No. 18-229

In the Supreme Court of the United States

RALPH CURRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), provides for enhanced statutory penalties for certain convicted felons who unlawfully possess firearms and whose criminal histories include at least three prior convictions for a "serious drug offense" or a "violent felony."

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). In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause is unconstitutionally vague, *id.* at 2557, but it emphasized that the decision "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.

Petitioner was sentenced as an armed career criminal based on four prior convictions—one for a serious drug offense (the sale of cocaine under Florida law), and three for violent felonies: one for aggravated assault under Georgia law and two for burglary under Florida law. Pet. 9; Presentence Investigation Report ¶¶ 25, 29, 30, 34. He contends (Pet. 20-32) that this Court's review is warranted to address whether a prisoner seeking to challenge his sentence under *Johnson* in a second-or-successive motion under 28 U.S.C. 2255 may obtain relief without proving that he was sentenced under the residual clause that was invalidated in *Johnson*, as opposed to one of the ACCA's still-valid clauses. That issue does not warrant this Court's review. This Court

has recently and repeatedly denied review of similar issues in other cases.[1] It should follow the same course here.[2]

1. For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in *Couchman* v. *United States*, No. 17-8480 (July 13, 2018), and *King* v. *United States*, No. 17-8280 (July 13, 2018), a defendant who moves 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 Gov't Br. in Opp. at 13-18, *King*,

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[1] See *Jordan* v. *United States*, No. 18-5692 (Dec. 3, 2018); *George* v. *United States*, No. 18-5475 (Dec. 3, 2018); *Sailor* v. *United States*, No. 18-5268 (Oct. 29, 2018); *McGee* v. *United States*, No. 18-5263 (Oct. 29, 2018); *Murphy* v. *United States*, No. 18-5230 (Oct. 29, 2018); *Perez* v. *United States*, No. 18-5217 (Oct. 9, 2018); *Safford* v. *United States*, No. 17-9170 (Oct. 1, 2018); *Oxner* v. *United States*, No. 17-9014 (Oct. 1, 2018); *Couchman* v. *United States*, No. 17-8480 (Oct. 1, 2018); *King* v. *United States*, No. 17-8280 (Oct. 1, 2018); *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).

[2] Other pending petitions raise the same issue, or related issues. *Prutting* v. *United States*, No. 18-5398 (filed July 25, 2018); *Washington* v. *United States*, No. 18-5594 (filed Aug. 13, 2018); *Sanford* v. *United States*, No. 18-5876 (filed Aug. 30, 2018); *Wyatt* v. *United States*, No. 18-6013 (filed Sept. 14, 2018).

supra (No. 17-8280); see also Gov't Br. in Opp. at 12-17, *Couchman*, *supra* (No. 17-8480).[3]

The decision below is therefore correct, and its approach is consistent with the First, Sixth, Eighth, and Tenth Circuits. See *Dimott* v. *United States*, 881 F.3d 232, 242-243 (1st Cir.), cert. denied, 138 S. Ct. 2678 (2018); *Potter* v. *United States*, 887 F.3d 785, 787-788 (6th Cir. 2018); *Walker* v. *United States*, 900 F.3d 1012, 1015 (8th Cir. 2018); *United States* v. *Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018).

In its briefs in opposition to the petitions filed in *King* and *Couchman*, the United States acknowledged that some inconsistency exists in the approaches of different circuits to *Johnson*-premised collateral attacks like petitioner's. Those briefs explained that the Fourth and Ninth Circuits had interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A)—which provides 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. *Geozos*, 870 F.3d 890, 896-897 & n.6 (9th Cir. 2017) (citation omitted); *United States* v. *Winston*, 850 F.3d 677, 682 (4th Cir. 2017); see Gov't Br. in Opp. at 16-18, *King*, *supra* (No. 17-8280); see also Gov't Br. in Opp. at 17-19, *Couchman*, *supra* (No. 17-8480).

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[3] We have served petitioner with copies of the government's briefs in opposition in *King* and *Couchman*.

After the government's briefs in those cases were 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, 224 (2018); see *id.* at 221-224, and it found the requisite gatekeeping inquiry for a second or successive collateral attack to have been made where the record did not indicate which clause of the ACCA had been applied at sentencing, *id.* at 224. Further review of inconsistency in the approach taken by the Third, Fourth, and Ninth Circuits remains unwarranted for the reasons stated in the government's previous briefs in opposition. See Br. in Opp. at 16-18, *King*, *supra* (No. 17-8280); Br. in Opp. at 17-19, *Couchman*, *supra* (No. 17-8480).

2. Petitioner's case differs in some respects from the aforementioned cases, but those differences do not alter the conclusion that review is unwarranted.

On November 30, 2016, the district court entered an order granting petitioner's Section 2255 motion, based on its determination that the court may have relied on the residual clause. Pet. App. 10-11, 18-19. The court's determination accorded with *In re Chance*, 831 F.3d 1335 (11th Cir. 2016), in which a panel of the court of appeals stated in dictum that "the required showing is simply that [Section] 924(c) may no longer authorize [a movant's] sentence as that statute stands after *Johnson*." *Id.* at 1341. The court of appeals reversed based on its then-recent decision in *Beeman* v. *United States*, 871 F.3d 1215 (11th Cir. 2017), petition for cert. pending, No. 18-6385 (filed Oct. 16, 2018), which rejected *Chance*'s "possibility" dictum and determined that a defendant must show that it is more likely than not that the residual clause led to the sentencing court's enhancement of his sentence. *Id.* at 1222; see Pet. App. 4.

The court in *Beeman* explained that, in making this showing, "if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause." 871 F.3d at 1224 n.5. In petitioner's case, the court of appeals observed that petitioner "concede[d] that the record was unclear" as to which clause of the ACCA the sentencing court relied upon to classify petitioner's burglary convictions as violent felonies, and it therefore remanded to the district court with instructions to dismiss. Pet. App. 4; see *id.* at 4-5.

Petitioner contends (Pet. 38-41) that instead of ordering the district court to dismiss his petition, the court of appeals should have ordered the district court to hold a hearing on whether petitioner could satisfy the higher standard announced in *Beeman*. According to petitioner (*ibid.*), 28 U.S.C. 2255(b) entitles him to a hearing before the district court "unless the * * * files and records of the case conclusively show that [he wa]s entitled to no relief," *ibid.*, and the court of appeals' determination that the sentencing record was "unclear" as to which clause the district court relied upon to impose an ACCA sentence mandates that he receive a hearing on his claim. Pet. 40. That is incorrect. In this context, an unclear sentencing record means that petitioner cannot satisfy his burden to show that he was sentenced under the residual clause, and the files and records of petitioner's case therefore conclusively show that he is not entitled to relief. See, *e.g.*, *Beeman*, 871 F.3d at 1222. And petitioner identifies no court of appeals, whatever its view of a movant's burden to show *Johnson* error in a Section 2255 motion, that requires a hearing to determine whether the standard has been met.

According to petitioner (Pet. 35-36), the court of appeals further erred by ordering the district court to dismiss the petition because the district court had alternatively suggested in a footnote that there is "a reasonable likelihood" petitioner was sentenced under the residual clause. See Pet. App. 19 n.8. It is unclear that the district court's reference to a "reasonable likelihood" was necessarily equivalent to a preponderance-of-the-evidence standard, and, in any event, the court of appeals implicitly rejected petitioner's case-specific contention when it found that "the record was unclear" regarding which clause of the ACCA the sentencing court had relied upon. Pet. App. 4. And in any event, at the time of petitioner's November 2005 sentencing, the sentencing court could have determined that Florida burglary categorically qualified as generic burglary within the meaning of ACCA's enumerated offenses clause. This Court had defined burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 598 (1990). The Eleventh Circuit had held that "*every* burglary under the Florida statute * * * requires the entering or remaining in a structure" with the requisite criminal intent. *United States* v. *Spell*, 44 F.3d 936, 939 (1995) (citation and emphasis omitted).[4] Indeed, one week after petitioner was sentenced, the Eleventh Circuit held that Florida burglary "is an enumerated felony under [Section] 924(e)(2)(B)(ii)." *United States* v. *James*, 430 F.3d 1150,

[4] *Spell* concluded that Florida burglary did not categorically satisfy the Sentencing Guidelines' career-offender provision, which then included only "burglary of a dwelling" as an enumerated offense. 44 F.3d at 939-940; see Sentencing Guidelines § 4B1.2(1)(ii) (1995). The ACCA's reference to "burglary" is not so limited.

1157 (2005), aff'd, 550 U.S. 192 (2007), overruled on other grounds by *Johnson*, *supra*.

The Eleventh Circuit first applied the ACCA's residual clause to Florida burglary in 2006. See *United States* v. *Matthews*, 466 F.3d 1271, 1275 (2006), cert. denied, 552 U.S. 921 (2007). And in 2007, this Court held that Florida burglary is categorically broader than generic burglary because the Florida statute defines a "structure" to include curtilage. *James* v. *United States*, 550 U.S. 192, 212 (2007), overruled on other grounds by *Johnson*, *supra*. But at the time petitioner was sentenced, those decisions lay in the future.[5]

Finally, after the court of appeals reversed the district court's order granting petitioner's Section 2255 motion and remanded the case with instructions to dismiss, the district court did not dismiss the case but instead *sua sponte* issued a "Notice to Parties," in which it stated that "[t]he undersigned was [petitioner's] sentencing judge and relied on the residual clause in determining that his [prior] convictions" supported his ACCA enhancement. Pet. App. 7. Petitioner then unsuccessfully sought rehearing from the court of appeals based on the district court's notice. *Id.* at 23-24.

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[5] The district court stated (Pet. App. 19 n.8) that the Eleventh Circuit had deemed Florida burglary to be broader than generic burglary in *United States* v. *Adams*, 91 F.3d 114 (per curiam), cert. denied, 519 U.S. 1047 (1996), but that is incorrect. *Adams* addressed Georgia's burglary statute, which the parties did not dispute encompassed non-generic forms of the offense. See 91 F.3d at 115. Although the court referred to "Florida's non-generic burglary statute" in citing *Spell*, it is clear from context that the court was referring to the fact that the Florida statute did not satisfy the narrower burglary definition in the career-offender guideline, not the ACCA. *Ibid.*

The district court's after-the-fact statement does not suggest that this case warrants further review in this Court. As an initial matter, the district court's post-hoc statement arguably reflects an abuse of its discretion. The case was remanded to the district court for the specific purpose of "dismiss[ing]" petitioner's motion. Pet. App. 5. A district court acting on remand cannot vary or examine an appellate court's mandate "for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *United States* v. *Tamayo*, 80 F.3d 1514, 1520 (11th Cir. 1996) (citation omitted). Accordingly, when a court issues a "limited mandate, * * * the trial court is restricted in the range of issues it may consider on remand," *United States* v. *Davis*, 329 F.3d 1250, 1252 (11th Cir.), cert. denied, 540 U.S. 925 (2003), and it "abuse[s] [its] discretion" by "assert[ing] jurisdiction over matters outside the scope of a limited mandate," *Tamayo*, 80 F.3d at 1520.

Even assuming that the district court's statement was permissibly issued, petitioner filed for rehearing on the basis of that statement, and the court of appeals declined to revisit its decision. Petitioner may also seek a certificate of appealability when the district court denies his Section 2255 motion, which has not yet happened. Petitioner identifies no other case (and the government is not aware of any such case) where the law at the time of sentencing was unclear, but the district court issues a statement after the court of appeals has issued a decision in the case purporting to clarify the basis for its sentencing determination. The unusual fact

pattern presented by this case makes it an unsuitable vehicle for further review.[6]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2018

[6] The government waives any further response to the petition unless this Court requests otherwise.