No. 19-6037

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ANZURES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH 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 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 (D.N.M.):

United States v. Anzures, No. 10-cr-3461 (July 16, 2012)

Anzures v. United States, No. 16-cv-697 (June 5, 2018)

United States Court of Appeals (10th Cir.):

United States v. Anzures, No. 18-2115 (June 19, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 779 Fed. Appx. 531. The opinion of the district court (Pet. App. 7a-31a) is not published in the Federal Supplement but is available at 2018 WL 2684107.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2019. The petition for a writ of certiorari was filed on September 17, 2019. 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 District of New Mexico, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal. Pet. App. 2a. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. D. Ct. Doc. 40 (June 24, 2016). The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. 7a-31a; D. Ct. Doc. 76, at 1 (June 5, 2018). The court of appeals likewise denied a COA. Pet. App. 1a-6a.

1. In 2010, a friend of petitioner's girlfriend contacted the Albuquerque Police Department to report that petitioner had taken the friend's car at gunpoint and threatened to shoot her if she contacted the police. Presentence Investigation Report (PSR) ¶ 22; see PSR ¶ 10. Police officers followed petitioner to a gas station, where they conducted a traffic stop and arrested him. PSR ¶ 23. During a search of petitioner's car, the police found a loaded semiautomatic pistol. PSR ¶ 25.

A federal grand jury in the District of New Mexico indicted petitioner on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. 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).

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 and stipulated to a 180-month sentence. Id. at 2-3. The district court accepted the plea. D. Ct. Doc. 34, at 1 (Apr. 11, 2012). The Probation Office's presentence report informed that petitioner was eligible

for an enhanced sentence under the ACCA. PSR ¶ 39. Its presentence report identified three prior New Mexico convictions -- two for aggravated assault with a deadly weapon and one for commercial burglary -- as ACCA predicates. Ibid.; see PSR ¶¶ 44, 46, 53. The presentence report also informed the court that petitioner's criminal history included a New Mexico conviction for aggravated battery. PSR ¶ 43. In accordance with the plea agreement, the court sentenced petitioner to 180 months of imprisonment. Sent. Tr. 3, 10. Petitioner did not appeal. Pet. App. 2a.

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 applies retroactively to cases on collateral review. Welch, 136 S. Ct. at 1264-1265.

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. D. Ct. Doc. 40, at 4-16. Petitioner contended that his prior conviction for commercial burglary and his two prior convictions for aggravated assault with a deadly weapon were not convictions for violent felonies under the ACCA's enumerated offenses clause or elements clause, and that Johnson precluded reliance on the residual clause. Ibid.

Adopting the recommendation of a magistrate judge, the district court denied petitioner's motion. Pet. App. 7a-31a. The court explained that petitioner "bears the burden of showing, based on the relevant legal environment when he was sentenced in July 2012 and on the record, that it was more likely than not that the Court relied on the residual clause in sentencing him." Id. at 11a. The court determined that petitioner had "failed to establish by a preponderance of the evidence that the Court relied on the residual clause in finding that [his] commercial burglary conviction was a violent felony under the ACCA." Id. at 13a.

The district court observed that, "when [petitioner] was sentenced, the most recent published Tenth Circuit opinion on whether a New Mexico commercial burglary conviction qualified as a violent felony under the ACCA was" United States v. Ramon Silva, 608 F.3d 663 (2010), cert. denied, 562 U.S. 1224 (2011). Pet. App. 11a. The district court noted that in Ramon Silva, the Tenth Circuit had determined that the defendant's commercial burglary conviction qualified as generic "burglary" under the ACCA's enumerated offenses clause by examining whether the indictment had charged the defendant with committing the burglary in "'a building or enclosed space.'" Id. at 12a (quoting Ramon Silva, 608 F.3d at 668). The district court found that application of that same analysis at the time of petitioner's sentencing "would have resulted in the determination that [his] commercial burglary conviction constituted generic burglary," because the indictment

to which petitioner pleaded guilty "charged him with 'enter[ing] a structure, New Mexico Storage and Lock.'" Id. at 12a-13a (quoting D. Ct. Doc. 40-1, at 1 (June 24, 2016)) (brackets in original). The court therefore determined that, "[g]iven the relevant legal background in 2012, the Court had no reason to resort to the residual clause in finding that [petitioner's] commercial burglary conviction was a violent felony under the ACCA." Id. at 16a.

The district court further determined that, under circuit precedent, petitioner's two prior convictions for aggravated assault with a deadly weapon were convictions for violent felonies under the ACCA's elements clause. See Pet. App. 16a-18a (citing United States v. Maldonado-Palma, 839 F.3d 1244, 1050 (10th Cir. 2016), cert. denied, 137 S. Ct. 1214 (2017)). And the court agreed with the magistrate judge that, even if the court had "incorrectly relied on [petitioner's] prior commercial burglary conviction in finding that he qualified for the ACCA enhancement, any error was harmless because he had another qualifying conviction: aggravated battery." Id. at 19a. The court rejected petitioner's contention that the government had "waived its ability to rely on his prior aggravated battery conviction as an ACCA-predicate offense." Id. at 22a. And it determined that New Mexico aggravated battery qualifies as a violent felony under the ACCA's elements clause. Id. at 22a-31a. The court declined to issue a COA. D. Ct. Doc. 76, at 1.

3. The court of appeals likewise declined to issue a COA. Pet. App. 1a-6a. The court found that, "[i]n view of th[e] background legal environment, 'there would have been little dispute at the time of [petitioner's] sentencing that his [New Mexico commercial burglary conviction] fell within the scope of the ACCA's enumerated crimes clause.'" Id. at 4a (fourth set of brackets in original; citation omitted). The court therefore determined that petitioner "has not established by a preponderance of the evidence that the sentencing court relied on the residual clause to categorize his commercial burglary conviction as an ACCA predicate offense." Ibid. The court further determined that petitioner's "two convictions for aggravated assault qualified as predicate felonies under the ACCA's elements clause." Id. at 5a. Having found that petitioner had "three previous convictions for violent felonies" even without considering his prior conviction for aggravated battery, the court declined to address whether that conviction was also a violent felony under the ACCA. Ibid.

ARGUMENT

Petitioner contends (Pet. 11-27) 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] His contention 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 claims 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, e.g., Tinker v. United States, No. 19-6618 (filed Nov. 5, 2019).

[2] See Starks v. United States, No. 19-5129 (Jan. 13, 2020); Wilson v. United States, No. 18-9807 (Jan. 13, 2020); McCarthan v. United States, No. 19-5391 (Dec. 9, 2019); 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, 140 S. Ct. 147 (2019) (No. 18-8309); 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).

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 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.

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 Br. in Opp. at 7-9, 11-13, Casey, supra (No. 17-1251).[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, Eighth, 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); Beeman v. United States, 871 F.3d 1215, 1221-1222 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019); see also 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

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

explains 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); 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. 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 Br. in Opp. at 14-15, Casey, supra (No. 17-1251). And the Sixth Circuit has directly addressed both types of Section 2255 motions and has required a showing that the sentencing court relied on the residual clause for a second or successive collateral attack, but not for an initial one. See Raines v. United States, 898 F.3d 680, 685-686 (2018) (per curiam). But further review of inconsistency in the circuits' approaches remains unwarranted. See 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 July 2012, see Pet. App. 11a, circuit precedent indicated that a prior conviction for New Mexico commercial burglary could qualify as a conviction for a violent felony under the ACCA's enumerated offenses clause, if the "charging document, plea agreement, [or] plea colloquy" showed that the defendant had been convicted of generic burglary, United States v. Ramon Silva, 608 F.3d 663, 666 (10th Cir. 2010), cert. denied, 562 U.S. 1224 (2011). Here, the indictment shows that petitioner pleaded guilty to "enter[ing] a structure, New Mexico Storage and Lock, located at 220 Isleta SW, without authorization or permission, with intent to commit any

felony or a theft therein." D. Ct. Doc. 40-1, at 1. Because the indictment shows that the burglary was "committed in a building or enclosed space," "there would have been little dispute at the time of [petitioner's] sentencing that his [New Mexico commercial burglary conviction] fell within the scope of the ACCA's enumerated crimes clause." Pet. App. 4a (second set of brackets in original; citations omitted); see United States v. King, 422 F.3d 1055, 1058 (10th Cir. 2005) (determining that a New Mexico commercial burglary conviction was a conviction for a violent felony under the ACCA's enumerated offenses clause, where the indictment showed that the defendant had pleaded guilty to entering a storage unit), cert. denied, 546 U.S. 1120 (2006). Because the residual clause was plainly unnecessary to support petitioner's sentence, he could not show even that the classification of that conviction as a violent felony "may have been" premised on Johnson error. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897.

Moreover, petitioner would not be entitled to relief even if the question presented were resolved in his favor and his commercial burglary conviction was not classified as an ACCA predicate, because he would have three ACCA predicates even without it. The court of appeals correctly determined that, under circuit precedent, petitioner's prior convictions for aggravated assault with a deadly weapon satisfy the ACCA's elements clause. Pet. App. 4a-5a. And although the court of appeals did not reach the issue, see id. at 5a, petitioner's prior conviction for aggravated

battery likewise satisfies the ACCA's elements clause, for reasons explained by the district court, id. at 23a-31a. Petitioner argued below that the government waived reliance on his prior conviction for aggravated battery by not relying on that conviction at his sentencing in 2012. Id. at 19a. The district court correctly rejected that contention, id. at 19a-22a, but even assuming petitioner were correct, his prior conviction for aggravated battery 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 180-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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