with a consecutive term of life imprisonment on the Section 924(c) count, to be followed by five years of supervised release, Judgment 2-3. The court of appeals affirmed petitioner's convictions but vacated his sentences, concluding that burglary under Illinois law does not qualify as a "serious violent felony" under Section 3559. 449 F.3d at 913-914.

On remand, the district court resentenced petitioner to concurrent terms of 240 months of imprisonment on the Hobbs Act robbery count and 360 months of imprisonment on the Section 922(g)(1) count, with a consecutive 84-month term of imprisonment

on the Section 924(c) count, to be followed by five years of supervised release. Am. Judgment 2-3. The court of appeals affirmed. 254 Fed. Appx. at 562. This Court granted certiorari, vacated the judgment, and remanded for further consideration in light of the Court's intervening decision in Gall, supra. 555 U.S. 801. On remand, the court of appeals again affirmed, finding no abuse of discretion in the imposition of petitioner's sentences. 364 Fed. Appx. at 313.

In 2011, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentences, alleging, among other things, ineffective assistance of counsel. 11-cv-1014 D. Ct. Doc. 2, at 4-24 (June 6, 2011). The district court denied petitioner's motion and declined to issue a COA. 11-cv-1014 D. Ct. Doc. 18, at 1-6.

3. 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 2017, the court of appeals granted petitioner's application for leave to file a second Section 2255 motion to challenge his sentence on the Section 922(g)(1) count. 16-2435 C.A. Order (Nov. 1, 2017). In his second Section 2255 motion, petitioner argued that Johnson establishes that he was wrongly classified and sentenced as an armed career criminal. 16-cv-1020 D. Ct. Doc. 1, at 1 (May 25, 2016). Petitioner

contended that none of his prior convictions qualified as convictions for violent felonies under the ACCA's enumerated-offenses clause or elements clause, and that Johnson precluded reliance on the residual clause. 16-cv-1020 D. Ct. Doc. 12, at 3-40 (Feb. 1, 2018).

The district court denied petitioner's motion. Pet. App. 1-20. The court explained that, under circuit precedent, petitioner bore the burden of showing that "it is more likely than not that the residual clause," rather than the enumerated-offenses or elements clauses, "provided the basis for [his] ACCA sentence." Id. at 7 n.6 (citing Walker v. United States, 900 F.3d 1012 (8th Cir. 2018), cert. denied, 139 S. Ct. 2715 (2019)). The court determined that petitioner had failed to carry that burden. Id. at 11. Given the "relevant background legal environment" and "the materials before the court," id. at 18, the court found it "apparent" that his sentence had been based on the determination "that [petitioner] qualified as an armed career criminal because his Illinois residential burglary conviction qualified as an enumerated offense" and "his Illinois armed robbery conviction and his Iowa assault causing serious injury conviction qualified as 'violent felonies' under the elements clause," id. at 11-12. The court therefore found that petitioner's "sentence is not called into question by Johnson." Id. at 11. The court denied a COA. Id. at 20.

4. The court of appeals likewise denied a COA. Pet. App. 21.

ARGUMENT

Petitioner contends (Pet. 7-20) 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.[1] This Court has recently and repeatedly denied review of similar issues in other cases.[2] The Court should follow the same course here. Petitioner's

[1] Other pending petitions for writs of certiorari raise similar issues. See Starks v. United States, No. 19-5129 (filed July 8, 2019); McCarthan v. United States, No. 19-5391 (filed July 25, 2019).

[2] See Ziglar v. United States, No. 18-9343 (Oct. 15, 2019); Morman v. United States, No. 18-9277 (Oct. 15, 2019); Levert v. United States, No. 18-1276 (Oct. 15, 2019); Zoch v. United States, No. 18-8309 (Oct. 7, 2019); 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)

meritless subsidiary contention (Pet. 14-20) -- that developments in statutory-interpretation case law years after his sentencing and resentencing are relevant to his claim of Johnson error -- does not suggest otherwise. And the unpublished disposition below does not provide a suitable vehicle for further review in any event, because petitioner could not prevail under any circuit's approach.

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

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(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).

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.

2. 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

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

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, 887 F.3d at 787-788 (6th Cir.); 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, 1221-1222 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019). As stated 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 note 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).

3. Petitioner errs in contending (Pet. 14-20) that developments in statutory-interpretation case law years after his sentencing and resentencing are relevant to his claim of Johnson error. The inquiry into whether his sentence was based on the ACCA's now-invalid residual clause is a matter of "historical fact." Beeman, 871 F.3d at 1224 n.5. The relevant rules of statutory construction therefore are those that were in effect at the time petitioner was sentenced. Ibid. As the district court explained, "[i]t makes no difference whether [petitioner's] prior convictions would count as a predicate if the court sentenced [petitioner] today." Pet. App. 9.

4. In any event, this case would be an unsuitable vehicle for reviewing the question presented because petitioner could not prevail under any circuit's approach. Petitioner acknowledges (Pet. 4) that the predicate convictions used to classify him as an armed career criminal included a 1988 Illinois conviction for residential burglary, a 1992 Illinois conviction for armed robbery, and a 2001 Iowa conviction for assault causing serious injury. During the proceedings below, the district court found it "apparent" from the record that his sentence was based on a determination "that [petitioner] qualified as an armed career criminal because his Illinois residential burglary conviction qualified as an enumerated offense" and "his Illinois armed robbery conviction and his Iowa assault causing serious injury conviction qualified as 'violent felonies' under the elements clause." Pet. App. 11-12. Petitioner would accordingly not be entitled to relief even if he had no affirmative burden to prove constitutional error. This Court has recently denied review in other cases presenting similar circumstances, see Zoch v. United States, No. 18-8309 (Oct. 7, 2019); Jordan v. United States, 139 S. Ct. 593 (2018) (No. 18-5692), and the same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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