

No. 17-8480

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES DEAN COUCHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner's request for a certificate of appealability to vacate his sentence based on Johnson v. United States, 135 S. Ct. 2551 (2015), where it determined he was sentenced under a different clause of "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), from the one this Court invalidated in Johnson.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A12) is unreported. The order of the district court (Pet. App. B1-B4) is also unreported. Two previous orders of the court of appeals in petitioner's case are unreported but are available at 329 Fed. Appx. 836 and 521 Fed. Appx. 636.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2018. The petition for a writ of certiorari was filed on April 10, 2018. 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 Western District of Oklahoma, petitioner was convicted on one count of possession of a firearm by a felon and one count of possession of ammunition by a felon, both in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced him to 192 months of imprisonment, to be followed by four years of supervised release. Id. at 2-3. The court of appeals affirmed. 329 Fed. Appx. 836. In 2013, petitioner moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 39 (Mar. 29, 2013). The district court denied the motion. D. Ct. Doc. 42 (Apr. 2, 2013). In 2016, petitioner obtained authorization to file a second Section 2255 motion. D. Ct. Doc. 50 (May 24, 2016). The district court denied the motion, Pet. App. B1-B4, and declined to issue a certificate of appealability (COA). D. Ct. Doc. 63 (Dec. 13, 2016). The court of appeals likewise declined to issue a COA, and it dismissed the appeal. Pet. App. A1-A12.

1. In 2007, officers with the Oklahoma City police department received a tip that a stolen vehicle was located at a specific address. Presentence Investigation Report (PSR) ¶ 4. Petitioner was reportedly wanted by the State of Missouri in connection with the theft. Ibid.

Officers located the vehicle at the address and confirmed that it was stolen, and the owner of the residence allowed the officers inside his home. PSR ¶ 5. Officers found petitioner

hiding behind the refrigerator in the kitchen. PSR ¶ 6. During a search incident to petitioner's arrest, officers located a magazine containing six live .22-caliber rounds in petitioner's front pocket. Ibid. Officers later discovered a .22-caliber pistol on top of the refrigerator along with a wallet with petitioner's identification and a key to the stolen vehicle. PSR ¶ 7.

A federal grand jury in the Western District of Oklahoma returned an indictment charging petitioner with possession of a firearm by a felon, and possession of ammunition by a felon, both in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty to both charges. Judgment 1.

2. The default sentencing range for a violation of Section 922(g)(1) is zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), however, prescribes a sentencing range of 15 years to life imprisonment if the defendant has 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).

The Probation Office determined that petitioner was subject to an enhanced sentence under the ACCA. PSR ¶ 25. The Probation Office observed that petitioner had four prior burglary convictions -- two Oklahoma second-degree burglary convictions (in 1992 and 1994), see PSR ¶¶ 37, 41; a 1993 Oregon first-degree burglary conviction, see PSR ¶ 39; and a 2002 Missouri second-degree burglary conviction, see PSR ¶ 44; Pet. App. A1. The Probation Office also noted that petitioner had two prior convictions for escape. PSR ¶¶ 32, 42. The Probation Office viewed all six of those convictions as violent felonies and petitioner as therefore subject to an enhanced sentence under the ACCA. PSR ¶ 25. The Probation Office did not specify whether petitioner’s burglary convictions qualified as ACCA predicate offenses under the enumerated offenses clause (which includes “burglary”) or the residual clause. The presentence report calculated an advisory guidelines range of 168 to 210 months of imprisonment, which, by virtue of the ACCA’s statutory minimum, became 180 to 210 months. PSR ¶ 86; see Sentencing Guidelines 5G1.1(b) (2007).

Petitioner objected to the determination that he was subject to the ACCA, focusing on the conduct underlying his prior offenses and arguing that his escape convictions involved non-violent walkaways, and that his Oklahoma and Missouri burglary convictions involved unlawful entries into commercial premises (a business and two storage units). Addendum to PSR 24. At the August 18, 2008, sentencing hearing, petitioner's counsel reiterated his objection to petitioner being classified as an armed career criminal. Counsel asserted that, even though some of petitioner's crimes had been deemed violent felonies under the ACCA, petitioner "has never committed a violent crime," but is "a drug addict" who has "committed various crimes just to support that habit." Sent. Tr. 4.

The district court overruled the objections. The court explained that the ACCA applies "based on the definitions that Congress and the higher courts have used," and that crimes such as escape and burglary can qualify as violent felonies regardless of "the level of actual violence that may have been employed." Sent. Tr. 4-5. The court further explained that "the decisions don't require that there be actual violence in particular in connection with a particular offense, but rather if the burglary, for example, involves a building or structure that's deemed to involve a sufficient risk of violence for the nature of it." Id. at 5. And, although the court noted that it could not tell whether one of the burglaries (apparently the Missouri conviction, see Pet. App. A10

n.3) involved a structure, it determined that the three other burglary convictions under Oklahoma and Oregon law qualified, as did the escape convictions. Sent. Tr. at 4-5. It accordingly overruled petitioner's objections "directed to the characterization of [his] prior felonies and the determination of armed career criminal status." Id. at 5; see Pet. A2-A3.

The district court sentenced petitioner to 192 months of imprisonment, to be followed by four years of supervised release. Sent. Tr. 10-11; Judgment 2-3.

2. Petitioner appealed. His counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), identifying no non-frivolous issues for appeal. 329 Fed. Appx. at 837. After reviewing the record on its own, the court of appeals determined that the district court had erred in classifying petitioner's escape convictions as violent felonies in light of Chambers v. United States, 555 U.S. 122 (2009). It determined, however, that petitioner was still properly classified and sentenced as an armed career criminal in light of three of petitioner's prior burglary convictions, citing precedent holding that similar prior convictions constitute generic "burglary" under the ACCA's enumerated offenses clause. 329 Fed. Appx. at 837-838 (citing United States v. Hill, 53 F.3d 1151, 1154-1155 (10th Cir.) (en banc), cert. denied, 516 U.S. 900 (1995)).

3. On March 29, 2013, petitioner filed a motion to vacate his sentence under Section 2255, alleging ineffective assistance

of trial counsel, and violations of the Eighth Amendment and the Ex Post Facto Clause. D. Ct. Doc. 39, at 4-5. The district court denied the motion, D. Ct. Doc. 42, and the court of appeals declined to issue a COA, 521 Fed. Appx. 636.

4. On June 26, 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. The Court explained, however, that its decision invalidating the residual clause "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 2563. The Court later held in Welch, supra, that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. at 1265.

5. On June 2, 2016, petitioner sought permission from the court of appeals under 28 U.S.C. 2255(h)(2) to file a second Section 2255 motion to vacate his sentence based on Johnson. Pet. App. A4. Section 2255(h)(2) allows a second or successive collateral attack under Section 2255 if a court of appeals panel "certifie[s] as provided in [S]ection 2244" that it "contain[s]" a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(2). Under 28 U.S.C. 2244(b)(3)(c), a "court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application

satisfies the requirements of this subsection," which mirror the requirements of Section 2255(h). See 28 U.S.C. 2255(b)(2)(A). Petitioner argued that, because the residual clause was invalid, his burglary convictions could qualify as violent felonies only under the ACCA's enumerated offenses clause or elements clause. And according to petitioner, his convictions satisfied neither clause. Pet. App. A4. The court of appeals granted the application. Ibid.

The district court thereafter denied petitioner's second Section 2255 motion. Pet. App. B1-B4. The court acknowledged that Johnson announced a new rule of constitutional law that had been made retroactive to cases on collateral review. Id. at B2. The court explained, however, that "[petitioner's] sentence was not affected by the issues involved in Johnson and would not be affected by the new rule announced in that case," ibid., because "[p]etitioner's sentence was not based on the residual clause," but relied instead on the still-valid enumerated offenses clause, id. at B3. The district court declined to issue a COA. D. Ct. Doc. 63.

6. The court of appeals declined to issue a COA and dismissed petitioner's appeal. Pet. App. A1-A12. Citing its decision in United States v. Snyder, 871 F.3d 1122 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018), the court explained that petitioner, as the moving party, bore the burden of proving his claim, which required him to prove that his sentence was based

upon the now-invalid residual clause. Pet. App. A5; see Snyder, 871 F.3d at 1128-1129. It further explained that to meet that burden, petitioner could point to either the sentencing record or case law in effect at the time of sentencing to show that his sentence was based on the residual clause. Snyder, 871 F.3d at 1128-1129.

The court of appeals determined that, in the circumstances of this case, both the record and the then-extant case law showed that petitioner's ACCA-enhanced sentence was based upon the enumerated offenses clause. Pet. App. A5-A12. The court found "no mention of the residual clause in the sentencing record." Id. at A6. The court rejected petitioner's reliance on the district court's reference at sentencing to the existence of a "sufficient risk of violence" during the burglary of a building or structure. Ibid. The court explained that petitioner took that statement "out of context," and that the district court had used that language to explain why petitioner was wrong to argue that his burglaries were not violent felonies because they did not involve actual violence. Ibid. ("The judge correctly responded that courts do not look to a defendant's actual conduct but to the elements of a prior conviction."). And the court determined that at the time of sentencing, "there would have been little dispute" that petitioner's Oklahoma and Oregon burglary convictions fell within the ACCA's enumerated offenses clause. Id. at A11 (quoting Snyder, 871 F.3d at 1129).

ARGUMENT

Petitioner contends (Pet. 11-28) that the court of appeals incorrectly declined to grant him a COA. In his view, the court of appeals erred by requiring him, as a prerequisite to relief on a claim premised on Johnson v. United States, 135 S. Ct. 2551 (2015), to prove that his ACCA sentence had been imposed based on the residual clause that Johnson invalidated. Although some inconsistency exists in the approaches of different circuits to Johnson-premiered collateral attacks like petitioner's, further review is not warranted in this case. Petitioner has not shown that the lower courts erred in rejecting his postconviction motion, his claim would fail under any circuit's approach, and this Court has recently denied review of similar claims in other cases. See Casey v. United States, No. 17-1251 (June 25, 2018); Westover v. United States, No. 17-7607 (Apr. 30, 2018); Snyder v. United States, No. 17-7157 (Apr. 30, 2018). The same result is appropriate here.

1. a. 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 obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented

were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted). Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), the Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). Petitioner failed to make that showing.

b. A federal prisoner generally may not obtain postconviction relief unless he establishes that his sentence was "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. 2255(a). In addition, under 28 U.S.C. 2255(h), a second or successive motion for postconviction relief may not be filed unless a court of appeals certifies that it contains (as relevant here) "a new rule of constitutional law, made retroactive to cases on collateral review by th[is] * * * Court, that was previously unavailable." 28 U.S.C. 2255(h)(2). Section 2255(h) incorporates by reference the certification procedures of 28 U.S.C. 2244, under which a panel need only determine that the prisoner has made a "prima facie" showing to that effect. 28 U.S.C. 2244(b)(3)(C). Section 2244 further provides, however, that even when such a prima facie showing initially is made, a legal claim in a second or successive habeas application "shall [be] dismissed" if it does not in fact rely on a new retroactive

rule of constitutional law. 28 U.S.C. 2244(b)(4), 2255(h)(2). Petitioner accordingly does not dispute that the lower courts here were required to satisfy themselves that his claim met that condition. See United States v. Snyder, 871 F.3d 1122, 1128-1129 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018).

Those stringent standards reflect the principle that collateral review "is an extraordinary remedy" that "'will not be allowed to do service for an appeal.'" Bousley v. United States, 523 U.S. 614, 621 (1998) (citation omitted). After the completion of direct review in a criminal case, "a presumption of finality and legality attaches to the conviction and sentence," Brecht v. Abrahamson, 507 U.S. 619, 633 (1993), and courts are "entitled to presume" that the defendant's sentence is lawful, United States v. Frady, 456 U.S. 152, 164 (1982). That "presumption of regularity * * * makes it appropriate to assign a proof burden to the defendant" on collateral review. Parke v. Raley, 506 U.S. 20, 31 (1992); see Hawk v. Olson, 326 U.S. 271, 279 (1945) (explaining that a prisoner necessarily "carries the burden in a collateral attack on a judgment").

2. a. The limitations on postconviction relief, and the prisoner's burden of proof in that context, preclude an approach that would entitle a prisoner to postconviction relief from an ACCA sentence on a second or successive collateral attack based on Johnson without requiring the prisoner to show that his sentence

was actually the result of constitutional error under Johnson. Johnson invalidated the ACCA's residual clause, but it "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." 135 S. Ct. at 2563. Accordingly, as several circuits have recognized, a prisoner who fails to prove that his ACCA sentence actually depended on application of the residual clause fails to carry his burden of demonstrating a constitutional violation that would entitle him to collateral relief. See Dimott v. United States, 881 F.3d 232, 242-243 (1st Cir. 2018), cert. denied, No. 17-1251 (June 25, 2018); Potter v. United States, 887 F.3d 785, 787-788 (6th Cir. 2018); Beeman v. United States, 871 F.3d 1215, 1224 (11th Cir. 2017); Snyder, 871 F.3d at 1130.

b. In this case, reasonable jurists would not debate the court of appeals' determination that petitioner failed to make that showing. Petitioner renews his contention (Pet. 20-21) that the sentencing record shows that the district court relied on the residual clause in imposing his sentence because it stated that "if the burglary * * * involves a building or structure that's deemed to involve a sufficient risk of violence for the nature of it," Sent. Tr. 5, then the burglary is a violent felony even if no violence occurred. The court of appeals correctly rejected that argument. The sentencing court made that statement in response to petitioner's argument that he is not an armed career criminal

because none of his prior crimes involved actual violence. Id. at 4; Pet. App. A6. The court cited Taylor v. United States, 495 U.S. 575, 588 (1990), to explain that Congress singled out burglary, as opposed to other property crimes, for inclusion in the ACCA's enumerated offenses clause because of the inherent potential for violence during an encounter with an occupant when an offender enters or remains in a building or structure with the intent to commit a crime. Pet. App. A6-A7.

Contrary to petitioner's contention (Pet. 18-21) that it should be assumed that district courts relied on the residual clause in the pre-Johnson era because it was the "path of least resistance," Pet. 21, the relevant legal background that existed at the time of petitioner's August 2008 sentencing strongly indicates that his Oklahoma and Oregon burglary convictions qualified as ACCA predicates under the enumerated offenses clause. Burglary is one of the ACCA's enumerated offenses, see 18 U.S.C. 924(e) (2) (B) (ii), and as the pre-Johnson experience in this Court and the courts of appeals demonstrates, the most logical basis for classifying a burglary conviction as an ACCA violent felony was to classify it as "burglary" under the enumerated offenses clause. See, e.g., Taylor, 495 U.S. at 598-599) (reviewing classification of convictions for Missouri burglary); United States v. Green, 55 F.3d 1513, 1515 (10th Cir. 1995) (analyzing Oklahoma second-degree burglary), cert. denied, 516 U.S. 924 (1995); United States v.

Hill, 53 F.3d 1151, 1155 (10th Cir.) (en banc) (same), cert. denied, 516 U.S. 900 (1995).

Indeed, on petitioner's direct appeal, the court of appeals concluded that all of petitioner's burglary convictions "were sufficient to qualify him for the armed career criminal enhancement under [Section] 924(c)," citing United States v. Hill, supra, in support of its conclusion that "the generic burglary elements [are] satisfied by language very similar to the charging language at issue here." 329 Fed. Appx. at 838. Accordingly, reasonable jurists would not debate the correctness of the determination that, "[a]t the time of sentencing[,]" * * * "there would have been little dispute" that [petitioner's burglary] convictions fell within the ACCA's enumerated-offense clause," Pet. App. 11a (quoting Snyder, 871 F.3d at 1129).

c. Petitioner's assertion (Pet. 18) that the court of appeals' decision "will lead to arbitrary results" by conditioning relief on whether the sentencing court "happened to state on the record that it relied on the residual clause," see Pet. 21-24, is incorrect. As the court of appeals explained, a prisoner can meet his burden under Section 2255 to establish Johnson error if the record or "relevant background legal environment" at the time of sentencing indicate that he was likely sentenced under the residual clause. Pet. App. A5. A prisoner may show, for example, that courts had classified his offense as an ACCA predicate under the

residual clause, supporting an inference that the sentencing court did the same. He may also show that his offense could only have been treated as a violent felony under the residual clause because, under the law at the time, it would not have satisfied one of the other clauses. See, e.g., Sykes v. United States, 564 U.S. 1, 8 (2011) (analyzing Indiana felonious vehicle flight), overruled by Johnson, 135 S. Ct. at 2563.

The court of appeals examined all of the relevant circumstances here and determined that petitioner's burglary convictions were classified as ACCA predicates under the enumerated offenses clause, not the later-invalidated residual clause. Pet. App. A11. It is not arbitrary to require a prisoner to satisfy the ordinary burden of proof when seeking collateral relief under Johnson. As one court of appeals has observed, "[r]equiring habeas petitioners to establish -- by a preponderance of the evidence -- that they were sentenced pursuant to the residual clause does not lead to treating similarly situated defendants differently. Precisely the opposite: it is imposing a uniform rule." Dimott, 881 F.3d at 242. "What would be arbitrary is to treat Johnson claimants differently than all other [Section] 2255 movants claiming a constitutional violation." Beeman, 871 F.3d at 1224 (emphasis added).

d. Petitioner is also incorrect to the extent he contends (Pet. 16) that his claim is supported by Stromberg v. California,

283 U.S. 359 (1931), which invalidated a conviction based on a general verdict where the jury had been instructed on alternative theories of guilt, one of which was unconstitutional. Id. at 367-369. Stromberg involved a direct appeal from a conviction in state court, and thus did not implicate the burden imposed on prisoners in the collateral-review context. Moreover, unlike a jury's reasons for returning a guilty verdict, which generally cannot be examined after the verdict is announced, see Fed. R. Evid. 606(b), the basis for a district court's determination that a defendant's prior conviction qualifies as a violent felony under the ACCA can be determined after the fact by reference to the judge's own recollection, the record in the case, the relevant legal background, and an examination of the statute of conviction. And in any event, even Stromberg errors are subject to harmless-error review, meaning that reversal is not warranted based on the theoretical possibility that the jury relied on an improper ground. See Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per curiam) (adopting, in the collateral review context, Brecht's "substantial and injurious effect" harmless-error standard for Stromberg errors). Stromberg does not support petitioner's claim that he can obtain collateral relief based on Johnson without showing a Johnson error.

3. Petitioner contends (Pet. 12-17) that this Court's review is warranted because of a disagreement among the courts of

appeals regarding a Johnson movant's burden of proof. Petitioner's claim of a circuit conflict relies principally on United States v. Winston, 850 F.3d 677 (4th Cir. 2017), and United States v. Geozos, 870 F.3d 890 (9th Cir. 2017), both of which, as here, involved second or successive motions under Section 2255 invoking Johnson. Although those courts of appeals have applied a different standard to determine whether a successive petition should be authorized, further review of any conflict is unwarranted in this case.

In Geozos and Winston, the courts of appeals granted the defendants' applications to file successive motions based on Johnson. 870 F.3d at 894; 850 F.3d at 681. The district court then denied those motions, and the defendants appealed. Ibid. On appeal, the government argued that the district courts should have dismissed the motions under Section 2244(b)(4) for failure to show reliance on a new retroactive rule of constitutional law, because the record did not show that the district court had relied on the residual clause to classify the disputed prior convictions as violent felonies. The courts of appeals in Geozos and Winston interpreted the phrase "relies on" in Section 2244(b)(2)(A) to require only a showing that the prisoner's sentence "may have been predicated on application of the now-void residual clause." 870 F.3d at 896 & n.6 (citation omitted); 850 F.3d at 682. And they found that showing to have been made where the records did not indicate "which clause of Section 924(e)(2)(B)" had been applied

at sentencing. Winston, 850 F.3d at 682; see Geozos, 870 F.3d at 896-897.

The “may have been” rule adopted in Winston and Geozos derives from dicta in an Eleventh Circuit decision, In re Chance, 831 F.3d 1335 (2016), that concerned a prisoner’s application for authorization to file a second-or-successive motion for relief following Johnson. See Winston, 850 F.3d at 682 (citing Chance, 831 F.3d at 1340); see also Geozos, 870 F.3d at 894 n.4, 896 n.6 (citing Winston and Chance). The Eleventh Circuit, however, has since rejected that dicta. See Beeman, 871 F.3d at 1228 n.3. As the Sixth Circuit has explained, the approach suggested by that dicta is flawed because it not only “flip[s] the normal burdens” in collateral attacks but also “create[s] strange incentives.” Potter, 887 F.3d at 788. Indeed, the rule petitioner seeks, under which the absence of a record about which ACCA clause was originally applied would entitle a prisoner to seek relief, would produce anomalous results. It would bar relief for a defendant who invited the creation of a record by objecting at sentencing to his ACCA classification, while at the same time allowing a collateral attack by a defendant who made no such objection. Ibid.

4. Petitioner contends (Pet. 25-26) that this case would be a good vehicle to consider how a movant can show a Johnson claim on a silent record because his prior convictions cannot be upheld under either of the ACCA’s remaining clauses. That is incorrect.

The record here is not silent. To the contrary, the court of appeals examined it and determined that petitioner was, in fact, sentenced under the enumerated offenses clause -- not the residual clause. Pet. App. A5-A12. His sentence was affirmed on direct review on precisely that basis. 329 Fed. Appx. 837-838. He thus would not qualify for relief under any court of appeals' approach. Indeed, the Ninth Circuit in Geozos explicitly recognized that a prisoner cannot establish that his claim "relies on" Johnson for purposes of filing a second-or-successive Section 2255 motion if the circumstances show that he was not in fact sentenced based on the residual clause. Geozos, 870 F.3d at 896.*

* Petitioner briefly argues (Pet. 26-28) that the court of appeals' decisions "creates a separate and independent due process violation" because it causes a prisoner who does not qualify for the ACCA's mandatory minimum sentence to serve "more time than the law allows." Pet. 26. This hinges on the question whether petitioner is validly subject to an ACCA sentence under current law, which in turn hinges on questions about the classification of petitioner's state law crimes that do not warrant this Court's review. In any event, petitioner did not raise a due-process challenge below, and this Court's "traditional rule * * * precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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