No. 15-6110

IN THE SUPREME COURT OF THE UNITED STATES

RONALD HAMMONS, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1254(1) to review, by petition for a writ of certiorari, the court of appeals' orders denying petitioners' applications for authorization to file second or successive motions under 28 U.S.C. 2255(a), in light of a statute providing that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition for a writ of certiorari." 28 U.S.C. 2244(b)(3)(E).

2. Whether this Court has "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).

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. A1-A2 (Hammons); Pet. App. A3-A5 (Nix)) denying petitioners' applications for leave to file second or successive Section 2255 motions are unpublished and unreported.

JURISDICTION

The judgment of the court of appeals in Hammons's case was entered on August 31, 2015, and the judgment of the court of appeals in Nix's case was entered on September 1, 2015. Pursuant to Rule 12.4 of the Rules of this Court, the joint petition for a writ of certiorari was filed on September 15,

2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 1651(a). As explained below, however, this Court lacks statutory certiorari jurisdiction to review the orders of the court of appeals denying petitioners' applications for leave to file second or successive Section 2255 motions. See pp. 17-24, infra.

STATEMENT

Following their guilty pleas in the United States District Court for the Southern District of Florida, petitioners were convicted in separate proceedings of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Hammons was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. 0:11-cr-60161 Dkt. No. 48 (Oct. 28, 2011). Nix was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. 9:09-cr-80015 Dkt. No. 38 (Oct. 15, 2009). The court of appeals affirmed. See 628 F.3d 1341; 504 Fed. Appx. 804. Petitioners filed motions to vacate their sentences under 28 U.S.C. 2255(a). The district court denied the motions and declined to issue certificates of appealability (COA). 0:11-cr-60161 Dkt. No. 67 (Apr. 20, 2015); 9:09-cr-80015 Dkt. No. 56 (Nov. 25, 2103).

Petitioners filed separate applications in the court of appeals requesting permission to file second or successive Section 2255 motions in light of Johnson v. United States, 135 S. Ct. 2551 (2015). See Pet. App. A44-A50; 15-13618 Docket entry (Aug. 13, 2015) (Nix). The court of appeals denied the applications. Pet. App. A1-A2; id. at A3-A5.

1. a. On June 27, 2011, petitioner Hammons was arrested as part of an undercover sting operation in which he had agreed to conduct robberies of drug stash houses. Hammons Presentence Investigation Report (PSR) ¶¶ 6-14. During an ensuing search of the undercover location at which Hammons was arrested, officers recovered, among other things, a 12-gauge shotgun. Id. ¶ 14.

On August 2, 2011, a federal grand jury in the Southern District of Florida returned a seven-count indictment charging Hammons with drug, robbery, and related firearms charges, including one charge alleging that he unlawfully possessed a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 6). Hammons Superseding Indictment 1-6. Hammons pleaded guilty to Count 6. Hammons Plea Agreement 1-4.

b. i. 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," 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 "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)(ii). 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.

ii. The Probation Office recommended that the district court sentence Hammons as an armed career criminal because his criminal history included four qualifying prior convictions: three for a "violent felony" (i.e., a 1995 Florida conviction for burglary of a structure (Hammons PSR ¶ 35); a 1996 Florida conviction for burglary of a dwelling (id. ¶ 36); and a 1996 Florida conviction for resisting arrest with violence (id.

¶ 39)) and one for a "serious drug offense" (i.e., a 2010 Florida conviction for trafficking methamphetamine (id. ¶ 50)). See Hammons Plea Agreement 1. The district court accepted the recommendation and sentenced Hammons to 188 months of imprisonment, to be followed by five years of supervised release. 0:11-cr-60161 Dkt. No. 48. The court of appeals affirmed, 504 Fed Appx. 804, and this Court denied certiorari, 133 S. Ct. 2753.

c. On February 11, 2014, Hammons filed a pro se motion to vacate his sentence under 28 U.S.C. 2255(a), raising claims of ineffective assistance of counsel in relation to his classification as an armed career criminal. 0:11-cr-60161 Dkt. No. 66. A magistrate judge recommended that the motion be denied. 0:14-cv-60341 Dkt. No. 21 (Mar. 9, 2015). The magistrate judge concluded that Hammons's prior convictions for methamphetamine trafficking and resisting arrest with violence qualified as ACCA predicates, but did not address Hammons's contention that his burglary convictions did not qualify as "violent felon[ies]," apparently because of a mistaken belief that two prior convictions were sufficient to qualify Hammons as an armed career criminal. Id. at 24-30.[1] But in any event, at

[1] The magistrate judge apparently focused on the fact that a defendant can be classified as a career offender under the

the time of Hammons's Section 2255 motion, a conviction for Florida burglary qualified as a "violent felony" under the ACCA's residual clause. See United States v. Matthews, 466 F.3d 1271, 1275 (11th Cir. 2006), cert. denied, 552 U.S. 921 (2007); cf. James v. United States, 550 U.S. 192, 197 (2007) (holding that attempted burglary under Florida law satisfied the ACCA's residual clause).[2]

On April 20, 2015, the district court adopted the magistrate judge's recommendation, denied the motion, and declined to issue a COA. 0:11-cr-60161 Dkt. No. 67.

d. On January 9, 2015, this Court directed the parties in Johnson to file supplemental briefs addressing the question "[w]hether the residual clause in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague." S. Ct. Doc. 13-7120.[3] On June 26, 2015, the Court held

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federal Sentencing Guidelines if his criminal history includes two prior convictions for a "crime of violence." See 0:14-cv-60341 Dkt. No. 21, at 23-24 (citing Sentencing Guidelines § 4B1.1).

[2] Florida burglary did not qualify as generic "burglary" under the ACCA's enumerated-crimes clause because the state statute defined the crime in a way that was broader than the generic definition of the crime. See Descamps v. United States, 133 S. Ct. 2276, 2281 (2013); James, 550 U.S. at 197.

[3] On May 14, 2015, Hammons filed a motion "for relief from the judgment" arguing that an application of this Court's as-yet-unissued decision in Johnson invalidating the ACCA's

in Johnson that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557.

i. 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); 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) -- 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 "make" a

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residual clause would demonstrate that he was erroneously sentenced to a term of imprisonment that exceeds the otherwise-applicable ten-year statutory maximum for his offense. See 0:14-cv-60341 Dkt. No. 26, at 6. The district court summarily denied the motion and denied a certificate of appealability. Id. Nos. 27, 30. The court of appeals dismissed Hammons's appeal for want of prosecution and later reinstated the appeal. 7/16/15 Order; 9/29/15 Letter.

new constitutional rule retroactive to cases on collateral review and that the Court "makes" 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.

On August 11, 2015, Hammons 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. A44-A50. On August 12, 2015, while Hammons's application was pending, the court of appeals denied an application for leave to file a successive Section 2255 motion filed by Gilberto Rivero, a federal defendant who, in contrast to Hammons, brought a challenge based on Johnson to his classification and sentence as a career offender under the then-mandatory federal Sentencing Guidelines. See In re Rivero, 797 F.3d 986 (11th Cir. 2015).[4]

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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.

In Rivero, 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]." 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]," the Court had not "made" Johnson retroactive to cases on collateral review either expressly or through a combination of holdings. Ibid.

The court explained that "there 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 (citation and internal quotation marks omitted). The court reasoned that the rule announced in Johnson does not fall into either 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 only held, the Court noted, that Congress cannot do so with vague language. Ibid.

Judge Jill Pryor dissented. 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." Rivero, 797 F.3d at 994-996 (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)). Judge Pryor further explained that, because the 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 by Atkins v. Virginia, 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.

ii. On August 31, 2015, the court of appeals issued an order denying Hammons's application based on its "recent[] h[o]ld[ing] that the Supreme Court did not make Johnson's holding retroactive to cases on collateral review." Pet. App. A2 (citing Rivero, supra, pp. 9-10). The court directed the clerk to return as "unfiled" Hammons's separate motion asking

the court to certify the question of Johnson's retroactivity to this Court pursuant to 28 U.S.C. 1254(2) or to issue an interlocutory order that the Court could review, stating that it lacked jurisdiction to consider the motion. Pet. App. A2.

f. On September 14, 2015, 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, No. 15-13089.

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. Br. 9, Rivero, supra (filed 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 Schriro, 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. 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. U.S. Br. 11, Rivero, supra. 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 regulates how the sentence is imposed. Id. at 11-12.

2. a. On November 18, 2008, officers from the Boynton Beach Police Department responded to 2802 Foxboro Court, in Boynton Beach, Florida, to investigate a shooting. When they arrived at the scene, no one was there. Detectives learned from dispatch that a black male with a gunshot wound was at a nearby hospital. Detectives went to the hospital and met with the

gunshot victim, petitioner Anthony Nix. Nix stated that he was at the above residence and was attempting to put his gun in his pants pocket when he shot himself in the leg. Nix stated that the gun was a .22 caliber pistol and that he left the gun under a "Dora" chair in the master bedroom. During a subsequent search, detectives found a .22 caliber Smith and Wesson semi-automatic pistol in the master bedroom, under a chair depicting the cartoon character "Dora." Nix PSR. ¶¶ 5-7.

b. A federal grand jury in the Southern District of Florida returned an indictment charging Nix with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Nix Indictment 1-2. On July 31, 2009, Nix pleaded guilty pursuant to a written plea agreement. Nix PSR ¶ 1; Nix Plea Agreement 1-4.

c. The Probation Office recommended that the district court sentence Nix as an armed career criminal because his criminal history included three predicate Florida convictions -- one "serious drug offense" (i.e., a 2006 conviction for the sale of cocaine (Nix PSR ¶ 31)), and two "violent felonies" (i.e., a 2007 conviction for fleeing and eluding (id. ¶ 36), and a 2007 conviction for resisting an officer with violence (id. ¶ 35)). See id. ¶ 70. The district court accepted the recommendation

and sentenced Nix to 180 months of imprisonment, to be followed by five years of supervised release. 9:09-cr-80015 Dkt. No. 38.

Nix appealed, arguing that neither of his violent felony convictions satisfied the residual clause after Begay v. United States, 553 U.S. 137 (2008). The court of appeals concluded that both convictions were violent felonies under the residual clause and affirmed. 628 F.3d 1341 (per curiam). This Court denied certiorari. 132 S. Ct. 258.

d. In 2012, Nix filed a motion to vacate his sentence under Section 2255, alleging that counsel had been ineffective and that the district court had relied on improper documents to classify his prior convictions as ACCA predicates. The district court denied the motion and the request for a COA. See 9:12-cv-81106 Dkt. No. 20 (Nov. 26, 2013).

e. On August 13, 2015, Nix filed an application in the court of appeals requesting leave to file a second Section 2255 motion challenging his ACCA sentence in light of Johnson. The court of appeals denied the application and directed the clerk to return as "unfiled" Nix's separate motion requesting that the court of appeals certify to this Court the question whether Johnson had been "made" retroactive or to issue an interlocutory order for the Court to review. Pet. App. A3-A5.

ARGUMENT

Petitioners seek review of the court of appeals' determination that this Court has not "made" Johnson retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2). The courts of appeals are currently divided on that question. Congress, however, has eliminated statutory certiorari review of denials of authorization to file second or successive collateral attacks, referred to as "gatekeeping" determinations. 28 U.S.C. 2244(b)(3)(E). Petitioners contend (Pet. 22-26) that Section 2244(b)(3)(E)'s restriction on this Court's statutory certiorari jurisdiction is limited to applications for leave to file successive collateral attacks by state prisoners, and they further contend (Pet. 26-32) that, if Section 2244(b)(3)(E) applies to federal prisoners, and if no other means permits the Court to review gatekeeping determinations, then the statute is unconstitutional. Those arguments lack merit and do not warrant this Court's review.

Petitioners further contend (Pet. 27 & n.3) that, if the Court is deprived of statutory certiorari jurisdiction under Section 2244(b)(3)(E), it should construe their petition for a writ of certiorari as a petition for a writ of mandamus and instruct the Eleventh Circuit through mandamus to authorize their second or successive Section 2255 motions. If the Court

decides to exercise its jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to resolve the conflict in the courts of appeals on the question whether Johnson has been made retroactive to cases on collateral review, there is a petition for a writ of mandamus currently pending before the Court that expressly asks the Court to address that question through its authority under the All Writs Act and therefore, unlike this petition for a writ of certiorari, specifically addresses the strict standards applicable to an exercise of that jurisdiction. See In re Triplett, No. 15-625 (filed Nov. 10, 2015). The government's response to the petition for a writ of mandamus in Triplett is currently due on December 14, 2015.

There are also three pending petitions for a writ of habeas corpus that ask the Court to address the question of Johnson's retroactivity through the Court's authority to issue writs of habeas corpus under 28 U.S.C. 2241. See In re Butler, No. 15-578 (filed Nov. 3, 2015); In re Triplett, No. 15-626 (filed Nov. 10, 2015); In re Sharp, No. 15-646 (filed Nov. 16, 2015). Butler and Sharp also request that their petitions be construed in the alternative as petitions for writs of mandamus. Butler, No. 15-578, Pet. 32 n.16; Sharp, No. 15-646, Pet. 31 n.13. The Court has ordered a response from the United States in Butler, which is currently due on December 18, 2015. It has also

ordered a response in Sharp, which is currently due on December 30, 2015. The Court may therefore wish to hold this petition until it acts on the petition for a writ of mandamus filed in Triplett or any of the petitions for a writ of habeas corpus.

1. Congress has provided that decisions of the courts of appeals denying authorization to file a second or successive collateral attack are not subject to certiorari review. 28 U.S.C. 2244(b)(3)(E).

a. i. As part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Congress divested federal district courts of jurisdiction to entertain "second or successive" collateral attacks by state and federal prisoners. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). Section 2244(b)(2) permits a state prisoner to seek leave from a court of appeals to file a second or successive habeas corpus petition if his claim relies on (A) a new rule of constitutional law made retroactive to cases on collateral review by this Court, or (B) newly discovered evidence that establishes that, but for constitutional error, no reasonable factfinder would have found the defendant guilty. See 28 U.S.C. 2244(b)(2)(A), (B).

Section 2244(b)(3) contains five subsections that regulate the procedure for obtaining authorization to file a second or

successive application. It provides that an order authorizing a second or successive application must be sought from the court of appeals, see 28 U.S.C. 2244(b)(3)(A); that the application must be determined by a three-judge panel, see 28 U.S.C. 2244(b)(3)(b); that the application must make a prima facie showing that the requirements in subsection (b)(2) have been satisfied, see 28 U.S.C. 2244(b)(3)(C); that the court of appeals must grant or deny authorization within 30 days of the filing of the application, see 28 U.S.C. 2244(b)(3)(D); and that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable 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).

Section 2255(h), which applies to federal prisoners, states that a second or successive Section 2255 motion "must be certified as provided in [S]ection 2244 by a panel of the appropriate court of appeals" to satisfy substantive criteria that parallel the grounds set forth in Section 2244(b)(2) for second or successive petitions filed by state prisoners -- i.e., new evidence establishing actual innocence, or a new rule of constitutional law made retroactive to cases on collateral review by this Court, see 28 U.S.C. 2255(h)(1), (2).

ii. Petitioners contend that Section 2255(h)'s requirement that "[a] second or successive motion must be certified as provided in [S]ection 2244" means that Section 2255 incorporates for federal prisoners only the first four requirements set forth in Section 2244(b)(3)(A)-(D), but not Section 2244(b)(3)(E)'s restriction on statutory certiorari jurisdiction. Pet. 22 (emphasis added). In petitioners' view (ibid.), that last provision is not part of the certification process, but merely "circumscribes the options available to litigants after the certification determination has occurred." The identity of the decisionmaker, however, is a key part of the procedure for certification: Congress intended for certification decisions to be made by a single panel of three appellate judges, for the decisions to be made quickly, and for decisions granting or denying certification to be final. 28 U.S.C. 2244(b)(3)(A)-(E).

Because Section 2244(b)(3)(E) prohibits parties from filing petitions for rehearing as well as petitions for writs of certiorari to review court of appeals gatekeeping decisions, the courts of appeals have had occasion to address petitioner's argument. Every court to have done so has concluded that the finality rule of Section 2244(b)(3)(E) is fully applicable to Section 2255 cases. See Leonard v. United States, 383 F.3d 1146, 1148 (10th Cir. 2004); In re Sonshine, 132 F.3d 1133, 1134

(6th Cir. 1997); Triestman v. United States, 124 F.3d 361, 367 (2d Cir. 1997); United States v. Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997); see also In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998). As the Second Circuit has explained, Section 2255 broadly incorporates the requirements "in section 2244" without any limitation, and therefore "it is logical to assume that Congress intended to refer to all of the subsections of Section 2244 dealing with the authorization of second and successive motions, including * * * [Section] 2244(b)(3)(E)." Triestman, 124 F.3d at 367.

Throughout Section 2244, when Congress intended to refer to a state prisoner's petition for a writ of habeas corpus, it said so specifically. See 28 U.S.C. 2244(b)(1) ("a second or successive habeas corpus application under section 2254"), (b)(2) (same), (c) ("a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court"); (d)(1) (similar). When Congress intended to refer only to a federal prisoner's petition, it said so. See 28 U.S.C. 2244(a) ("an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States"). But in the certification subparagraphs -- including not only subsections (b)(3)(A)-(D), which petitioner concedes apply to both state and federal

prisoners' certification requests, but also subsection (b)(3)(E) -- Congress used only the term "a second or successive application," or "a second or successive application permitted by this section." The absence of any limiting language from these subsections, and only these, is significant.

This Court apparently assumed that Section 2244(b)(3)(E) applies to Section 2255 motions when it raised sua sponte in Castro v. United States, 540 U.S. 375 (2003), the question whether Castro's petition for a writ of certiorari was barred by Section 2244(b)(3)(E). See 537 U.S. 1170 (2003). Although the Court ultimately found the provision inapplicable by its terms in that particular case because Castro was not seeking authorization to file a second or successive application, 540 U.S. at 379, the Court left undisturbed the consensus view of the courts of appeals -- which had been briefed by the government, see U.S. Br. at 13-15, Castro v. United States, No. 02-6683 -- that the bar on filing rehearing or certiorari petitions applies to requests for certification of successive Section 2255 motions.

b. i. Petitioners contend (Pet. 25) that Congress might have intended to limit Section 2244(b)(3)(E) to state prisoners and not their federal counterparts in order to further "the federal concerns underlying AEDPA." But a possible reason for

treating state and federal prisoners differently carries no interpretive weight when the text of the provision treats them the same.[5] And in any event, while the AEDPA was motivated in part by concerns for principles of federalism and comity, see Woodford v. Garceau, 538 U.S. 202, 206 (2003), Congress's overarching motivation for imposing stricter limitations on second or successive collateral motions was "respect for the finality of criminal judgments." Calderon v. Thompson, 523 U.S. 538, 558 (1998); see Jimenez v. Quarterman, 555 U.S. 113, 121 (2009); see also H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996). Because "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments," United States v. Frady, 456 U.S. 152, 166 (1982); see also Johnson v. United States, 544 U.S. 295, 309 (2005), the finality concerns underlying the AEDPA, along with the text, establish that Section 2244(b)(3)(E) applies to state and federal prisoners alike.

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[5] The clarity of the operative statutory text also renders inapposite petitioners' invocation (Pet. 21) of various canons of statutory construction. See Sebelius v. Cloer, 133 S. Ct. 1886, 1895-1896 (2013) (reiterating that canons of construction must "give way when 'the words of a statute are unambiguous'") (quoting Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254 (1992)).

ii. Petitioners assert (Pet. 26-27) that, even assuming that Section 2244(b)(3)(E) restricts this Court's statutory certiorari jurisdiction under Section 1254(1), this case presents an opportunity for the Court to consider whether other avenues for this Court to review gatekeeping determinations by the courts of appeals remain available, such as the 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 Section 28 U.S.C. 1254(2), or to issue a writ of mandamus under 28 U.S.C. 1651(a). That issue does not warrant this Court's review.

By its terms, Section 2244(b)(3)(E) "does not purport to limit [this Court's] jurisdiction" to grant review under the alternative jurisdictional bases petitioners identify. Felker, 518 U.S. at 666 (Stevens, J., concurring); id. at 667 (Souter, J., concurring). Although it is unclear why the court of appeals concluded that it lacked jurisdiction to consider petitioners' request to issue an interlocutory order or certify the question of Johnson's retroactivity to this Court (Pet. App. A2, A5), granting certiorari to review that conclusion would not assist petitioners in getting the question of Johnson's retroactivity before the Court. Any decision in petitioners' favor would still require the court of appeals, on remand, to

exercise its discretion to enter an interlocutory order or certify a question to this Court.

Petitioners' related assertion (Pet. 27-31) that "serious constitutional issues" would arise under the Exceptions Clause, see U.S. Const. art. III, sec. 2, if this Court were deprived of jurisdiction to review the question presented by any means likewise is not implicated here. The Court held in Felker that Section 2244(b)(3)(E) does not disturb this Court's authority to entertain an original habeas corpus petition, see 518 U.S. at 661, and Section 2244(b)(3)(E) does not eliminate the Court's authority under the All Writs Act, Felker, 518 U.S. at 666 (Stevens, J., concurring); id. at 667 (Souter, J., concurring). The existence of those alternative means of review "obviates any claim by petitioner[s] under the Exceptions Clause." Id. at 654.

iii. In these cases, the orders that are the subject of this joint certiorari petition are orders of the court of appeals that "denied" petitioners' respective "application[s] for leave to file a second or successive [Section 2255] motion." Pet. App. A2, A5. Pursuant to Section 2244(b)(3)(E), this Court lacks jurisdiction to grant certiorari review.

2. Petitioners contend (Pet. 1, 27 & n.3) that, if Section 2244(b)(3)(E) deprives this Court of statutory certiorari

jurisdiction under 28 U.S.C. 1254(1), the Court could elect to construe their petition for a writ of certiorari as a petition for a writ of mandamus under the All Writs Act. There is no need for the Court to construe the petition for a writ of certiorari as a petition for a writ of mandamus in order to consider whether to exercise extraordinary-writ jurisdiction to address whether Johnson is (or has been made) retroactive on collateral review.

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 solicited the government's views on Price's application for leave to file a second Section 2255 motion and adopted 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 concluded that, based on the government's concession that the Court has made Johnson retroactive to cases on collateral review, 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 (1st Cir. 2015) (per curiam); Woods v. United States, 2015 WL 7351939 (8th Cir. Nov. 20, 2015) (No. 15-3531).

Three circuits, however, have reached the opposite conclusion. As described above, the Eleventh Circuit in In re Rivero, denied a prisoner's request for authorization to file a successive Section 2255 motion in light of Johnson because, 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. 797 F.3d at 989-990 (citations omitted). The Eleventh Circuit reached that conclusion without first requesting a response from the United States to the prisoner's application, and it later requested additional briefing from both parties. C.A. Order (9/14/2015) (Rivero). The Eleventh Circuit has taken no further action since requesting additional briefing.

The Fifth Circuit has likewise denied authorization to file a successive Section 2255 motion that raises a claim under Johnson. In re Williams, 2015 WL 7074261 (Nov. 12, 2015) (No. 15-30731). 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). 2015 WL 7074261, at *2. The court explained 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 accomplished with sufficient clarity. Ibid. The court further explained 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 Section 2255 motion challenging his ACCA sentence based on Johnson. In re Gieswein, 802 F.3d 1143 (2015). In Gieswein, 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 the Court can do so. Id. at 1148.

b. Although the circuits are in conflict on the question whether Johnson has been made retroactive to cases on collateral

review, Section 2244(b)(3)(E) prevents the Court from conducting certiorari review of gatekeeping determinations of the courts of appeals addressing that question. Petitioners, however, filed a petition for a writ of certiorari instead of a petition for a writ of mandamus. See Pet. 27 n.3. As a result, the petition does not discuss why petitioners would meet the "admittedly-strict criteria for mandamus" other than to state in conclusory fashion that mandamus review "would be an exercise of this Court's appellate jurisdiction; exceptional circumstances exist for the reasons discussed throughout th[e] petition; and relief is otherwise unavailable in any other court." Pet. 27. In particular, petitioners do not explain why their "right to issuance of the writ is 'clear and indisputable,'" which this Court has described as a prerequisite to mandamus. Cheney v. U.S. Dist. Ct., 542 U.S. 367, 381 (2004); see Gieswein, 802 F.3d at 1148 ("Our sister circuits' holdings in Price and Rivero illustrate the difficulty with their approach to determining whether the Supreme Court has made a new rule of constitutional law retroactive to cases on collateral review. Both courts applied the Supreme Court's retroactivity principles, yet they reached opposite conclusions.")

A petition for a writ of mandamus is currently pending before the Court that expressly asks the Court to address

Johnson's retroactivity through its authority under the All Writs Act and specifically addresses the strict standards applicable to an exercise of that jurisdiction. See Triplett, No. 15-625 (filed Nov. 10, 2015). The government's response to the petition for a writ of mandamus in Triplett is currently due on December 14, 2015. Additionally, three petitions for a writ of habeas corpus currently pending before the Court ask the Court to address the question of Johnson's retroactivity through its authority to issue writs of habeas corpus under 28 U.S.C. 2241. See Butler, No. 15-578 (filed Nov. 3, 2015); Triplett, No. 15-626 (filed Nov. 10, 2015); Sharp, No. 15-646 (filed Nov. 16, 2015). "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). The Court has ordered a response from the United States in Butler, which is currently due on December 18, 2015. It has also ordered a response in Sharp, which is currently due on December 30, 2015. Butler and Sharp, like petitioners here, also request that their petitions be construed in the alternative as petitions for writs of mandamus. Butler, No. 15-578, Pet. 32 n.16; Sharp, No. 15-646, Pet. 31 n.13. In light of the other petitions pending before this Court that expressly seek the exercise of this Court's

authority to issue an extraordinary writ or an original writ of habeas corpus and substantively address the criteria for the issuance of those writs, 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 certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

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