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IN THE SUPREME COURT OF THE UNITED STATES

BILLY DWIGHT SMITH, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case.**

When a movant raising a claim under *Johnson v. United States*, 135 S.Ct. 2551 (2015), would not be an armed career criminal if sentenced today, what is the appropriate burden to demonstrate error when the sentencing court did not specify which clause of the Armed Career Criminal Act applied to each of the prior convictions?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) **Reference to the Official and Unofficial Reports of any Opinions**

The order and judgment of the of the United States Court of Appeals for the Tenth Circuit denying a certificate of appealability is unpublished. *United States v. Smith*, No. 17-6128 (10th Cir. Oct. 24, 2017) (unpublished).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.**

- (i) Date of judgment sought to be reviewed.

The unpublished order of the Tenth Circuit of which review is sought was filed October 24, 2017;

- (ii) Date of any order respecting rehearing.

None;

- (iii) Cross Petition.

None;

- (iv) Statutory Provision Believed to Confer Jurisdiction.

Title 28, United States Code, Section 1254(1)

- (v) Supreme Court Rule 29.4(b) and (c) do not apply.
The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) **The Constitutional Provisions, Statutes and Rules which the Case Involves.**

(1) Statutory Provisions:

18 U.S.C. § 924(e):

(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 section 922(g).

(2) As used in this subsection –

(A) the term “serious drug offense” means –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possession with intent to manufacture or distribute, a controlled substances (as defined in

Section 201 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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 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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This petition seeks review of an order entered by a United States Court of Appeals, denying a certificate of appealability pursuant to Title 28, United States Code, Section 2253(c)(1)(B). The jurisdiction of the District Court was invoked pursuant to Title 28, United States Code, Section 2255. Mr. Smith sought review of the District Court's order denying Section 2255 relief and requested a certificate of appealability from the United States Court of Appeals for the Tenth Circuit. The Court of Appeals denied a certificate of appealability and dismissed the appeal on October 24, 2017. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Facts Material to Consideration of Question Presented

On April 4, 2000, Mr. Smith was indicted on a single count of possession of a firearm after having been convicted of a felony in violation of 18 U.S.C. § 922(g). (*Indictment* dated 4/4/2000, Vol. I, docket number 117). Mr. Smith proceeded to trial and was convicted. (*Judgment in a Criminal Case* dated 5/31/2001, Vol. 1, docket number 49, at 1).

The Government filed a Notice in which it considered Mr. Smith eligible for an enhanced sentence under the ACCA. *See* 18 U.S.C. § 924(e). (*Notice* dated Feb. 8, 2001, Vol. I, docket number 27). Specifically, the Government cited three Oklahoma convictions for enhancement: Oklahoma County Case No. CRF-82-5681, burglary in the second degree (OKLA. STAT. tit. 21, § 1435 (1961)); Cleveland County

Case No. CRF-83-417, robbery with a firearm (OKLA. STAT. tit. 21, § 801 (1982)), and Oklahoma County Case No. CRF-88-004686, robbery with a firearm (OKLA. STAT. tit. 21, § 801 (1982)). (*Id.* at 2). Mr. Smith objected to application of the ACCA, arguing Oklahoma's burglary in the second degree did not fall within the statutory definition of a violent felony. (*Defendant's Objection* dated 4/18/2001, Vol. I, docket number 43 at 2-3). Mr. Smith did not make any argument with respect to robbery with a firearm.

The Government filed a sentencing memorandum in which it argued burglary in the second degree qualified under the ACCA because review of Mr. Smith's charging instrument indicated his offense fell within the generic definition of burglary as set forth in *Taylor v. United States*, 495 U.S. 575 (1990). (*Government's Sentencing Memorandum* dated 4/30/2001, Vol. I, docket number 44, at 3-5). The Government did not articulate how robbery with a firearm was a violent felony. (*Id.* at 1-5).

The district court overruled Mr. Smith's objection to application of the ACCA and issued a written order explaining its conclusion. (*Order* dated 5/31/2001, Vol. I, docket number 48). With respect to robbery with a firearm, the entirety of the district court's analysis was as follows:

Unquestionably, the two robbery convictions fall within the ACCA's definition of violent felony:

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year . . . 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 . . .

(*Id.* at 2) (alterations in original).

The district court’s analysis of the burglary conviction was more thorough. It first applied *Taylor*, 495 U.S. 575, and reviewed Mr. Smith’s charging instrument. (*Id.* at 2-3). The district court concluded Mr. Smith’s burglary conviction fit the generic burglary definition. (*Id.* at 4).

On direct appeal, the Court affirmed the district court’s conclusion that Mr. Smith’s burglary conviction fit the generic definition. *United States v. Smith*, 33 Fed.Appx. 462, 465-66 (10th Cir. 2002) (unpublished).

Mr. Smith received permission to file a second or subsequent Section 2255 motion raising a *Johnson* claim. *In re: Smith*, No. 16-6129 (10th Cir. filed May 17, 2016). Mr. Smith filed his pro se Section 2255 motion on June 27, 2016. (*Motion to Vacate* dated 6/27/2016, Vol. I, docket number 86). The district court appointed the Office of the Federal Public Defender on July 8, 2016 (*Order Appointing Counsel* dated 7/8/2016, Vol. I, docket number 89). Mr. Smith, acting through appointed

counsel of record, sought leave to file an Amended Motion. (*Unopposed Motion to Amend* dated 7/25/2016, Vol. I, docket number 94).

In his Amended Motion, Mr. Smith argued his convictions for robbery with a firearm and burglary in the second degree no longer qualified as violent felonies under the ACCA without the now-void residual clause. (*Amended Motion* dated 8/24/2016, Vol. I, docket number 96, at 5-11). The Government filed a response in which it argued Mr. Smith's challenge to his burglary convictions were procedurally and time barred, and failed on the merits. (*Response* dated 10/3/2016, Vol. 2, docket number 99, at 3-12). Similarly, the Government asserted the robbery convictions qualified under the force clause of the ACCA. (*Id.* at 12-17).

The district court dismissed Mr. Smith's petition. (*Order* dated 4/28/2017, Vol. 1, docket number 109). Specifically, the district court concluded the original sentencing court did not employ the residual clause when it determined Mr. Smith qualified under the ACCA. (*Id.* at 5-6). The original sentencing judge, Judge Ralph Thompson, did not adjudicate the Section 2255 motion at issue in this case. Without implication of the residual clause, the district court dismissed the petition. (*Id.* at 6). The district court also denied a certificate of appealability. (*Id.* at 7). Mr. Smith timely appealed. (*Notice of Appeal* dated 5/25/2017, Vol. 1, docket number 111).

The Tenth Circuit Court of Appeals denied a certificate of appealability and dismissed the appeal. *United States v. Smith*, No. 17-6128 (10th Cir. Oct. 24, 2017) (unpublished). The Court concluded reasonable jurists could not debate the district court's finding that the sentencing court did not rely on the residual clause at sentencing. *Id.* at 4. There was no mention of the residual clause at sentencing and the sentencing court's discussion cited to the force and enumerated clauses of the ACCA. Moreover, the Court of Appeals reasoned that the residual clause was not implicated because the discussion at sentencing focused on whether the prior burglary convictions qualified under the enumerated clause. *Id.* at 5. It cited to *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017) in support.

Mr. Smith did not seek rehearing.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

The Court should grant review in this case because the circuits are divided over how a movant can show *Johnson* error. This presents an issue of national importance that may affect criminal defendants nationwide. In this case, Mr. Smith would not be an armed career criminal if he was sentenced today.

I. *Lower Courts Conflict Over How A Movant Can Demonstrate Johnson Error*

The federal courts of appeal apply different tests when resolving the question of how a movant can show *Johnson* error. *See, e.g., United States v. Taylor*, 873 F.3d

476, 480-81 (5th Cir. 2017) (collecting cases). The Court should grant review to resolve this split.

a. The Tenth Circuit's Test Directly Conflicts with the Fourth's Circuit's Test

The decision below cited to *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017). *Snyder* has held that if, based on the record and the “relevant background legal environment,” a movant’s sentence could have rested on a clause other than the residual clause at sentencing, a movant has not demonstrated Johnson error. *Snyder*, 871 F.3d at 1130.

However, the Fourth Circuit approaches the inquiry differently. There, a *Johnson* movant need only show that his sentence “may have been predicated on application of the now-void residual clause, and therefore may be an unlawful sentence” in order to demonstrate *Johnson* error. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). In the Fourth Circuit, an inconclusive record is sufficient to show error.

The Fourth Circuit’s test accounts for the common problem of ambiguous ACCA sentencing records. Indeed, it noted “[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence.” *Id.* (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus declines to “penalize a movant for a court’s discretionary choice not to specify under

which clause of Section 924(e)(2)(B) an offense qualified as a violent felony.” *Id.* *Winston* further criticized requiring a movant to show affirmative reliance on the residual clause because it would result in “‘selective application’ of the new rule of constitutional law announce in *Johnson*,” in violation of “‘the principle of treating similarly situated defendants the same.’” *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error.

The panel’s decision in this case applying *Snyder* is at odds with the *Winston* decision. Under the *Winston* rule, Mr. Smith would prevail because the sentencing court may have relied on the residual clause to classify his robbery convictions as violent felonies. Whereas the Fourth Circuit’s approach allows for the possibility of unconstitutional reliance on the residual clause where there is ambiguity in the record, the decision below places a far higher burden on *Johnson* movants.

b. Two other Circuit have developed additional tests

The Eleventh and Ninth Circuits have applied different approaches for determining when a *Johnson* claimant has shown error. In a divided decision, a panel of the Eleventh circuit ruled that “[t]o prove a *Johnson* claim, 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.” *Beeman v. United States*, 871 F.3d 1215, 1221-

22 (11th Cir. 2017). In the Eleventh Circuit, a *Johnson* movant fails to meet their burden to demonstrate error if “it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement.” *Id.* at 1222. *But see id.* at 1225-31 (Williams, J., dissenting) (submitting the appropriate inquiry is whether a *Johnson* movant has demonstrated that his prior convictions could not possibly call under any clause but the residual clause under the legal framework that exists today).

The Ninth’s Circuit’s approach adds another test to the *Johnson* question. Applying *Stromberg v. California*, 283 U.S. 359 (1931), the Ninth Circuit held that “when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or constitutionally invalid legal theory,” so an unclear record is sufficient for a movant to show *Johnson* error. *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). The *Geozos* panel ultimately decided that the alleged *Johnson* error was not harmless because the movant’s prior conviction for Florida robbery was no longer a violent felony under the current legal framework in that circuit.

In short, the circuits have offered and applied divergent legal tests for whether a *Johnson* movant has met his burden to demonstrate error. This Court should resolve this deepening divide. *Cf. Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (“Because

uniformity among federal courts is important on questions of this order, we granted certiorari to end the division of authority.”).

II. *Mr. Smith is entitled to relief*

At the time of Mr. Smith’s sentencing, there was no dispute his robbery with a firearm convictions qualified as violent felonies under the Act’s residual clause. This is demonstrated by the lack of argument from both parties and the summary conclusion of the district court.

In the Government’s initial notice regarding Mr. Smith’s potential eligibility under the ACCA, the Government did not explain how any of Mr. Smith’s convictions qualified as violent felonies. (*Notice* dated 2/08/2001, Vol. 1, docket number 27, at 1-2). Mr. Smith raised an objection to applicability of the Act, but focused his argument squarely on his burglary conviction. (*Objection* dated 4/18/2001, Vol. 1, docket number 43, at 2). He specifically argued “[B]urglary in the second degree . . . under the laws of the States of Oklahoma, is not a violent felony[.]” (*Id.*). No argument was made as to his robbery convictions. The Government responded accordingly, arguing Mr. Smith’s specific burglary conviction fit the generic definition and therefore qualified. (*Government’s Sentencing Memorandum* dated 4/30/2001, Vol. 1, docket number 44, at 2-5).

The sentencing court's written order overruling Mr. Smith's objection is similarly devoid of any analysis, meaningful or otherwise, that his robbery convictions qualified as violent felonies. For the court, there was no question the convictions qualified. (*Order* dated 5/31/2001, Vol. 1, docket number 48, at 2). The residual clause was not quoted in its order and for the district court reviewing the Section 2255 petition, this omission was "purpose[ful]." (*Order* dated 4/28/2017, Vol. 1, docket number 109, at 5). However, the sentencing court did not make a finding the convictions qualified under the elements clause. (*Id.*). The order did not conclude the offense contained, "as an element, the use, attempted use, or threatened use of force," nor did it hold the offense "involve[d] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(i) and (ii).

Without this clarity, neither the judge reviewing the prior sentencing court's order, nor this Court can be sure the residual clause was not employed. Because it is not certain the residual clause was not employed, Mr. Smith has properly shown that *Johnson* affects his case. Without the residual clause, he does not qualify under the Armed Career Criminal Act and his sentence is a violation of due process.

iii. Conclusion

The petition should be granted.

(i) Appendix.

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Smith, No. 17-6218 (10th Cir. Oct. 24, 2017) (unpublished).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

None;

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

Order, dated April 28, 2017, United States District Court for the Western District of Oklahoma, CR-00-49-D; CIV-16-738-D (Docket Number 109);

- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

None.

Respectfully submitted,



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