No. 15-625

In the Supreme Court of the United States

IN RE RONNIE GLENN TRIPLETT, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should issue a writ of mandamus ordering the court of appeals to grant petitioner's application for leave to file a second or successive motion to vacate his sentence under 28 U.S.C. 2255(a), on the ground that *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), has been "made" retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2).

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OPINIONS BELOW

The order of the court of appeals denying petitioner's application for leave to file a second or successive Section 2255 motion (Pet. App. 1a-3a) is unpublished and unreported. Prior opinions of the court of appeals in petitioner's case are reported at 263 Fed. Appx. 688, and 160 Fed. Appx. 753.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2015. The petition for a writ of mandamus was filed on November 10, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

In 2004, following a guilty plea in the United States District Court for the Western District of Oklahoma, petitioner was convicted on two counts of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1), and one count 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 188 months of imprisonment on all counts, to be followed by three years of supervised release. 5:04-cr-00062-C Docket entry No. (Dkt. No.) 33 (Feb. 2, 2005). The court of appeals affirmed. 160 Fed. Appx. 753.

In 2007, petitioner filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. 2255(a). The district court dismissed the motion and declined to issue a certificate of appealability (COA). Dkt. No. 71 (Aug. 20, 2007); *id.* No. 76 (Aug. 29, 2007). The court of appeals declined to issue a COA and dismissed petitioner's appeal. 263 Fed. Appx. 688.

In 2015, petitioner filed an application in the court of appeals requesting authorization to file a second Section 2255 motion based on *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). The court of appeals denied the application. Pet. App. 1a-3a.

1. In January 2004, law enforcement officers in Oklahoma City, Oklahoma, received an anonymous tip that an auto repair shop was operating as a warehouse for stolen automobile parts and that illegal drugs were being sold at the venue. PSR ¶ 6. On January 6, 2004, officers acting in an undercover capacity made several controlled purchases of methamphetamine from petitioner. PSR ¶ 7. A subsequent search of the repair shop led to the discovery of drug paraphernalia as well as a .410-caliber shotgun and related ammunition. PSR ¶ 9. Further investigation revealed that petitioner owned the repair shop, PSR ¶ 13, and that petitioner's extensive criminal history included several prior felony convictions, PSR ¶ 2.

2. On April 20, 2004, a federal grand jury in the Western District of Oklahoma returned a six-count

indictment charging petitioner with possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) (Counts 1, 2 and 6); possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i) (Count 3); possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 4); and maintaining a place for the purpose of distributing and using methamphetamine, in violation of 21 U.S.C. 856(a)(1) (Count 5).

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 "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). It further defines "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.

3. Pursuant to a written plea agreement, petitioner pleaded guilty to two counts of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) (Counts 1 and 2), and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 4). Plea Agreement ¶¶ 1-2. The plea agreement preserved petitioner's right to seek appellate and collateral review of any decision by the district court to impose an ACCA sentence. *Id.* ¶ 8(d).

The Probation Office recommended that petitioner be sentenced pursuant to the ACCA. PSR ¶ 39. The PSR listed four qualifying convictions: (1) an Oklahoma conviction for possession of a controlled dangerous substance with intent to distribute (PSR ¶ 44); (2) an Oklahoma conviction for possession of a sawed-off shotgun (PSR ¶ 47); (3) an Oklahoma conviction for trafficking in illegal drugs (PSR ¶ 48); and an Oklahoma conviction for manufacturing a controlled dangerous substance (PSR ¶ 49). PSR ¶ 39; see also PSR ¶ 30. The Probation Office explained that, under the ACCA, the sentencing range for petitioner's Section 922(g)(1) conviction (Count 4) was 15 years of imprisonment to life. PSR ¶ 91; see 18 U.S.C. 924(e). The Probation Office calculated a guidelines range of 188 to 235 months. PSR ¶ 92.

Petitioner objected to the application of the ACCA on the grounds that, *inter alia*, "the convictions listed in * * * paragraph 39 are related cases." PSR Addendum 30. Petitioner contended that "[t]he convic-

tions arose from the same course of conduct, were part of a common scheme or plan, * * * were consolidated for sentencing," and "resulted in one incarceration." *Ibid.*[1]

The government contended that application of the ACCA was justified. Dkt. No. 30, at 7-10 (Jan. 31, 2005). The government explained that it was "[of] no consequence" that three of petitioner's qualifying convictions—the conviction for possession of a controlled dangerous substance with intent to distribute (PSR ¶ 44), the conviction for possession of a sawed-off shotgun (PSR ¶ 47), and the conviction for trafficking in illegal drugs (PSR ¶ 48)—occurred on the same day. Dkt. No. 30, at 7.[2] The government explained

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[1] At the time of petitioner's sentencing, under Sentencing Guidelines § 4A1.2(a)(2) (Nov. 1, 2007), "prior sentences imposed in related cases [we]re to be treated as one sentence for purposes of Section 4A1.1(a), (b), and (c)," *i.e.*, for purposes of scoring a defendant's criminal history. Application note 3 stated that "[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest." *Id.* § 4A1.2 comment. (n.3). Otherwise, "prior sentences [we]re to be considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing." *Ibid.* The Probation Office concluded that the drug offenses in paragraphs 48 and 49 of the PSR were "related" because "[t]he course of conduct" in each of those cases occurred in January 1996. PSR Addendum 29. The Probation Office therefore did not award any further criminal history points for the drug crime described in paragraph 49. See *ibid.*; PSR ¶ 49. That conclusion had no bearing on whether the crimes were "committed on occasions different from one another" for purposes of applying the ACCA enhancement. See 18 U.S.C. 924(e).

[2] Petitioner pleaded guilty to all three crimes on May 30, 1996. See PSR ¶¶ 44, 47, 48.

that the criminal acts underlying each of those convictions were "separated by many months." *Id.* at 8; see *id.* at 7. The government further explained that petitioner was convicted in a separate proceeding of yet another serious drug crime—manufacturing a controlled dangerous substance (PSR ¶ 49)—for conduct that also occurred on a different date. Dkt. No. 30, at 7-8.[3]

At petitioner's sentencing, the district court adopted the probation officer's recommendation and classified petitioner as an armed career criminal. 2/01/05 Sent. Tr. (Tr.) 5, 8. The court rejected petitioner's argument that the ACCA should not apply because his qualifying prior convictions were "really one continuing violation in '95 or '96 rather than separate convictions." Tr. 4. The court concluded that the convictions "may have resulted in one sentence or sentences served concurrently[,] * * * but they were separate offenses and * * * they do warrant the application of the armed career criminal provision." Tr. 5. The court sentenced petitioner to 188 months of imprisonment on each count of conviction, to be served concurrently. Tr. 16.

4. The court of appeals affirmed. 160 Fed. Appx. 753. The court noted that petitioner "maintain[ed] that he was only convicted once because three of his prior convictions were the result of a single judicial proceeding and term of incarceration." *Id.* at 762. The court concluded that "[e]nhancement under the ACCA is proper even if the three prior convictions were the result of a single judicial proceeding," because "[t]he ACCA only requires that the felonies be

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[3] Petitioner pleaded guilty to that offense on January 17, 1997. PSR ¶ 39.

committed on occasions different from one another." *Ibid.* The court concluded that "[petitioner's] prior convictions, while arising out of only two judicial proceedings and resulting in one term of incarceration, stemmed from criminal acts occurring on different dates and at different locations, which [petitioner] does not dispute." *Ibid.* The court held that "the district court did not err in treating these convictions as separate for purposes of applying the ACCA." *Ibid.* This Court denied certiorari. 547 U.S. 1215.

5. On June 4, 2007, petitioner filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. 2255(a), claiming that the sentencing court had erred in applying the ACCA; that *United States* v. *Booker*, 543 U.S. 220 (2005), repealed 18 U.S.C. 3553(b)(1); and that his trial counsel was ineffective. The district court dismissed the motion, holding that his first and second claims had been considered and rejected in earlier pleadings and could not be reasserted now, that petitioner had waived his third claim by virtue of his plea agreement, and that the third claim was meritless in any event. Dkt. No. 71 (Aug. 20, 2007). The district court declined to issue a COA. *Id.* No. 76 (Aug. 29, 2007). The court of appeals likewise declined to issue a COA and dismissed petitioner's appeal. 263 Fed. Appx. 688.

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

a. Federal defendants who have previously filed a motion to vacate under Section 2255 may not file a "second or successive" Section 2255 motion without obtaining authorization from the court of appeals. See 28 U.S.C. 2255(h), 2244(b)(3)(A); *Burton* v. *Stewart*,

549 U.S. 147, 152 (2007) (per curiam). 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," *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (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. 2255(h)(2); see also 28 U.S.C. 2244(b)(3)(C).

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.

b. On September 2, 2015, petitioner filed an application in the court of appeals requesting leave to file a successive Section 2255 motion challenging his ACCA sentence in light of *Johnson*. Pet. App. 1a. On September 21, 2015, while petitioner's application was pending, the court of appeals issued a published decision denying another federal prisoner's application for leave to file a successive Section 2255 motion seeking to challenge his ACCA sentence based on *Johnson*. See *In re Gieswein*, 802 F.3d 1143, 1144 (10th Cir. 2015) (per curiam). In *Gieswein*, the court, acting

solely on the basis of Gieswein's application, concluded that *Johnson* announced a new substantive rule of constitutional law, but that this Court had not yet "made" that rule retroactive to cases on collateral review either expressly or through a combination of holdings. *Id.* at 1146, 1147-1149.

c. On September 23, 2015, the court of appeals issued an order denying petitioner's application for leave to file a successive Section 2255 motion based on *Gieswein*. Pet. App. 1a-3a.

d. On the same day that petitioner's application was denied, federal prisoner Bryan Lee Jackson, who had a pending application for leave to file a successive Section 2255 motion based on *Johnson*, asked the court of appeals to reconsider *Gieswein* in an initial hearing en banc. See Pet. for Initial Hr'g En Banc, *In re Jackson*, No. 15-8098 (10th Cir. 2015).[4] The government, in its court-ordered response to the petition, agreed with Jackson that *Gieswein* was wrongly decided and should be reconsidered en banc and overruled, but argued that Jackson's case was not a suitable vehicle in which to grant reconsideration because Jackson's ACCA-enhanced sentences were subsequently reduced and thus did not exceed the other-

[4] A "petition for rehearing" of an order granting or denying authorization for leave to file a successive Section 2255 motion is barred by statute. See 28 U.S.C. 2244(b)(3)(E). Jackson's motion, however, sought an initial hearing en banc concerning whether to grant or deny authorization. See generally *Browning* v. *United States*, 241 F.3d 1262, 1263 (10th Cir. 2001) (en banc) (granting initial hearing en banc to decide authorization issue); but see *Bryan* v. *Mullin*, 100 Fed. Appx. 783, 785 (10th Cir. 2004) (striking petition for initial hearing en banc in analogous circumstances, reasoning that nothing in Section 2244(b)(3)(E) affirmatively authorizes initial hearing en banc).

wise-applicable statutory maximum. Pet. App. 20a-21a. The government suggested, however, that the court may wish to grant rehearing en banc sua sponte in either *Gieswein* itself or in petitioner's case. *Ibid.*; see *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) ("Although an order issued under Section 2244(b) 'shall not be appealable and shall not be the subject of a petition for rehearing or a petition for a writ of certiorari,' 28 U.S.C. 2244(b)(3)(E), such orders are not beyond all review, as the statute does not preclude the [c]ourt of [a]ppeals from rehearing such a decision *sua sponte*.").

On November 2, 2015, the court of appeals entered an order denying Jackson's petition for initial hearing en banc. No. 15-8098 Order (Nov. 2, 2015). As of the date of this filing, the court of appeals has not ordered rehearing en banc *sua sponte* in either *Gieswein* or petitioner's case.

ARGUMENT

Petitioner seeks review of the court of appeals' determination that this Court has not "made" *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2). Because Congress has eliminated statutory certiorari review of denials of authorization to file second or successive collateral attacks, see 28 U.S.C. 2244(b)(3)(E), petitioner has sought review in this Court by filing a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. 1651(a). Petitioner asks this Court to "direct[] the United States Court of Appeals for the Tenth Circuit * * * to enter an order under 28 U.S.C. 2244(b)(3) authorizing a second Section 2255 motion." Pet. 18.

Although the courts of appeals are divided on the question presented, and although the government agrees with petitioner that this Court has "made" *Johnson* retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h), petitioner has failed to meet the strict criteria that govern the issuance of the extraordinary writ that he seeks. Accordingly, the petition for a writ of mandamus should be denied.

1. a. The government agrees with petitioner that this Court has "made" *Johnson* retroactive to cases on collateral review within the meaning of Section 2255(h)(2). *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). 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).

Furthermore, the new, previously unavailable rule of constitutional law announced in *Johnson* 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 analytical 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 656 (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 defy 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* v. *Lynaugh*, 492 U.S. 302 (1989), abrogated on other grounds, 536 U.S. 304 (2002), which 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. 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).

As applied to the ACCA, *Johnson* is a substantive rule and it has therefore been "made" retroactive by this Court to cases on collateral review. A 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 substantive effect, just as pre-*Johnson* decisions that narrowly interpreted 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 (2007), was a substantive rule under *Schriro*).

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 this Court has "made" *Johnson* retroactive to cases on collateral review.

In *Price* v. *United States*, 795 F.3d 731 (2015), the Seventh Circuit agreed with the government's position that *Johnson* announced a new substantive rule that has therefore been "made" retroactive to ACCA cases on collateral review. *Id.* at 734-735. 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*, No. 15-3531, 2015 WL 7351939, at *1 (8th Cir. Nov. 20, 2015) (per curiam).

Three circuits, however, have reached the opposite conclusion. In *In re Rivero*, 797 F.3d 986 (2015), the Eleventh Circuit denied a prisoner's request for au-

thorization to file a successive Section 2255 motion in light of *Johnson*. Although the court concluded that *Johnson* had announced a new substantive rule of constitutional law, it held that this Court had not "made" *Johnson* retroactive to cases on collateral review because Congress could have authorized the same sentence for the defendant's conduct had it done so with language that was not vague. *Id.* at 989-990. 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 C.A. Order (Rivero). The Eleventh Circuit has taken no further action since receiving that briefing.

The Fifth Circuit has likewise denied authorization to file a successive Section 2255 motion that raises a claim under *Johnson*. *In re Williams*, 806 F.3d 322 (2015). The court concluded that *Johnson* establishes a new rule of constitutional law, but that the holding of *Johnson* was not a new substantive rule within the meaning of the second exception for retroactivity recognized in *Teague* v. *Lane*, 489 U.S. 288 (1989). *Williams*, 806 F.3d at 325. 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. *Ibid.* The court also stated 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*. *Ibid.*

As described above, 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*. *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.

2. Although the circuits are in conflict on the question whether *Johnson* has been made retroactive to cases on collateral review, 28 U.S.C. 2244(b)(3)(E) prevents certiorari review of gatekeeping determinations of the courts of appeals addressing that question. Petitioner does not dispute that this provision applies to his case or that it bars certiorari review. Pet. 3, 6, 8-9.

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 this 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). Petitioner seeks review of the court of

appeals' gatekeeping determination through a petition for a writ of mandamus. See Pet. 1.[5]

In *Cheney* v. *United States District Court for the District of Columbia*, 542 U.S. 367 (2004), this Court held that the extraordinary remedy of mandamus will not issue unless three conditions are met. First, the petitioner must demonstrate that he has "no other adequate means to attain the relief he desires." *Id.* at 380. Second, the petitioner "must satisfy his burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* at 381. Third, "even if the first two prerequisites have been met," the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Ibid.* Petitioner accepts that those conditions apply and that they govern his right to the relief he seeks. Pet. 18. Petitioner has failed to satisfy those criteria, however, and accordingly, his petition should be denied.

a. i. Petitioner has not demonstrated that "his right to issuance of the writ is clear and indisputable," *Cheney*, 542 U.S. at 381, because petitioner has failed to show that, without the residual clause, he would not otherwise have been subject to the ACCA's enhanced penalties.

The ACCA mandates a minimum sentence of 15 years of imprisonment if a defendant convicted under Section 922(g)(1) has at least three prior convictions

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[5] Petitioner has also sought review by separately filing a petition for an original writ of habeas corpus. See *In re Triplett*, No. 15-626 (Dec. 14, 2015); see also Pet. 9 n.3; *id.* at 18. "Habeas corpus proceedings, except in capital cases, are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted." Sup. Ct. R. 20.4(b).

for a "violent felony" or a "serious drug offense" that were "committed on occasions different from one another." 18 U.S.C. 924(e). Prior felonies are committed on "occasions different from one another" for purposes of Section 924(e)(1) "if each of the prior convictions arose out of a separate and distinct criminal episode." *United States* v. *Letterlough*, 63 F.3d 332, 335 (4th Cir.) (citation omitted), cert. denied, 516 U.S. 955 (1995). Applying that standard, courts of appeals have upheld enhancements under Section 924(e)(1) for crimes committed within a short period of time if they occurred sequentially (as opposed to simultaneously), if they took place at different locations, or if they involved different crimes and different victims. See *United States* v. *Hudspeth*, 42 F.3d 1015, 1019-1021 (7th Cir. 1994) (en banc) (reviewing cases), cert. denied, 515 U.S. 1105 (1995).

The requirement that prior convictions be "committed on occasions different from one another" was added to Section 924(e)(1) in 1998. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4402. The relevant language was adopted after the Eighth Circuit concluded in *United States* v. *Petty*, 798 F.2d 1157, 1159-1160 (1986), vacated, 481 U.S. 1034 (1987), that ACCA's 15-year minimum sentence could be applied based on six prior convictions for armed robbery stemming from a single incident where the defendant robbed six people simultaneously. Senator Biden explained:

> Under the amendment, the three previous convictions would have to be for offenses "committed [on] occasions different from one another." Thus a single multi-count conviction could still qualify where the counts related to crimes committed on different

> occasions, but a robbery of multiple victims simultaneously (as in *Petty*) would count as only one conviction.

134 Cong. Rec. 32,702 (1988).

Although petitioner's prior conviction for possession of a sawed-off shotgun (PSR ¶ 47) falls under the now-invalidated residual clause, petitioner has three prior convictions for a "serious drug offense" that are unaffected by *Johnson*. See PSR ¶ 39. Each of those convictions was identified in the PSR as a qualifying conviction. *Ibid.* (identifying a total of four qualifying convictions). The term "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

- On May 30, 1996, petitioner pleaded guilty to possession of a controlled dangerous substance with intent to distribute under Oklahoma law and was sentenced to 20 years of imprisonment for that offense. PSR ¶ 44. That conviction arose from the execution of a search warrant at petitioner's residence (1420 S.W. 81st Street) on May 10, 1995. *Ibid.*
- On May 30, 1996, petitioner also pleaded guilty to trafficking in illegal drugs under Oklahoma law and was sentenced to 20 years of imprisonment for that offense. PSR ¶ 48. That conviction arose from petitioner's arrest on January 24, 1996, in a motel room where he and his common-law wife were cutting and packaging methamphetamine to sell. *Ibid.*

- On January 17, 1997, petitioner pleaded guilty to manufacturing a controlled dangerous substance under Oklahoma law and was sentenced to 25 years of imprisonment for that offense. PSR ¶ 49. That conviction arose from the execution of a search warrant at petitioner's methamphetamine lab in rural Logan County, Oklahoma, on January 25, 1996. *Ibid.* Officers learned about the methamphetamine lab in Logan County at the time of defendant's arrest in the motel room the day before. *Ibid.*

Petitioner objected to the probation officer's determination that petitioner was an armed career criminal on the grounds that the convictions listed in paragraph 39 of the PSR "arose from the same course of conduct, were part of a common scheme or plan, * * * were consolidated for sentencing," and "resulted in one incarceration." PSR Addendum 30. But the district court rejected that argument at sentencing. Tr. 5. The court concluded that although petitioner's qualifying convictions "may have resulted in one sentence or sentences served concurrently[,] * * * they were separate offenses" and they "warrant the application of the armed career criminal provision." *Ibid.* On direct appeal, the court of appeals likewise held that "[petitioner's] prior convictions, while arising out of only two judicial proceedings and resulting in one term of incarceration, stemmed from criminal acts occurring on different dates and at different locations, which [petitioner] does not dispute," and that the district court "did not err in treating these convictions

as separate for purposes of applying the ACCA." 160 Fed. Appx. at 762.[6]

In the government's court-ordered response to the petition for initial hearing en banc in *In re Jackson*, No. 15-8098 (10th Cir.), see pp. 9-10, *supra*, the government stated that Jackson's case was not an appropriate vehicle for the court of appeals to reconsider its decision in *Gieswein* because Jackson's ACCA sentence was later reduced. Pet. App. 19a-20a. The government added, however, that the court may wish to grant initial hearing en banc in *Gieswein* or in petitioner's case, because "unlike Jackson, those defendants' erroneously-enhanced ACCA sentences exceed the unenhanced statutory maximum." *Id.* at 20a-21a; *id.* at 28a.

That view was based on petitioner's statement in his gatekeeping motion that his ACCA sentence was "imposed on the basis of two prior drug offenses and one prior possession of a sawed-off shotgun." 15-6168 C.A. Doc. 1, at 1 (Sept. 2, 2015); see also Pet. 5 ("One of the three predicate convictions upon which petitioner's enhanced sentence under the ACCA was based—his conviction in Oklahoma state court for possession of a sawed-off shotgun—qualified as a predicate offense under the residual clause."). A full review of petitioner's case reveals that petitioner's description of the prior convictions underlying his ACCA sentence is incorrect. Petitioner has failed to

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[6] The court of appeals stated in its unpublished opinion that "the district court found three of [petitioner's] four prior convictions qualified for purposes of the ACCA and that the ACCA applied," 160 Fed. Appx. at 758, but the record does not support that statement.

show that, without the residual clause, he would not have been subject to the ACCA's enhanced penalties.

ii. Even if petitioner had shown that his ACCA sentence depends on a residual-clause conviction, he still would not be able to show that his right to issuance of the writ of clear and indisputable. *Cheney*, 542 U.S. at 381.

As petitioner acknowledges (Pet. 12-14), the courts of appeals are "openly divided" on the question whether this Court has "made" *Johnson* retroactive to cases on collateral review. The absence of a definitive ruling from this Court on that question, coupled with the division of opinion on the issue in the courts of appeals, shows that petitioner's right to relief, if any, is not "clear and indisputable." Cf., *e.g.*, *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (holding that an error is not "clear or obvious" within the meaning of the plain-error rule of Federal Rule of Criminal Procedure 52(b) when it is "subject to reasonable dispute"); *United States* v. *Castillo-Estevez*, 597 F.3d 238, 241 (5th Cir.) (no plain error when there is no controlling case law and other circuits are split), cert. denied, 562 U.S. 961 (2010); *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (same); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006).

Furthermore, petitioner predicates his claim to relief, in part, on the fact that, although the courts of appeals are divided on whether this Court has "made" *Johnson* retroactive, the courts of appeals all agree that *Johnson* announced a "new substantive rule." Pet. 19; see *ibid.* ("No court to address the question has disagreed that *Johnson* states a new substantive rule."). After petitioner filed his mandamus petition,

however, the Fifth Circuit held in *Williams* that a federal prisoner was not entitled to authorization to file a successive Section 2255 motion because *Johnson* was not a substantive rule with retroactive effect. See 806 F.3d at 325. Although the government disagrees with that conclusion, these conflicting decisions, not only on whether *Johnson* has been "made" retroactive to cases on collateral review, but also on whether *Johnson* is a substantive rule, undermine petitioner's claim that he has a "clear and indisputable" right to the extraordinary relief he seeks. See, *e.g.*, *Republic of Venezuela* v. *Philip Morris, Inc.*, 287 F.3d 192, 199 (D.C. Cir. 2002) (presence of conflicting decisions on a legal question justified the conclusion that a mandamus petitioner's right to relief was not clear and indisputable).

b. In any event, petitioner has not demonstrated the existence of "exceptional circumstances" warranting the exercise of this Court's discretionary powers. Sup. Ct. R. 20.1; *Cheney*, 542 U.S. at 381 (even where criteria for mandamus are met, the Court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances"). Petitioner's essential argument is that the circuits are divided on whether *Johnson* has been "made" retroactive to cases on collateral review and that Section 2244(b)(3)(E) blocks traditional certiorari review of that conflict, which would otherwise be worth of this Court's statutory certiorari review. Pet. 8-20. Those considerations, standing alone, do not constitute "exceptional circumstances" justifying mandamus, especially where the issue of *Johnson*'s retroactivity could reach the Court in a more traditional way.

The question whether *Johnson* has been "made" retroactive to cases on collateral review is unique to second or successive collateral motions, and Congress has barred certiorari review of a gatekeeping determination denying leave to file such an attack. See 28 U.S.C. 2255(h); 28 U.S.C. 2244(b)(2)(A). But, as outlined above, the courts of appeals are now also divided on an antecedent issue bearing on that question, which is whether *Johnson* announced a new "substantive" rule. The answer to that question not only informs the analysis of whether *Johnson* has been "made" retroactive within the meaning of Section 2255(h)(2), but it also bears on the question whether *Johnson* is retroactively applicable in an *initial* Section 2255 motion. See *Schriro*, 542 U.S. at 351-352 (explaining that new substantive rules are retroactively applicable to cases on collateral review).

The Fifth Circuit's decision in *Williams* addressed both issues: it precluded a second or successive Section 2255 motion based on *Johnson*, but its reasoning (that *Johnson* is not substantive) would also seem to preclude initial Section 2255 relief as well. One district court within the Fifth Circuit has so held, stating that *Williams* "unmistakably forecloses" a federal prisoner from raising a *Johnson*-based ACCA challenge to his sentence in a first Section 2255 motion. See *Harrimon* v. *United States*, No. 15-cv-00152 Docket entry No. 9 (N.D. Tex. Nov. 19, 2015), appeal pending, No. 15-11175 (Nov. 23, 2015). Unless the Fifth Circuit narrows its holding in *Williams*, a conflict will exist on the threshold question whether *Johnson* announced a "substantive" rule. See *Rivero*, 797 F.3d at 989-990; *Price*, 795 F.3d at 734-735.

In light of that conflict, it is reasonably possible that the retroactivity of *Johnson* to cases on collateral review could be reviewed by this Court through a grant of certiorari from an order affirming the denial of an initial Section 2255 motion (or from the denial of a certificate of appealability on that issue). The continued availability of certiorari review in that context undercuts petitioner's suggestion that exceptional circumstances exist that warrant the exercise of mandamus jurisdiction.

Petitioner correctly points out (Pet. 16-17) 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). 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); 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). But that consideration does not make it appropriate to conduct review through mandamus where the conditions for issuing the writ are not otherwise satisfied.

3. In addition to this petition for a writ of mandamus, three pending petitions for an original writ of habeas corpus under 28 U.S.C. 2241, including one filed by petitioner, ask the Court to address the question of *Johnson*'s retroactivity. See *In re Butler*, No. 15-578 (Nov. 3, 2015); *In re Triplett*, No. 15-626 (Nov. 10, 2015); *In re Sharp*, No. 15-646 (Nov. 16, 2015).

The Court has ordered a response from the United States in *Butler*, which is currently due on December 18, 2015.[7] It has also ordered a response in *Sharp*, which is currently due on December 30, 2015. Butler and Sharp request that their petitions be construed in the alternative as petitions for writs of mandamus. Pet. 32 n.16, *Butler*, *supra*, (No. 15-578); Pet. 31 n.13, *Sharp*, *supra*, (No. 15-646).

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). On December 2, 2015, the United States filed its response in *Hammons*. In light of those other petitions pending before the Court, the Court may wish to hold this petition until it acts on those petitions and then determine whether any of them affords an appropriate vehicle for review.

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[7] On December 9, 2015, the petitioner in *Butler* obtained habeas corpus relief and an order directing his immediate release from the District of Arizona (the district of his confinement). See App., *infra*, 13a-14a. On December 11, 2015, in light of Butler's release, the parties filed Rule 46.1 notices of dismissal.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL A. ROTKER
Attorney

DECEMBER 2015

APPENDIX A

UNITED STATES COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CR-04-62-C

UNITED STATES OF AMERICA, PLAINTIFF

v.

RONNIE GLENN TRIPLETT

Tues. Feb. 1, 2005

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

FOR THE PLAINTIFF:

BY: EDWARD KUMEIGA
Assistant U.S. Attorney
Oklahoma City, Oklahoma

FOR THE DEFENDANT:

BY: TONY LACY
Assistant Federal Public Defender
Oklahoma City, Oklahoma

* * * * *

[2]

PROCEEDINGS:

THE COURT: This is United States vs. Ronnie Glenn Triplett, case number criminal 04-62-C.

Counsel, make your appearances, please.

MR. KUMIEGA: Good morning, Your Honor. Edward Kumiega for the United States Government. At counsel table with me is Keri Nestor of the Oklahoma City Police Department and Mark Brown of the ATF.

MR. LACY: Good morning. Tony Lacy on behalf of Ronnie Glenn Triplett, and he's present in court and we're ready to proceed.

THE COURT: This case comes on for sentencing pursuant to Mr. Triplett's earlier plea of guilty. I have read and reviewed the presentence report which indicates it was most recently revised on September 10th of this year.

Mr. Triplett, let me ask you if you have had a full opportunity to read this report carefully and discuss it thoroughly with Mr. Lacy?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Lacy, do you confirm that?

MR. LACY: Yes.

THE COURT: And, Mr. Kumiega, has the government had its opportunity as well?

MR. KUMIEGA: Yes, Your Honor.

[3]

THE COURT: According to the findings and recommendation of the probation officer, the total offense level in this case is 31, the criminal history category is VI, and the resulting guideline range is 188 to 235 months. To these conclusions, the defendant, through counsel, has lodged a number of objections.

I have read the sentencing memoranda that has been—that have been filed by both counsel on both the Blakely and Booker issues and the specific objections to the contents of the presentence report.

Mr. Lacy, do you have anything to add to what's in the addendum or in your brief?

MR. LACY: No, Your Honor.

THE COURT: On any objection?

MR. LACY: No, Judge.

THE COURT: I find on the objection to the treatment of the methamphetamine as a Schedule III as opposed to a Schedule II substance, that the objection is overruled. I believe every circuit that's addressed this issue has found against your position, Mr. Lacy, and I will follow that precedent and overrule that objection.

I'm not sure I said that right. I'm treating it as a Schedule II substance as recommended in the presen-

tence report rather than a Schedule III substance, as you argue.

There are objections to factual statements in the [4] presentence report which make no difference in the guideline calculation and which will make no difference in my sentencing decision. For an example, your objection to paragraph 11, I will not make rulings on those as they are immaterial.

Your objections based on Blakely have been resolved by the Booker decision. I will calculate the guidelines as I always have and, of course, they're just simply not mandatory now.

I think that resolves all of the objections in the presentence report based on Blakely, does it not, Mr. Lacy?

MR. LACY: It would, Judge.

THE COURT: The possession of a firearm, there is an objection beyond Blakely arguing that the guidelines system shifts the burden of proof. Again, case law is clear that once the government carries its burden of showing link, then the defendant must show that it is unreasonable to believe it was in connection with the offense. The defendant has not made that showing and I will overrule your objection.

A chapter 4 enhancement—and if I'm summarizing—if my summary is not adequate to state your position, Mr. Lacy, I assume that you will jump in there. But it appears to me that you really have two objec-

tions on the armed career criminal enhancement. One is that this is really one continuing violation in '95 or '96 rather than separate convictions and it shouldn't be used—this shouldn't be treated separately.

I think the probation officer's response and Mr. Kumiega's [5] brief are very good at explaining why that isn't so. They were separate times and in some instances they're separate places. They may have resulted in one sentence or sentences served concurrently on all of them but they were separate offenses and they are appropriately treated as such under the guidelines, and they do warrant the application of the armed career criminal provision.

Insofar as you argue that the Blakely and Booker line of cases will ultimately result in the necessity to plead and prove previous convictions, existing case law says that isn't so, and I will follow existing case law and the armed career criminal enhancement will apply.

MR. LACY: With that, Judge, may I submit an exhibit to the Court with regard to the previous pleadings that have been filed in this court wherein the United States Government does allege and plead the armed career criminal statute in their indictment and in other notices provided to the Court?

THE COURT: In other cases, you mean?

MR. LACY: Yes. May I approach?

THE COURT: Yes.

MR. LACY: In the Outlaws case, it's noted that in the indictment against Virgil Earl Nelson they actually pled it as an armed career criminal violation in the penalty part of the indictment, and, further, they provided notice to the defendant by form of a written notice regarding the application [6] of the armed career criminal. In this case, no notice or pleading was made to that regard.

THE COURT: Mr. Kumiega?

MR. KUMIEGA: Two things, Your Honor. Mr. Triplett had notice through the plea agreement that he was an armed career criminal, and under U.S. vs. Johnson, the government doesn't even have to provide notice; it's mandatory if the court finds that there are predicate convictions that qualify.

As to Virgil Nelson, Virgil Nelson was not an armed career criminal. And if the government pled it, the government pled the statute, not the actual underlying predicate felonies to make it an armed career criminal. I'm not sure of the relevancy of Mr. Lacy's argument regarding any pleadings that the government filed in the Outlaws case.

MR. LACY: Judge, that was Tom Delana's count. It's in Virgil Nelson's indictment but it's actually addressed to Tom Delana. With regard to Johnson, I believe the Booker line of cases supersedes the prior precedent regarding notice, and under the circumstances that have developed since June with Blakely and Booker, I believe that notice in the indictment and pleading in the

indictment and proof of that beyond a reasonable doubt is necessary in order to be constitutional and for the armed career criminal to apply.

THE COURT: I don't have the file in front of me but [7] do you dispute that the plea agreement—well, I do have the file in front of me.

MR. LACY: Judge, the plea agreement specifically reserves the defendant's right to challenge the armed career criminal and to appeal that. So there is reference to the armed career criminal application in the plea agreement.

THE COURT: Well, I thought I recalled that from the plea colloquy, that we discussed the application of the Armed Career Criminal Act. So the defendant was on notice at the time he entered his guilty plea that that enhancement could be imposed; right?

MR. LACY: It was an allegation in the plea agreement. It was not contained in the charging documents.

THE COURT: I understand.

MR. LACY: Yes.

MR. KUMIEGA: Your Honor, there is case law that the government does not even have to provide notice. If the Court finds it sui sponte, it applies. U.S. vs. Johnson is the case, Your Honor.

THE COURT: Well, I'm satisfied that existing case law supports the application of that enhancement in this case.

MR. LACY: Judge, and we said that in our motion, that we recognize the existing precedent.

THE COURT: So that objection is overruled.

I believe that this resolves all of your objections. It's [8] difficult because there are so many based on those rulings.

Mr. Lacy, are there any I have not covered, other than the right to a downward departure?

MR. LACY: Judge, if the Court determines him to be an armed career criminal, his offense level and criminal history is established by the guidelines and it would resolve the other issues because that would limit where the Court can go within those guidelines.

THE COURT: So I have ruled on all of your objections?

MR. LACY: What you've done is you have circumvented other necessary rulings if the Court determines him to be an armed career criminal.

THE COURT: All right. Well, based on those rulings, I adopt the factual recommendations and findings that are set out in the presentence report. Of course, the defendant has urged a right to a downward departure. I'm sure any information in connec-

tion with a downward departure would also bear on the reasonableness of the application of the guidelines.

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[15]

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THE COURT: Mr. Triplett, I assume these are your friends and family, and I agree with you that it is certainly inappropriate to call drug offenses victimless crimes. Your family is the victim of your conduct, and you recognize that, and I think that will help in your rehabilitation and it has been taken into account in reductions in the guideline range for acceptance of responsibility.

I disagree with much of what you've said, however. First, finding that there's no guarantee at all that the state charges would have been filed as one charge in federal court. But, more importantly, the purpose of the armed career criminal statute enhancements for multiple convictions are to ratchet up the punishment every time you're caught. And when I look at your criminal history and what Mr. Lacy has called a really bad year for you in '95, I'm amazed that no apparent number of arrests could deter you from what you were doing, which was criminal conduct.

If you can't be brought up short by being hauled into jail by the police and being forced to bond out, I don't know what [16] would haul you up short. I don't think that did because you're back at it.

And while you argue about the small quantity involved in this particular offense, that was just luck on your part. Obviously, you were manufacturing. You continued after first—again after being exposed by a search warrant.

I don't believe that the guideline range is inappropriate to satisfy the goals of sentencing in this case. I think you need to be protected from yourself, and the public needs to be protected from your continuing manufacture of methamphetamine and use of it by having firearms where that is being done. I think to promote respect for the law, perhaps in your own family, it's necessary that a significant punishment be imposed. So, I don't think the guidelines are unreasonable in this case at all. On the other hand, all of the things that you mention warrant a sentence at the bottom of the guidelines. Certainly 188 months is enough to correct your behavior, if it's capable of correction.

For that reason, I'm committing you to the custody of the Bureau of Prisons to be imprisoned for a term of 188 months. This consists of 188 months as to each count, all to be served concurrently.

I find that you have no ability to pay a fine and no fine is imposed. I recommend that you participate in the Inmate [17] Financial Responsibility Program at a rate to be determined by the prison staff in accordance with the requirements of that program.

I further recommend that you participate in the Residential Drug Abuse Program while you are incarcerated.

Mr. Triplett, on release from imprisonment, you will be placed on supervised release for a term of three years. That is three years on each count and all to run concurrently. Within 72 hours of your release from the custody of the Bureau of Prisons, you must report in person to the probation office to which—in the district to which you are released. While on supervision, you will comply with all standard conditions which have been adopted by this Court and which will be set out in your judgment and commitment order. You will not possess a firearm or any destructive device.

I find that you are not a candidate for community service but I do impose a special condition of participation in a program of substance abuse aftercare at the direction of your probation officer. You will totally abstain from the use of alcohol and any intoxicant both during and after completion of this program, and you may be required to contribute to the cost of services depending on your ability to pay. I require you to pay a special assessment of $100 as to each count, for a total of $300, which is due immediately. Mr. Triplett, I advise you that from this judgment and [18] sentence you have the right of appeal to the United States Court of Appeals for the Tenth Circuit, at least to the extent that you have not waived any right of appeal. That appeal—If you can't afford the costs of

an appeal, you may apply for leave to appeal informa pauperis, that is, without prepayment of costs, for preparation of transcripts and appointment of counsel at government expense. If you wish to file an appeal, you must do so within 10 days of today's date or you may request that the clerk spread that of record at this time.

I will remand you to the custody of the marshal for service of sentence immediately.

* * * * *

(PROCEEDINGS CLOSED)

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Mar. 4, 2005 /s/ GREG BLOXOM
Date GREG BLOXOM

APPENDIX B

UNITED DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. 4:15-cv-321-TUC-DCB (LAB)

JUAN DESHANNON BUTLER, PETITIONER

v.

SUSAN G. MCCLINTOCK, WARDEN, FCI-TUCSON, RESPONDENT

Dec. 9, 2015

ORDER GRANTING WRIT OF HABEAS CORPUS AND DIRECTING IMMEDIATE RELEASE OF PETITIONER

Pending before the Court is the parties' Joint Motion for Expedited Ruling on Second Amended Petition for a Writ of Habeas Corpus and Immediate Release from Custody. In light of the parties' agreement that Petitioner is entitled to relief based on *Chambers v. United States*, 555 U.S. 122 (2009),

IT IS HEREBY ORDERED granting the second amended petition as to Claim One.

IT IS FURTHER ORDERED that the Respondent shall discharge Petitioner from custody immediately.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on Judge Claire V. Eagan of the United States District Court for the Northern District of Oklahoma, referencing that court's case No. 05-CR-004-CVE.

Dated this 9th day of Dec., 2015.

/s/ DAVID C. BURY
DAVID C. BURY
United States District Judge