No. 15-6418

IN THE
Supreme Court of the United States

GREGORY WELCH,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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As the government concedes, this Court should grant certiorari, vacate the judgment of the Eleventh Circuit, and remand this case ("GVR") for further consideration in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). If the Court does not GVR, the only reasonable alternative would be to grant plenary review to resolve the serious disagreement among the courts of appeals as to *Johnson*'s retroactivity.

The present petition arises from Petitioner's initial motion under 28 U.S.C. § 2255, in which he challenged, among other things, the constitutionality of his sentence under the residual clause of the Armed Career Criminal Act ("ACCA"). After the district court denied Petitioner's motion and after the Eleventh Circuit denied Petitioner a certificate of appealability, this Court decided *Johnson*, which struck down the residual clause as unconstitutionally vague. 135 S. Ct. at 2557. Because the Eleventh Circuit did not consider this Court's intervening decision in *Johnson*—which not only bears on Petitioner's § 2255 motion, but entitles him to relief—GVR is appropriate.

In the event that the Court does not GVR, it should grant certiorari and order full briefing and argument to resolve the deep confusion among the circuits as to *Johnson*'s retroactivity. The Court could use this case as a vehicle to resolve the 6-3 split as to whether *Johnson* has been "made retroactive" to successive § 2255 motions, under 28 U.S.C. § 2255(h)(2), because it provides the opportunity to resolve that issue

without resorting to an extraordinary writ, as would be required by other petitions pending before this Court. The government's only argument to the contrary—that "[t]his case does not implicate that conflict . . . because petitioner seeks review of the denial of his first Section 2255 motion"—is belied by the government's responses to other petitions pending before this Court, in which it represents that there is also a circuit split in the context of initial § 2255 motions and asks this Court to review the issue in the context of an initial motion. It is also inconsistent with the government's prior representations that a decision by this Court applying a rule retroactively to an initial petition necessarily means that the rule has been "made retroactive" to successive petitions.

1. Consistent with the government's memorandum, this Court should GVR this case for further consideration in light of *Johnson*. Due to the to the timing of Petitioner's initial § 2255 motion and request for a certificate of appealability, the Eleventh Circuit did not consider this Court's intervening decision in *Johnson*, under which Petitioner is clearly entitled to relief. *See Lawrence v. Chater*, 516 U.S. 163, 169 (1996) (recognizing it as uncontroversial that GVR is appropriate in the case of "Supreme Court decisions rendered so shortly before the lower court's decision that the lower court had no opportunity to apply them" (internal quotation marks omitted)).

On September 20, 2005, Petitioner was found guilty of being a felon in possession of a firearm and ammunition under 18 U.S.C. § 922(g)(1), which carries a maximum sentence of ten years' imprisonment. 18 U.S.C. § 924(a)(2). Over Petitioner's objection,

however, the district court concluded that he was subject to a mandatory minimum of fifteen years' imprisonment on the basis that he had three predicate convictions, including a Florida conviction for robbery by sudden snatching. *United States v. Welch*, 683 F.3d 1304, 1311-12 (11th Cir. 2012). On direct appeal, the Eleventh Circuit upheld Petitioner's sentence based on ACCA's residual clause. *Id.* at 1312-13.

Thereafter, Petitioner, acting *pro se*, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 challenging, among other things, the constitutionality of his sentence under ACCA. The district court denied Petitioner's motion and declined to issue a certificate of appealability. *See* Order, *Welch v. United States*, No. 0:13-cv-62770-KAM (S.D. Fla. Dec. 9, 2014), ECF No. 19.

On January 30, 2015, Petitioner filed a *pro se* request for a certificate of appealability from the Eleventh Circuit. In his request, Petitioner explained that *Johnson*—which had recently been calendared for reargument on the question of "[w]hether the residual clause in the Armed Career Criminal Act of 1984, 18 U. S. C. § 924(e)(2)(B)(ii), is unconstitutionally vague," *see* Docket entry, *Johnson v. United States* No. 13-7120 (U.S. Jan. 9, 2015)—was pending before this Court, *see* Motion for Certificate of Appealability to the Court of Appeals 4, *Welch v. United States*, No. 14-15733 (11th Cir. Jan. 30, 2015). Petitioner also filed a motion to hold his case in abeyance pending this Court's resolution of *Johnson* because he would be entitled to relief in the event that *Johnson* were resolved favorably. *See* Motion to Supplement, *Welch v. United States*, No. 14-15733 (11th Cir. Mar. 7, 2015).

Prior to this Court's decision in *Johnson*, the Eleventh Circuit issued an order denying Petitioner a certificate of appealability without addressing Petitioner's motion. *See* Order, *Welch v. United States*, No. 14-15733 (11th Cir. June 9, 2015). After *Johnson*, Petitioner sought leave to file a motion for reconsideration based on *Johnson*, which the Eleventh Circuit denied as untimely. *See* Motion Returned Unfiled, *Welch v. United States*, No. 14-15733 (11th Cir. July 7, 2015).

2. Under *Johnson*, Petitioner is entitled to relief on his initial § 2255 motion. In *Johnson*, this Court held that ACCA's residual clause is unconstitutionally vague because it "denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557. The Eleventh Circuit has since recognized that the rule announced in *Johnson* applies retroactively to initial motions under § 2255. *In re Rivero*, 797 F.3d 986, 991 (11th Cir. 2015) (where a petitioner is "seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively"). As described above, Petitioner had only three predicate convictions, at least one of which qualified only under ACCA's residual clause. *Welch*, 683 F.3d at 1312-13. Thus, as Petitioner explained in his petition (and the government does not contest), upon retroactive application of *Johnson*, Petitioner would no longer qualify under ACCA and is entitled to be resentenced. *See* Pet. at 5, 7.

3. If this Court does not GVR, it should grant certiorari and use this case to resolve the disagreement among the courts of appeal regarding the retroactivity of *Johnson* to cases on collateral review.

First, in response to other pending petitions, the government has expressly represented to this Court that there is conflict "on the threshold question whether *Johnson* announced a 'substantive' rule" and thus whether *Johnson* applies retroactively to initial § 2255 motions. Brief of the United States in Opposition at 17-19, *In re Sharp*, No. 15-646 (U.S. Dec. 16, 2015) (asserting that the Fifth Circuit's decision in *In re Williams*, 806 F.3d 322, 325-26 (5th Cir. 2015), has created a circuit split in the context of initial motions). On this basis, the government has encouraged this Court to grant review in a case that presents the question of *Johnson*'s retroactivity in the context of an initial § 2255 motion. *Id.* at 17-18, 20 & n.8. As far as Petitioner is aware, this is the *only* petition pending before this Court that has arisen through the courts of appeal in the context of an initial § 2255 motion.[1]

Second, there is also a deep split regarding whether *Johnson* has been "made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2255(h)(2), so as to apply in the case of second or successive § 2255 motions. The Seventh Circuit has squarely held that this Court "has made *Johnson* categorically retroactive to cases on collateral review." *Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015). Consistent with the Seventh Circuit, the First, Second, Sixth, Eighth, and Ninth Circuits have granted petitioners authorization to file second or successive § 2255 motions because they have stated a *prima facie* claim that *Johnson* has been "made

[1] The only other petition that Petitioner is aware of is *Harrimon v. United States*, No. 15-7426 (U.S. Dec. 11, 2015), which has been referred to by the government in other petitions pending before this Court. Brief of the United States in Opposition at 20, *In re Sharp*, No. 15-646 (U.S. Dec. 16, 2015). *Harrimon* seeks certiorari prior to any judgment from the court of appeals.

retroactive to cases on collateral review" by this Court. *Pakala v. United States*, 804 F.3d 139, 139-40 (1st Cir. 2015) (quotation marks omitted); Order, *Rivera v. United States*, No. 13-4654 (2d Cir. Oct. 5, 2015), ECF No. 44; *In re Watkins*, No. 15-5038, 2015 WL 9241176 (6th Cir. Dec. 17, 2015); *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam); Order, *United States v. Striet*, No. 15-72506 (9th Cir. Aug. 25, 2015), ECF No. 2. In conflict with those circuits, the Fifth, Tenth, and Eleventh Circuits have held that *Johnson* has not been "made retroactive" to second or successive petitions. *Williams*, 806 F.3d at 326-27; *In re Gieswein*, 802 F.3d 1143, 1148 (10th Cir. 2015); *Rivero*, 797 F.3d at 989.

As the government has previously recognized, if this Court holds that a rule is retroactive in the context of an initial § 2255 motion, it will necessarily have been "made retroactive" by this Court within the meaning of 28 U.S.C. § 2255(h)(2) and thus "become available on a second or successive federal habeas petition." Brief of the United States as Amicus Curiae at 10, *In re Smith*, 526 U.S. 1157 (1999) (No. 98-5804). Resolving the retroactivity of *Johnson* in this case would thus necessarily resolve not only the split described by the government in the context of initial motions, but also the split as to successive petitions.

This case presents an ideal opportunity to resolve these splits for several reasons. First, because Petitioner's case arises in the context of an initial petition, it is not subject to the gatekeeping requirements of § 2244(b)(3)(E), which preclude the

Court from reviewing the issue through its certiorari process and thus require the issuance of an extraordinary writ.

Second, the government has recently represented to this Court that it should not issue an extraordinary writ to resolve the circuit split with respect to second or successive § 2255 motions because "it is reasonably possible" that the issue could be presented to the Court in the context of an initial § 2255 motion. Brief of the United States in Opposition at 17-19, *In re Sharp*, No. 15-646 (U.S. Dec. 16, 2015). At the same time, the government has conceded "that timing of review is an issue because a ruling from this Court clarifying whether *Johnson* is retroactive must occur during this Term in order for prisoners to comply with the one-year statute of limitations set forth in 28 U.S.C. 2255(f)." *Id.* As far as Petitioner is aware, this is the only petition pending before this Court that would reasonably allow this Court to resolve the split prior to the impending statute of limitations.

Third, this case, in effect, presents both circuit splits: If this Court were to deny the present petition, Petitioner would be forced into the second or successive context, precluded from filing a second or successive petition by *Rivero*, and thus on the wrong end of the second circuit split described above. Rather than subject Petitioner to a circuit split that can be resolved only through this Court's original habeas jurisdiction, the Court may take this opportunity to grant certiorari through the ordinary process.[2]

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[2] As described above, Petitioner also took every action possible to have the Eleventh Circuit wait for or consider this Court's decision in *Johnson*, including filing a motion for leave to seek reconsideration after *Johnson* was decided.

Finally, as described above, this case provides an unobstructed opportunity to address the retroactivity of *Johnson* because Petitioner had only three predicate convictions, one of which was expressly upheld under the now-void residual clause. *Welch*, 683 F.3d at 1312-13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the Eleventh Circuit vacated, and the case remanded for further consideration. In the alternative, the Court should grant certiorari and order full briefing and argument to resolve the deep disagreement among the circuits regarding the retroactivity of *Johnson*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lindsay C. Harrison hereby certify that I am a member of the Bar of this Court, and that I have this 21st day of December, 2015, caused the Reply Brief of Petitioner to be served via overnight mail and an electronic version of the document to be transmitted via electronic mail to:

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