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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 Juan Deshannon Butler,
11 Petitioner,
12 vs.
13 Susan G. McClintock, Warden,
14 Respondent.
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CV-15-00321-TUC-DCB-LAB
RETURN AND ANSWER

16 Per the Court's Order dated October 13, 2015, (Doc. 7), Respondent Susan G.
17 McClintock, Warden of the Federal Correctional Institution in Tucson, Arizona, hereby
18 responds to Petitioner Juan Deshannon Butler's Amended Petition for Writ of Habeas
19 Corpus (Doc. 6). Without conceding any procedural issues, Respondent agrees that
20 Petitioner's prior conviction for escape under 21 Okla. Stat. § 443 does not qualify as a
21 violent felony under the Armed Career Criminal Act ("ACCA"), and that *Johnson v.*
22 *United States*, __ U.S. __, 135 S. Ct. 2551 (2015), applies retroactively to defendants
23 sentenced pursuant to the ACCA, whether in an initial or successive motion under 28
24 U.S.C. § 2255. See *United States v. Price*, 795 F.3d 731 (7th Cir. 2015). However, the
25 Tenth Circuit has rejected the Seventh Circuit's analysis and held that, because the
26 Supreme Court has not made the rule in *Johnson* retroactively applicable on collateral
27 review, relief under *Johnson* is not available in a second or successive petition under
28 § 2255. See *In re Gieswein*, No. 15-6138, 802 F.3d 1143, 1148, 2015 WL 5534388 at

1 *5 (10th Cir. Sept. 21, 2015). Thus, on September 23, 2015, a panel of that Court
2 denied Petitioner permission to file a successive § 2255 motion under 28 U.S.C. §
3 2255(h)(2). See Doc. 101 in *United States v. Juan Deshannon Butler*, No. 4:05-cr-
4 00004-CVE-1 (N.D. Okla. Sept. 23, 2015). Moreover, the Fifth Circuit recently held that
5 *Johnson* is not retroactively applicable to any defendants whose convictions were final
6 when *Johnson* was decided, even those filing a first motion under § 2255. See *In re*
7 *Williams*, No. 15-30731, ___ F.3d ___, 2015 WL 7074261 at *2 (5th Cir. Nov. 12, 2015)
8 (*Johnson* relief not available on collateral review).

9 Contrary to the positions of the Tenth and Fifth Circuits, Respondent agrees that,
10 after *Johnson's* invalidation of the ACCA's residual clause, Butler's prior conviction for
11 escape under 21 Okla. Stat. § 443 does not qualify as a violent felony, and that the
12 Supreme Court has made *Johnson* retroactively applicable to cases on collateral
13 review. Whether Butler may obtain relief under 28 U.S.C. § 2241 depends upon
14 whether the remedy provided by § 2255 is "inadequate or ineffective to test the legality
15 of his detention." 28 U.S.C. § 2255(e); *Harrison v. Ollison*, 519 F.3d 952, 956 (9th Cir.
16 2008); *Prost v. Anderson*, 636 F.3d 578, 580 (10th Cir. 2011) ("Savings clause" of
17 § 2255(e) allows prisoners to proceed to § 2241 where § 2255 remedy is inadequate or
18 ineffective). The Tenth Circuit's denial of permission to file a successive § 2255 motion
19 under *Johnson* does not render the § 2255 remedy inadequate or ineffective. See *Prost*
20 at 582; *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006). Accordingly,
21 § 2255(e)'s savings clause does not permit Petitioner to seek relief in this Court under
22 § 2241 based on *Johnson*. See *Prost* at 582; *Stephens*, 464 F.3d at 898.

23 Petitioner may nonetheless be entitled to relief under § 2241 based upon the
24 Supreme Court's decision in *Chambers v. United States*, 555 U.S. 122 (2009). The
25 district court sentenced Petitioner under the ACCA in 2006, based in part upon his
26 walkaway escape conviction. At the time of Butler's conviction, controlling Tenth Circuit
27 law held that all escapes were violent felonies. See, e.g., *United States v. Springfield*,

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1 196 F.3d 1180, 1185 (10th Cir. 1999). On January 13, 2009, the Supreme Court held
2 that some escapes fell outside the scope of the ACCA's definition of violent felony.
3 *Chambers*, 555 U.S. at 693. Under *Chambers*, Petitioner's escape conviction no longer
4 qualified as a violent felony under the ACCA. But *Chambers*, unlike *Johnson*, was
5 based on a new statutory rule, rather than a new rule of constitutional law. Therefore,
6 unlike *Johnson*, *Chambers* did not permit Butler to seek relief in a successive § 2255
7 motion pursuant to § 2255(h)(2), and he arguably could seek a remedy under
8 § 2255(e)'s savings clause. See *Abernathy v. Wanders*, 713 F.3d 538, 547 (10th Cir.
9 2013) (AEDPA "did not provide a remedy for second or successive § 2255 motions
10 based on intervening judicial interpretations of statutes," but "federal prisoners who are
11 barred from bringing second or successive § 2255 motions may still be able to petition
12 for habeas relief under § 2241 through the mechanism of § 2255(e)'s savings clause.")
13 To qualify to file a § 2241 petition under the "savings clause" or "escape hatch" of
14 2255(e), a petitioner must (1) make a claim of actual innocence, and (2) show he has
15 not had unobstructed procedural shot at presenting that claim." *Alaimalo v. United*
16 *States*, 645 F.3d 1042, 1046 (9th Cir. 2011). Here, Petitioner satisfies both elements.

17 First, because his 180-month ACCA sentence exceeded the 120-month statutory
18 maximum for a conviction under 18 U.S.C. § 922(g), Petitioner's claim falls within the
19 savings clause of § 2255(e). See *Mackey v. Warden*, 739 F.3d 657, 662 (11th Cir.
20 2014); *Bryant v. Warden*, 738 F.3d 1253, 1283 (11th Cir. 2013); see also *Marrero v.*
21 *Ives*, 682 F.3d 1190, 1195 (9th Cir. 2012) (explicitly leaving open whether a defendant
22 who was statutorily ineligible for the sentence he received would have a claim
23 cognizable under the escape hatch).

24 Next, Petitioner did not have an unobstructed shot at presenting his actual
25 innocence claim under *Chambers*. At the time of his sentencing and first motion under
26 § 2255, controlling Tenth Circuit law held that all escapes were violent felonies.
27 Because "the law of the circuit was so firmly against him" at the time, Petitioner was not
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1 required to raise a *Chambers* argument in his first motion under § 2255. *Alaimalo* at
2 1048, quoting *In re Davenport*, 147 F.3d 605, 610 (7th Cir. 1998). Although the
3 Supreme Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), may have
4 cast some doubt on the continuing validity of the Tenth Circuit's position, it did not make
5 Petitioner's actual innocence claim available to him for purposes of § 2241. See
6 *Alaimalo* at 1048. Thus, the denial of Petitioner's prior § 2241 motion based on his
7 failure to raise a *Chambers* argument in his initial § 2255 motion was error. Petitioner
8 may now obtain relief under § 2241 because his escape conviction does not qualify as a
9 violent felony under *Chambers*, invalidating his sentence under the ACCA.

10 Accordingly, pursuant to § 2241, this Court may vacate Petitioner's sentence and
11 remand to the Northern District of Oklahoma for resentencing in light of *Chambers*.

12 RESPECTFULLY SUBMITTED this 20th day of November, 2015.

13 JOHN S. LEONARDO
14 United States Attorney
District of Arizona

15 /s/ Michael A. Ambri
16 MICHAEL A. AMBRI
Assistant U.S. Attorney

17 Copy of the foregoing served by first class U.S. mail on November 20, 2015, upon:

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21 /s/ Terry Whatley
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