No. 15-646

IN THE
Supreme Court of the United States

In re WILLIE B. SHARP, *Petitioner.*

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The government concedes all of the circumstances that make this case exceptional. It concedes that the circuits are deeply split on the question of whether *Johnson* has been "made retroactive" to second or successive § 2255 motions by this Court (a split that has only gotten deeper since the government filed its brief). Opp. 14-16. And it concedes that this split has led to a gross inequity—potentially thousands of people are sitting in prison, carrying out unconstitutional sentences, while their counterparts in other circuits are being resentenced and released.

The government also concedes that *Johnson has* been "made retroactive"—*i.e.*, that prisoners who, like Petitioner, were sentenced under the residual clause in the Fifth, Tenth, and Eleventh Circuits are entitled to relief. Opp. 11 & n.6.[1] And it concedes that, due to the statute of limitations, "a ruling from this Court clarifying whether *Johnson* is retroactive must occur during this Term." Opp. 19.

Moreover, the government concedes that the record in this case provides the perfect vehicle to resolve the gross inequity. As the government expressly acknowledges, Petitioner has only one non-residual-clause predicate under ACCA and has already served his statutory maximum of ten years in prison. Pet. 30-31; Opp. 3-4 & n.2. Accordingly, Petitioner will be

[1] The government also concedes that even if *Johnson* has not already been "made retroactive," this Court can make it so now. Pet. 31-32.

entitled to immediate release upon retroactive application of *Johnson*.

The government's *only* argument is that these exceptional circumstances are defeated by a remote, long-shot possibility that, if it materialized, would almost certainly *not* occur in time to resolve the extraordinary circumstances presented by this circuit split. According to the government, *In re Williams*, 806 F.3d 322 (5th Cir. 2015), might have created a circuit split in the context of *initial* § 2255 motions, such that this Court could someday resolve *Johnson*'s retroactivity through its ordinary certiorari process. That argument is confounding. The Fifth Circuit has *not* held that *Johnson* does not apply retroactively to initial § 2255 motions, and both *Williams* itself and other Fifth Circuit case law provide reason to believe otherwise. Moreover, even if the Fifth Circuit *had* created a split in the context of an initial § 2255 motion, and even if the split were at some point squarely presented in a petition for certiorari, this Court would be unable to resolve the split before prisoners' claims expire under the statute of limitations.

At bottom, the government's argument is that the exceptional circumstances presented by this case—gross inequity affecting the liberty of thousands of people, where the government agrees that relief is warranted, and such relief is subject to a strict deadline—should be disregarded based on a theoretical possibility that, if true, would nonetheless fail to provide any meaningful resolution for those thousands of people.

This Court should grant this petition. Failing to do so would effectively admit that the Court's original habeas jurisdiction is nugatory, notwithstanding the Court's holding to the contrary in *Felker*. Even if the Court were to eventually happen upon a viable petition for certiorari, the prudent approach would be to order briefing and argument in this case immediately, and later consolidate it with any such petition.

1. The government does not contest that the record in this case presents the ideal vehicle to resolve the question presented. Pet. 30-31. Unlike the other petitions pending before the Court, there is no dispute that Petitioner would be entitled to immediate release upon retroactive application of *Johnson*.[2] In particular, as the government recognizes, enhancement under ACCA requires three qualifying predicate convictions, and Petitioner has just one. Opp. at 3. Although the government refers to Petitioner having other prior felony convictions, it concedes that none could have qualified under ACCA but for the residual clause. The government recognizes that under this Court's own precedent, Petitioner's convictions for attempted burglary and burglary in Florida could have qualified only under the now-void residual clause. Opp. at 3-4 & n.2 (citing *James v. United States*, 550 U.S. 192, 211-12

[2] *See, e.g.*, Brief for the United States In Opposition at 19-22, *In re Triplett*, No. 15-625 (U.S. Dec. 14, 2015), 2015 WL 8959420 ("Petitioner has failed to show that, without the residual clause, he would not have been subject to the ACCA's enhanced penalties.").

(2007)).[3] And the government does not contest that Petitioner's *Johnson* claim is properly before this Court.[4]

2. The government concedes that the first of two factors required to exercise this Court's discretionary habeas jurisdiction is satisfied—that Petitioner has "shown that he has no other adequate means to obtain the relief he now seeks." Opp. 12-14.[5]

3. With respect to the second factor—the existence of "exceptional circumstances"—the government concedes each circumstance that makes this case

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[3] To prevent the possibility of any confusion, Petitioner notes that his convictions under Fla. Stat. § 893.13(1)(f) occurred at a time when that provision prohibited only simple possession of a controlled substance, *see Gibbs v. State*, 698 So. 2d 1206, 1207 & n.2 (Fla. 1997), which is not a "serious drug offense" under ACCA, *see* 18 U.S.C. § 924(e)(2)(A) (requiring "manufacturing, distributing, or possessing with intent to manufacture or distribute"); *United States v. Pitts*, 394 F. App'x 680, 683 (11th Cir. 2010).

[4] *See also Trest v. Cain*, 522 U.S. 87, 89 (1997) (the government's failure to raise any issue related to procedural default constitutes waiver); Sup. Ct. R. 15.2 (issues not raised in brief in opposition are deemed waived).

[5] The government erroneously states that "Petitioner concedes that Section 2244(b)(3)(E)'s bar against certiorari review of gatekeeping determinations by the courts of appeals applies." Opp. 11 (internal citation omitted). Although the exercise of original habeas jurisdiction is warranted to the extent that § 2244(b)(3) applies here, Petitioner expressly requested that his Petition be construed as a petition for certiorari "[t]o the extent that this Court believes that Petitioner is not precluded from seeking certiorari upon the denial of authorization under § 2255(h)." Pet. 10 n.4.

exceptional, but nevertheless argues that the Court should ignore them.

First, the government concedes that there is a deep split as to the question presented, putting the First, Second, Seventh, Eighth, and Ninth Circuits at odds with the Fifth, Tenth, and Eleventh Circuits. Pet. 11-16; Opp. at 14-16. One day after the government filed its brief, the split deepened. *See In re Watkins*, No. 15-5038, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) (joining the First, Second, Seventh, Eighth, and Ninth Circuits in authorizing a successive § 2255 motion based on *Johnson*, and holding that "the Supreme Court has made *Johnson*'s rule categorically retroactive to cases on collateral review").

Second, the government does not contest that this split has resulted in manifest injustice. Prisoners convicted in the Fifth, Tenth and Eleventh Circuits—who are each serving *at least* five additional years as a result of their ACCA enhancement—continue to carry out their unconstitutional sentences while those in the First, Second, Seventh, Eighth Ninth—and now Sixth—Circuits are resentenced or sent home. *See* Pet. 23-26.

Third, the government agrees that *Johnson has* been "made retroactive" and the Fifth, Tenth, and Eleventh Circuits are wrong. In other words, the government *agrees* that Petitioner should right now be at home with his family, not in a prison cell.

Fourth, the government concedes that the statute of limitations for these prisoners is impending—that "a ruling from this Court clarifying whether *Johnson* is

retroactive *must occur during this Term*." Opp. 19 (emphasis added); Pet. 24-26. Although the government cites a case noting that it *could in theory* waive the statute of limitations, Opp. 19, it notably omits any commitment to do so. And even if the government had made such a commitment, it is hardly clear that such a statement would be binding in any other case or on any future administration. To the many prisoners whose liberty is at stake after being subject to enhanced sentences at the government's urging, the vague possibility of voluntary waiver in the future offers nothing.

Notwithstanding these extraordinary circumstances, the government says that this Court should not exercise its discretionary habeas jurisdiction in this case. The sole reason it offers is that the Fifth Circuit's reasoning in *Williams* suggests that *Johnson* is not a substantive rule. Opp. 17. According to the government, that reasoning is enough to create a "conflict," which makes it "reasonably possible" that this Court would grant certiorari in the context of an initial § 2255 motion. *Id.* This argument is unpersuasive for many reasons.

First, it is not at all clear that *Williams* creates a circuit split in the context of initial § 2255 motions. *Williams* itself arose in the context of a successive § 2255 motion and therefore could not have held *anything* with respect to initial motions. Neither the Fifth Circuit's opinion nor the parties' briefing to the court ever addressed the applicability of *Johnson* to initial motions. Furthermore, although the court's reasoning suggests that *Johnson* is not a substantive

rule (which could lead to a split), the court also stated that it was adopting the "decision and reasoning" of *Rivero*. *Williams*, 806 F.3d at 326. In *Rivero*, the Eleventh Circuit similarly reasoned that "*Johnson* does not meet the criteria the Supreme Court uses to determine whether the retroactivity exception for new substantive rules applies," but expressly noted that if a petitioner "were seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively." *In re Rivero*, 797 F.3d 986, 989, 991 (11th Cir. 2015). The Fifth Circuit did not indicate any intention to depart from *Rivero* in this respect.

Moreover, reading *Williams* to preclude retroactive application to initial § 2255 motions would be inconsistent with other Fifth Circuit case law. The Fifth Circuit has emphasized that the standard that applies to successive motions is "intentionally high" relative to initial motions. *In re Jackson*, 776 F.3d 292, 294 (5th Cir. 2015). Furthermore, the Fifth Circuit and district courts therein have consistently been willing to assume that this Court's pre-*Johnson* ACCA cases apply retroactively and have cited favorably decisions that apply those cases retroactively. *See, e.g.*, *id.* at 294-95; *Neal v. United States*, No. 3:04-CR-0046-M 01, 2011 WL 2412551, at *1 (N.D. Tex. May 19, 2011)), *report and recommendation adopted by* 2011 WL 2314142 (N.D. Tex. June 9, 2011); *Williams v. United States*, No. 3:03-CR-0139-N (01), 2011 WL 6130414, at *3 n.3 (N.D. Tex. Nov. 21, 2011), *report and recommendation adopted by* 2011 WL 6130412 (N.D. Tex. Dec. 9, 2011). Although the government points to one district court case interpreting *Williams* to

preclude application of *Johnson* to initial motions, Opp. 17 (citing Order, *Harrimon v. United States*, 15-cv-00152 (N.D. Tex. Nov. 19, 2015), ECF No. 9), the Fifth Circuit has not yet had the opportunity to decide whether that decision was correct. *See also* Leah Litman, *Circuit Splits & Original Writs*, Casetext (Dec. 17, 2015) (observing that "no court of appeals in a case involving a first petition for post-conviction review has held that *Johnson* is not retroactive" and identifying the district court's decision in *Harrimon* as an outlier).[6]

Accordingly, it is, at best, a stretch to assume that the Fifth Circuit intended to depart from all other circuits in a five-page opinion, in which the court never mentions initial motions, and in which the parties' briefing never even mentioned the standard for retroactivity that applies to initial motions. The government's own language reveals as much. *See* Opp. 17 (positing only that *Williams* would "*seem to* preclude" initial motions "*[u]nless the Fifth Circuit narrows its holding*" (emphasis added)).

Second, even assuming the Fifth Circuit *had* intended to create a split over the retroactivity of *Johnson* to initial § 2255 motions, it would not undermine any of the exceptional circumstances in this case. This case presents a manifest inequity, wherein the government concedes that potentially thousands of persons are unlawfully in custody, and, as the government acknowledges, "a ruling from this Court

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[6] *Available at* https://casetext.com/posts/circuit-splits-original-writs (last visited on Dec. 17, 2015).

clarifying whether *Johnson* is retroactive must occur during this Term." Opp. 19. There is simply no possibility that an initial § 2255 motion will be processed through the district court, through appeal in the Fifth Circuit, and then through this Court's certiorari process in time to provide meaningful relief to any of these prisoners.[7]

The only case that the government is able to identify is *Harrimon v. United States*, which has yet to be docketed and apparently seeks certiorari prior to any judgment by the Fifth Circuit. While Petitioner urges the Court to consider this issue by any means it deems possible, there are several obvious problems with assuming that prejudgment certiorari is a viable option.

First, prejudgment certiorari raises several concerning hurdles: Can prejudgment certiorari be used to bypass the certificate of appealability process that is statutorily mandated for initial motions by 28 U.S.C. § 2253? If so, would this Court apply a plenary standard or ask whether there has been a "substantial

[7] The government appears to assume, without any explanation or authority, that the absence of a circuit split in the context of initial motions is an absolute "condition[] for issuing the writ," regardless of whether that split would have any meaningful effect on the exceptional circumstances before the Court. Opp. 19. That assumption is incoherent and conflicts with the actual test under this Court's Rule 20.4(a)—whether "exceptional circumstances" exist. The identification of a circuit split that has no hope of resolving the exceptional circumstances before the Court obviously has no relevance.

showing," 28 U.S.C. § 2253(c)(2), obstructing the Court from squarely reaching the question presented?

Second, prejudgment certiorari would be premised on the assumption that the Fifth Circuit would extend *Williams* to initial motions which, as described above, is far from clear. The Court could conclude that it should wait for the Fifth Circuit to clarify this ambiguity rather than granting prejudgment certiorari.

Third, prejudgment certiorari may be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. While Petitioner believes that this standard is satisfied for the same reasons that this petition satisfies Rule 20.4, the government could simply invoke the same argument to oppose *Harrimon* as it does here: Because *Williams* has purportedly created a split as to initial motions, Mr. Harrimon cannot "justify deviation from normal appellate practice." Sup. Ct. R. 11; *see also generally* Litman, *supra* (reviewing all avenues through which this Court could conceivably address the question presented, including prejudgment certiorari, and concluding that original habeas jurisdiction is the most appropriate).

At bottom, it appears from the government's brief that it would be satisfied for prisoners like Mr. Sharp to remain in prison, serving unconstitutional sentences, despite this Court having ruled them unconstitutional. The government all but concedes that it would support the exercise of original jurisdiction in this case, absent the Fifth Circuit's decision in *Williams*. *See* Opp. 18 n.8

(explaining that the only basis for distinguishing its support for original habeas jurisdiction in *In re Smith* is the potential split on initial motions created by *Williams*). At the same time, however, the government concedes that this new avenue would be wholly ineffectual to the prisoners who need that question resolved before the end of this Term. The Court ought not allow the government to avoid the consequences of having lost in *Johnson*—precisely the result that will follow should the Court decline to grant this petition.

Even if the Court were to assume that a viable petition for certiorari could arrive through the Fifth Circuit prior to the end of this Term, the prudent course of action would be to immediately grant Mr. Sharp's petition, order briefing and schedule argument, and then later consolidate that hypothetical petition. That would allow the Court to exercise its original habeas jurisdiction now—when it appears implausible that the Court could decide the question presented by any other means and thus this case qualifies as "extraordinary"—while reserving the option of deciding it on a petition for certiorari, in the unlikely event one should arise in time.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of habeas corpus should be granted. In the alternative, the Court should immediately order any necessary additional briefing and/or argument.

Respectfully submitted,

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