No. 15-7426

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner Richard Ray Harrimon and the government are in substantial agreement on a number of important points. First, the parties agree that this Court announced a new constitutional rule of criminal law in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Second, the parties agree that the rule in *Johnson* is a *substantive* rule that applies retroactively to final convictions on collateral review. U.S. Br. at 14. Third, the parties agree that the circuit courts are sharply divided over *Johnson*'s retroactivity and that "confusion" reigns among the lower courts. U.S. Br. at 21. Fourth, the parties agree that the Fifth Circuit held that *Johnson* is not available to *any* petitioner on collateral review in *In re Williams*, 806 F.3d 322 (5th Cir. 2015), and further agree that the *Williams* opinion is "unsound." U.S. Br. at 29. Finally, and perhaps most importantly, the parties agree that the "procedural posture" of Mr. Harrimon's case would allow this Court to settle the conflicts, remove the confusion, and create nationwide consistency in the handling of petitions for collateral relief based on *Johnson*. U.S. Br. at 27.

The only remaining question—and the only point of hesitation preventing the Solicitor General from fully acquiescing to a grant in this case—is whether "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. The Solicitor General has taken no position on that discretionary question, but this Reply will show why immediate resolution is appropriate given the unusual and compelling circumstances that this case presents.

I. BECAUSE THE FIFTH CIRCUIT HAS ALREADY DECIDED THE QUESTION PRESENTED IN A BINDING PUBLISHED OPINION, THERE IS LITTLE TO BE GAINED FROM AWAITING A FINAL DECISION.

Rule 11 recognizes that a grant of certiorari before judgment is generally disfavored because it represents a deviation from "the normal appellate process." In this case, however, that factor should not weigh heavily against the petition because the Fifth Circuit has already decided the question presented. See *Williams*, 806 F.3d at 326. The Fifth Circuit unmistakably held that the rule in *Johnson* is "not available to [a petitioner] on collateral review," because it is not "substantive" and it does not satisfy the criteria set forth in *Teague* v. *Lane*, 489 U.S. 288 (1989). See *Williams*, 806 F.3d at 325–26, reprinted at Pet. App. 81a–82a.

While there were other, narrower ways of resolving the *Williams* case, the Fifth Circuit chose to decide the case in a way that applied to *all* petitioners under 28 U.S.C. § 2255, including first-time petitioners like Mr. Harrimon. Nothing about the court's reasoning is limited to second or successive petitioners, and the decision does not even cite the holding of *Tyler* v. *Cain*, 533 U.S. 656, 662 (2001).

The sweeping scope of the *Williams* decision negates any inferences that the district court's decision here is an "outlier," or that an appellate panel might grant a certificate of appealability and somehow hold that *Johnson* applies retroactively to first § 2255 petitions. See *e.g.* Reply Brief of Petitioner at 8, *In re Sharp* (2015) (No. 15-646). There is no realistic possibility that a Fifth Circuit judge (considering the application for COA) or panel (considering the applica-

tion for COA or the appeal on the merits) to find any way around *Williams*'s reasoning.

"It is a firm rule" of the Fifth Circuit "that in the absence of an intervening contrary or superseding decision by [that] court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision." *Burge* v. *Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). "[N]o [Fifth Circuit] panel is empowered to hold that a prior decision applies only on the limited facts set forth in that opinion," *United States* v. *Smith*, 354 F.3d 390, 399 (5th Cir. 2003), "and a prior panel's explication of the rules of law governing its holdings may not generally be disregarded as dictum." *Rios* v. *City of Del Rio*, 444 F.3d 417, 425 n.8 (5th Cir. 2006) (citing *Gochicoa* v. *Johnson*, 238 F.3d 278, 286 n. 11 (5th Cir. 2000)). Thus, Mr. Harrimon must reluctantly concede that the reasoning of *Williams* appears to foreclose any claim for relief in his Fifth Circuit appeal.

Williams likewise governs Mr. Harrimon's request for a COA. A persuasive argument could be made that a petitioner presenting a debatable but foreclosed claim is entitled to issuance of a COA under *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). But that is not the practice in the Fifth Circuit. If a *panel* is foreclosed from granting ultimate relief on a petitioner's claim, the court will not issue a COA. For instance, in *Medellin* v. *Dretke*, 371 F.3d 270 (5th Cir. 2004), the Fifth Circuit refused to issue a COA on the petitioner's claim under the Vienna Convention because the issue was foreclosed by its prior decision in *United States* v. *Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001), despite evidence that the International Court of Justice had resolved the legal question in a different fashion in two intervening decisions. See *Medellin*, 371 F.3d at 280 ("We are bound to apply

this holding, the subsequent decision [of the ICJ] notwithstanding, until either the Court sitting *en banc* or the Supreme Court say otherwise."). That case ultimately came before this Court two different times. See *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (dismissing the writ of certiorari as improvidently granted in light of subsequent developments in the Executive Branch and in state court); see also *Medellin* v. *Texas*, 552 U.S. 491 (2008) (affirming Texas court's decision denying collateral relief).

The same was true in *Foster* v. *Quarterman*, 466 F.3d 359 (5th Cir. 2006). This Court had twice reserved judgment on whether standalone innocence claims were separately cognizable on federal collateral review. See *House* v. *Bell*, 547 U.S. 518, 555 (2006) and *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993). Even though the question was expressly an open one for this Court, the Fifth Circuit denied a COA based on its own decision foreclosing standalone claims: "Because *House* did not change the law to recognize the validity of stand-alone actual-innocence claims, this panel may not entertain Foster's stand-alone claim." *Foster*, 466 F.3d at 368 (discussing *Dowthitt* v. *Johnson*, 230 F.3d 733 (5th Cir. 2000)).

Accordingly, the Fifth Circuit can, and likely will, deny the requested COA based solely on the binding reasoning of *Williams*. Even if a judge were to defy precedent and issue a COA on the question presented, the panel considering the merits would be just as bound by *Williams* as the district courts in the Fifth Circuit. Indeed, district courts have consistently recognized that *Williams* forecloses relief on a first § 2255 petition. Pet. App. 6a ("[T]he Fifth Circuit's recent decision in *In re Williams* . . . unmistakably forecloses habeas relief based on *Johnson*."); *accord* *Parra-Martinez* v. *United States*, No. 11-CR-530, 2015

WL 9244611, at *4 (W.D. Tex. Dec. 16, 2015) ("[T]he Fifth Circuit Court of Appeals held on November 12, 2015 that, '*Johnson* is not available . . . on collateral review.'") and *United States* v. *Curry*, No. 10-CR-111, 2015 WL 8478192, at *4 (E.D. La. Dec. 10, 2015) ("*Johnson* does not afford [petitioner] any relief, however, because the unconstitutionality of the residual clause does not apply to cases on collateral review.").

If *Williams* leaves any room for debate in the Fifth Circuit, then neither the government nor the district court were able to find it. After all, the government agrees with Mr. Harrimon that *Johnson*'s rule is substantive and retroactive and that Mr. Harrimon should already be released from prison. Yet it felt compelled, by its duty of candor, to describe the issue as foreclosed in district court. See Response to Motion Under 28 U.S.C. § 2255 at 1, *Harrimon* v. *United States* (N.D. Tex. Nov. 16, 2015) (No. 7:15-CV-152-D) ("Although contrary to the Department's position, the government acknowledges that the opinion's reasoning applies equally to initial motions under section 2255—like Harrimon's—that are based on *Johnson*."). The district court also had a strong incentive to find a way around *Williams*, if one were available. Pet. App. 6a (expressing sympathy for Mr. Harrimon's "plight" and noting that ACCA's vagueness caused the court to decline to impose an enhancement at Mr. Harrimon's original sentencing).

There is no doubt that this Court could resolve the question presented by granting certiorari to review a decision denying a COA or affirming the district court's denial of relief. There is likewise no doubt that Mr. Harrimon will face one of those two outcomes in the Fifth Circuit, unless *Williams* is overruled by a superior tribunal while his case is pending. Since the lower court has already announced its position in a

unanimous and binding opinion, it is only a matter of time until the Fifth Circuit enters an adverse judgment against Mr. Harrimon. Allowing the "normal appellate process" to work its way to conclusion would provide no measurable benefit in this case.

II. THE HIGH SYSTEMIC COSTS OF FURTHER DELAY GIVE RISE TO A PUBLIC NECESSITY FOR IMMEDIATE INTERVENTION.

For all the would-be "successive" petitioners in the Fifth, Tenth, and Eleventh Circuits, a decision on the merits before the end of this Term may well permit timely filing of petitions via 28 U.S.C. § 2255. U.S. Br. at 31. At the very least, a grant of certiorari now will provide an incentive for lower courts to hold motions instead of rejecting them. By contrast, awaiting a final judgment in Mr. Harrimon's case would prejudice those same "successive" petitioners and almost certainly would bring a significant wave of subsequent—and unnecessary—litigation over timing, tolling and conditional filings from petitioners desperate to preserve their rights. While Mr. Harrimon requests a minimal departure from the "normal appellate process," any delay beyond this Term would be much more disruptive at all levels of federal courts. A grant in this case would preserve § 2255 as the primary mechanism for collateral review of federal convictions and sentences.

This Court has already received multiple petitions for mandamus and for "original jurisdiction" habeas corpus. The Court has also observed another unusual vehicle for collateral relief: after the Tenth Circuit denied his motion for authorization to file a successive § 2255 petition, see *In re Butler*, No. 15-5087 (10th Cir. Sept. 23, 2015), Juan Deshannon Butler sought an "original jurisdiction" writ of habeas corpus

from this Court. See Petition for Writ of Habeas Corpus, *In re Butler* (2015) (No. 15-578). Before that matter could be decided, the government conceded that Mr. Butler was entitled to release in a separate and equally unusual post-conviction proceeding pending in the jurisdiction where he was confined. See *Butler* v. *McClintock*, No. 4:15-CV-321 (D. Ariz. Dec. 9, 2015). Mr. Butler was released, and his proceeding before this Court was voluntarily dismissed.

Section 2255(e) contemplates that at least some petitions for habeas corpus will be filed in the district of confinement if the remedy provided by § 2255 "is inadequate or ineffective to test the legality of [the prisoner's] detention." Like mandamus and original jurisdiction habeas relief in this Court, this "savings clause" habeas procedure in the district of confinement might allow at least some prisoners originally convicted in the Fifth, Tenth, or Eleventh Circuits to gain release under *Johnson*, especially if they happen to be confined in one of the majority-law jurisdictions. Given the government's considered position that residual-clause-based sentences are illegal, courts in the confining jurisdiction might be more receptive to this unusual vehicle than they otherwise would be. But these "savings clause" writs will spawn even more litigation and give rise to difficult legal questions about the "adequacy" of § 2255, about choice-of-law when a prisoner in Jurisdiction B argues that his sentence handed down in Jurisdiction A was unconstitutional, and about the interaction of statutory timeliness requirements and equitable laches. If *Johnson*'s retroactivity were resolved by this Court, there would be no incentive to pursue that unusual form of relief.

Even under § 2255, the present state of affairs seems calculated to require *more* intervention from

this Court, rather than *less*. As another example, it is not at all clear whether a successive petition is timely if the petitioner has filed a motion for authorization within the one-year deadline specified by 28 U.S.C. § 2255(f)(3) but the court of appeals does not rule on that petition before the deadline. For its part, the government suggests that a prisoner must actually *receive* authorization, *then* file the petition in district court before the one-year deadline expires. U.S. Br. 31 n.4 (contending that "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." (emphasis added)).

If that is correct, then a prisoner hoping for a change of law in this Court can never know whether he has filed his motion for authorization early enough. The statute appears to require that the court of appeals grant or deny authorization "not later than 30 days after the filing of the motion," see 28 U.S.C. § 2244(b)(3)(D). But the statute provides no means of ensuring compliance, and already burdened circuit courts may not follow such deadlines in practice. The motion giving rise to *Williams* was filed on August 18, 2015, but the Fifth Circuit did not decide the case until November 12, 2015.

On the other hand, if a petitioner in the Fifth, Tenth, or Eleventh Circuits acts too swiftly and moves for authorization *before* this Court has settled the question presented, a denial would leave him with no obvious statutory remedy to seek further review from this Court or the en banc Court. A successive petitioner may very well deserve relief under

Johnson, but he must choose whether to file now and risk an early (and potentially unreviewable) adverse decision or to await a favorable change in law in this Court, at the risk of running out of time if that decision does not come this Term. Granting review before the Fifth Circuit's inevitable judgment would, at the very least, provide a strong incentive for courts considering successive petitions in the Fifth, Tenth, and Eleventh Circuits to conditionally accept motions for authorization while awaiting resolution during this Term.

Another unresolved question under § 2255 is whether a party may request *initial* en banc review of his motion for authorization to file a successive petition. Section 2244(b)(3)(B) states that the motion "shall be determined by a three-judge panel of the court of appeals." It is not at all clear whether that permits *more than* three judges to decide the matter, or permits an en banc court to overrule a prior case denying authorization before remanding to a three-judge panel. If successive petitioners are never allowed to seek en banc review of the published decisions denying authorization, they will be forced to seek extraordinary writs from this Court. And while only a handful have reached this Court in time for its January 2016 conferences, there are numerous other "successive" petitioners awaiting resolution of the confusion before choosing how to file. These petitions will soon begin flooding into the lower courts if the issue remains unsettled this Term.

The systemic cost of the status quo is too high to bear. Mr. Harrimon's petition presents an opportunity to preempt all those difficult questions and to fully resolve the conflict in time for this case and all others to proceed in the ordinary fashion envisioned by Con-

gress: through a motion for relief under 28 U.S.C. § 2255.

CONCLUSION

For all the foregoing reasons and the reasons stated in the petition and brief for the government, 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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