No. 20-5762

IN THE SUPREME COURT OF THE UNITED STATES

WILL ROBERTSON BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Armed Career Criminal Act of 1984 (ACCA) provides for enhanced statutory penalties for certain convicted felons who unlawfully possess firearms and whose criminal histories include at least three prior convictions for a "serious drug offense" or a "violent felony." 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). In Johnson v. United States, 576 U.S. 591 (2015), this Court held that the ACCA's residual clause is unconstitutionally vague, id. at 597, but it emphasized that the decision "d[id] not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony," id. at 606.

Petitioner received an ACCA sentence based on prior Mississippi convictions for second-degree arson, third-degree arson, aggravated assault, aggravated assault on a law enforcement officer, and burglary and larceny. Presentence Investigation Report ¶¶ 24, 31-33. He contends (Pet. 9-16) that the court of appeals erred in requiring him, as a prerequisite for relief on a claim premised on Johnson, to show that his ACCA enhancement more likely than not was based on the residual clause that Johnson invalidated. That issue does not warrant this Court's review.

This Court has recently and repeatedly denied review of similar claims in other cases.[1] It should follow the same course here.

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.

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[1] See Franklin v. United States, No. 20-5030 (Dec. 14, 2020); McKenzie v. United States, No. 19-8597 (Dec. 14, 2020); 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) (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).

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).[2] Such a showing is necessary 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 decisions from the First, Sixth, Eighth, 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.); 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),

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

cert. denied, 138 S. Ct. 1696 (2018); Beeman v. United States, 871 F.3d 1215, 1224 (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' approaches 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).

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. Petitioner does not dispute (Pet. 7) that his prior Mississippi convictions for second-degree arson and third-degree arson qualify as violent felonies under the ACCA. And contrary to petitioner's contention (ibid.), the record demonstrates that classification of his convictions for aggravated assault and aggravated assault on a law enforcement officer as violent felonies did not depend on the ACCA's residual clause. As the court of appeals explained, petitioner "concedes, and the record supports, that [those] convictions arose under [the] subsection" of a "divisible state statute" that "criminalized an 'attempt[] to cause or purposely or knowingly caus[ing] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm'" -- an offense that satisfied the ACCA's elements clause under "legal precedent at the time of [petitioner's] sentencing." Pet. App. 2, at 3 (citations omitted; third and fourth sets of brackets in original). Petitioner fails to explain how classification of his convictions for aggravated

assault and aggravated assault on a law enforcement officer as violent felonies even "may have been" premised on the residual clause, Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897, and without satisfying at least that prerequisite, he would not be entitled to relief even under the minority approach to the burden of proof to establish that a second or successive Section 2255 motion is premised on Johnson error.

Moreover, even if petitioner's Section 2255 motion were premised on a Johnson claim, he still would not be entitled to relief. That is because his prior Mississippi convictions for aggravated assault and aggravated assault on a law enforcement officer still satisfy the ACCA's elements clause under current law. See Pet. App. 1, at 2-6. Because petitioner would still have at least three ACCA predicate convictions, he would still be subject to an ACCA sentence, and he would not be entitled to any relief.

Finally, even if petitioner prevailed in this Court and was ultimately resentenced, such a resentencing is unlikely to provide him with any practical benefit. Petitioner completed his term of imprisonment and was released in January 2017. See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (search for inmate register number 03641-043). The only portion of petitioner's sentence to which he is still subject is his term of five years of supervised release. Pet. App. 2, at 1-2. And

petitioner would already have nearly completed it by the time any resentencing would occur.

The petition for a writ of certiorari should be denied.[3]

Respectfully submitted.

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DECEMBER 2020

[3] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.