No. 17-6297

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LAMONT LLOYD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability where the district court rejected as untimely petitioner's claim on collateral review that his prior conviction for South Carolina second-degree burglary was not a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 692 Fed. Appx. 711. Prior orders of the district court (Pet. App. B1-B5, F1-F7) are not published in the Federal Supplement but are available at 2016 WL 5720112 and 2016 WL 7076972.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2017. The petition for a writ of certiorari was filed on October 3, 2017. 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 District of South Carolina, petitioner was convicted on one count of possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. 841(a) and (b)(1)(B) (2000 & Supp. V 2005), and one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(e) (2000 & Supp. V 2005). Judgment 1. He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. The district court denied the motion and denied petitioner's request for a certificate of appealability (COA). Pet. App. B1-B5. The court of appeals also denied a COA. Id. at A1-A2.

1. In August 2003, officers on routine patrol observed petitioner's car make an unlawful turn. Presentence Investigation Report (PSR) ¶ 8. When they attempted to initiate a traffic stop, petitioner sped away. Ibid. The vehicle pursuit ended after petitioner wrecked his car in a parking lot. Ibid. Petitioner then fled on foot; during the ensuing pursuit, he pointed a pistol at two officers. Ibid. Officers ultimately were able to recover the firearm, and a subsequent search of petitioner's car revealed more than 16 grams of cocaine base. PSR ¶¶ 8-9.

A federal grand jury indicted petitioner on one count of possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2000 & Supp. V 2005); one count of possession of a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); and one count of unlawful possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (c)(1). Indictment 1-2. Petitioner pleaded guilty to possession with intent to distribute five grams or more of cocaine base and possession of a firearm by a convicted felon. Judgment 1.

2. The PSR reflected that, at the time of his offenses, petitioner had prior convictions under South Carolina law for, inter alia, (1) second-degree burglary in 1991;[1] (2) strong-arm robbery in 1993; (3) and possession with intent to distribute marijuana in 2003. PSR ¶¶ 16, 18-19.

Based on those prior convictions (see Pet. 2), the PSR determined that petitioner was eligible for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). A conviction for unlawfully possessing a firearm following a felony conviction, in violation of Section 922(g)(1), ordinarily

[1] Although petitioner was convicted on two counts of second-degree burglary in 1991, PSR ¶ 16, the district court treated them as one offense because petitioner "was arrested for both burglaries at the same time and then sentenced for both burglaries on the same day" and "the record * * * contain[ed] insufficient information to find that [petitioner] committed them on occasions different from one another" as required by 18 U.S.C. 924(e)(1). Pet. App. B4 n.1.

exposes the offender to a statutory maximum sentence of ten years of imprisonment and three years of supervised release. 18 U.S.C. 924(a)(2), 3559(a)(3), 3583(b)(2). But where the defendant "has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another," the ACCA imposes a sentence of "not less than fifteen years" of imprisonment, followed by a maximum term of five years of supervised release. 18 U.S.C. 924(e)(1) (2000 & Supp. V 2005), 3559(a)(1), 3583(b)(1). The ACCA defines a "violent felony" to include any crime punishable by a term of imprisonment exceeding one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause); "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-felonies clause); or "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. 924(e)(2)(B).

The PSR calculated an advisory sentencing range of 188 to 235 months. PSR ¶¶ 51-53, 63. The PSR recommended a four-year term of supervised release for the drug offense (the statutory minimum under 21 U.S.C. 841(b)(1)(B) (2000 & Supp. V 2005)) and a five-year term of supervised release for the Section 922(g) offense (the statutory maximum under 18 U.S.C. 3583(b)(1)). PSR ¶ 66. The district court imposed concurrent terms of 188 months of

imprisonment on each count, as well as concurrent terms of four years of supervised release for the Section 841 offense and five years of supervised release for the Section 922(g) offense. Judgment 2-3. Petitioner did not appeal.

3. Following this Court's decisions in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the ACCA's residual clause was unconstitutionally vague, and Welch v. United States, 136 S. Ct. 1257 (2016), which held that Johnson applies retroactively to cases on collateral review, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. Pet. App. C1-C11. Petitioner contended, inter alia, that his strong-arm robbery offense did not constitute a "violent felony" under the ACCA because it was not an enumerated felony (id. at C7); it did not satisfy the elements clause (id. at C5-C7); and "the residual clause no longer exists" (id. at C8 (capitalization and emphasis omitted)). Petitioner also contended that his burglary conviction did not qualify as an ACCA predicate because the state burglary statute was "actually broader" than the "generic" form of burglary covered by the relevant sentencing provision. Id. at C9 (citing United States v. McLeod, 808 F.3d 972 (4th Cir. 2015)).

The district court ultimately denied petitioner's Section 2255 motion, concluding that his marijuana, robbery, and burglary convictions all still qualified as valid predicate offenses under

various clauses of the ACCA. Pet. App. B1-B5. The court's order denying relief referred to the reasoning of a prior stay order. See id. at B4. In that stay order, the court had determined that petitioner's challenge to the classification of his burglary conviction as a predicate offense was untimely, reasoning that 28 U.S.C. 2255(f)(3)'s one-year time limit for the assertion of a "newly-recognized claim[]" based on Johnson did not allow the assertion of an "unrelated" challenge to a classification that did not depend on the residual-clause language that Johnson had declared unconstitutionally vague. See Pet. App. F4-F5.[2] The court also denied a COA because petitioner had failed to demonstrate that "reasonable jurists would find both that the merits of his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong." Id. at B5 n.2. The court subsequently denied petitioner's motion for reconsideration. Id. at H1.

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[2] The district court's order denying relief misidentified petitioner's three predicates as his robbery conviction, a "marijuana conviction," and another "drug conviction[]." Pet. App. B4. But the order also referenced the two "career-offender predicate offenses" described in the court's prior stay order (ibid.), i.e., the marijuana conviction and the burglary conviction. Thus, in context, it is clear that the court considered the three predicates to be the robbery, marijuana, and burglary convictions. Id. at F4; see 05-cr-142 D. Ct. Doc. 57, at 2 (Dec. 8, 2016) (petitioner's motion for reconsideration construing the district court's order as "ruling that the Petitioner's burglary conviction still counts as a predicate under the [ACCA]").

4. Petitioner sought a COA from the court of appeals. Pet. App. I1-I8. In an unpublished, per curiam decision, the court stated that it had "independently reviewed the record and conclude[d] that [petitioner] ha[d] not made the requisite showing" for a COA. Id. at A2.

DISCUSSION

Petitioner contends (Pet. 5-11) that the court of appeals erred in denying a COA because reasonable jurists would find it debatable whether his argument that his South Carolina burglary conviction no longer qualified as an ACCA predicate relied on Johnson v. United States, 135 S. Ct. 2551 (2015), such that it was timely under 28 U.S.C. 2255(f)(3). Petitioner's claim does not warrant plenary review. Neither the district court nor the court of appeals expressly addressed the proper standard for determining when Section 2255(f)(3) is satisfied. And the posture of this case makes it a poor vehicle for resolving any issue beyond the narrow one of whether petitioner is entitled to a COA.

Nonetheless, the government agrees that under current Fourth Circuit case law, petitioner may no longer be eligible for an ACCA sentence. The government therefore suggests that the Court grant the petition for a writ of certiorari for the limited purpose of vacating the court of appeals' judgment and remanding for further proceedings in light of the position expressed in this brief.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To do so, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Where the district court has denied a Section 2255 motion on procedural grounds without reaching the merits of the underlying constitutional claim, the court of appeals should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As the district court recognized (Pet. App. F4), a federal prisoner generally has one year from "the date on which the judgment of conviction [became] final" to seek relief under Section 2255, 28 U.S.C. 2255(f)(1), meaning that, here, petitioner's "opportunity to seek § 2255 relief from his sentence expired in 2006." Pet. App. F5. Section 2255(f)(3) provides an exception: a federal prisoner may file a Section 2255 motion within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. 2255(f)(3). Although petitioner

filed his Section 2255 motion within one year of Johnson, "[t]imeliness under § 2255(f) is to be assessed 'on a claim-by-claim basis.'" Pet. App. F4 (citation omitted). The district court determined in its stay order that petitioner could not "rely on Johnson to revive his untimely, unrelated challenge to the use of his burglary convictions," reasoning that Johnson invalidated only the ACCA's residual clause and not its other clauses. Id. at F6.

To the extent that determination was incorporated into the district court's final order denying relief, it does not warrant this Court's review. Petitioner seeks review of the question whether, to qualify for Section 2255(f)(3)'s statute of limitations, a defendant must "show that the [sentencing] court definitely relied upon the residual clause," or whether it is enough to show that the sentencing court "may have" done so. Pet. 7 (emphasis added). But neither the district court nor the court of appeals expressly addressed that question in this case, and petitioner himself suggests that the court of appeals has already adopted the rule he advocates. See Pet. 6 (citing United States v. Winston, 850 F.3d 677 (4th Cir. 2017)).

The district court's view of petitioner's challenge to the ACCA status of his burglary conviction as "unrelated" to Johnson, Pet. App. F5, likely reflects the way in which petitioner had addressed the issue in his Section 2255 motion. In arguing that

his burglary conviction should not count as an ACCA predicate, petitioner neither cited Johnson nor suggested that the sentencing court might have relied on the residual clause in classifying the burglary offense as an ACCA predicate. Id. at C8-C10. Instead, petitioner contended, based on a 2015 Fourth Circuit decision, that the South Carolina burglary statute under which he was convicted is "broader than generic burglary" as defined by this Court's decision in Taylor v. United States, 495 U.S. 575 (1990). Pet. App. C9; see id. at C8-C10. It was not until petitioner's motion for reconsideration that he argued that "[i]t is possible" that the sentencing court "found that the burglaries were crimes of violence under the residual clause." D. Ct. Doc. 57, at 2; see Pet. App. J8-J10 (repeating this argument in his informal brief in support of a COA in the court of appeals).

It is thus unclear, at best, that the district court's order, or the court of appeals' denial of a COA, rests on a determination of the question petitioner presents. And even assuming the result here reflected an inconsistency in circuit practice (see Pet. 7-9), "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). Moreover, although petitioner suggests (Pet. 10-11) that "[a]t least two Circuits have granted COAs to petitioners who argued that their state burglary predicates were overbroad," the cited decisions involved

different statutes and did not directly address Section 2255(f)(3)'s time limitation. See Mays v. United States, 817 F.3d 729 (11th Cir. 2016) (Alabama third-degree burglary; petitioner's first Section 2255 motion was pending when Johnson was decided); McCloud v. United States, No. 16-2051, 2017 WL 3132004 (6th Cir. Mar. 20, 2017) (Michigan breaking and entering; no discussion of whether the petition was timely under Section 2255(f)(3)).

2. Although this case does not warrant plenary review, the Court may wish to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings. The government did not have occasion to brief either the timeliness or the merits of petitioner's motion in the courts below. At this point, the government agrees that in light of current Fourth Circuit case law, petitioner may no longer be eligible for an ACCA sentence. See United States v. Hall, 684 Fed Appx. 333, 335 (2017) (per curiam) (holding that South Carolina's statutory definition of "building" renders the State's third-degree burglary crimes overbroad and that the definition is not divisible under Mathis v. United States, 136 S. Ct. 2243 (2016)); United States v. McLeod, 808 F.3d 972, 976-977 (4th Cir. 2015) (holding that South Carolina's statutory definition of "building" renders the State's second-degree burglary crimes overbroad, but subject to the modified categorical approach, pre-Mathis); Cade v. United States, No. 07-cr-795, 2017 WL 3620004, at *2 (D.S.C. Aug. 23, 2017)

(parties agreed that petitioner's prior South Carolina burglary offenses no longer qualified as ACCA predicates); Dais v. United States, No. 03-cr-386, 2017 WL 3620048, at *2 (D.S.C. Aug. 23, 2017) (same). Were that the case, the government would not oppose relief, notwithstanding any timeliness issues. See Wood v. Milyard, 566 U.S. 463, 474 (2012) (government may waive statute of limitations defense); see also, e.g., Sanchez v. United States, No. 06-CR-67-JRG, 2016 WL 4921029, at *1 & n.2 (E.D. Tenn. Sept. 14, 2016) (granting relief where government waived statute of limitations defense under Section 2255(f)(3)); Jolly v. United States, No. 16-cv-4-RJC, 2016 WL 1614409, at *2 & n.1 (W.D.N.C. Apr. 22, 2016) (granting relief where government stated that even if petition were untimely, it would waive statute of limitations defense).[3]

[3] Because petitioner was released on May 9, 2017, a determination that he is no longer eligible for an ACCA sentence would not affect his term of imprisonment. See Federal Bureau of Prisons, U.S. Dep't of Justice, Find an Inmate, https://www.bop.gov/inmateloc/ (last visited Dec. 19, 2017) (search for inmate register number 12558-171). A remand is warranted, however, because petitioner could be entitled to a one-year reduction in his term of supervised release. If he is no longer subject to an ACCA sentence, petitioner would be relieved of the five-year term of supervised release imposed for his 922(g) offense, see Judgment 3, but would remain subject to the concurrent four-year term of supervised release for his drug offense, see Judgment 4; 21 U.S.C. 841(b)(1)(B) (2000 & Supp. V 2005).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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