

No. 17A264

IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, _____

RAYMOND A. WHITE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

Petitioner is serving an unconstitutional 188-month sentence, improperly enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (“ACCA”), concurrent with a 188-month sentence, improperly enhanced under the career offender provision of the Sentencing Guidelines, U.S.S.G. § 4B1.1.

The district court determined that Petitioner’s ACCA sentence is unconstitutional because it exceeds the statutory maximum, but denied Petitioner’s motion and declined to issue a certificate of appealability (“COA”). The district court’s denial was based on its erroneous determination that Missouri robbery in the second degree qualifies as a “crime of violence”, that Petitioner’s career offender sentence would remain intact, and that Petitioner’s overall sentence would remain unchanged. During the pendency of Petitioner’s appeal, the Eighth Circuit confirmed that Missouri robbery in the second degree does not qualify as a “crime of violence” because “it does not necessarily require the use of violent force as one of its elements.” *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016).

Pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), Petitioner submits that it is reasonably debatable among jurists of reason whether the district court should be given the opportunity to reconsider Petitioner’s initial motion under 28 U.S.C. § 2255, when the district court’s denial of the motion was based on the erroneous determination that Petitioner’s career offender sentence was unreviewable, and his overall sentence would remain unchanged.

The question presented is:

Whether it is reasonably debatable among jurists of reason that a prisoner serving an unconstitutional ACCA sentence is entitled to further consideration on his initial motion under 28 U.S.C. § 2255, when the district court’s denial of the motion was based on its erroneous determination that the prisoner’s overall sentence would remain unchanged.

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Petitioner, Raymond A. White, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

On January 28, 2016, the district court denied Petitioner's initial 28 U.S.C. § 2255 motion and declined to issue a certificate of appealability ("COA"). *White v. United States*, Nos. 15-cv-564, 12-cr-64 (W.D. Mo. Jan. 28, 2016). On June 21, 2016, Petitioner's COA application was granted as to Count 2, but denied as to Count 1. On June 24, 2016, Petitioner's COA application was denied in its entirety and his appeal was dismissed. *White v. United States*, No. 16-1375 (8th Cir. June 24, 2016). On August 23, 2016, a divided panel of the Eighth Circuit granted Petitioner's motion to hold his case in abeyance. On June 20, 2017, the Eighth Circuit denied Petitioner's request for rehearing and rehearing *en banc*, and denied Petitioner's motion to remove case from abeyance and for leave to file an amended COA application as moot. These decisions are included in Appendix A.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit was entered on June 24, 2016. On June 20, 2017, the Eighth Circuit denied Petitioner's request for rehearing and rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 924(e)(1):

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under § 922(g).

18 U.S.C. § 924(e)(2):

As used in this subsection --

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that --

- (i) has an element the use, attempted use, or threatened 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; ...

28 U.S.C. § 2255(a) :

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was

without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2253:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Missouri Revised Statute section 569.030 (1986) (robbery in the second degree):

A person commits the crime of robbery in the second degree when he forcibly steals property.

Missouri Revised Statute section 569.010 (1986), (definition of “forcibly steals”):

A person ‘forcibly steals’, and thereby commits robbery, when, in the course of stealing ... he uses or threatens the immediate use of physical force¹ upon another for the purpose of

- (a) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
- (b) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft ...

¹ The term “physical force” is not defined by statute.

STATEMENT OF THE CASE

On April 18, 2013, Petitioner pled guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (“Count II”), and possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (“Count I”).² The presentence investigation report (“PSR”) concluded that Petitioner’s prior convictions for possession of a short-barreled shotgun, robbery in the second degree, and delivery of a controlled substance, subjected him to enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (“ACCA”), and the career offender provision of the Sentencing Guidelines, U.S.S.G. § 4B1.1.

On September 10, 2014, the Court adopted the PSR without change, and, granting Petitioner a downward departure, sentenced him to 188 months on each count, to be served concurrently. Without the erroneous ACCA enhancement, the erroneous career offender enhancement, Petitioner’s guideline range would have been 84 to 105 months.

Petitioner did not appeal his conviction or sentence, however, on July 6, 2015, he timely filed his initial motion under 28 U.S.C. § 2255, less than a year after his conviction. The district court determined that Petitioner’s ACCA

² The statutory term of imprisonment on Count I is ten years to life, and the maximum statutory term of imprisonment on Count II is ten years. 21 U.S.C. §§ 841(a)(1) and (b)(1)(B); 21 U.S.C. § 851; 18 U.S.C. § 922(g)(1).

sentence on Count II was unconstitutional because possession of a short-barreled shotgun no longer qualified as a violent felony, however, the district court determined that Missouri robbery in the second degree was a crime of violence, and Petitioner was still a career offender and his sentence on Count I would remain unchanged. On this basis, the district court denied Petitioner's motion and declined to issue a COA.

Petitioner filed his notice of appeal, and requested a COA as to three issues. On June 21, 2016, Petitioner's COA application was granted as to Count 2, but denied as to Count 1. Petitioner filed a motion for clarification of the COA order, because it did not address the third issue, and, on June 24, 2016, Petitioner's COA application was denied in its entirety and his appeal was dismissed. On August 23, 2016, a divided panel of the Eighth Circuit granted Petitioner's motion to hold his case in abeyance pending the Eighth Circuit's decisions in *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016) and *United States v. Dace*, 842 F.3d 1067 (8th Cir. 2016), and this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017).

On October 28, 2016, the Eighth Circuit held that Missouri robbery in the second degree does not qualify as "crime of violence" under U.S.S.G. §

2K2.1(a)(4)(A), because “it does not necessarily require the use of violent force as one of its elements.” *Bell*, 840 F.3d at 967.³

On May 18, 2017, Petitioner filed his motion to remove the case from abeyance, for leave to file an amended COA application, and a supplemental petition for rehearing and rehearing *en banc*. In Petitioner’s supplemental petition for rehearing, he asserted that, in light of the Eighth Circuit’s decision in *Bell*, Missouri robbery in the second degree is no longer considered a “crime of violence” under the career offender provision of the Sentencing Guidelines, and the district court’s denial of Petitioner’s initial 2255 motion was based on an erroneous interpretation of the law.

On June 20, 2017, the Eighth Circuit denied Petitioner’s request for rehearing and rehearing *en banc*, and denied Petitioner’s motion to remove case from abeyance and for leave to file an amended COA application as moot.

³ In *United States v. Swopes*, 850 F.3d 979 (8th Cir. 2017), the Eighth Circuit held that Missouri robbery in the second degree is also not a “violent felony” for purposes of the ACCA. However, on June 17, 2017, the Eighth Circuit Court granted the Appellee’s petition for rehearing and rehearing *en banc*. Oral arguments were held on September 19, 2017, and could call into question the Eighth Circuit’s decision in *Bell*.

REASONS FOR GRANTING THE WRIT

- I. **It is at least debatable among jurists of reason whether a prisoner serving an unconstitutional ACCA sentence is entitled to further consideration on his initial motion under 28 U.S.C. § 2255, when the district court's denial of the motion was based on its erroneous determination that the prisoner's overall sentence would remain unchanged.**

The standard for the issuance of a COA is set out in 28 U.S.C. § 2253, which provides, in pertinent part, that the movant must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A movant satisfies this standard by “demonstrating that jurists of reason would disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 481 (2000) (same).

It is important to emphasize that a petitioner need not establish that he will eventually prevail on the merits of his claims in order to demonstrate his entitlement to a COA. In *Miller-El*, this Court specifically noted that “a COA does not require a showing that the appeal will succeed,” and neither should a Court deny

the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will

issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner “has already failed in that endeavor.” *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983).

We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El, 537 U.S. at 336-38.

It is at least debatable among jurists of reason whether, as the Government conceded, Petitioner is entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), when he is serving an unconstitutional 188-month sentence, improperly enhanced under the ACCA. It is also debatable among jurists of reason whether the district court erred in concluding that Petitioner’s 188-month career offender sentence would remain intact, when Petitioner’s prior conviction for Missouri robbery in the second degree is not a crime of violence under *Bell*, and when Petitioner’s prior conviction for possession of a short-barreled shotgun is not a crime of violence under *King v. United States*, 595 F.3d 844 (8th Cir. 2010) or *United States v. Peters*, 215 F.3d 861 (8th Cir. 2000), because it did not receive “criminal history points under subsection (a), (b), or (c) of [§] 4A1.1.”

The district court denial of Petitioner's 2255 motion was made without the benefit of the Eighth Circuit's guidance in *Bell*, and it was made with the understanding that it had no discretion to resentence Petitioner on both counts. *See Alaniz v. United States*, 351 F.3d 365, 368 (8th Cir. 2003) (remanding because the district court's sentence was based on its erroneous determination that the § 2255 movant's sentence was unreviewable). In such a case, it is at least debatable among jurists of reason whether "it is appropriate to remand this case to permit the district court, in the first instance," so the district court can decide whether to exercise its discretion to resentence Petitioner without the unconstitutional ACCA-enhanced sentence and the erroneous career offender enhancement. *See Hohn v. United States*, 193 F.3d 921, 924 (8th Cir. 1999) (in light of new Supreme Court case law, the Eighth Circuit remanded so the district court could determine whether movant was entitled to relief on his § 2255 motion).

On remand, the district court has the discretion to fashion a sentence as it sees fit. *See Pepper v. United States*, 562 U.S. 476, 507 (2011) ("[A] district court's original sentencing intent may be undermined by altering one portion of the calculus. ... on remand, the trial court can reconfigure the sentencing plan ... to satisfy the sentencing factors.").

Because petitioners' § 924(c) sentences are intertwined with their drug sentences, vacating the § 924(c) convictions without allowing for resentencing on the drug convictions would result in periods of custody based on an erroneous application of the Sentencing

Guidelines. This would be inconsistent with both the Guidelines and with § 2255, which directs the court to “correct the sentence as may appear appropriate.”

Gardiner v. United States, 114 F.3d 734, 736 (8th Cir. 1997).

The statute [28 U.S.C. § 2255] gives district courts broad and flexible remedial authority to resentence a defendant and correct the sentence as appropriate. A remedy that seems appropriate is to put § 2255 defendants in the same position as defendants on direct appeal by permitting resentencing ...

United States v. Harrison, 113 F.3d 135, 137 (8th Cir. 1997) (concluding that once the district court vacated the term imposed by the erroneous firearm conviction, it could correct the defendant’s interdependent drug sentence); *United States v. Binford*, 108 F.3d 723, 728 (7th Cir. 1997) (the sentence refers to the aggregate, indivisible term of imprisonment and a “district court has the authority to restructure a defendant’s entire sentence even when the prisoner’s petition attacks the validity of just one of the counts of conviction.”); *United States v. Bruguier*, 735 F.3d 754, 764 (8th Cir. 2013) (reversing one of the four counts and remanding for re-sentencing because the district court based its “sentencing package” on all four convictions); *United States v. Evans*, 314 F.3d 329, 333 (8th Cir. 2002) (a defendant who successfully appeals one part of a multi-count sentencing package has no expectation of finality as to any part of the sentence).

Relying on this Court’s decision in *Johnson*, numerous district courts have vacated unconstitutional ACCA sentences aggregated with career offender

sentences. In *Taylor v. United States*, No. 16-cv-149 (E.D. Mo. Nov. 30, 2016), the District Court for the Eastern District of Missouri vacated Taylor’s sentence, finding that “movant has established that his sentence is ‘in excess of the maximum authorized by law,’ ... [m]ovant is therefore entitled to be resentenced.” *Id.* (quoting 28 U.S.C. § 2255(a)) (noting that “movant met the Career Offender provisions of [U.S.S.G.] § 4B1.1 ...”).⁴

⁴ See also *United States v. Beckham*, 202 F. Supp. 3d 1197, 1203 (E.D. Wash. 2016) (noting that the unlawful ACCA sentence “disrupted” the sentencing scheme, the court resentenced movant on both the firearm and drug offenses); *United States v. Booker*, Nos. 4-cr-49, 16-cv-1107 (Dist. D.C. March 2, 2017) (granting movant’s § 2255 motion, despite government’s argument that the district court should “not address the application of the career offender provision under the Sentencing Guidelines.”); *Phillips v. United States*, Nos. 4-cr-29, 16-cv-58 (E.D. Tn. April 10, 2017) (granting movant’s § 2255 motion on the basis of his unconstitutional ACCA sentence, even though *Johnson* had no impact on movant’s Career Offender designation); *United States v. Farrow*, No. 5-cr-78 (W.D. Va. April 13, 2017) (granting movant’s § 2255 motion on the basis of his unconstitutional ACCA sentence, even though his guideline range was established based on his Career Offender designation); *Drayton v. United States*, Nos. 16-cv-396, 5-cr-16 (W.D. N.C. June 20, 2017) (resentencing on the ACCA count only; declining to “exercise its discretion” to resentence movant on the remaining counts); *United States v. Nelson*, No. 9-cr-211 (M.D. Pa. Oct. 17, 2017) (noting that all counts were “interdependent” on the ACCA sentence, the court determined that *de novo* sentencing was warranted).

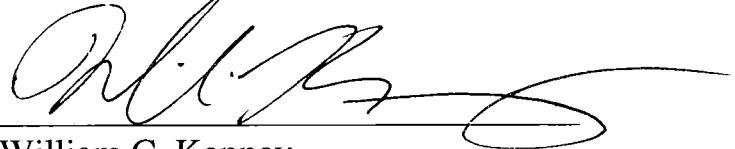
CONCLUSION

The district court found that Petitioner's ACCA sentence was unconstitutional because it exceeds the statutory maximum of 10 years, but denied Petitioner's initial 2255 motion based on its erroneous determination that Missouri robbery in the second degree is a crime of violence, and that Petitioner's career offender sentence would remain unchanged. The district court's denial was based on its erroneous determination that it did not have the discretion to resentence Petitioner on both counts. As a result, Petitioner is serving an unconstitutional sentence, and is subject to an additional 2 years of supervised release. Additionally, Petitioner's erroneous sentencing enhancements preclude him from qualifying for the drug quantity reduction under Amendment 782 to the Sentencing Guidelines.

In light of the Eighth Circuit's decision in *Bell*, Missouri robbery in the second degree is not a crime of violence. It is at least debatable among jurists of reason whether Petitioner is entitled to reconsideration and resentencing by the district court, with the benefit of the Eighth Circuit's decision in *Bell*. It is at least debatable among jurists of reason whether the district court should be entitled to exercise its discretion to resentence Petitioner on both counts, as a number of other district courts have done.

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'W.C. Kenney', with a long horizontal flourish extending to the right.

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