No. 20-5030

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY LEE FRANKLIN, 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

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN C. RABBITT
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of petitioner's motion to vacate his sentence based on Samuel 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 Samuel Johnson, as opposed to the ACCA's still-valid elements clause.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

Franklin v. Warden, FCC Coleman -- Medium, No. 11-cv-43 (Oct. 18, 2013)

United States District Court (S.D. Fla.):

United States v. Franklin, No. 06-cr-20709 (Oct. 16, 2007)

Franklin v. United States, No. 09-cv-20046 (June 11, 2009)

Franklin v. United States, No. 16-cv-22192 (July 23, 2019)

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

Franklin v. United States, No. 07-14917 (July 1, 2008), petition for reh'g denied (Aug. 25, 2008)

Franklin v. United States, No. 09-13962 (Jan. 14, 2010)

Franklin v. Warden, FCC Coleman -- Medium, No. 13-15074 (Mar. 21, 2014)

In re Franklin, No. 16-12528 (June 14, 2016)

Franklin v. United States, No. 17-14495 (May 30, 2019)

Franklin v. United States, No. 19-13422 (Apr. 14, 2020)

Supreme Court of the United States:

Franklin v. United States, No. 10-5790 (Jan. 18, 2011)

Franklin v. United States, No. 17-8401 (Feb. 25, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-5030

JIMMY LEE FRANKLIN, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-4) is not published in the Federal Reporter but is reprinted at 810 Fed. Appx. 707. The order of the district court (Pet. App. A10, at 1-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2020. The petition for a writ of certiorari was filed on July 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A3, at 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. 284 Fed. Appx. 701. 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). 09-cv-20046 D. Ct. Doc. 11 (June 11, 2009); 09-cv-20046 D. Ct. Doc. 17 (Aug. 11, 2009); 09-13962 C.A. Order (Jan. 14, 2010). This Court denied a petition for a writ of certiorari. 562 U.S. 1181.

In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of Samuel Johnson v. United States, 135 S. Ct. 2551 (2015). 16-12528 C.A. Order (June 14, 2016). The district court denied the motion and declined to issue a COA. Pet. App. A5, at 1-10. The court of appeals likewise denied a COA. 17-14495 C.A. Order (Jan. 2, 2018). This Court granted certiorari, vacated the judgment, and remanded for further consideration in light of the government's memorandum in response to the petition for a writ of certiorari. 139 S. Ct. 1254. On remand, the district court again denied petitioner's second 2255 motion, Pet. App. A10, at 1-2, but

granted a COA, Pet. App. A11, at 1. The court of appeals affirmed. Pet. App. A1, at 1-4.

1. In 2006, police officers arrived at petitioner's apartment in Miami, Florida, to arrest him on an outstanding warrant. Presentence Investigation Report (PSR) ¶ 6. The officers conducted a search of the apartment and found a rifle, ammunition, and body armor. PSR ¶ 8; 284 Fed. Appx. at 702. Petitioner was not home at the time. PSR ¶ 8. The officers later located him at work and arrested him there. PSR ¶ 12.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1); and one count of possessing body armor as a felon, in violation of 18 U.S.C. 931. Pet. App. A2, at 1-2. Following the denial of a motion to suppress evidence found at his apartment, petitioner entered a conditional guilty plea to the first count in the indictment, reserving his right to appeal the denial of his suppression motion. 284 Fed. Appx. at 702-703.

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 an armed career criminal, identifying three prior convictions as violent felonies: a 1987 Florida conviction for armed robbery, a 1987 Florida conviction for battery on a law enforcement officer, and a 1997 Florida conviction for attempted armed robbery. PSR ¶ 25; see PSR ¶¶ 31, 32, 38; Pet. App. A5, at 5 n.4. Petitioner made no objections to the presentence report. Addendum to PSR 1; Pet. App. A1, at 2. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. A3, at 2-3. Petitioner appealed the denial of his suppression motion, and the court of appeals affirmed. 284 Fed. Appx. at 701-704.

In 2009, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging, among other things, ineffective assistance of counsel. 09-cv-20046 D. Ct. Doc. 1, at 3-4 (Jan. 8, 2009). The district court denied petitioner's motion and declined to issue a COA. 09-cv-20046 D. Ct. Doc. 11, at 1-10; 09-cv-20046 D. Ct. Doc. 17, at 1. The court of appeals likewise denied a COA. 09-13962 C.A. Order. This Court denied a petition for a writ of certiorari. 562 U.S. 1181.

2. In 2015, this Court concluded in Samuel Johnson v. United States, supra, that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court subsequently held that Samuel 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. 16-12528 C.A. Order 1-4. In his second Section 2255 motion, petitioner argued that Samuel Johnson establishes that he was wrongly classified and sentenced as an armed career criminal. Pet. App. A4, at 1-2, 11-22. Petitioner contended that he lacked three prior convictions for violent felonies under the ACCA's enumerated-offenses and elements clauses, and that Samuel Johnson precluded reliance on the residual clause. Id. at 11-22.

The district court denied petitioner's motion. Pet. App. A5, at 1-10. Finding it "not clear" from the presentence report or the sentencing transcript "whether [petitioner] was sentenced under the ACCA's residual clause as opposed to the elements or enumerated[-offenses] clause," the court "focus[ed] on whether [petitioner] has three prior convictions that still qualify as violent felonies" under current law. Id. at 4. The court viewed petitioner's prior convictions for armed robbery, battery on a law enforcement officer, and attempted armed robbery to all still satisfy the ACCA's elements clause under current law. Id. at 6-9. The court therefore "sustain[ed] his ACCA enhancement" and declined to issue a COA. Id. at 9. The court of appeals likewise denied a COA. 17-14495 C.A. Order 1.

Petitioner filed a petition for a writ of certiorari. In response, the government filed a memorandum acknowledging that petitioner's conviction for battery on a law enforcement officer does not satisfy the ACCA's elements clause under current law. Gov't Mem. at 1, Franklin v. United States, 139 S. Ct. 1254 (2019) (No. 17-8401). The government observed that, under Florida law, battery on a law enforcement officer may be committed either by intentionally "touch[ing] or strik[ing]" a law enforcement officer or by intentionally "caus[ing] bodily harm" to such an officer. Id. at 3 (citation omitted); see id. at 3-4. The government explained that, following petitioner's sentencing, this Court in Curtis Johnson v. United States, 559 U.S. 133 (2010), determined

that "touching or striking" battery does not satisfy the ACCA's elements clause. Gov't Mem. at 4-5, Franklin, supra. The government further explained that "[n]othing in the record of this case indicates that petitioner's conviction for battery on a law enforcement officer was for 'bodily harm' battery." Id. at 5. The government therefore acknowledged that the district court had incorrectly concluded that petitioner's conviction for battery on a law enforcement officer still qualifies as a violent felony under current law. Id. at 3. This Court granted certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of the position asserted in the government's memorandum. 139 S. Ct. 1254.

3. Following this Court's order, the parties jointly moved the court of appeals to remand the case to the district court for consideration of 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 explained that, to prevail on a claim based on Samuel 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. The court of appeals granted the parties' joint motion. Pet. App. A7, at 1-4.

On remand, the district court again denied petitioner's second Section 2255 motion. Pet. App. A10, at 1-2. The court determined that, although it had "no specific recollection" of

petitioner's sentencing hearing in 2007, it was "more likely than not" that the court "did not rely on the ACCA's residual clause" in classifying his Florida conviction for battery on a law enforcement officer as a violent felony. Id. at 2; see id. at 1. The court explained that "the law in this Circuit . . . at the time of [petitioner's] sentencing was clear that [Florida battery on a law enforcement officer] was a crime of violence under the elements clauses of U.S.S.G. §§ 2L1.2(b)(1) and 4B1.2(a)(1) and, in turn, a violent felony under the elements clause of the ACCA." Id. at 2 (citation omitted); see United States v. Llanos-Agostadero, 486 F.3d 1194, 1197-1198 (11th Cir. 2007) (per curiam), cert. denied, 555 U.S. 1105 (2009), abrogated by Curtis Johnson v. United States, supra. The court further explained that it "would not have ignored th[at] binding precedent * * * to determine [petitioner's] ACCA eligibility based solely on the residual clause, but instead would have decided [that battery on a law enforcement officer] was a crime of violence under the ACCA's elements clause." Pet. App. A10, at 2.

The district court granted a COA on "whether a section 2255 movant must prove it is 'more likely than not' the court relied only on the residual clause" or whether "the movant need only show the ACCA enhancement 'may have' rested on the residual clause." Pet. App. A11, at 1.

4. The court of appeals affirmed. Pet. App. A1, at 1-4. The court explained that its prior decision in Beeman foreclosed

petitioner's claim that he should have been required to show only that "the ACCA enhancement 'may have' rested on the residual clause." Id. at 1-2; see id. at 3. The court further determined that, even if petitioner were required to show only that the sentencing court "may have relied on" the residual clause, his claim based on Samuel Johnson would still fail, because "the district court indicated 'it would not have ignored binding precedent' and instead at the time of sentencing would have determined that the conviction in question qualified under the ACCA's elements clause." Id. at 3-4.

ARGUMENT

Petitioner contends (Pet. 16-25) that the court of appeals incorrectly affirmed the district court's denial of his second Section 2255 motion. In his view, the district court erred in requiring him, as a prerequisite for relief on a claim premised on Samuel 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 Samuel Johnson invalidated. This Court has recently and repeatedly denied review of similar issues in other cases, and it should follow the same course here.[1] Indeed, the

[1] 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); Ziglar v. United States, 140 S. Ct. 375 (2019) (No. 18-9343); Morman v. United States, 140 S. Ct. 376 (2019)

unpublished disposition below does not provide a suitable vehicle for further review, because the court of appeals determined that petitioner could not prevail under any circuit's approach.

1. 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 Samuel Johnson is required to establish,

---

(No. 18-9277); 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) (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).

through proof by a preponderance of the evidence, that his sentence in fact reflects Samuel 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).[2] That approach makes sense because Samuel 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 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). As stated in the government's briefs in opposition in Couchman and King, however, some

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

inconsistency exists in circuits' approach to Samuel 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]

2. In any event, this case is not a suitable vehicle for this Court's review because the court of appeals found that petitioner would not prevail under any circuit's approach. Pet. App. A1, at 3-4. The classification of his Florida conviction for battery on a law enforcement officer did not depend on the residual clause. When petitioner was sentenced in 2007, see Pet. App. A10, at 1, circuit precedent held that Florida battery on a law enforcement officer was a "crime of violence" under the Sentencing Guidelines because it "'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" United States v. Llanos-Agostadero, 486 F.3d 1194, 1197 (11th Cir. 2007) (per curiam) (citation omitted), cert. denied, 555 U.S. 1105 (2009), abrogated by Curtis Johnson v. United States, 559 U.S. 133 (2010). Given that precedent, petitioner's prior Florida conviction for battery on a law enforcement officer also qualified as a violent felony under the ACCA's identically worded elements clause at the time of his sentencing. See Pet. App. A10, at 2. Petitioner cannot even show that the conviction's classification as a violent felony "may have been" premised on the

[3] Petitioner contends (Pet. 23) that the decision below also conflicts with the Second Circuit's summary order in Belk v. United States, 743 Fed. Appx. 481 (2018). The Second Circuit's nonprecedential order in that case, however, could not create a conflict warranting this Court's review. See 2d Cir. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect.").

residual clause, Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897, and he would accordingly not have been entitled to relief even under the minority approach to the burden of proof to establish that a second Section 2255 motion is premised on Samuel Johnson error.[4]

Following this Court's decision in Curtis Johnson -- which held that battery under Florida law does not categorically require the use of physical force, 559 U.S. at 138-143 -- a conviction for Florida battery on a law enforcement officer no longer categorically qualifies as a violent felony under the ACCA's elements clause. Gov't Mem. at 1-6, Franklin v. United States, 139 S. Ct. 1254 (2019) (No. 17-8401). 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).

---

[4] In initially denying petitioner's second Section 2255 motion, the district court stated that neither the presentence report nor the sentencing transcript themselves indicated "whether [petitioner] was sentenced under the ACCA's residual clause." Pet. App. A5, at 4. On remand, the court considered for the first time whether "'the law in th[e] Circuit . . . at the time of [petitioner's] sentencing'" illuminated the basis for petitioner's ACCA sentence, and determined that it "would not have ignored the binding precedent" in sentencing petitioner. Pet. App. A10, at 2 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

OCTOBER 2020