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In the
Supreme Court of the United States

JOHN FORREST,

Petitioner,

v.

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

A successive motion to correct a sentence under 28 U.S.C. §2255(h)(2) must contain a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”

In *Johnson v. United States*, 135 S. Ct. 2551 (2015) this Court held that violent felonies under the residual clause of the Armed Career Criminal Act (ACCA) no longer qualify as predicate offenses. That decision was made retroactive to cases on review. *See Welch v. United States*, 136 S. Ct. 1257 (2016)

In addition, certain ACCA enumerated clause violent felonies have also been invalidated and no longer qualify as predicates. *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *Descamps v. United States*, 570 U.S. 254 (2013) However, unlike *Johnson*, *Descamps* and *Mathis* are not retroactive and thus, those predicates alone cannot be challenged in a successive §2255 motion.

The question is: Can a successive §2255 motion under *Johnson* open the door and allow for collateral review of enumerated clause predicates invalidated under *Descamps* and *Mathis* under the theory that *Johnson*, as a new rule of constitutional law, makes such collateral review now available?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Forrest respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion affirming petitioner's conviction, Pet. App. 2, is reported at 934 F.3d 775 (8th Cir. 2019). A copy of the Eighth Circuit Court of Appeals' opinion is appended to this Petition.

JURISDICTION

The court of appeals entered judgment on August 15, 2019. Pet. App. 2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 2255(h)(2) provides, that a second motion to correct a sentence must be based upon a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”

Title 18, United States Code, § 924(e)(1) holds that under the Armed Career Criminal Act, an offender is subject to a mandatory minimum sentence of fifteen years if he or she has three prior predicate “violent felony” convictions.

Title 18, United States Code § 924(e)(2)(B) defines a violent felony as, “any crime punishable by imprisonment for a term exceeding one year” that 1) “has an element the use, or threatened use of physical force against the person of another,” 2) “is burglary, arson, or extortion, involves use of explosives,” or 3) “otherwise involves conduct that presents a serious risk of physical injury to another.”

STATEMENT OF THE CASE

Introduction. It is the circuit court’s “erroneous understanding of how to identify an ACCA predicate offense at the time of Forrest’s sentencing” (*quoting* Judge Kelly’s concurring opinion, see A-13) which brings Petitioner to the door of the Supreme Court. At the time Forrest was sentenced, his criminal convictions qualified him as an Armed Career Criminal. However, were he to be sentenced under today’s interpretation of the law, Forrest would not qualify as an Armed Career Criminal. Forrest argues that his subsequent § 2255 motion should be granted. And but for the errors referenced above, Forrest would not be serving an additional five years as an Armed Career Criminal. Forrest moves this Court to overrule the circuit court and find that his subsequent § 2255 should have been sustained due to the fact that Forrest, were he to be sentenced under today’s interpretation of the law, would not be an Armed Career Criminal.

Background Facts. In 2009, Forrest was convicted of unlawful possession of a firearm by a felon. *See* 18 U.S.C. §922(g)(1). The district court found Forrest to be an Armed Career Criminal due to four qualifying prior convictions of violent felonies including Colorado convictions for (1) menacing, (2) robbery,

and (3) second degree burglary. And (4) one Kansas conviction of attempted burglary.

Forrest appealed the ACCA designation, and in 2010 the circuit court upheld the ruling and denied his request to vacate the sentence. *United States v. Forrest*, 611 F.3d 908 (8th Cir. 2010).

In 2015, this Court held the residual clause unconstitutional per *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). And per *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) *Johnson* was determined to be retroactive on cases on collateral review.

In 2018, Forrest filed a successive 28 U.S.C. § 2255 motion to correct his sentence wherein he argued that *Johnson* invalidated his fourth predicate offense, the Kansas Attempted Burglary. Because *Johnson* was a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” Forrest argued that he was now able to also challenge his third predicate offense, the Colorado conviction for Second Degree Burglary. Forrest argued that *Johnson* allowed for a recount of the predicates. And the third predicate would have been invalid under *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *Descamps v. United*

States, 570 U.S. 254 (2013). Forrest argued that the result would be that both his fourth and third predicates would have been invalidated, leaving only two predicates, thus making him now ineligible for the ACCA designation.

The district court invalidated the filing of the successive § 2255 and explained that the third predicate offense was not subject to collateral review because *Mathis* and *Descamps* are not retroactive.

Forrest appealed to the Eighth District Court of Appeals. On August 15, 2019, the circuit court upheld the district court's ruling. Judge Kelly, in her concurring opinion, wrote that but for the errors of the circuit courts, Forrest would not be serving an additional five years' incarceration.

REASONS FOR GRANTING THE WRIT

Errors should be corrected. Simply, the circuit courts have misinterpreted what convictions qualify as ACCA predicate offenses and citizens are paying the price. As Eighth Circuit Court of Appeals Judge J. Kelly wrote in her concurring opinion:

“It is undisputed that under current law, Forrest does not qualify for an ACCA enhancement. Yet he will be required to serve five years more than the statutory maximum sentence for his offense as the result of the ACCA enhancement because the original application of the enhancement might have resulted from not one mistake, but two: first, application of the residual clause, which the Supreme Court later struck from the statute is unconstitutional; and, second, application of our circuit’s case law on the modified categorical approach, which the Supreme Court later explained was erroneous and had been for some time. See Mathis, 136 S. Ct. at 2257 (“Our precedents make this a straightforward case. For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements.”). But for this court’s erroneous understanding of how to identify an ACCA predicate offense at the time of Forrest’s sentencing, the district court would have identified three predicates, and Forrest would now qualify for relief under Johnson because he has only two predicates.” (A-13)

Forrest moves this Court to carve out an exception for § 2255 motions with a valid *Johnson* claim, to review the movant’s ACCA designation under current law.

I. This Court Should Find That *Johnson* Provides An Avenue Of Reconsideration and Recalculation of ACCA Predicate Offenses, Under Current Law.

Eighth Circuit Court of Appeals Judge Kelly makes an excellent point that citizens are serving longer sentences because of mistakes made by the circuit court. These mistakes are correctable, but not without judicial intervention from this Court.

In the case at bar, it is undisputed that Forrest's ACCA designation would not stand under current law. Of his four predicates, one would be invalidated as a residual clause violent felony by *Johnson* and one would be invalidated as an enumerated clause violent felony per *Mathis* and *Descamps*. Forrest respectfully disagrees with the district and circuit court ruling that non-*Johnson* predicates are not subject to collateral review if there exists a valid *Johnson* argument. Forrest asks this Court to correct the sentencing error by finding a special exception for § 2255 motion with a valid *Johnson* claim. Specifically, Forrest moves the Court to rule that if a successive § 2255 invalidates at least one residual clause predicate, then the movant's ACCA designation must be reviewed and recalculated under current law.

Forrest moves the Court to overrule and discontinue the practice of continuing to punish citizens for circuit court errors in determining ACCA predicates. Petition asks this Court to grant certiorari for the purpose of a remedial ruling - to allow *Johnson* to serve as a § 2255 avenue of relief to challenge other, subsequently invalidated prior ACCA predicates.

II. This Court Should Resolve the Split Between The Circuit Courts On This Issue.

This Court should address the split in the circuits on this issue of whether, once a defendant meets the § 2255 requirements to file a subsequent motion to correct his sentence under *Johnson*, he can use post-sentencing ACCA case law to support his claim that current case law invalidates his ACCA designation.

In 2018 the Third Circuit in *United States v. Peppers*, held, “that once a defendant has satisfied § 2255(h)’s gatekeeping requirements by relying on *Johnson*, he may use post-sentencing cases such as *Mathis*, *Descamps*, and *Johnson 2010* to support his *Johnson* claim because they are Supreme Court cases that ensure we correctly apply the ACCA’s provision.” See *United States v. Peppers*, 899 F.3d 211, 230 (2018).

In footnote 13, the Third Circuit in *Peppers* continued,

“The government’s argument that allowing the use of post-sentencing case law impermissibly bootstraps *Mathis*, *Descamps* and *Johnson* 2010 claims onto a *Johnson* claim ignores that there remains, throughout the entire collateral attack, a valid *Johnson* claim upon which the sentencing court is passing judgment. The post-sentencing case law is not being smuggled in under *Johnson*’s cloak because a proper analysis in light of *Johnson* warrants applying the ACCA’s terms correctly. *But see Hires*, 825 F.3d at 1301 (“A defendant cannot use *Johnson* as a portal to challenge his ACCA predicates ... based on *Descamps*.”). *Id.*

Clearly there is a significant divide between the circuits. Petitioner moves this Honorable Court to grant certiorari and adopt the Eighth Circuit Court of Appeals’ reasoning in *Peppers*. Forrest clearly met the gatekeeping requirements of § 2255, but the lower courts erred in denying him relief and by failing to acknowledge the applicability of post-sentencing ACCA precedent in *Mathis* and *Descamps*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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