No. 15-7426

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD RAY HARRIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), is unconstitutionally vague. The question presented is whether Johnson is a new "substantive" rule of constitutional law, entitled to retroactive application in an initial motion to vacate an ACCA-enhanced sentence under 28 U.S.C. 2255(a).

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## OPINIONS BELOW

The opinion of the district court (Pet. App. 6a-7a) denying petitioner's motion to vacate sentence under 28 U.S.C. 2255(a) and denying a certificate of appealability (COA) is unreported. Prior opinions in petitioner's case are reported at 568 F.3d 531 and 410 Fed. Appx. 836.

## JURISDICTION

The judgment of the district court was entered on November 19, 2015. A notice of appeal (Pet. App. 3a) was filed on November 20, 2015. The case was docketed in the court of appeals on November 23, 2015 (No. 15-11175). The jurisdiction

of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

Under 28 U.S.C. 1254(1), this Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not been entered by that court. See, e.g., United States v. Nixon, 418 U.S. 683, 692 (1974). Because a notice of appeal has been filed and this case has been properly docketed in the court of appeals, it is "in" the court of appeals for purposes of Section 1254(1). Ibid.; see Hohn v. United States, 524 U.S. 236, 248 (1998) (lack of a COA does not "prevent[] a case from being in the court of appeals for purposes of [Section] 1254(1)"). Under 28 U.S.C. 2101(e), a petition for a writ of certiorari before judgment is timely if it is filed "at any time before judgment."

## STATEMENT

In 2008, following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on two counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to concurrent terms of 96 months of imprisonment on each count, to be followed by three years of supervised release. 07-cr-00017 Docket entry No. (Dkt. No.) 26, at 2-3 (June 13, 2008). The court of appeals vacated and remanded for resentencing. 568 F.3d 531. On remand, the district court

resentenced petitioner to concurrent terms of 188 months of imprisonment on each count, to be followed by three years of supervised release. Dkt. No. 44, at 2-3 (May 14, 2010). The court of appeals affirmed. 410 Fed. Appx. 836. This Court denied certiorari. 132 S. Ct. 372 (No. 10-10558).

On October 23, 2015, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255(a). Dkt. No. 63. The district court denied the motion and declined to issue a COA. Pet. App. 6a-7a. Petitioner filed a notice of appeal. Id. at 3a.

1. On February 6, 2007, petitioner pawned a Mossberg .22-caliber rifle at City Jewelry & Loan in Wichita Falls, Texas. He later admitted that he stole the firearm from his father and pawned it for money to purchase drugs. Presentence Investigation Report (PSR) ¶¶ 12, 14.

On March 30, 2007, the Wichita Falls Police Department was alerted that a white 1994 Chevrolet truck had been stolen. Later that day, a police officer attempted to make contact with the driver of a car matching that description, but the driver, later identified as petitioner, exited the vehicle and fled on foot. The officer apprehended petitioner and arrested him. During a subsequent search of the vehicle, officers discovered four firearms. Petitioner later admitted that he had stolen the firearms when he burglarized the home belonging to the owner of

the stolen vehicle. Further investigation revealed that petitioner's extensive criminal history included several prior felony convictions. PSR ¶¶ 16-22.

2. On June 19, 2007, a federal grand jury in the Northern District of Texas returned an indictment charging petitioner with two counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Dkt. No. 1. Petitioner pleaded guilty pursuant to a written plea agreement. Pet. App. 65a-73a. Petitioner waived his rights to appeal and to collaterally attack his sentence, subject to certain exceptions, one of which reserved petitioner's right to argue that his sentence "exceed[s] the proper statutory maximum punishment." Id. at 70a. The plea agreement also included petitioner's written acknowledgment that his criminal history included four prior felony convictions: a 1986 Texas conviction for burglary of a building, a 2002 Texas conviction for burglary of a habitation, and two Texas convictions (in 2003 and 2004) for evading arrest using a motor vehicle. Id. at 76a; see PSR ¶¶ 40, 45-47.

3. a. A conviction for violating Section 922(g)(1) ordinarily exposes the offender to a statutory maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug offense" that were

"committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a minimum sentence of at least 15 years of imprisonment and authorizes a maximum sentence of life. See Logan v. United States, 552 U.S. 23, 26 (2007); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that -- * * * (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). The second half of this definition ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as the residual clause.

b. The Probation Office calculated a total offense level of 27 and a criminal history category of VI, which resulted in an advisory Sentencing Guidelines range of 130 to 162 months of imprisonment. PSR ¶ 84. The government objected on the ground that petitioner's criminal history required that the court sentence him as an armed career criminal because he had four qualifying "violent felony" convictions: two for burglary and two for evading arrest with a vehicle. Add. to PSR 1. The Probation Office adhered to the view that the ACCA did not apply. Id. at 2. In the view of the Probation Office,

petitioner's 1986 burglary conviction was the only prior conviction that qualified as an ACCA violent felony. Second Add. to PSR 3-5. The Probation Office explained that petitioner's 2002 burglary conviction did not qualify because the pertinent documentation did not demonstrate that petitioner broke into the residence "with the intent to commit theft." Id. at 4.

c. At sentencing, the district court declined to apply the ACCA because the court was "unable to say with the level of confidence necessary to avoid the rule of lenity" that the crime of evading arrest with a vehicle typically involves "purposeful, violent, and aggressive conduct." Pet. App. 50a. In light of the court's rulings during sentencing, including a ruling that petitioner's 2002 burglary conviction was not a violent felony, petitioner's recalculated advisory guidelines range was 77 to 96 months of imprisonment. Id. at 54a. The court imposed concurrent sentences of 96 months on each count, to be followed by three years of supervised release. Id. at 59a; Dkt. No. 26, at 2-3.

4. On the government's appeal, the court of appeals vacated and remanded for resentencing. 568 F.3d 531. The court concluded that a conviction for evading arrest by use of a vehicle was a "violent felony" under the ACCA's residual clause, as interpreted in Begay v. United States, 553 U.S. 137 (2008).

568 F.3d at 536. This Court denied certiorari. 558 U.S. 1093 (No. 09-6395).

On remand, the district court sentenced petitioner under the ACCA to concurrent terms of 188 months of imprisonment on each count, to be followed by three years of supervised release. Dkt. No. 44, at 2-3. The court of appeals affirmed. 410 Fed. Appx. 836. Four months later, this Court issued its decision in Sykes v. United States, 131 S. Ct. 2267 (2011), overruled by 135 S. Ct. 2551 (2015), holding that a conviction for fleeing and eluding law enforcement officers qualified as a violent felony under the residual clause. Id. at 2277. This Court denied petitioner's petition for a writ of certiorari. 132 S. Ct. 372 (No. 10-10558).

5. On June 26, 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague. Id. at 2557.

a. On October 23, 2015, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255(a). Pet. App. 16a-23a. Petitioner contended that, in light of Johnson, he had been erroneously classified and sentenced as an armed career criminal. Id. at 18a-21a.

b. On November 12, 2015, while petitioner's motion was pending, the court of appeals held in In re Williams, 806 F.3d 322 (5th Cir. 2015), petitions for mandamus and habeas corpus

pending, Nos. 15-758 & 15-759 (filed Dec. 11, 2015), that Johnson was not retroactively applicable to cases on collateral review. In Williams, a federal prisoner who was sentenced under the ACCA filed an application in the court of appeals for leave to file a second or successive Section 2255 motion based on Johnson. See 28 U.S.C. 2244(b)(3), 2255(h). The courts of appeals may authorize the filing of a successive Section 2255 motion if the defendant makes a "prima facie" showing -- i.e., "a sufficient showing of possible merit to warrant a fuller exploration by the district court," Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001) (citation omitted) -- that (as relevant here) his claim relies on "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. 2244(b)(3)(C), 2255(h)(2).

In Tyler v. Cain, 533 U.S. 656 (2001), the Court explained that the state prisoner analogue to Section 2255(h)(2) vests this Court alone with the authority to "ma[k]e" a new constitutional rule retroactive to cases on collateral review and that the Court "ma[k]e[s]" a new rule retroactive by holding it to be retroactive. Id. at 663. The Court further explained that, although an express statement that a new rule is retroactive is sufficient, an express statement is not necessary because the Court can "make" a new rule retroactive "over the

course of two cases * * * with the right combination of holdings." Id. at 666.

In its court-ordered response in Williams, the government acknowledged that the holding in Johnson is a "substantive, constitutional holding [that] is fully retroactive in ACCA cases," and the government stated that Williams had made a "sufficient showing of possible merit to warrant a fuller exploration by the district court." 15-30731 Docket entry, at 3-4, 6 (Sept. 24, 2015) (citation omitted). The court of appeals, however, denied Williams's application. 806 F.3d at 327. The court concluded that the holding of Johnson was not a new "substantive" rule entitled to retroactive effect within the meaning of Teague v. Lane, 489 U.S. 288 (1989). 806 F.3d at 325-326. The court reasoned that "Johnson does not forbid the criminalization of any of the conduct covered by the ACCA -- Congress retains the power to increase punishments by prior felonious conduct" if it acts with sufficient clarity. Id. at 325. The court further reasoned that Johnson "does not forbid a certain category of punishment," because Congress could constitutionally impose a 15-year sentence on a defendant with the same prior convictions as Williams after Johnson. Id. at 325-326. Accordingly, the court concluded that "Johnson is not available to Williams on collateral review." Id. at 326.

c. On November 19, 2015, the district court denied petitioner's Section 2255 motion. Pet. App. 6a-8a. The court explained that the court of appeals' holding in Williams that Johnson is not a substantive rule "unmistakably forecloses" postconviction relief based on Johnson, even in petitioner's initial Section 2255 motion. Id. at 6a.

The district court declined to issue a COA, Pet. App. 7a, which is a statutory and jurisdictional prerequisite for an appeal from a final order denying a Section 2255 motion, see Gonzalez v. Thaler, 132 S. Ct. 641, 647 (2012). On November 20, 2015, the court granted petitioner leave to proceed in forma pauperis (IFP) on appeal, but the court reiterated that the order granting IFP status "d[id] not affect the court's prior denial of a [COA]." Pet. App. 5a.

d. On November 20, 2015, petitioner filed a notice of appeal from the district court's denial of his Section 2255 motion. Pet. App. 3a. Although petitioner has not yet requested the court of appeals to issue a COA, the Federal Rules of Appellate Procedure provide that, in the absence of an "express request for a [COA][,] * * * the notice of appeal constitutes" such a request. Fed. R. App. P. 22(b)(2); see, e.g., Miller v. Dretke, 404 F.3d 908, 912 (5th Cir. 2005) (treating notice of appeal as an implied request for a COA). On November 23, 2015, petitioner's appeal was docketed in the court

of appeals. Pet. App. 1a-2a. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254(1). On December 18, 2015, the court of appeals issued a briefing notice stating that petitioner must apply for a COA and submit a brief in support of the application within 40 days (absent any extension) or the appeal will be dismissed. 15-11175 Docket entry.

ARGUMENT

Petitioner has filed a petition for a writ of certiorari before judgment, asking this Court to decide whether the holding of Johnson v. United States, 135 S. Ct. 2251 (2015), is a substantive rule that applies retroactively to cases on collateral review. The courts of appeals are divided on that question, and they are further divided on the question whether this Court has "made" Johnson retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2), such that courts of appeals should authorize the filing of second or successive motions raising claims based on Johnson. Those circuit conflicts have developed in the context of denials of authorization to file second or successive collateral attacks, and Congress has eliminated statutory certiorari review of those denials. See 28 U.S.C. 2244(b)(3)(E). Petitioner's case, however, is not subject to that statutory barrier because petitioner did not need authorization from the court of appeals

to file his initial Section 2255 motion for post-conviction relief. Accordingly, unlike prisoners who were denied authorization to file second or successive Section 2255 motions raising Johnson claims, petitioner can raise the question of Johnson's retroactivity in a petition for a writ of certiorari, including a petition for a writ of certiorari before judgment. See 28 U.S.C. 2101(e).

A petition for a writ of certiorari before judgment "will 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. Petitioner's case, standing on its own, does not appear to satisfy the "very demanding standard [that this Court] require[s] in order to grant certiorari [before judgment]." Mount Soledad Mem'l Ass'n v. Trunk, 134 S. Ct. 2658, 2659 (2014) (statement of Alito, J., respecting the denial of the petition for a writ of certiorari before judgment). Nevertheless, resolution of the retroactivity of Johnson in petitioner's case would have wider legal and practical importance for the larger class of prisoners who need authorization to file second or successive motions raising Johnson claims within the one-year limitations period set forth in 28 U.S.C. 2255(f)(3). If the Court concludes that those considerations create the degree of imperative public importance

that justifies the resolution during this Term of the conflicts concerning the retroactivity of Johnson, this petition presents an appropriate opportunity for doing so.

1. a. The government agrees with petitioner that the holding of Johnson is a new substantive rule, and the government further agrees that this Court has "made" Johnson retroactive to cases on collateral review within the meaning of Section 2255(h)(2), such that courts of appeals should authorize the filing of second or successive Section 2255 motions raising Johnson claims.

i. Johnson's holding that the ACCA's residual clause is unconstitutionally vague represents "a new rule of constitutional law * * * that was previously unavailable." 28 U.S.C. 2255(h)(2). No pre-Johnson precedent dictated that the residual clause was unconstitutionally vague. To the contrary, the pre-Johnson decisions in James v. United States, 550 U.S. 192 (2007), and Sykes v. United States, 131 S. Ct. 2267 (2011), expressly rejected the dissents' claim that the residual clause was vague. To conclude as it did, Johnson had to "overrule[]" the "contrary holdings in James and Sykes," 135 S. Ct. at 2563, and "there can be no dispute that a decision announces a new rule it if expressly overrules a prior decision." Graham v. Collins, 506 U.S. 461, 467 (1993).

ii. Johnson's new rule invalidating the ACCA's residual clause is a "substantive" rule. In Penry v. Lynaugh, 492 U.S. 302 (1989), abrogated on other grounds, 536 U.S. 304 (2002), this Court held that a substantive rule includes a rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." Id. at 329-330. As applied to the ACCA, Johnson has precisely that effect. As the Court has more recently explained, a new rule that alters the statutory sentencing range for a crime and results in the imposition of a "punishment that the law cannot impose," Schriro v. Summerlin, 542 U.S. 348, 352 (2004), is a substantive rule.

In cases where a prisoner's ACCA sentence depended on the residual clause, the defendant has received an enhanced sentence of at least 15 years of imprisonment (the statutory mandatory minimum), when the correct statutory maximum for the crime is ten years of imprisonment. Compare 18 U.S.C. 924(e), with 18 U.S.C. 924(a)(2). The misapplication of the ACCA resulting from Johnson's invalidation of the residual clause thus has clear substantive effect, just as pre-Johnson decisions that narrowed the interpretation of the ACCA had substantive effect. See, e.g., Bryant v. Warden, 738 F.3d 1253, 1278 (11th Cir. 2013) (holding that a misapplication of the ACCA based on Begay v. United States, 553 U.S. 137 (2008), was a substantive rule under Summerlin).

iii. Because the new, previously unavailable rule of constitutional law announced in Johnson is substantive, it follows that the rule has been "made retroactive to cases on collateral review by [this] Court." 28 U.S.C. 2255(h)(2). The Court's decision in Tyler v. Cain, 533 U.S. 656 (2001), provides the framework for analyzing that question. In Tyler, all nine Justices agreed that the statutory term "made" is synonymous with "held" and that, while an explicit statement of retroactivity is sufficient to make a rule retroactive, it is not necessary because a rule can be "made" retroactive "over the course of two cases * * * with the right combination of holdings." Id. at 666 (majority); id. at 668-669 (O'Connor, J., concurring); id. at 672-673 (Breyer, J., dissenting). Tyler's claim was that Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam), which found a Louisiana jury instruction defining "reasonable doubt" constitutionally defective, had been "made" retroactive by the later decision in Sullivan v. Louisiana, 508 U.S. 275 (1993), which held that Cage errors are "structural" errors that are not subject to harmless-error review. Although the Court accepted the premise that multiple cases could "make" a new rule retroactive, it rejected the view that Cage had been "made" retroactive by Sullivan. Tyler, 533 U.S. at 656-658.

Justice O'Connor wrote separately to explain -- in language that the four dissenting Justices endorsed and the majority did

not dispute -- that, unlike the new procedural rule at issue in Tyler, a new substantive rule of constitutional law has been "made" retroactive to cases on collateral review. As Justice O'Connor explained, "if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review." Tyler, 533 U.S. at 668-669 (O'Connor, J., concurring); see id. at 672-673 (Breyer, J., dissenting) ("The matter is one of logic. If Case One holds that all men are mortal and Case Two holds that Socrates is a man, we do not need Case Three to hold that Socrates is mortal."). Justice O'Connor further explained that, when a new substantive rule is at issue, the required "Case One" is Penry, supra, which defined a substantive rule to include a rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." 492 U.S. 329-330. Accordingly, when a later case ("Case Two") announces "a given rule * * * of that particular type" -- i.e., a substantive rule as defined by Penry -- then it logically and "necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." Tyler, 533 U.S. at 669 (O'Connor, J., concurring); see id. at 675 (Breyer, J., dissenting).

Accordingly, if an ACCA defendant can demonstrate that, without the residual clause, he would not have been subject to the ACCA's enhanced penalties, then he has made at least a prima facie showing that his claim satisfies Section 2255(h)(2) by relying on a new rule of constitutional law that has been made retroactive by this Court. In that circumstance, a court of appeals should grant an application for leave to file a successive Section 2255 motion.

b. The courts of appeals that have considered gatekeeping motions under 28 U.S.C. 2255(h) are divided on the question whether Johnson announced a new substantive rule, and they are further divided on the question whether this Court has "made" Johnson retroactive to cases on collateral review.

The Sixth and Seventh Circuits have agreed with the government that Johnson announced a new "substantive" rule that has therefore been "made" retroactive to ACCA cases on collateral review. See In re Watkins, No. 15-5038, 2015 WL 9241176 (6th Cir. Dec. 17, 2015); Price v. United States, 795 F.3d 731, 734-735 (7th Cir. 2015). The Sixth Circuit explained that, "[b]ecause Johnson prohibits the imposition of an increased sentence on those defendants whose status as armed career criminals is dependent on offenses that fall within the residual clause," it is a substantive rule entitled to

retroactive effect within the meaning of Teague v. Lane, 489 U.S. 288 (1989). Watkins, 2015 WL 9241176, at *6.

The First and Eighth Circuits have relied on the government's concession that the Court has made Johnson retroactive to cases on collateral review to conclude that petitioners seeking authorization to file successive Section 2255 motions based on Johnson have made a prima facie showing that their claims fall within the scope of Section 2252(h)(2). See Pakala v. United States, 804 F.3d 139, 139 (1st Cir. 2015) (per curiam); Woods v. United States, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam).

The Eleventh Circuit agrees with the Sixth and Seventh Circuits that Johnson announced a new substantive rule of constitutional law. See In re Rivero, 797 F.3d 986, 989-990 (2015). But the court nevertheless denied a prisoner's request for authorization to file a successive Section 2255 motion in light of Johnson, reasoning that because Congress could have authorized the same sentence for the defendant's conduct had it done so with language that was not vague, the rule announced in Johnson has not been "made" retroactive to cases on collateral review by this Court. Ibid. The court issued its decision without requesting a response from the United States to the prisoner's application, and it later requested additional briefing from both parties. 9/14/15 Order, Rivero, supra (No.

15-13089). The Eleventh Circuit has taken no further action since receiving that briefing.

The Tenth Circuit has also denied a prisoner's application for leave to file a second or successive Section 2255 motion challenging his ACCA sentence based on Johnson. See In re Gieswein, 802 F.3d 1143 (2015) (per curiam). The court acknowledged that Tyler recognized the doctrine of retroactivity-by-necessary-implication, but the court concluded that a court of appeals cannot "determine, for itself in the first instance, whether the rule in Johnson is of a type that the Supreme Court has held applies retroactively"; in its view, only this Court can do so. Id. at 1148.

And, as described above, the Fifth Circuit concluded in In re Williams, 806 F.3d 322 (2015), petitions for mandamus and habeas corpus pending (Nos. 15-758 & 15-759), that the holding of Johnson was not a new substantive rule at all, and thus it is "not available * * * on collateral review," because "Johnson does not forbid the criminalization of any of the conduct covered by the ACCA -- Congress retains the power to increase punishments by prior felonious conduct" if it uses language that is not vague. Id. at 325. The court of appeals acknowledged disagreement with the decisions in Price and Pakala. Id. at 326. The court stated that its "decision and reasoning align with the majority" in Rivero, ibid., but that statement

overlooked the Eleventh Circuit's conclusion that "[t]he new rule announced in Johnson is substantive rather than procedural." 797 F.3d at 989 (brackets and citation omitted); see id. at 991 ("If Rivero * * * were seeking a first collateral review of his sentence, the new substantive rule from Johnson would apply retroactively.").

2. The conflicts described above have developed in the context of requests made to the courts of appeals for authorization to file second or successive Section 2255 motions. Congress, however, has barred certiorari review of denials of authorization to file successive collateral attacks. See 28 U.S.C. 2244(b)(3)(E), 2255(h). In Felker v. Turpin, 518 U.S. 651 (1996), this Court rejected various constitutional challenges to Section 2244(b)(3)(E), reasoning that Congress's decision to eliminate certiorari jurisdiction under 28 U.S.C. 1254(1) did not preclude all review in this Court because it did not disturb the Court's authority to entertain petitions for original writs of habeas corpus. See 518 U.S. at 661. Three concurring Justices further noted that Section 2244(b)(3)(E) "does not purport to limit [this Court's] jurisdiction" to review interlocutory orders under 28 U.S.C. 1254(1), to give instructions in response to certified questions from the courts of appeals under 28 U.S.C. 1254(2), or to issue a writ of

mandamus under 28 U.S.C. 1651(a). Felker, 518 U.S. at 666 (Stevens, J., concurring); id. at 667 (Souter, J., concurring).

Because the conflicts have developed in the context of second or successive applications, the denials have precipitated the filing of a number of petitions by ACCA prisoners asking the Court to resolve the confusion about Johnson's retroactivity by issuing extraordinary writs. Two pending petitions for a writ of mandamus ask the Court to address Johnson's retroactivity through its authority under the All Writs Act, 28 U.S.C. 1651(a). See In re Triplett, No. 15-625 (Nov. 10, 2015) (response filed Dec. 14, 2015); In re Williams, No. 15-578 (Dec. 11, 2015). The government's response in Williams is currently due without any extension on January 11, 2016, but is being filed contemporaneously with this brief on December 22, 2015.[1]

Three pending petitions for original writs of habeas corpus under 28 U.S.C. 2241 also ask the Court to address Johnson's retroactivity. See In re Sharp, No. 15-646 (Nov. 16, 2015) (response filed Dec. 16, 2015); In re Triplett, No. 15-626 (Nov. 10, 2015); In re Williams, No. 15-759 (Dec. 11, 2015).[2] Sharp

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[1] The government is doing so in order to permit all of these related cases to be considered at the Court's conference on January 8, 2016, if the petitioners in Williams and this case waive their time for filing a reply brief. That would allow the Court, if it wishes, to grant review and consider Johnson's retroactivity during the current Term.

[2] "Habeas corpus proceedings, except in capital cases, are ex parte, unless the Court requires the respondent to show cause

requests that his petition be construed in the alternative as a petition for a writ of mandamus. See 15-646 Pet. 31 n.13.

Additionally, a pending petition for a writ of certiorari asks the Court to review a gatekeeping determination that denied authorization to file a successive Section 2255 motion based on Johnson, arguing that Section 2244(b)(3)(E) does not eliminate the Court's statutory certiorari jurisdiction to review gatekeeping determinations concerning federal prisoners. Hammons v. United States, No. 15-6110 (Sept. 15, 2015) (response filed Dec. 2, 2015).

Petitioner's case would not provide an occasion for directly resolving the disagreement in the lower courts over the legal standard for determining whether this Court has "made" a new constitutional decision retroactive, which is a question unique to second or successive Section 2255 motions. Because petitioner had not filed any Section 2255 motion before Johnson

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why the petition for a writ of habeas corpus should not be granted." Sup. Ct. R. 20.4(b). The Court ordered the United States to respond to Sharp's habeas petition, but it did not request a response to the habeas petitions filed by Triplett or Williams (although the United States responded to the mandamus petitions filed by those petitioners). The Court ordered the United States to respond to another petition for a writ of habeas corpus that was previously pending, In re Butler, No. 15-578 (Nov. 3, 2015). On December 9, 2015, Butler obtained habeas corpus relief and an order directing his immediate release from the District of Arizona (the district of his confinement). See 15-cv-00321 Docket entry No. 20 (D. Ariz.). On December 14, 2015, Butler's petition was dismissed under Sup. Ct. R. 46.1.

was decided, petitioner did not need authorization from a court of appeals to file his Section 2255 motion in district court. See 28 U.S.C. 2255(h) (authorization is required only for a second or successive motion). But review of petitioner's case would afford an opportunity to resolve the conflict over whether Johnson is a substantive rule that is retroactive to cases on collateral review, and a ruling in petitioner's favor would expressly "ma[k]e" Johnson retroactive and permit prisoners filing timely second or successive motions to satisfy the gatekeeping requirements of 28 U.S.C. 2255(h)(2). The Court's analysis of whether Johnson is a substantive rule might also shed light on the proper approach to determining when this Court has "made" a new decision retroactive.

3. a. To obtain resolution of Johnson's retroactivity this Term, petitioner has filed a petition for a writ of certiorari before judgment has been entered in the court of appeals. Such a petition "will 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.

Petitioner has not demonstrated a sufficiently extraordinary reason why his own case must be resolved immediately by this Court. Petitioner has already served the statutory maximum sentence for his offense in light of Johnson.

See Pet. 15. But that would not ordinarily warrant this Court granting certiorari before judgment instead of allowing the court of appeals to decide for itself whether to deny a COA (a decision that could then be reviewed by this Court, see Hohn v. United States, 524 U.S. 236, 253 (1998)), or to grant a COA (in which case the Court could review the court of appeals' decision on the merits of petitioner's claim). Furthermore, petitioner does not face any statute of limitations problem that requires the immediate resolution of his case during this Term. Petitioner has already complied with the one-year statute of limitations set forth in Section 2255(f)(3) by filing his Section 2255 motion in the district court within one year of Johnson.

The Court may conclude, however, that petitioner's case is of "imperative public importance" so as to warrant an "immediate determination in this Court," Sup. Ct. R. 11, because it would provide a vehicle for the Court to address Johnson's retroactivity -- without the necessity of issuing a writ of mandamus or an original writ of habeas corpus -- before time runs out for prisoners who need authorization from a court of appeals before they can file a second or successive Section 2255 motion raising a Johnson claim. Petitioner correctly points out (Pet. 14-15) that the one-year limitations period set forth in Section 2255(f)(3) runs from the date Johnson was decided. See

Dodd v. United States, 545 U.S. 353, 357 (2005) (one-year statute of limitations applies to all Section 2255 motions, including successive motions, and it runs from the date of the decision announcing the new right, not a later decision making that right retroactive). Accordingly, prisoners who have been denied authorization to file second or successive Section 2255 motions will be unable to comply with the one-year limitations period unless the Court decides that Johnson is retroactive during this Term. But see Wood v. Milyard, 132 S. Ct. 1826, 1830 (2012) (court may not "bypass, override, or excuse" the government's "deliberate waiver of a limitations defense" in a habeas case).

In rare and exceptional circumstances, the Court has previously exercised its authority to grant certiorari before judgment in cases that presented an opportunity to resolve important, systemic questions about criminal sentencing. See United States v. Booker, 543 U.S. 220, 228-229 (2005) (explaining that the Court granted certiorari before judgment in United States v. Fanfan, No. 04-105, "because of the importance of the questions" whether Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to the federal Sentencing Guidelines, and if so, what portions of the Guidelines remain in effect); Mistretta v. United States, 488 U.S. 361, 371 (1989) (granting certiorari before judgment to consider the constitutionality of the

Sentencing Guidelines "[b]ecause of the 'imperative public importance' of the issue, * * * and because of the disarray" among federal district courts).

The question whether Johnson is retroactive to cases on collateral review does not have the same broad impact on all federal criminal sentencing proceedings that the Court found sufficiently compelling to justify certiorari before judgment in Fanfan and Mistretta. But the issue whether Johnson is a substantive rule that applies retroactively to cases on collateral review is nevertheless important to the fair and proper administration of federal criminal justice. As petitioner notes (Pet. 13-14), many federal defendants received statutory sentencing enhancements under the ACCA on the basis of prior convictions that were deemed to trigger that enhancement based on the now-invalid residual clause. In cases where a prisoner's ACCA sentence depends on the residual clause, the defendant has received an enhanced sentence of at least 15 years of imprisonment (the statutory mandatory minimum), when the correct statutory maximum for the crime is ten years of imprisonment. Compare 18 U.S.C. 924(e), with 18 U.S.C. 924(a)(2). Prisoners whose sentences are invalid in light of Johnson thus have a considerable stake in whether that decision is retroactive. And because Congress alone has the sole and exclusive power to define crimes and "ordain [their]

punishment," United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820), "serious, constitutional, separation-of-powers concerns * * * attach to sentences above the statutory maximum penalty" that is validly "authorized by Congress," Bryant, 738 F.3d at 1283.

b. The procedural posture of petitioner's case would permit the Court to determine whether Johnson is a substantive rule that applies retroactively on collateral review. It is true that the posture of this case would not necessarily require that outcome. The notice of appeal that petitioner filed in the court of appeals "constitutes a request addressed to the judges of the court of appeals" for a COA. Fed. R. App. P. 22(b)(2). And a COA is required in order for the court of appeals to have jurisdiction to render judgment on the merits. Gonzalez v. Thaler, 132 S. Ct. 641, 647-648, 659 (2012). Accordingly, if the Court granted review before the issuance of a COA, the Court would need to decide in this case only whether "reasonable jurists could debate whether * * * [petitioner's Section 2255 motion] should have been resolved in a different manner" such that a COA should be issued. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The Court could, however, conclude in petitioner's case that all reasonable jurists would agree that Johnson is substantive, which would authoritatively resolve the issue.

Slack, 529 U.S. at 484 (prisoner's burden is to show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further") (emphasis added) (citation and internal quotation marks omitted). Or, the Court could simply hold that Johnson is (or is not) a substantive rule in ACCA cases, thus settling the retroactivity issue for the lower courts. The Court has on occasion in analogous circumstances determined the correct rule when reviewing a court of appeals' denial of a COA, rather than holding only that the issue is reasonably debatable such that a COA should have issued. See Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (holding that procedural default did not bar state prisoner's ineffective-assistance-of-counsel claim, where the court of appeals had affirmed the denial of a COA on that issue because in its view "[r]easonable jurists cannot disagree with the district court's procedural ruling" on default, see Trevino v. Thaler, 449 Fed. Appx. 415, 426 (5th Cir. 2011)); Jimenez v. Quarterman, 555 U.S. 113, 121 (2009) (holding that a state prisoner's conviction was not yet final for purposes of federal statute of limitations, where court of appeals had denied a COA based on a contrary reading of the statute).

Although the Fifth Circuit disagreed with the other courts of appeals that have addressed the issue of Johnson's retroactivity, its basis for holding that Johnson is not a substantive rule is unsound. In Williams, the court of appeals concluded that Johnson is not a substantive rule under the test set out in Penry, see 492 U.S. at 330 (applying and extending test articulated by the plurality in Teague, 489 U.S. at 307). 806 F.3d at 325 & n.15. The court held that Johnson is not substantive because it "does not forbid the criminalization of any of the conduct covered by the ACCA" and does not "forbid a certain category of punishment." Id. at 325-326. The court reasoned that, despite Johnson, Congress retains the power to impose a 15-year sentence on a defendant whose prior convictions had qualified him for ACCA sentencing under the residual clause if it does so using language that is not vague. Ibid. But as the Sixth Circuit explained in Watkins, "Johnson prohibits the imposition of an increased sentence on those defendants whose status as armed career criminals is dependent on offenses that fall within the residual clause," and it is therefore entitled to retroactive effect within the meaning of Teague. Watkins, 2015 WL 9241176, at *6.

Contrary to the Fifth Circuit's reasoning, the ability of Congress to amend ACCA to cure any vagueness issue does not prevent this Court's decision from being substantive. See

Rivero, 797 F.3d at 999-1000 (Jill Pryor, J., dissenting) (finding no "logical explanation why a future Congress's hypothetical actions could affect retroactivity today"); Watkins, 2015 WL 9241176, at *6 ("Congress' ability to amend ACCA in a manner that would constitutionally impose the category of punishment Watkins seeks to challenge is irrelevant to the retroactivity analysis."). This Court held that its decision in Bailey v. United States, 516 U.S. 137, 144 (1995), which narrowed the construction of 18 U.S.C. 924(c)(1) to exclude possession offenses, was "substantive" and retroactive, see Bousley v. United States, 523 U.S. 614, 620 (1998), even though Congress can (and did) amend Section 924(c)(1) to restore possession offenses to the statute, see Watson v. United States, 552 U.S. 74 77 n.3 (2007) (discussing amendment).[3] Johnson is substantive for the same reason that prior decisions narrowing the reach of the ACCA were substantive: each prohibits punishment under that statute based on certain prior convictions. And by virtue of the Ex Post Facto Clause, any future amendment of the ACCA that might expand the type of

[3] The Fifth Circuit distinguished Bousley because it believed that Bousley "was decided completely outside of the Teague framework." 806 F.3d at 326. But in Summerlin, this Court cited and described Bousley in explaining that "[n]ew substantive rules generally apply retroactively" and that "[t]his includes decisions that narrow the scope of a criminal statute by interpreting its terms." 542 U.S. at 351-352; see also id. at 352 n.4.

convictions that qualify as predicate offenses cannot apply to defendants who formerly qualified for ACCA because of the residual clause. Those defendants' eligibility for ACCA sentencing turns on the law that applied at the time of their Section 922(g) offenses, including the provision invalidated by Johnson. Accordingly, as to such defendants, Johnson does "forbid a certain category of punishment" and constitutes a substantive, retroactive holding.

c. If the Court were to grant review and "ma[k]e" Johnson retroactive to cases on collateral review, see 28 U.S.C. 2255(h)(2), prisoners who need authorization to file second or successive Section 2255 motions raising Johnson claims would likely have sufficient time to seek authorization and file their motions within one year of Johnson.[4] Indeed, this case appears to be the only vehicle currently pending that would permit the Court to address Johnson's retroactivity during this Term without issuing a writ of mandamus or habeas corpus. Thus, while petitioner's case, considered on its own, may not satisfy

[4] Because prisoners must receive authorization from a court of appeals before filing a second or successive motion under Section 2255, a decision sufficiently in advance of June 26, 2016 (one year after the decision in Johnson), would be necessary to permit eligible prisoners to seek and receive authorization and then timely file Section 2255 motions, unless the government waived the statute of limitations or a court determined that the limitations period is subject to equitable tolling.

the strict criteria for a writ of certiorari before judgment, its resolution would have a wider impact. Accordingly, if the Court decides that the question presented "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, because prisoners who must obtain authorization to file second or successive Section 2255 motions need a ruling from this Court on Johnson's retroactivity before the end of the Term, then this petition would be an appropriate vehicle to decide whether Johnson is a substantive rule with retroactive effect.

## CONCLUSION

The petition for a writ of certiorari before judgment should be denied unless this Court concludes that the criteria of Rule 11 are satisfied, in which case the petition should be granted and set for argument so it may be decided this Term.

Respectfully submitted.

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