No. 20-8053

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM LEROY SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed 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 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 Johnson, as opposed to the ACCA's still-valid elements clause.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Sanders, No. 14-cr-7 (Sept. 23, 2014)

Sanders v. United States, No. 16-cv-135 (Sept. 4, 2019)

United States Court of Appeals (8th Cir.):

Sanders v. United States, No. 19-3009 (Dec. 14, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45-46) is not published in the Federal Reporter but is reprinted at 824 Fed. Appx. 435. The order of the district court (Pet. App. 31-44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2020. A petition for rehearing was denied on December 14, 2020. The petition for a writ of certiorari was filed on May 13, 2021. 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 Southern District of Iowa, petitioner was convicted of possessing ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal. Pet. 4. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. 16-cv-135 D. Ct. Doc. 1 (Apr. 26, 2016). The district court denied the motion but granted a certificate of appealability (COA). Pet. App. 31-44. The court of appeals affirmed. Id. at 45-46.

1. In 2013, police officers responded to a report of domestic violence at a residence in Sully, Iowa. Presentence Investigation Report (PSR) ¶ 8; Plea Agreement 3. When the officers arrived, petitioner's wife ran to the patrol vehicle and stated that petitioner had assaulted her. PSR ¶ 9. The officers entered the residence, found petitioner passed out on the floor, and arrested him. Ibid. The officers found shotgun shells in the pockets of petitioner's pants and coat. Ibid. A subsequent search of the residence uncovered four loaded firearms and five boxes of ammunition. Ibid.

A federal grand jury in the Southern District of Iowa indicted petitioner on one count of possessing firearms and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. 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 "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, 578 U.S. 120, 123 (2016).

Petitioner and the government entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Plea Agreement 1. Petitioner agreed to plead guilty to possessing ammunition as a felon, in violation of Section 922(g)(1), and stipulated to a 180-month sentence. Id. at 1, 4. The district

court accepted the plea. 14-cr-7 D. Ct. Doc. 50, at 2 (July 15, 2014). The Probation Office's presentence report informed the court that petitioner was eligible for an enhanced sentence under the ACCA. PSR ¶ 23. The presentence report identified three prior Iowa convictions -- a 1997 conviction for possessing methamphetamine with intent to deliver, PSR ¶ 45; a 2002 conviction for "interfer[ing] with official acts causing serious injury," PSR ¶ 51 (capitalization omitted); and a 2006 conviction for possessing a Schedule II controlled substance with intent to deliver, PSR ¶ 53 -- as ACCA predicates. See PSR ¶ 23. In accordance with the plea agreement, the court sentenced petitioner to 180 months of imprisonment. Sent. Tr. 5-6, 12. Petitioner did not appeal. Pet. 4.

2. In 2015, this Court concluded in Johnson v. United States, 576 U.S. 591 (2015), that the ACCA's residual clause is unconstitutionally vague. Id. at 597. The Court subsequently held that Johnson applies retroactively to cases on collateral review. See Welch, 578 U.S. at 129-130.

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. 16-cv-135 D. Ct. Doc. 3, at 2 (Dec. 29, 2016). Petitioner contended that his prior conviction for interfering with official acts was not a conviction for a violent felony under the ACCA's

enumerated-offenses or elements clauses, and that Johnson precluded reliance on the residual clause. Id. at 4-12.

The district court denied petitioner's motion. Pet. App. 31-44. The court explained that, "[i]n order to be entitled to relief on a claim based on Johnson, § 2255 claimants must 'show by a preponderance of the evidence that the residual clause [rather than the enumerated or elements clause] led the sentencing court to apply the ACCA enhancement.'" Id. at 36 (citation omitted; second set of brackets in original). The district court determined that petitioner had "fail[ed] to show" that the sentencing court "relied on the residual clause in deciding" that his "2002 conviction" for interfering with official acts "was a predicate ACCA offense." Id. at 43.

In making that determination, the district court examined the materials that had been before the court at sentencing. Pet. App. 36-40. The district court observed that petitioner had been charged with interfering with official acts, in violation of Iowa Code § 719.1(1) (2001), a Class D felony. Pet. App. 42. The court further observed that, "[t]o qualify as a class D felony offense, the Interference With Official Acts must inflict or attempt to inflict serious bodily injury, must involve the display of a dangerous weapon, or the individual must be armed with a firearm." Id. at 41. The court found the Iowa statute "divisible" because "Iowa courts have referred to the subsections of the offense as elements." Id. at 43.

The district court then determined that "[t]he relevant records show [that petitioner] was convicted of interference with official acts by inflicting or * * * attempting to inflict serious injury." Pet. App. 43. The court noted that petitioner "did not object" to the portions of the presentence report describing the offense as "Interference With Official Acts Causing Serious Injury" and stating that petitioner had "command[ed]" a "Rottweiler dog" "to attack a law enforcement officer." Id. at 38-39; see PSR ¶ 51. And the court explained that because the offense "had as an element the use, attempted use, or threatened use of physical force against the person of another," "there was no reason [for the sentencing court] to rely on the broader language of the residual clause." Pet. App. 43.

The district court granted a COA. Pet. App. 44.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 45-46. It agreed with the district court that petitioner "did not meet his burden to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." Id. at 46.

ARGUMENT

Petitioner contends (Pet. 6-30) that the court of appeals incorrectly affirmed the district court's denial of his Section 2255 motion. In his view, the district court erred in requiring him, as a prerequisite for relief on a claim premised on Johnson v. United States, 576 U.S. 591 (2015), to show that his ACCA

enhancement more likely than not was based on the residual clause invalidated in Johnson. This Court has recently and repeatedly denied review of similar issues in other cases,[1] and it should follow the same course here. Indeed, the unpublished disposition

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[1] See, e.g., Brown v. United States, 141 S. Ct. 1271 (2021) (No. 20-5762); Franklin v. United States, 141 S. Ct. 960 (2020) (No. 20-5030); McKenzie v. United States, 141 S. Ct. 954 (2020) (No. 19-8597); Tinker v. United States, 140 S. Ct. 1137 (2020) (No. 19-6618); Anzures v. United States, 140 S. Ct. 1132 (2020) (No. 19-6037); Starks v. United States, 140 S. Ct. 898 (2020) (No. 19-5129); Clay v. United States, 140 S. Ct. 866 (2020) (No. 19-6884); Wilson v. United States, 140 S. Ct. 817 (2020) (No. 18-9807); McCarthan v. United States, 140 S. Ct. 649 (2019) (No. 19-5391); Levert v. United States, 140 S. Ct. 383 (2019) (No. 18-1276); Morman v. United States, 140 S. Ct. 376 (2019) (No. 18-9277); Ziglar v. United States, 140 S. Ct. 375 (2019) (No. 18-9343); 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).

below does not provide a suitable vehicle for further review, because petitioner could not prevail under any circuit's approach. Petitioner's subsidiary contention (Pet. 9-22) -- that he is not ACCA-eligible on the theory that his prior conviction for interfering with official acts, in violation of Iowa Code § 719.1(1) (2001), is not divisible under current law -- lacks merit, is at bottom an objection to the court of appeals' interpretation of state law, and likewise does not warrant this Court's review. In all events, this case is not a suitable vehicle for reviewing either of the issues that petitioner raises because neither issue alone is outcome-determinative.

1. 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).[2] 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, Fifth, Tenth, 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); United States v. Clay, 921 F.3d 550, 559 (5th Cir. 2019), cert. denied, 140 S. Ct. 866 (2020); United States v. Driscoll, 892 F.3d 1127, 1135 (10th Cir. 2018); Beeman v. United States, 871 F.3d 1215, 1221-1222 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019); see also Gov't 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 the circuits' approaches to Johnson-premised collateral attacks like petitioner's. That brief explains that the Fourth and Ninth Circuits have interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A) -- which provides

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

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, however, because the Fourth and Ninth Circuit decisions "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) (citation omitted), 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 the Fourth and Ninth

Circuit decisions, the Third Circuit's decision 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). Further review of inconsistency in the circuits' approaches remains unwarranted. See Br. in Opp. at 15, Casey, supra (No. 17-1251).

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. When petitioner was sentenced in 2014, see Sent. Tr. 1, circuit precedent held that a statute of conviction was divisible -- and thus subject to analysis under the modified categorical approach, in which courts may examine a limited set of records to determine the precise statutory basis for the conviction -- so long as the statute listed alternative ways of violating the statute, regardless of whether those alternatives amounted to alternative elements or merely alternative means of fulfilling a single element. See United States v. Bell, 445 F.3d 1086, 1090-1091 (8th Cir. 2006), abrogated by Mathis v. United States, 136 S. Ct. 2243 (2016). Here, the Iowa statute of conviction provided that "[i]f a person commits an interference with official acts,

* * * and in so doing inflicts or attempts to inflict serious injury, or displays a dangerous weapon * * * , or is armed with a firearm, that person commits a class 'D' felony." Iowa Code § 719.1(1) (2001). Petitioner did not object to the presentence report's description of the offense as "interference with official acts causing serious injury" (namely, by commanding a Rottweiler to attack a police officer). PSR ¶ 51 (capitalization omitted); see Pet. App. 39, 43; see also Plea Agreement 3 (stipulating that petitioner was convicted in 2002 of "assault causing injury - peace officers"). Thus, under circuit precedent at the time, petitioner's offense plainly involved the use or attempted use of physical force and therefore qualified as a violent felony under the ACCA's elements clause. See Bell, 445 F.3d at 1090-1091. As a result, even under the minority approach to the burden of proof to establish that a Section 2255 motion is premised on Johnson error, the conviction's classification as an ACCA predicate would not be subject to collateral attack under Johnson, because in these circumstances, petitioner cannot even show that its classification "may have been" premised on the residual clause. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897.

Petitioner's contrary arguments (Pet. 22-30) lack merit. He contends that inflicting, or attempting to inflict, serious injury does not necessarily satisfy the ACCA's elements clause because Iowa law defines "[s]erious injury" to include not just serious "[b]odily injury," but also "[d]isabling mental illness." Iowa

Code § 702.18(1) (2001) (emphasis omitted); see Pet. 25. But nothing suggests that the sentencing court took such a view of the Iowa statute or relied on the residual clause as a result. Cf. United States v. Chapman, 720 Fed. Appx. 794, 796 (8th Cir.) (per curiam) (determining, "[a]fter extensive review of Iowa decisions," that "there is only a mere 'theoretical possibility,' rather than a 'realistic probability,' that Iowa would apply its aggravated assault statute * * * to criminalize assault with intent to inflict a disabling illness alone") (citation omitted), cert. denied, 138 S. Ct. 2664 (2018).

Petitioner also contends (Pet. 26) that the "state court records * * * do not establish which Class D felony alternative of § 719.1(1) formed the basis of [petitioner's] conviction." But the presentence report's description of the offense as "interference with official acts causing serious injury" was based on "judicial records," PSR ¶ 51 (capitalization omitted), and petitioner did not object to that description, Pet. App. 39; see p. 12, supra. Under circuit precedent, petitioner's failure to object relieved the government of any obligation to introduce the state-court records themselves at sentencing. See Bell, 445 F.3d at 1090-1091; Pet. App. 39. Given that precedent, petitioner's conviction plainly satisfied the ACCA's elements clause under circuit law at the time of his sentencing.

2. Petitioner makes the subsidiary contention (Pet. 9-22) that his prior conviction for interfering with official acts does

not satisfy the ACCA's elements clause under precedent that postdates his sentencing -- namely, this Court's clarification of the divisibility analysis in Mathis v. United States, 136 S. Ct. 2243 (2016). That contention likewise does not warrant this Court's review.

Developments in statutory-interpretation case law years after petitioner's sentencing are not relevant to petitioner's claim of Johnson error. The inquiry into whether his sentence was based on the ACCA's now-invalid residual clause is a matter of "historical fact." Beeman, 871 F.3d at 1224 n.5. The relevant rules of statutory construction therefore are those that were in effect at the time petitioner was sentenced. Ibid. The question whether petitioner's prior conviction would count as an ACCA predicate if a court sentenced petitioner today is immaterial to the historical analysis of the original basis for petitioner's sentence.

Petitioner also errs in contending that Section 719.1(1) is not divisible under current law. In Mathis, this Court explained that a statute is divisible if it defines multiple offenses with different elements, as opposed to alternative means of committing a single offense. 136 S. Ct. at 2256. As the district court observed, "Iowa courts have referred to" the alternatives set out in Section 719.1(1) as "elements," not means. Pet. App. 43; see State v. Campbell-Scott, 898 N.W.2d 203, 2017 WL 512590, at *2 (Iowa Ct. App. Feb. 8, 2017) (Tbl.); State v. Hall, 886 N.W.2d 616, 2016 WL 4543891, at *1 (Iowa Ct. App. Aug. 31, 2016) (Tbl.).

Thus, even under current law, Section 719.1(1) is divisible, and petitioner's prior conviction satisfies the ACCA's elements clause under the modified categorical approach.

Moreover, petitioner identifies no decision of another court of appeals that has determined that Section 719.1(1) is not divisible. And whether Section 719.1(1) is divisible ultimately depends on an interpretation of Iowa law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004), and petitioner provides no reason to deviate from that "settled and firm policy" here.

3. In all events, this case is a poor vehicle for further review because, in order to be entitled to vacatur of his ACCA sentence, petitioner would have to show both that his Section 2255 motion was premised on a Johnson claim and that his prior conviction does not satisfy the ACCA's elements clause under current law. Because neither of those issues is outcome-determinative, this Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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