No. 15-

IN THE

Supreme Court of the United States

RICHARD RAY HARRIMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 11, 2015

QUESTION PRESENTED

Whether the rule announced by this Court in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), applies retroactively to final convictions on a petition for collateral review under 28 U.S.C. § 2255?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Richard Ray Harrimon, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioner Richard Ray Harrimon seeks a writ of certiorari before judgment to review his case presently pending in the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's unpublished opinion denying Mr. Harrimon's petition under 28 U.S.C. § 2255 is reproduced in the Appendix. Pet. App. 6a-7a. At Mr. Harrimon's original sentencing proceeding, the district court applied "the rule of lenity" and concluded that Mr. Harrimon's prior conviction for evading arrest with a vehicle could not be considered a violent felony under the Armed Career Criminal Act. Pet. App. 49a-53a. The Fifth Circuit reversed in a published opinion. See *United States* v. *Harrimon*, 568 F.3d 531 (5th Cir.), *cert. denied*, 558 U.S. 1093 (2009), reproduced in the Appendix at 27a-37a. On remand, the district court imposed a mandatory minimum sentence of 180 months under ACCA, and the Fifth Circuit affirmed that second sentence in an unpublished opinion. See *United States* v. *Harrimon*, 410 F. App'x 836 (5th Cir.), *cert. denied*, 132 S. Ct. 372 (2011), reproduced in the Appendix at 25a-26a.

JURISDICTION

The district court had original jurisdiction over the case pursuant to 28 U.S.C. § 2255, and denied the petition on November 19, 2015. Pet. App. 6a-7a. Mr. Harrimon filed a timely notice of appeal on November 20, 2015, Pet. App. 3a-4a, which was docketed by the Fifth Circuit as *United States* v. *Harrimon*, No. 15-11175. The Fifth Circuit has jurisdiction over the ap-

peal pursuant to 28 U.S.C. § 2253(a). That notice of appeal "constitutes a request" to issue a certificate of appealability "addressed to the judges of the court of appeals." Fed. R. App. P. 22(b)(2).[1]

This Court has jurisdiction to review the case via a writ of certiorari before judgment pursuant to 28 U.S.C. §§ 2101(e) & 1254(1). See *Hohn* v. *United States*, 524 U.S. 236, 241 (1998) ("There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under § 1254(1).")

LEGAL PROVISION INVOLVED

This case involves the interpretation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e), as well as 28 U.S.C. § 2255. Those provisions are reproduced in the Appendix. Pet. App. 88a-91a.

INTRODUCTION

After this Court issued its watershed decision in *Johnson*, there was nearly universal agreement that the rule that case announced was substantive and therefore cognizable for purposes of collateral relief under 28 U.S.C. § 2255, at least for an offender (a) sentenced under ACCA but, (b) ineligible for an ACCA sentence in the absence of the violent felony definition's "residual clause." The government has agreed that *Johnson* is retroactive and several courts have granted relief. The courts of appeals diverged on whether this Court had "made" *Johnson* retroactive for purposes of a *successive* § 2255 petition, but both sides of that important dispute agreed that *Johnson*

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[1] The Fifth Circuit often asks petitioners to file a separate brief and motion in support of a certificate of appealability. Whether the court asks for a separate brief or not, the ultimate outcome of the request in this case appears to be pre-ordained.

was substantive and therefore cognizable in a *first* § 2255 petition.

The Fifth Circuit, however, very recently took the opposite view. *In re Anthony Williams*, No. 15-30731 (5th Cir. Nov. 12, 2015), Pet. App. 78a-84a. Although *Williams* was an application for authorization to pursue relief in a *successive* § 2255 petition, the Fifth Circuit chose to resolve the case in a way that foreclosed relief for *all* § 2255 petitioners, including Mr. Harrimon. This petition presents an opportunity to reverse the erroneous and broad rule announced by *Williams,* while simultaneously resolving the division of authority over "successive" petitions. Given the time frame described below, Mr. Harrimon respectfully contends that it would be appropriate to grant this petition even before the Fifth Circuit's judgment and resolve the issue of *Johnson*'s retroactivity immediately or at least before the end of this Court's current term.

STATEMENT OF THE CASE

Mr. Harrimon, a convicted felon, was arrested and charged with violation of 18 U.S.C. § 922(g)(1) after he tried to pawn stolen firearms. The parties reached an agreement under which Mr. Harrimon admitted guilt to two violations of § 922(g)(1) while reserving the right to dispute (and appeal) any application of ACCA's enhanced penalties.

At Mr. Harrimon's initial sentencing, the district court *rejected* the government's request for an ACCA enhancement based in part on a finding that ACCA did not provide fair notice that Mr. Harrimon's prior convictions for evading arrest using a motor vehicle (Texas Penal Code § 38.04) were violent felonies:

> I think there are good arguments to be made on

> both sides. And when there are good arguments to be made on both sides, that sometimes, and I think here, calls for application of the rule of lenity and supports my concluding that these prior convictions are not the kind that under [*Begay* v. *United States*, 553 U.S. 137 (2008)] are punishable under the armed career criminal statute.
>
> I cannot in looking at these elements determine that this statute insists on violent and aggressive conduct, even though violent and aggressive conduct might often be associated with this offense.
>
> Accordingly, for those reasons and applying the rule of lenity, I overrule the government's objection.

Pet. App. 48a-53a. Without the ACCA enhancement, the district court imposed concurrent sentences of 96 months on each count. Pet. App. 54a-61a.

The prosecutors appealed. The Fifth Circuit reversed on the ground that a "typical" case of fleeing in a vehicle was categorically violent under ACCA's residual clause. See *Harrimon*, 568 F.3d at 536 ([W]hile it is possible, as Harrimon argues, to be guilty of fleeing by vehicle despite obeying all traffic laws and later surrendering quietly, we think that, in the typical case, an offender fleeing from an attempted stop or arrest will not hesitate to endanger others to make good his or her escape.") (internal citation omitted). This Court denied certiorari.

On remand, the district court imposed ACCA's mandatory minimum sentence of 188 months in prison. Pet. App. 17a. The Fifth Circuit affirmed, and this Court denied certiorari a second time. *Id.* The Court later held that fleeing by vehicle was a violent felony under the residual clause. See *Sykes* v. *United States*,

131 S. Ct. 2267, 2278 (2011) (quoting *Harrimon*, 568 F.3d at 535).

In *Johnson*, however, this Court overruled *Sykes* and rejected the reasoning used to justify Mr. Harrimon's enhanced sentence:

> Our most recent case, *Sykes*, also relied on statistics, though only to "confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id.*, at ——, 131 S. Ct., at 2274 (majority opinion). But common sense is a much less useful criterion than it sounds—as *Sykes* itself illustrates. The Indiana statute involved in that case covered everything from provoking a high-speed car chase to merely failing to stop immediately after seeing a police officer's signal. See *id.*, at ——, 131 S. Ct., at 2289–2290 (Kagan,, J., dissenting). How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum?

Johnson v. *United States*, 135 S. Ct. 2551, 2559 (2015).

Mr. Harrimon filed his § 2255 petition in October 2015. By that time, the government had conceded that the rule announced in *Johnson* is retroactive and cognizable under § 2255. See, *e.g.*, *Price* v. *United States*, 795 F.3d 731, 732 (7th Cir. 2015) ("We now conclude, *consistently with the government's position*, that *Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions.") (emphasis added). Mr. Harrimon's counsel also informed the district court that the government would waive any procedural defenses such as untimeliness or procedural default, based on ongoing negotiations with

the United States Attorney's office. C.f. *Wood* v. *Milyard*, 132 S. Ct. 1826, 1833–34 (2012) (quoting *Day* v. *McDonough*, 547 U.S. 198, 210–11 (2006)) (instructing courts not to *sua sponte* invoke such procedural defenses where a respondent has made a conscientious decision to waive them).

Unless the government somehow reversed its recently announced position in *Price* and many other cases, the government would have agreed that Mr. Harrimon is entitled to relief and to resentencing or to reinstatement of his original, 96-month sentence. After *Williams,* however*,* the government concluded that Mr. Harrimon's claim was foreclosed and asked the district court to deny the petition. Mr. Harrimon conceded that *Williams* appeared to foreclose relief even on a first § 2255 petition, but urged the district court to issue a certificate of appealability ("COA") given the substantial weight of authority (including the government's position in *Price*) that *Johnson*'s rule *is* retroactive. Mr. Harrimon also asked the district court to expedite resolution of the case, since he would already have completed service of his original sentence in the absence of the ACCA enhancement.

The district court granted the motion to expedite but denied relief and refused to issue a COA:

> In denying this petition, the court emphasizes that it is not unsympathetic to petitioner's plight. The very vagueness in the Armed Career Criminal Act (the "Act") that prompted the Supreme Court to strike it down in *Johnson* v. *United States*, ___ U.S. ___, 135 S.Ct. 2251 (2015), led this court when originally sentencing petitioner to follow the rule of lenity and conclude that the Act did not apply. It was only after this court's original sentence was reversed on the government's appeal that the court imposed a

> mandatory minimum sentence under the Act. Nevertheless, the Fifth Circuit's recent decision in *In re Williams*, ___ F.3d ___, 2015 WL 7074261 (5th Cir. Nov. 12, 2015), unmistakably forecloses habeas relief based on *Johnson*.

Pet. App. 6a. The district court later granted Mr. Harrimon's motion to proceed *in forma pauperis* on appeal. Mr. Harrimon lodged a timely notice of appeal, which is construed as a request for certificate of appealability addressed to the judges of the Fifth Circuit. Fed. R. App. P. 22(b)(2).

As of the date this petition is filed, the case has been docketed and is "in" the Court of Appeals. Whether or not the Fifth Circuit chooses to grant a certificate of appealability, the ultimate outcome of the case in *that* court appears to be a foregone conclusion: As the district court recognized, *Williams* held that *Johnson*'s rule is not substantive. Thus, Mr. Harrimon asks this Court to review the case at the present time and expects that the Fifth Circuit will, in any event, deny the certificate on the basis of *Williams* in the coming weeks.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED HAS UNDENIABLY DIVIDED THE LOWER COURTS.

This case presents an entrenched, three-way split of authority which has been acknowledged by courts and by the government. See Pet. App. 83a [*Williams*, 806 F.3d at 326] ("In so deciding, we disagree with recent decisions in two of our sister Circuits.").

The majority of courts to have considered the question presented recognize that *Johnson* is retroactive because it is a new constitutional substantive rule. As

the government has acknowledged this is the only outcome that can be reconciled with this Court's retroactivity jurisprudence. Among these courts, however, there is a disagreement about whether this Court has "made" *Johnson* retroactive. That is not necessary to file a *first* § 2255 petition, but it is necessary in order to prevail in a *successive* § 2255 petition.

The Seventh Circuit, for example, has explicitly held the rule is retroactive *and* that this Court "made" it retroactive through a combination of holdings: "*Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions." *Price*, 795 F.3d at 732. At this point, four other circuits have either agreed with this position or at least held that petitioners made a *prima facie* showing that this Court "made" *Johnson* retroactive. The following decisions are illustrative:

- *Pakala* v. *United States*, 804 F.3d 139 (1st Cir. 2015) (Mem.) ("In view of the government's concessions, we certify that Pakala has made the requisite prima facie showing that the new constitutional rule announced in Johnson qualifies as a basis for habeas relief on a second or successive petition, and so we allow him to file his petition with the district court.");
- *Woods* v. *United States*, 805 F.3d 1152 (8th Cir. 2015) ("Here, the United States concedes that *Johnson* is retroactive, and it joins Woods's motion. Based on the government's concession, we conclude that Woods has made a prima facie showing that his motion contains '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). Therefore, we grant Woods authorization to file a successive § 2255 motion.");

- *Rivera* v. *United States*, No. 13-4654 (2d Cir. Oct. 5, 2015) ("Petitioner has made a prima facie showing that he has satisfied the successive motion requirements with respect to his proposed claim based on *Johnson*."); and
- *Striet* v. *United States*, No. 15-72506 (9th Cir. Aug. 25, 2015) (granting joint motion for authorization to file a successive § 2255 petition).

The minority view—although still agreeing that *Johnson* is available on a *first* § 2255 petition—holds that this Court has yet to declare definitively that *Johnson* is retroactive for purposes of a successive § 2255 motion. For example, the Tenth Circuit denied authorization to file a successive petition in *In re Gieswein*, 802 F.3d 1143 (10th Cir. 2015). The Eleventh Circuit reached a similar result in *In re Rivero*, 797 F.3d 986 (11th Cir. 2015). These decisions do not support the Fifth Circuit view, however. Unlike *Williams*, these decisions did *not* express doubt that *Johnson*'s rule is retroactive for purposes of a first § 2255 petition, *Gieswein* and *Rivero* instead focused on the "stringent" limitations on successive § 2255 relief, in particular the requirement that the Supreme Court itself "has made" a new rule retroactive. *Gieswein*, 802 F.3d at 1148–49 ("The Supreme Court has not held in one case, or in a combination of holdings that dictate the conclusion, that the new rule of constitutional law announced in *Johnson* is retroactive to cases on collateral review") (internal quotation and alterations omitted).

The Eleventh Circuit explicitly held that a *first-time* petitioner (such as Mr. Harrimon) *would* be eli-

gible for collateral relief: "If Rivero—like the petitioner in [*Bousley* v. *United States*, 523 U.S. 614 (1998)]—were seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively." *Rivero*, 797 F.3d at 991. At least one district court in the Eleventh Circuit has already granted relief under *Rivero* for a first § 2255 petitioner because his prior "fleeing and eluding" conviction was not a violent felony after *Johnson*. See *Bargman* v. *United States*, No. 8:15-CV-1877 (M.D. Fla. Dec. 3, 2015).

The Fifth Circuit rejected this widely held view in *Williams*. The Court held that *Johnson* announced a new constitutional rule, but that rule was not *substantive* for purposes of *Teague* v. *Lane*, 489 U.S. 288 (1989). As of the date this petition is filed, no other appellate court has adopted that extraordinary view and the government is unlikely to defend it. *Williams* is "in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). The rule announced in *Johnson* is a substantive rule, and thus it *presumptively* applies retroactively. See *Schiriro* v. *Summerlin*, 542 U.S. 348, 351 (2004) (emphasis in original) ("New *substantive* rules generally apply retroactively.").

II. *JOHNSON* ANNOUNCED A SUBSTANTIVE RULE OF CRIMINAL LAW.

The "distinction between substance and procedure is an important one in the habeas context." *Bousley* v. *United States*, 523 U.S. 614, 620 (1998). If a new rule is *procedural*, it generally does *not* apply retroactively to final convictions, and that general rule is subject to only one narrow exceptions defined in *Teague* v. *Lane*, 489 U.S. 288 (1989). But if the new rule is *substantive*, then *Teague*'s retroactivity bar does not apply. *Schriro*, 542 U.S. at 351.

The *Schriro* opinion describes what makes a rule "substantive," and this description inescapably encompasses the right recognized in *Johnson*. The category of new *substantive* rules:

> includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish . . . . Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.

Schriro, 542 U.S. at 351–52 (internal citations and punctuation omitted). The rule announced in *Johnson* satisfies this description.

First, the rule in *Johnson* "narrow[s] the scope" of ACCA by eliminating the ACCA's residual clause. Prior to *Johnson*, the category of "violent felony" included the enumerated offenses, offenses with "force" as an element, *and* offenses that satisfied the residual clause. Pet. App. 89a. After *Johnson*, the term "violent felony" is much narrower, because it no longer includes residual-clause offenses like vehicular fleeing.

Second, the rule in *Johnson* places "particular conduct or persons covered by the statute beyond the [government's] power to punish" as armed career criminals. Offenders like Mr. Harrimon, who qualified as armed career criminals solely because their predicate offenses fell within the residual clause, cannot be sentenced to more than ten years for any violation of § 922(g). There is not merely a "significant risk" that Mr. Harrimon "faces a punishment

that the law cannot impose upon him"; it is a certainty.

The impact of *Johnson* is thus very similar to the impact of this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). *Bailey* worked a substantive change in the law because it narrowed the *terms* of § 924(c). After *Bailey*, no one could be punished under the pre-1998 version of § 924(c) for mere possession of a firearm and thus the class of defendants who could be punished under that provision was significantly narrower. The Court subsequently held that *Bailey*'s rule was retroactive because it was a substantive rule. *Bousley*, 523 U.S.

The Fifth Circuit recognized that *Bousley* was decided "outside of the *Teague* framework," but concluded that *Bailey* was different than *Johnson* because *Johnson* "did not interpret the ACCA in service of Congressional intent—it excised as unconstitutional an entire provision of duly enacted law." Pet. App. 84a. This is simply a non-sequitor. The rationale for this Court's decision has nothing to do with whether the outcome represents a *s*ubstantive rule or a procedural one.

Nor is it significant that Congress could, hypothetically, pass a *different* law that punished "defendants similar to Williams," or to Mr. Harrimon, with a 15 year sentence without running afoul of the Constitution. Pet. App. 82a. That was certainly true in *Bousley* as well. Just a few months after *Bousley* was decided Congress passed the so-called "*Bailey* Fix Act" to reach offenders whose conduct was "similar" to Bailey's and Bousley's. See *Abbott* v. *United States*, 562 U.S. 8, 16–17 (2010) (discussing Pub. L. 105-386 (Nov. 13, 1998)). Even so, *Bailey* was substantive because it narrowed the class of offenders covered by § 924(c); in the same way, *Johnson* is substantive be-

cause it narrows the class of offenders covered by § 924(e).

III. THE QUESTION PRESENTED WARRANTS IMMEDIATE RESOLUTION VIA A WRIT OF CERTIORARI.

Under Rule 11, this Court will exercise its power to grant certiorari before judgment "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." S. Ct. R. 11. Those criteria are satisfied here.

A. The Three-way Split Is Causing Severe And Substantial Sentencing Disparities Based On The Accident Of Geography.

Mr. Harrimon's case highlights the gross disparities that result from the conflict of authority described in this petition. Had Mr. Harrimon's conviction been in the Seventh Circuit, he would have been released by now, just as Marcus Sykes was released from prison this September because the district court granted his unopposed successive motion for collateral relief. *Sykes* v. *United States*, No. 1:15-CV-1528 (S.D. Ind. Sept. 30, 2015), Pet. App. 85a-87a. The district court in Indiana amended Mr. Sykes's sentence to time served (a determination supported by the government) and Mr. Sykes was released in time for Thanksgiving with his family.

Given the government's position that *Johnson* is retroactive and that it justifies collateral relief, it is likely that many other examples exist throughout the the country. See, *e.g.*, *Imm* v. *United States*, No. 2:03-CR-63 (W.D. Pa. Aug. 20, 2015) (non-generic burglary conviction could no longer qualify as violent felony after *Johnson*); *Richards* v. *United States*, No. 2:05-

CR-10 (D. Me. Aug. 28, 2015) (prior conviction for unlawful sexual contact was no longer a violent felony after *Johnson*, so § 2255 relief granted); *Hudson* v. *United States*, No. 03-CR-367 (D. Minn. Dec. 4, 2015) (theft-from-person, relief granted); *Strong* v. *United States*, No. 4:15-CV-1497 (E.D. Mo. Nov. 30, 2015) (stealing and attempted burglary; relief granted); *United States* v. *Seymour*, No. 03-CR-10296 (D. Mass. Sept. 29, 2015) (pickpocketing, relief granted).

Mr. Harrimon was far less fortunate. Before the district court could act on his then unopposed § 2255 petition, the Fifth Circuit issued a published opinion foreclosing any possibility of relief. Pet. App. 78a-84a [Williams]; *Id.* at 6a. [(unmistakably forecloses relief)]. If the district court had reinstated the original, non-ACCA sentence, Mr. Harrimon would be eligible for immediate release. He remains in prison, with each additional day constituting an irremediable injury.

B. Immediate Review Is Necessary Because "Successive" Petitioners Are Running Out Of Time To File For *Johnson*-based Relief.

Defendants in the First, Second, Seventh, Eighth, and Ninth Circuits have been authorized to file successive petitions under § 2255. But similarly situated defendants in the Fifth, Tenth, and Eleventh Circuits are foreclosed from doing so. Yet all petitioners have only one year from the date *Johnson* was decided to file under § 2255. Because of the ruling of those courts of appeals, the bar will remain until this Court "makes" *Johnson* retroactive. See *Dodd* v. *United States*, 543 U.S. 353, 359 (2005). If those motions for authorization are denied, there appears to be no statutory right to further review in this Court or from the En Banc Court of Appeals. See U.S. Br. in Opp. 17–

25, *Hammons* v. *United States*, No. 15-6110 (U.S. filed Sept. 15, 2015) (construing 28 U.S.C. § 2244(b)(3)(E)).

Based on counsels' calculations, and assuming a normal briefing schedule with argument, it appears that this Court would need to accept any case in which it intended to decide the question presented in mid-January 2016. If the matter is not decided this term, then scores if not hundreds of "successive" petitioners will lose the opportunity to file a petition which would be successful in another circuit. As it is, there may be precious little time left after a favorable decision from this Court, if any, for petitioners to file. But if this Court were to grant certiorari, then courts in the Fifth, Tenth, and Eleventh Circuits could accept petitions provisionally and then abate further briefing pending a decision from this Court.

Immediate review is also necessary to alleviate the spectre of additional time in prison for offenders like Mr. Harrimon whose continuing incarceration exists solely because of the unconstitutional residual clause. See *Johnson*, 135 S. Ct. at 2557 ("Increasing a defendant's sentence under the clause denies due process of law.").

C. Review By A Writ Of Certiorari—Even A Writ Before Judgment—Would Avoid Several Complex Issues Presented By Requests For Unusual Forms Of Relief.

This Court is presently considering several requests for non-statutory writs which raise the same question presented or a close analog. See *In re Triplett*, No. 15-625 (U.S. filed Nov. 10, 2015) (petition for a writ of mandamus); *In re Butler*, No. 15-578 (U.S. filed Nov. 3, 2015) ("original jurisdiction" habeas petition); *In re Triplett*, No. 15-626 (U.S. filed Nov. 10, 2015) (origi-

nal habeas); and *In re Sharp*, No. 15-646 (U.S. filed Nov. 16, 2015) (original habeas). As noted previously, the Court also has before it at least one petition for certiorari which might very well be forbidden by statute: *Hammons*, No. 15-6110.

Mr. Harrimon respectfully submits that the substantive question should be settled in a case like this one because the posture of this case presents no statutory barriers to relief. In addition to the statutory barriers (and this Court's justifiable reluctance to exercise its original jurisdiction or extraordinary powers), there is also a real concern that a "successive" § 2255 case might be resolved *without* settling the overall issue of *Johnson*'s retroactivity. For instance, the Court might ultimately conclude that the Tenth and Eleventh Circuits should have granted authorization because the question is debatable enough to survive that threshold or gatekeeping inquiry. Or, the Court might agree with the Tenth and Eleventh Circuits that *Johnson* has not yet been "made" retroactive by this Court by holding or necessary implication. That would leave the broader question unresolved for first-time petitioners like Mr. Harrimon.

But if the Court were to address the issue in a first § 2255 case, a decision would settle the remaining conflict. If the Court holds that *Johnson* is retroactive then that decision itself would unambiguously "make" the rule retroactive (if it were not so already).

Finally, this case presents a strong vehicle in other respects. Mr. Harrimon's non-ACCA sentence likely would be 96 months (because that was the district court's original non-ACCA sentence) and without *Williams* Mr. Harrimon would be eligible for immediate relief. Also, Mr. Harrimon does not qualify as an armed career criminal under the post-*Johnson* version of § 924(e), because there is no argument that his

prior convictions for evading arrest satisfy the "use of force" or enumerated offense clauses..

As Mr. Harrimon's "sentence was imposed in violation of the Constitution or laws of the United States," and "the sentence was in excess of the maximum authorized by law," 28 U.S.C. § 2255(a), he respectfully requests that this Court grant review.

CONCLUSION

For all the foregoing reasons, Mr. Harrimon asks this Court to grant the petition for a writ of certiorari and hold that the rule announced in *Johnson* applies retroactively on collateral review.

Respectfully submitted,

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