No. 15-646

In the Supreme Court of the United States

IN RE WILLIE B. SHARP, PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), announced a new rule of constitutional law that has been (or should be) made retroactive to cases on collateral review, as is required to file a successive motion to vacate a federal prisoner's sentence under 28 U.S.C. 2255(h)(2).

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OPINION BELOW

A prior opinion in petitioner's case appears at 204 Fed. Appx. 844.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 2241.

STATEMENT

In 2005, following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of unlawful possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. 05-cr-00039 Docket entry No. (Docket No.) 35, at 1-3 (Jan. 20, 2006). The court of appeals affirmed. 204 Fed. Appx. 844.

In 2007, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. 5a-7a.

In 2015, petitioner filed an application for leave to file a second or successive motion to vacate his sen-

tence under Section 2255(a). The court of appeals denied the application. Pet. App. 1a-3a.

1. On September 24, 2004, petitioner sold a .22-caliber Browning rifle to an undercover federal agent. Petitioner told the agent that he could obtain more firearms. Further investigation revealed that the rifle had been stolen, along with a number of other firearms, from a warehouse in Lutz, Florida, earlier that month. The investigation further revealed that petitioner's extensive criminal history included several prior felony convictions. Presentence Investigation Report (PSR) ¶¶ 7-9; Pet. App. 11a-12a.

2. On February 1, 2005, a federal grand jury in the Middle District of Florida returned an indictment charging petitioner with unlawful possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Docket No. 1, at 1-2. Petitioner pleaded guilty pursuant to a written plea agreement. Pet. App. 9a-12a. Petitioner waived his rights to appeal and collaterally attack his sentence, subject to certain exceptions, one of which reserved petitioner's right to argue that his "sentence exceeds the statutory maximum penalty." *Id.* at 10a.

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 first half of this definition ("is burglary, arson, or extortion, involves use of explosives") is known as the enumerated-crimes clause, while the second half ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as the residual clause.

3. The Probation Office recommended that the district court sentence petitioner as an armed career criminal because his criminal history included a number of prior violent felony convictions for burglary. PSR ¶¶ 15, 24, 99.[1] Petitioner also had a prior conviction for delivery of cocaine. PSR ¶ 34. Petitioner's cocaine-delivery conviction was a "serious drug offense" because it was punishable by up to 15 years of imprisonment. See Fla. Stat. Ann. § 775.082(3)(c) (West 2010); *id.* § 893.03(1) (West 2013). Petitioner's burglary and attempted-burglary convictions were

[1] Petitioner's criminal history included numerous convictions for burglary and attempted burglary under Florida law. See, *e.g.*, Pet. App. 11a-12a; PSR 5, ¶¶ 28-32, 42.

"violent felon[ies]" under the ACCA's residual clause.[2] The Probation Office calculated a guidelines range of 168 to 210 months of imprisonment, but noted that the mandatory minimum sentence was 15 years (180 months). PSR ¶ 100. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Docket No. 35, at 2-3; Pet. App. 5a.

4. On appeal, petitioner's counsel filed a motion to withdraw and a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), setting forth counsel's belief that no nonfrivolous issues existed for appeal. No. 06-10886, 2006 WL 4524185 (2006). The court of appeals granted the motion to withdraw and summarily affirmed. 204 Fed. Appx. 844.

5. On July 20, 2007, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255(a), alleg-

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[2] "Burglary" is a violent felony under the ACCA's enumerated-crimes clause, but in *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court explained that "burglary," as used in the ACCA, refers to the generic definition of the offense, which requires, *inter alia*, "an unlawful or unprivileged entry into, or remaining in, a building or other structure." *Id.* at 598. The Florida burglary statute is broader than this generic definition because it encompasses unprivileged entries into the curtilage. See *James* v. *United States*, 550 U.S. 192, 211-212 (2007), overruled by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). But even though Florida burglary is non-generic burglary under the enumerated-crimes clause, *Taylor* recognized that "[t]he Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under [the residual clause]." 495 U.S. at 600 n.9 (citation omitted). In *James*, this Court held that attempted burglary under Florida law satisfied the ACCA's residual clause. 550 U.S. at 211.

ing (as relevant here) that the district court erred in classifying and sentencing him as an armed career criminal. 07-cv-01274 Docket entry No. 1, at 12. The district court denied the motion. Pet. App. 4a-8a. The court explained that petitioner's "past criminal history * * * reflects convictions for delivery of cocaine, attempted burglary of a dwelling, and two burglaries of a dwelling, offenses which clearly fall within the ambit of the statute as constituting either a serious drug offense or a violent felony." *Id.* at 6a.

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

a. 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. 2244(b)(3)(A), 2255(h); *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 August 21, 2015, petitioner filed an application in the court of appeals requesting leave to file a successive Section 2255 motion challenging his ACCA classification and sentence in light of *Johnson*. 15-13795 Docket entry (11th Cir.).[3] He asserted that, in light of *Johnson*'s invalidation of the residual clause, his burglary and attempted burglary convictions were not ACCA predicate violent felonies, and therefore, he did not have the three predicate convictions necessary to support the application of the ACCA. *Id.* at 6-9.

On September 14, 2015, the court of appeals entered an order denying petitioner's application, relying on its decision in *In re Rivero*, 797 F.3d 986 (11th Cir. 2015). Pet. App. 1a-3a.

c. In *Rivero*, the court of appeals denied an application for leave to file a successive Section 2255 motion filed by a federal defendant who, in contrast to petitioner, brought a challenge based on *Johnson* to

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[3] Petitioner had previously and unsuccessfully filed an application for leave to file a successive Section 2255 motion to challenge his Section 922(g)(1) conviction based on alleged new evidence demonstrating that the indictment was defective because it did not allege that the gun in question, which was manufactured in Japan, traveled in foreign commerce. The court of appeals denied the application, concluding it did not meet the standards for authorization in Section 2255(h)(1). Order, 12-10329 Docket entry 1-3 (11th Cir. Feb. 16, 2012).

his classification and sentence as a career offender under the then-mandatory federal Sentencing Guidelines. See *Rivero*, 797 F.3d 986.[4]

The court of appeals, acting solely on the basis of Rivero's application, concluded that *Johnson* announced a new substantive rule of constitutional law because it "narrow[ed] the scope of [Section] 924(e)" and thereby "narrowed the class of people who are eligible for an increased sentence under the [ACCA]." *Rivero*, 797 F.3d at 989 (citation and internal quotation marks omitted). The court further concluded, however, that "[e]ven if we assume that the new substantive rule announced in *Johnson* also applies to the residual clause of [the career-offender sentencing guideline]," this Court had not "made" *Johnson* retroactive to cases on collateral review either expressly or through a combination of holdings. *Ibid.*

The court of appeals explained that "[t]here are two types of new substantive rules of constitutional law that the Supreme Court has necessarily dictated are to be applied retroactively on collateral review": (1) "new rule[s] that prohibit[] the punishment of certain primary conduct"; and (2) new rules that "place particular conduct or persons covered by a statute beyond the State's power to punish." *Rivero*, 797 F.3d at 990 (citations, brackets, and internal quotation marks omitted). The court reasoned that the rule announced in *Johnson* does not fall into either

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[4] The career-offender guideline applies to a defendant whose criminal history includes at least two prior convictions for a "crime of violence" or "serious drug offense." Sentencing Guidelines § 4B1.2. The guideline's definition of a "crime of violence" closely tracks the ACCA's definition of a "violent felony" and includes an identically worded residual clause.

category because it "neither prohibits Congress from punishing a criminal who has a prior conviction for attempted burglary nor prohibits Congress from increasing that criminal's sentence because of his prior conviction"; *Johnson* held only, the Court noted, that Congress cannot do so with vague language. *Ibid.*

Judge Jill Pryor dissented. *Rivero*, 797 F.3d at 992-1002. In her view, *Johnson* announced a new substantive rule of constitutional law because a defendant who was improperly sentenced under the residual clause had received a "punishment that the law cannot impose upon him." *Id.* at 994-996 (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004)). Judge Pryor further explained that, because this Court had previously held that substantive penalty-restricting rules are retroactive to cases on collateral review, see *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989), abrogated on other grounds, 536 U.S. 304 (2002), it necessarily follows from this Court's precedents, read together, that the Court has "made" *Johnson* retroactive to cases on collateral review. *Rivero*, 797 F.3d at 999-1002.

On September 14, 2015 (the same day it denied petitioner's application), the court of appeals, acting *sua sponte*, entered an order in *Rivero* appointing him counsel and directing counsel and the government to file briefs addressing whether Rivero's application should be granted and whether *Johnson* has been "made" retroactive by this Court to cases on collateral review. Order, 15-13089 Docket entry (11th Cir.).

In its brief, the government explained that *Tyler* provides the analytical framework for deciding whether *Johnson* sets forth a new rule of constitutional law that has been "made" retroactive to cases on collateral

review: if the *Johnson* rule is substantive, then it has necessarily been made retroactive by this Court to cases on collateral review; but if the *Johnson* rule is procedural, then it has not been made retroactive by this Court to cases on collateral review and cannot support an order authorizing a successive motion. U.S. C.A. Br. at 9, *Rivero*, *supra* (No. 15-13089) (Sept. 28, 2015). The government explained that, as applied to the ACCA, *Johnson* is a substantive rule because it alters the statutory sentencing range for a crime and results in the imposition of "a punishment that the law cannot impose." *Id.* at 9-10 (quoting *Summerlin*, 542 U.S. at 352).

The government further explained, however, that the court of appeals had correctly denied Rivero's application because Rivero was not sentenced under the ACCA; rather, he received an enhanced guidelines range under the career-offender sentencing guideline. U.S. C.A. Br. at 9-12, *Rivero*, *supra* (No. 15-13089). The government explained that, as applied to the sentencing guidelines, *Johnson* is not a new substantive rule because "misapplications of the guidelines cannot (and do not) alter the statutory sentencing range for a crime or expose the defendant to a punishment that the law could not impose." *Id.* at 11. Rather, a *Johnson* error in the guidelines context (*i.e.*, the erroneous calculation of a guidelines range based on prior convictions that constitute crimes of violence only under the residual clause of the career-offender guideline) is "procedural because [it] regulate[s] how the sentence is imposed." *Id.* at 11-12.

7. By statute, the court of appeals' order denying petitioner's request for authorization to file a successive motion under Section 2255 "shall not be appeala-

ble and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. 2244(b)(3)(E). On November 16, 2015, petitioner filed a petition for an original writ of habeas corpus under 28 U.S.C. 2241 in this Court. On November 30, 2015, the Court requested a response from the government.

ARGUMENT

The courts of appeals are currently divided on the question whether this Court has "made" *Johnson* v. *United States*, 135 S. Ct. 2531 (2015), retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2). Congress, however, has eliminated statutory certiorari review of denials of authorization to file second or successive collateral attacks under 28 U.S.C. 2244(b)(3)(E), referred to as "gatekeeping" determinations. *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996). In *Felker*, 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).[5] Petitioner concedes (Pet. 26) that Section 2244(b)(3)(E)'s bar against certiorari review of gatekeeping determinations by the courts of appeals applies and that it prevents him from asking this Court to settle the conflict in the courts of appeals concerning whether *Johnson* has been "made" retroactive by this Court to cases on collateral review "through the ordinary certiorari process." Relying on *Felker*, petitioner has instead sought an original writ of habeas corpus from this Court. Pet. 5-6, 26-28.

This Court's Rule 20.4(a) "delineates the standards" under which the Court will determine whether to grant an original writ of habeas corpus. Pet. 9 (quoting *Felker*, 518 U.S. at 665). That rule sets forth two preconditions for such relief. First, the habeas petitioner must show "that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). Second, the habeas petitioner must show "that exceptional circumstances warrant the exercise of the Court's discretionary powers." *Ibid.* Although the courts of appeals are divided on the question presented, and although the United States agrees with petitioner that this Court has "made" *Johnson* retroactive to cases on collateral review within the meaning of Section 2255(h),[6] petitioner has failed to meet the strict criteria that govern

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[5] Petitioner requests that his petition for a writ of habeas corpus be construed in the alternative as a petition for a writ of mandamus. Pet. 31 n.13.

[6] The United States set forth its position on the merits of the question presented in its brief in opposition to the petition for a writ of mandamus in *In re Triplett*, No. 15-625 (filed Dec. 14, 2015), a copy of which is being provided to petitioner here.

the issuance of the extraordinary writ that he seeks. Petitioner cannot obtain adequate relief in any other form or forum, but he has not shown that exceptional circumstances exist to warrant the exercise of this Court's discretionary powers. Accordingly, his habeas petition should be denied.

1. As petitioner concedes (Pet. 26-27), the court of appeals' denial of petitioner's application for leave to file a successive Section 2255 motion based on *Johnson* is not subject to further review and operates to block him from presenting his *Johnson* claim in a Section 2255 motion.

The habeas corpus savings clause, 28 U.S.C. 2255(e), states that "[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [Section 2255], shall not be entertained" unless "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." The Eleventh Circuit in *Bryant* v. *Warden*, 738 F.3d 1253 (2013), has recognized that a federal prisoner's categorical inability to file a successive Section 2255 motion based on an intervening decision of *statutory* construction that results in a fundamental defect in the judgment of conviction, such as a sentence above the otherwise-applicable statutory maximum for the crime, can render Section 2255 "inadequate or ineffective to test the legality of [a prisoner's] detention." 28 U.S.C. 2255(e). That finding, in turn, would permit the prisoner to seek successive collateral relief by filing a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the district of his confinement. *Bryant*, 738 F.3d at 1281-1284, 1286.

But *Johnson* is a decision of *constitutional* law, not statutory construction. See *Johnson*, 135 S. Ct. at 2563 (holding that the ACCA's residual clause violated "due process"). For that reason, petitioner sought leave to file a successive Section 2255 motion under Section 2255(h)(2), which expressly permits a court of appeals, in limited circumstances, to grant authorization when the claim relies on a "new rule of constitutional law." The court of appeals denied petitioner's application, reasoning that the new constitutional rule in *Johnson* had not been "made" retroactive to cases on collateral review by this Court, as Section 2255(h)(2) requires. But the court's denial of authorization to file a successive Section 2255 motion does not, by itself, mean that the remedy by a motion under that provision is "inadequate or ineffective to test the legality of [a prisoner's] detention" within the meaning of the savings clause. 28 U.S.C. 2255(e).

Were it otherwise, then Section 2255(e) would "nullify the limitations" on successive Section 2255 motions, *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998), since a prisoner could simply re-caption his rejected pleading as a habeas petition under Section 2241. See, *e.g.*, *United States* v. *Barrett*, 178 F.3d 34, 50 (1st Cir. 1999) ("A petition under [Section] 2255 cannot become 'inadequate or ineffective,' thus permitting the use of [Section] 2241, merely because a petitioner cannot meet the [Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214] 'second or successive' requirements. Such a result would make Congress's AEDPA amendment of [Section] 2255 a meaningless gesture."), cert. denied, 528 U.S. 1776 (2000); *Barrett*, 178 F.3d at 50 (citing cases). Because a *Johnson* claim

does not categorically elude the permission for a successive Section 2255 motion (like a statutory claim would), petitioner cannot seek Section 2241 relief based on *Johnson*. He thus has shown that he has no other adequate means to obtain the relief he now seeks.

2. Petitioner has not demonstrated, however, the existence of "exceptional circumstances" warranting the exercise of this Court's discretionary powers. Sup. Ct. R. 20.4(a). Petitioner's essential argument (Pet. 11-31) 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 might otherwise be worthy of this Court's statutory certiorari review. Those considerations, standing alone, do not constitute "exceptional circumstances" justifying an original habeas writ. That is especially so when other, more traditional ways exist by which the issue could reach this Court.

a. 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*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam).

Three circuits, however, have reached the opposite conclusion. As described above, in *In re Rivero*, 797 F.3d 986 (2015), the Eleventh Circuit denied a prisoner's request for authorization 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 Eleventh Circuit requested additional briefing in *Rivero*, but it 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), petition for writ of habeas corpus pending, No. 15-759 (filed Dec. 11, 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 entitled to retroactive effect within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion). *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.*

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* v. *Cain*, 533 U.S. 656 (2001), 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 1147-1148.

b. 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. 2244(b)(2)(A), 2255(h). But, as outlined above, the courts of appeals are 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 generally *Schriro* v. *Summerlin*, 542 U.S. 348, 351-352 (2004) (explaining that new substantive rules are retroactively applicable to cases on collateral review).

At the time petitioner filed his petition for a writ of habeas corpus in this Court, the courts of appeals agreed that *Johnson* was a substantive rule but disagreed as to whether this Court had "made" that rule retroactive, as Section 2255(h)(2) and *Tyler* require. After petitioner filed his petition for a writ of habeas corpus, 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.

The Fifth Circuit's decision addresses 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*, 15-cv-00152 Docket entry No. 9 (N.D. Tex. Nov. 19, 2015), appeal pending, No. 15-11175 (filed Nov. 23, 2015), petition for cert. pending, No. 15-___ (filed Dec. 11, 2015).[7] 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 review from an order affirming the

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[7] The United States was served with the petition in *Harrimon* on December 11, 2015, but the petition has not yet been docketed.

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 (Pet. 26-29) that exceptional circumstances exist that warrant the exercise of habeas jurisdiction.[8]

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[8] Petitioner notes (Pet. 15 n.5, 28-29, 31-32) that in *In re Smith*, No. 98-5404, the government filed an amicus brief at the Court's invitation supporting full briefing on Smith's application for an original petition for a writ of habeas corpus on a retroactivity issue. That case differs legally and factually from this one. In *Smith,* the lower courts had all found that the relevant decision, *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), was retroactive in *first* habeas petitions, but Smith was denied authorization to file a *successive* habeas petition because the court of appeals held that this Court has not "made" *Cage* retroactive as required by 28 U.S.C. 2244(b)(2)(A). The unanimity in the lower courts, combined with this Court's general practice of granting certiorari only to resolve a conflict in the lower courts, see Sup. Ct. R. 10(a), suggested that this Court was not likely to have an occasion to expressly determine whether *Cage* was retroactive, U.S. Br. at 9, *Smith*, *supra* (No. 95-5404), even though the lower courts agreed that it was. That scenario created an "anomalous result," in the government's view. As a result, the government agreed that Smith's claim presented extraordinary circumstances. *Id.* at 9-11. The Court, however, denied Smith's habeas petition. 526 U.S. 1157 (1999). Justices Stevens, Souter, and Breyer would have set the case for full briefing. *Ibid.*

Petitioner's *Johnson* claim does not present circumstances comparable to *Smith*. Unlike *Cage*, the lower courts to address the retroactivity of *Johnson* are not uniform. As noted above, one court (the Fifth Circuit) has concluded that the holding of *Johnson* was not a substantive rule with retroactive effect. See *In re Williams*, 806 F.3d at 325. Other courts have suggested, if not held outright, that *Johnson* claims can be raised in a first Section 2255 motion. See *Rivero*, 797 F.3d at 989-990; *Price*, 795 F.3d at 734-735. The existence of a conflict on that question suggests that the

Petitioner correctly points out (Pet. 23-26) 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 habeas corpus relief where the conditions for issuing the writ are not otherwise satisfied.

3. As of the time this brief was finalized on December 15, 2015, in addition to this habeas petition, two other pending petitions for writs of habeas corpus under 28 U.S.C. 2241 ask the Court to address the question of *Johnson*'s retroactivity. See *In re Triplett*, No. 15-626 (Nov. 10, 2015); *In re Williams*, No. 15-759 (Dec. 11, 2015).[9] Two pending petitions for writs of mandamus ask the Court to address *John-*

Court is likely to have an occasion to grant certiorari to decide the question of *Johnson*'s retroactivity in the ordinary course.

[9] The Court ordered the United States to respond to another petition for a writ of habeas corpus that was previously pending, *In re Butler*, No. 15-578 (Nov. 3, 2015). On December 9, 2015, 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 15-cv-00321 Docket entry No. 20 (D. Ariz.). On December 14, 2015, Butler's petition was dismissed under Rule 46.1.

son's retroactivity through its authority under the All Writs Act, 28 U.S.C. 1651(a). See *In re Triplett*, No. 15-625 (response filed Dec. 14, 2015); *In re Williams*, No. 15-758 (Dec. 11, 2015). The government's response in *Williams* is currently due on January 11, 2016. Petitioner also requests that his petition be construed in the alternative as a petition for a writ of mandamus. Pet. 31 n.13.

Additionally, a pending petition for a writ of certiorari asks the Court to review a gatekeeping determination that denied authorization to file a successive Section 2255 motion based on *Johnson*, arguing that Section 2244(b)(3)(E) does not eliminate the Court's statutory certiorari jurisdiction to review gatekeeping determinations concerning federal prisoners. *Hammons* v. *United States*, No. 15-6110 (Sept. 15, 2015) (response filed Dec. 2, 2015). Another pending petition for a writ of certiorari asks the Court to grant certiorari before judgment to review a case currently pending in the Fifth Circuit, in which the district court concluded that the court's decision in *Williams* foreclosed relief based on *Johnson* in a prisoner's first Section 2255 motion and denied a COA. *Harrimon* v. *United States*, No. 15-___ (Dec. 11, 2015). 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.

CONCLUSION

The petition for a writ of habeas corpus should be denied.

Respectfully submitted.

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