No. 19-8597

IN THE SUPREME COURT OF THE UNITED STATES

LEWIS MCKENZIE, 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 denied a certificate of appealability to review the denial of petitioner's motion to vacate his sentence based on Johnson v. United States, 576 U.S. 591 (2015), where the district court found that petitioner failed to show that it was more likely than not 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. McKenzie, No. 02-cr-151 (July 16, 2003)

United States v. McKenzie, No. 05-cv-332 (Aug. 6, 2007)

McKenzie v. United States, No. 16-cv-466 (July 11, 2019)

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

United States v. McKenzie, No. 03-13655 (Jan. 14, 2004)

McKenzie v. United States, No. 07-13357 (Dec. 13, 2007)

United States v. McKenzie, No. 10-10124 (July 27, 2010)

In re McKenzie, Nos. 16-11910 and 16-12457 (May 24, 2016)

McKenzie v. United States, No. 19-12594 (Jan. 2, 2020)

Supreme Court of the United States:

McKenzie v. United States, No. 03-9874 (May 24, 2004)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 2a) is unreported. The opinion and order of the district court (Pet. App. 1b-15b) are not published in the Federal Supplement but are available at 2019 WL 2023727.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2020. The petition for a writ of certiorari was filed on June 1, 2020. 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 Middle District of Alabama, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); distributing cocaine, in violation of 21 U.S.C. 841(a)(1); possessing cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and using or carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). Judgment 1. The district court sentenced petitioner to 337 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, 91 Fed. Appx. 656 (Tbl.), and this Court denied a petition for a writ of certiorari, 541 U.S. 1068. 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). 05-cv-332 D. Ct. Doc. 18, at 1 (July 9, 2007); 05-cv-332 D. Ct. Doc. 21, at 1 (Aug. 6, 2007); 07-13357 C.A. Order (Oct. 16, 2007). 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, 576 U.S. 591 (2015). Pet. App. 1c-3c. The district court denied the motion and declined to issue a COA. Id. at 1b-15b; 16-cv-466 D. Ct. Doc. 36, at 1-2 (July 11, 2019). The court of appeals likewise denied a COA. Pet. App. 2a.

1. In 2001, police officers learned that petitioner was selling narcotics in Tallapoosa County, Alabama, and recruited a confidential informant to purchase narcotics from him. Presentence Investigation Report (PSR) ¶ 8. The informant went to petitioner's home and purchased cocaine hydrochloride. PSR ¶ 9. The officers then obtained a search warrant for petitioner's home, where they found cocaine hydrochloride, cocaine base, and a rifle. PSR ¶ 10.

A federal grand jury in the Middle District of Alabama returned a four-count indictment charging petitioner with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1); one count of possessing cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and one count of using, carrying, or possessing a firearm during, in relation to, or in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). 16-cv-466 D. Ct. Doc. 3-1, at 2-4 (June 30, 2016). Following a trial, a jury found petitioner guilty on all counts. Judgment 1; PSR ¶ 7.

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. 18 U.S.C. 924(e)(1). 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 subject to an ACCA sentence. PSR ¶ 26. The presentence report informed the district court that petitioner had, among other convictions, a 1986 Alabama conviction for third-degree burglary, a 1986 Alabama conviction for distribution of marijuana, and a 1991 Alabama conviction for second-degree arson. PSR ¶¶ 32-33, 37. At sentencing, petitioner objected that his Alabama conviction for third-degree burglary did not qualify as a violent felony on the ground that this Court's decision in Taylor v. United States, 495 U.S. 575 (1990) -- which addressed the meaning of "burglary" under the ACCA's enumerated-offenses clause

-- had been "decided incorrectly." Sent. Tr. 4; see id. at 3-4. Petitioner acknowledged, however, that Taylor was "controlling law," and the district court overruled his objection. Id. at 4. The court adopted the presentence report's determinations, ibid., and sentenced petitioner to concurrent terms of 277 months of imprisonment on the Section 922(g)(1) count and 240 months of imprisonment on each of the Section 841(a)(1) counts, with a consecutive term of 60 months of imprisonment on the Section 924(c)(1) count, Judgment 2. The court of appeals affirmed, 91 Fed. Appx. 656 (Tbl.), and this Court denied a petition for a writ of certiorari, 541 U.S. 1068.

In 2005, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging, among other things, ineffective assistance of counsel. 05-cv-332 D. Ct. Doc. 1, at 2 (Apr. 11, 2005). The district court denied petitioner's motion and declined to issue a COA. 05-cv-332 D. Ct. Doc. 18, at 1; 05-cv-332 D. Ct. Doc. 21, at 1. The court of appeals likewise denied a COA. 07-13357 C.A. Order.

2. In 2015, this Court concluded in Johnson v. United States, supra, that the ACCA's residual clause is unconstitutionally vague. 576 U.S. at 597. 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 vacate his sentence. Pet. App. 1c-3c. In his second Section 2255 motion, petitioner argued that Johnson establishes that he was wrongly classified and sentenced under the ACCA. 16-cv-466 D. Ct. Doc. 1, at 4-9 (June 21, 2016). Petitioner contended that his prior convictions for third-degree burglary and second-degree arson were not convictions for violent felonies under the ACCA's enumerated-offenses and elements clauses, and that Johnson precluded reliance on the residual clause. Ibid.; 16-cv-466 D. Ct. Doc. 10, at 15-20, 30-36 (June 18, 2017).

Although the government's initial filing took the view that petitioner's second Section 2255 motion should be granted on the ground that his prior conviction for third-degree burglary no longer qualified as a violent felony under current law, 16-cv-466 D. Ct. Doc. 3, at 8 (June 30, 2016), the government subsequently informed the district court that its initial response was incorrect, 16-cv-466 D. Ct. Doc. 22, at 23 (Aug. 24, 2018). The government pointed to the court of appeals' intervening decision in Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019), which had recognized that, to prevail on a claim based on Johnson, "the movant must show that -- more likely than not -- it was use of the residual clause that led to the sentencing court's enhancement of his sentence." Id. at 1222; see 16-cv-466 D. Ct. Doc. 22, at 16-18, 23. In particular,

the court in Beeman had explained that whether the sentencing court relied on the residual clause is a question of "historical fact" and should be considered in light of the law "at the time of sentencing." 871 F.3d at 1224 n.5. The government identified circuit precedent at the time of petitioner's sentencing in 2003 indicating that the sentencing court had likely relied on the ACCA's enumerated-offenses clause -- not the now-invalid residual clause -- in determining that his prior conviction for third-degree burglary qualified as a violent felony. 16-cv-466 D. Ct. Doc. 22, at 24-25.

A magistrate judge recommended denying petitioner's second Section 2255 motion. 16-cv-466 D. Ct. Doc. 26, at 1-21 (Mar. 12, 2019). The magistrate judge observed that petitioner did not dispute that his prior conviction for distribution of marijuana qualified as a serious drug offense under the ACCA. Id. at 6. The magistrate judge then determined that petitioner could not meet his burden of showing that it was "more likely than not" that the sentencing court had relied on the ACCA's invalidated residual clause, rather than its still-valid enumerated-offenses and elements clauses, in determining that his prior convictions for third-degree burglary and second-degree arson qualified as violent felonies. Id. at 8 (quoting Beeman, 871 F.3d at 1222); see id. at 20. The magistrate judge explained that, at the time of petitioner's sentencing in 2003, the sentencing court "would have been comfortably within circuit law to have applied the modified

categorical approach . . . to conclude that [his] Alabama conviction[] for third-degree burglary * * * qualified as generic burglary under the ACCA's enumerated-crimes clause." Id. at 14 (citation omitted; second set of brackets in original). And the magistrate judge observed that, "at the time of [petitioner's] 2003 sentencing, there would have been little dispute that [his] Alabama second-degree arson conviction fell within the scope of the ACCA's enumerated-offenses clause." Id. at 18.

Adopting the recommendation of the magistrate judge, the district court denied petitioner's second Section 2255 motion. Pet. App. 1b-15b. The court emphasized that petitioner had "pointed to no precedent at the time of his sentencing 'holding, or otherwise making obvious, that a violation of Alabama's second-degree arson statute qualified as a violent felony under the residual clause.'" Id. at 12b (brackets and citation omitted). The court also denied petitioner's request for an evidentiary hearing on whether the sentencing court had relied solely on the residual clause in classifying his prior conviction for third-degree burglary as a violent felony. Id. at 13b-14b. The court declined to issue a COA. 16-cv-466 D. Ct. Doc. 36, at 1-2.

3. The court of appeals likewise declined to issue a COA, finding that petitioner had "failed to make a substantial showing of the denial of a constitutional right." Pet. App. 2a.

ARGUMENT

Petitioner contends (Pet. 16-25) 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, and it should follow the same course here.[2] Indeed, the

[1] Other pending petitions for writs of certiorari raise similar issues. See, e.g., Franklin v. United States, No. 20-5030 (filed July 7, 2020); Alexander v. United States, No. 20-5537 (filed Aug. 26, 2020).

[2] See Anzures v. United States, 140 S. Ct. 1132 (2020) (No. 19-6037); Tinker v. United States, 140 S. Ct. 1137 (2020) (No. 19-6618); Starks v. United States, 140 S. Ct. 898 (2020) (No. 19-5129); Wilson v. United States, 140 S. Ct. 817 (2020) (No. 18-9807); McCarthan v. United States, 140 S. Ct. 649 (2019) (No. 19-5391); Morman v. United States, 140 S. Ct. 376 (2019) (No. 18-9277); Ziglar v. United States, 140 S. Ct. 375 (2019) (No. 18-9343); Levert v. United States, 140 S. Ct. 383 (2019) (No. 18-1276); 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)

unpublished disposition below does not provide a suitable vehicle for further review, 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 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

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(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).

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 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

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

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.); 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).[4] 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

[4] Petitioner contends (Pet. 18) that the Fifth Circuit also adopted this approach in United States v. Wiese, 896 F.3d 720 (2018), cert. denied, 139 S. Ct. 1328 (2019), but that court expressly declined to adopt any standard because it concluded that the prisoner in that case was not entitled to relief under any circuit's approach. Id. at 724-725.

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. In any event, this case is not a suitable vehicle for this Court's review because petitioner could not prevail under any circuit's approach. Rather, the record demonstrates that the classification of his convictions for second-degree arson and third-degree burglary as violent felonies did not depend on the residual clause. As the magistrate judge explained, "at the time of [petitioner's] 2003 sentencing, there would have been little dispute that [his] Alabama second-degree arson conviction fell within the scope of the ACCA's enumerated-offenses clause." 16-cv-466 D. Ct. Doc. 26, at 18. And circuit precedent at the time indicated that prior convictions for Alabama third-degree

burglary could qualify under the enumerated-offenses clause if the underlying facts showed that the defendant was convicted of generic burglary. Id. at 13-14.

Here, "the underlying facts of [petitioner's] Alabama third-degree burglary conviction involved his breaking out a window of a gas station and entering and stealing a quantity of cigarettes." 16-cv-466 D. Ct. Doc. 26, at 14; see PSR ¶ 32. Given those facts, "[a] sentencing court in 2003 'would have been comfortably within circuit law to have applied the modified categorical approach . . . to conclude that [his] Alabama conviction[] for third-degree burglary * * * qualified as generic burglary under the ACCA's enumerated-crimes clause.'" 16-cv-466 D. Ct. Doc. 26, at 14 (citation omitted; second set of brackets in original). Accordingly, at sentencing, petitioner objected that this Court's decision in Taylor v. United States, 495 U.S. 575 (1990), had been "decided incorrectly," Sent. Tr. 4 -- indicating that he understood classification of his third-degree burglary conviction as a violent felony to depend on Taylor's interpretation of the term "burglary" in the ACCA's enumerated-offenses clause. Because petitioner cannot even show that classification of his prior convictions as violent felonies "may have been" premised on the residual clause, Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897, he would not be entitled to relief even under the minority approach to the burden of proof to establish that a second Section 2255 motion is premised on Johnson error.

As petitioner notes (Pet. 11, 26), 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).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020