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The Exceptional Circumstances of *Johnson v. United States*

Leah M. Litman
Harvard Law School

THE EXCEPTIONAL CIRCUMSTANCES OF *JOHNSON V. UNITED STATES*

Leah M. Litman[*]

Johnson v. United States held that the "residual clause" of the Armed Career Criminal Act (ACCA) is unconstitutionally vague.[1] Since *Johnson* was decided six months ago, courts have been sorting out which of the currently incarcerated defendants who were sentenced under ACCA's residual clause may be resentenced. Determining who can be resentenced in light of *Johnson* requires courts to answer several questions.[2] For example, does the rule in *Johnson* apply retroactively to convictions that have already become final? And can prisoners who have already filed one petition for postconviction review—review that occurs after a defendant's conviction has become final—file another, successive petition for postconviction review based on *Johnson*?

This second question has divided the courts of appeals. It also requires the Supreme Court's immediate and exceptional attention. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a prisoner may file a successive petition for postconviction review only when a court of appeals panel certifies that the petition involves "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[3] Less than six months after *Johnson*, over half the courts of appeals disagree about whether the Supreme Court has "made" *Johnson* retroactive and thus whether a prisoner may file a successive petition for postconviction review based on *Johnson*.

The Supreme Court must act immediately in order for many of the prisoners with *Johnson* claims to have a remedy. Prisoners generally have one year from the date on which the Supreme Court announces a new rule to file a successive petition for postconviction—that is, collateral—review.[4] But

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* Climenko Fellow and Lecturer on Law, Harvard Law School. Thanks to Donovan McCarty, Andrew Xue, and Megan DeMarco for their extraordinary efforts over the holidays to get this piece online. Thanks also to Daniel Deacon, Daniel Epps, Ben Levin, Will Ortman, Eve Brensike Primus, and Susannah Barton Tobin for helpful conversations about these ideas, and to Luke Beasley for research assistance.

1. 135 S. Ct. 2551 (2015).

2. Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55 (2015).

3. 28 U.S.C. § 2255(h) (2012).

4. § 2244(d)(1); § 2255(f)(3).

prisoners must also show that the Supreme Court has made that right retroactive. Therefore, "an applicant who files a . . . successive motion seeking to take advantage of a new rule of constitutional law will be time barred except in the rare case in which this Court announces a new rule of constitutional law and makes it retroactive within one year."[5] The Court decided *Johnson* on June 26, 2015, so prisoners have until June 26, 2016 to file successive petitions for postconviction review and to show that the Court has made *Johnson* retroactive.[6]

The Supreme Court must take some exceptional action to definitively make *Johnson* retroactive and resolve the split among the courts of appeals over whether it has made *Johnson* retroactive. AEDPA bars the Supreme Court from taking a petition for certiorari from a court of appeals decision granting or denying a prisoner authorization to file a successive petition.[7] The Supreme Court thus cannot make *Johnson* retroactive—or say that it has—by reviewing one of the decisions of the courts of appeals granting or denying authorization to file a successive petition for postconviction review. And, in the case of *Johnson*, the Supreme Court cannot grant certiorari to a court of appeals decision regarding a first petition for postconviction review. The government concedes that *Johnson* is retroactive,[8] and every district court but one has accepted that concession and ruled for prisoners who were sentenced under ACCA.[9] But because that district court did not issue its opinion until late November 2015, no court of appeals decision will make its way to the Supreme Court in time for the Court to make *Johnson* retroactive within the one-year window in which prisoners may file successive petitions for postconviction review.

That means the Court could make *Johnson* retroactive in two ways. One, the Court could entertain a petition for an original writ of habeas corpus to make *Johnson* retroactive. There are currently several petitions seeking original writs of habeas corpus before the Supreme Court,[10] and the Court or-

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5. Dodd v. United States, 545 U.S. 353, 359 (2005).

6. Because courts of appeals must "grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion," prisoners essentially must show the Court has made *Johnson* retroactive within one year after *Johnson*. § 2244(b)(3)(D). A court of appeals could, however, hold an application that is filed within the one-year statute of limitations for thirty days if the Supreme Court has pending a decision on whether *Johnson* applies retroactively.

7. § 2244(b)(3)(E).

8. *E.g.*, Woods v. United States, 805 F.3d 1152, 1154 (8th Cir. 2015) ("Here, the United States concedes that Johnson is retroactive . . . .").

9. Harrimon v. United States, No. 15-cv-00152 (N.D. Tex. Nov. 19, 2015).

10. Petition for Writ of Habeas Corpus, *In re* Williams, Nos. 15-758, -759 (U.S. Dec. 11, 2015); Petition for Writ of Habeas Corpus, *In re* Sharp, No. 15-646 (U.S. Nov. 16, 2015); Peti-

dered the Solicitor General of the United States to respond to several of these petitions.[11] Two, the Court could grant certiorari before judgment in the court of appeals to the one district court decision that held *Johnson* was not retroactive.[12] The Court will consider both the petitions for original writs of habeas corpus and the petition for certiorari before judgment in the court of appeals in early January. That gives the Court enough time to hear these cases and issue a decision before the end of the October 2015 Term in June and thus make *Johnson* retroactive before the period to file a successive petition expires.

This Essay argues that the Court should grant one of the petitions for an original writ of habeas corpus, or, failing that, the petition for a writ of certiorari before judgment. Under the Supreme Court's own rules, both writs are rarely granted: an original writ is granted only under "exceptional circumstances,"[13] while a petition for certiorari before judgment is granted if the case is of "imperative public importance" and "require[s] immediate settlement."[14] There are several reasons why the issue of *Johnson* retroactivity is both exceptional and of considerable public importance: prisoners are currently serving at least five years longer than their lawful terms of imprisonment; the remedy for a *Johnson* claim is time sensitive; and the United States' litigation posture effectively foreclosed one ordinary avenue by which the Court could have made *Johnson* retroactive. These kinds of considerations fit naturally into the equitable analysis that has traditionally governed habeas corpus, which is why an original writ of habeas corpus would be an appropriate way to make *Johnson* retroactive. But the government's lukewarm opposition to the petition for certiorari before judgment may make that an equally, if not more, attractive vehicle to make *Johnson* retroactive.

I. *JOHNSON* RETROACTIVITY

Federal law imposes a ten-year statutory maximum term of imprisonment for defendants who are convicted of being a felon in possession of a

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tion for Writ of Habeas Corpus, *In re* Triplett, No. 15-626 (U.S. Nov. 13, 2015). One additional petition was mooted after the district court granted relief on a separate claim. Petition for Writ of Habeas Corpus, *In re* Butler, No. 15-578 (U.S. Nov. 4, 2015); Order Granting Writ of Habeas Corpus and Directing Immediate Release of Petitioner, Butler v. McClintock, No. 4:15-cv-321-TUC-DCB (D. Ariz. Dec. 9, 2015), https://www.justsecurity.org/wp-content/uploads/2015/12/15-321joint-emergency-motion-for-release-proposed-order.pdf [perma.cc/HSJ5-CLHW].

11. *E.g.*, Petition for Writ of Habeas Corpus, *In re* Sharp, No. 15-646 (U.S. Nov. 16, 2015).

12. Petition for a Writ of Certiorari Before Judgment and Motion for Leave to Proceed in Forma Pauperis, Harrimon v. United States, No. 15-7426 (U.S. Dec. 11, 2015).

13. Felker v. Turpin, 518 U.S. 651, 665 (1996) (quoting SUP. CT. R. 20.4(a)).

14. SUP. CT. R. 11.

firearm.[15] However, ACCA imposes a fifteen-year term of imprisonment for defendants with three or more prior convictions for violent felonies or serious drug offenses.[16] ACCA's "residual clause" defined a violent felony as any crime that "*otherwise involves conduct that presents a serious potential risk of physical injury to another*."[17]

Johnson held the residual clause unconstitutionally void for vagueness.[18] Defendants convicted of being a felon in possession of a firearm therefore cannot receive a fifteen-year term of imprisonment under ACCA's residual clause; the statutory maximum term of imprisonment for their offense of conviction is ten years.

What about defendants whose convictions have already become final?[19] Generally, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[20] But new rules apply "retroactively" to cases that have become final where the new rule is "substantive"[21]or is a "watershed rule[] of criminal procedure."[22] Substantive rules include "decisions that narrow the scope of a criminal statute."[23] A rule is substantive if it creates "'a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him."[24]

In April, before *Johnson* was decided, I argued that "[a] decision invalidating ACCA's residual clause would be substantive and therefore should apply retroactively to defendants sentenced under ACCA whose convictions have already become final."[25] I won't fully explain that reasoning here, but for now it is important to note two things. First, the only court that has held that *Johnson* is not retroactive in an initial petition for postconviction review is the Northern District of Texas, in a decision on November 19, 2015.[26] Sec-

15. 18 U.S.C. § 924(a)(2) (2012).

16. § 924(e)(1).

17. § 924(e)(2)(ii) (emphasis added).

18. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

19. A criminal case becomes final when the time to file a petition for certiorari has expired, or the Supreme Court has denied a petition for certiorari. Greene v. Fisher, 132 S. Ct. 38, 44 (2011) ("Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from this Court has become time barred or has been disposed of.").

20. Teague v. Lane, 489 U.S. 288, 310 (1989).

21. Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004).

22. *Teague*, 489 U.S. at 307 (citing Mackey v. United States, 401 U.S. 667, 693–94 (1971)).

23. *Schriro*, 542 U.S. at 351–52.

24. *Id.* at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

25. Litman, *supra* note 2, at 61.

26. Harrimon v. United States, No. 15-cv-00152 (N.D. Tex. Nov. 19, 2015).

ond, the United States is conceding in the district courts and the courts of appeals that the rule invalidating ACCA's residual clause is retroactive.[27]

II. TO "MAKE" *JOHNSON* RETROACTIVE

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), prisoners may file a successive petition for postconviction review only when a court of appeals panel certifies that the petition involves "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[28] That is, a prisoner may file a successive petition for postconviction review once a new rule has been made retroactive *by the Supreme Court*, as opposed to by a court of appeals.[29] Less than six months after *Johnson*, three courts of appeals—the Fifth Circuit,[30] the Tenth Circuit,[31] and the Eleventh Circuit[32]—have held that the Supreme Court has not "made" *Johnson* retroactive. In these three circuits, a successive petition for postconviction review under § 2255 is not a remedy that is available to vindicate a *Johnson* claim.

Moreover, the Supreme Court cannot review these courts of appeals decisions. Another AEDPA provision provides 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."[33] Therefore, even though the courts of appeals disagree about whether the Supreme Court has made *Johnson* retroactive—the First,[34] Second,[35] Sixth,[36] Seventh,[37] and Ninth Circuits[38] have all granted authorization to file successive petitions—the Supreme Court cannot resolve that circuit split in the usual manner by granting a petition for certiorari to review one of the determinations of the courts of appeals.

This Part argues the Court could resolve the split among the courts of appeals—and ensure that prisoners with *Johnson* claims have a remedy—by

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27. *See supra* note 8.

28. 28 U.S.C. § 2255(h) (2012).

29. *E.g.*, Tyler v. Cain, 533 U.S. 656, 661–62 (2001) (interpreting similarly worded provision in § 2244, which is applicable to state-court prisoners, in this way).

30. *In re* Williams, 806 F.3d 322 (5th Cir. 2015).

31. *In re* Gieswein, 802 F.3d 1143 (10th Cir. 2015).

32. *In re* Rivero, 797 F.3d 986 (11th Cir. 2015).

33. § 2244(b)(3)(E).

34. Pakala v. United States, 804 F.3d 139 (1st Cir. 2015).

35. Order, Rivera v. United States, No. 13-4654 (2nd Cir. Oct. 5, 2015).

36. *In re* Wendy Watkins, No. 15-5038 (6th Cir. Dec. 17, 2015), http://www.ca6.uscourts.gov/opinions.pdf/15a0295p-06.pdf [perma.cc/E8QM-YKVZ].

37. Price v. United States, 795 F.3d 731 (7th Cir. 2015).

38. Order, United States v. Striet, No. 15-72506 (9th Cir. Aug. 25, 2015).

entertaining a petition for an "original" writ of habeas corpus. 28 U.S.C. § 2241 provides that "writs of habeas corpus may be granted by the Supreme Court."[39] This provision allows a prisoner to file a petition for a writ of habeas corpus directly in the Supreme Court, rather than seeking certiorari from a decision of a court of appeals or district court about whether to grant a petition for postconviction review.

But as Supreme Court Rule 20 makes clear, "This writ is rarely granted."[40] "To justify the granting of a writ of habeas corpus [under section 2241], the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers and that adequate relief cannot be obtained in any other form or from any other court."[41] The United States has conceded that prisoners in the Fifth, Tenth, and Eleventh Circuits cannot obtain otherwise "adequate relief"[42] because successive petitions are unavailable to prisoners in these circuits.[43] Two additional considerations—besides the unavailability of successive petitions for postconviction review—warrant the exercise of the Court's original habeas jurisdiction: timing, especially given the nature of *Johnson* claims, and other exceptional circumstances unique to the litigation concerning *Johnson* retroactivity.

In the alternative, the Court should grant certiorari before judgment in the court of appeals in *Harrimon v. United States*, the district court decision that held *Johnson* was not retroactive.[44] The Court's rules also make certiorari before judgment a rarity: a petition for certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court."[45] The reasons that the Court should entertain an original writ also suggest that the issue of *Johnson* retroactivity "require[s] immediate settlement." Prisoners are currently serving unlawful sentences at least five years longer than their lawful terms of imprisonment without an adequate remedy; this is also an issue of "imperative public importance."

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39. 28 U.S.C. § 2241(a) (2012).

40. SUP. CT. R. 20.4(a).

41. *Id.*

42. Brief for the United States in Opposition at 12, *In re* Sharp, No. 15-646 (U.S. Dec. 16, 2015).

43. Litman, *supra* note 2, at 75–76 (explaining this argument).

44. *See supra* note 9 and accompanying text.

45. SUP. CT. R. 11.

A. *Original Writs*

1. Timing

Prisoners have one year to file a successive petition from "the date on which the right asserted was initially recognized by the Supreme Court."[46] *Dodd v. United States* held that the statute of limitations period begins when the Court recognizes the new right, not when it makes the right retroactive, even though prisoners must also show that the Supreme Court has made a right retroactive to receive authorization to file a successive petition. "[A]n applicant who files a second or successive motion seeking to take advantage of a new rule of constitutional law will be time barred except in the rare case in which this Court announces a new rule of constitutional law and makes it retroactive within one year."[47] Thus, if the Supreme Court makes *Johnson* retroactive, it needs to do so less than one year after *Johnson*—the new rule—was decided, which was June 26, 2015.

To be sure, the Supreme Court has held that, in rare circumstances, AEDPA's statute of limitations may be "tolled" for prisoners to file untimely petitions for postconviction review.[48] In particular, the statute of limitations is tolled for "fundamental miscarriage[s] of justice," which includes cases in which the defendant establishes he or she is actually innocent.[49] It might be the case that prisoners who were sentenced to an unlawful mandatory minimum—a term of imprisonment exceeding the statutory maximum for their offense of conviction—are actually innocent of their sentences.[50] More than a decade ago, the Supreme Court granted certiorari to decide whether a prisoner can be actually innocent of a noncapital sentence.[51] But it ultimately disposed of the case on other grounds.[52] It is possible that a split could develop among the courts of appeals about whether prisoners can be "actually innocent" of ACCA's mandatory minimum; that the Supreme Court could grant certiorari in such a case; and that it would resolve the case on those grounds and say that the statute of limitations is tolled when the prisoner shows he or she is actually innocent of his or her sentence.

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46. 28 U.S.C. § 2244(d)(1) (2012); § 2255(f)(3).

47. *Dodd v. United States*, 545 U.S. 353, 357–59 (2005).

48. McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013).

49. *Id.* at 1931.

50. Litman, *supra* note 2, at 65–73 (explaining this argument).

51. Dretke v. Haley, 541 U.S. 386, 388–89 (2004).

52. *Id.* ("[T]he question before us is whether this exception applies where an applicant asserts 'actual innocence' of a noncapital sentence. Because the District Court failed first to consider alternative grounds for relief . . . that might obviate any need to reach the actual innocence question, we vacate . . . and remand.").

But this hypothetical scenario ignores how the nature of *Johnson* claims makes prompt Supreme Court intervention a necessary part of any adequate remedy. Under ACCA, prisoners received a fifteen-year term of imprisonment, but *Johnson* means that the statutory maximum term of imprisonment for these prisoners was ten years. The "remedy" for *Johnson* claims, therefore, is to ensure that a prisoner does not serve more than a ten-year term of imprisonment. But many prisoners are well into that ten-year term; some have already served more than ten years.[53] Indeed, it is the prisoners who have already served well into their ten years—and thus are at a point at which they are seeking to file successive petitions for postconviction review—who lack a remedy for a *Johnson* claim. Waiting for a circuit split to develop, or waiting for a case that perfectly presents the question of whether an actual innocence claim concerning a sentence tolls AEDPA's statute of limitations, means that many prisoners will serve more than their lawful terms of imprisonment. For these prisoners, there will be no adequate remedy without immediate Supreme Court attention.[54] A remedy that comes too late—after these prisoners have served their lawful terms of imprisonment—is no remedy at all.

2. Exceptional Circumstances Unique to *Johnson*

The way in which *Johnson* claims have been litigated is another exceptional circumstance that warrants the Court entertaining a petition for an original writ. In most cases, it is hypothetically possible for the Court to "make" a rule retroactive by applying that rule to a case on collateral review. But these kinds of cases will not make their way to the Supreme Court with regard to *Johnson* retroactivity. The government concedes that *Johnson* applies retroactively, and it is waiving all procedural objections to resentencing defendants who were sentenced under ACCA's residual clause.[55] Courts had,

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53. Joint Emergency Motion Under Circuit Rule 27-3 for an Order Authorizing District Court to Consider a Successive Motion Under 28 U.S.C. § 2255 at 10–11, United States v. Striet, No. 15-72506 (9th Cir. Aug. 25, 2015) ("Mr. Striet has already served more time than the maximum term for the offense of conviction . . . ."); Joint Emergency Motion for an Order Authorizing District Court to Reconsider a Successive Motion Under 28 U.S.C. § 2255 at 10, Reliford v. United States, No. 15-3224 (8th Cir. Oct. 6, 2015) ("Reliford has already served more time than the maximum term for the offense of conviction . . . .").

54. For similar reasons, it also does not make sense for the Supreme Court to wait for a case involving the career offender Guideline. *See* Leah Litman, *Circuit Splits & Original Writs*, CASETEXT (Dec. 17, 2015), https://casetext.com/posts/circuit-splits-original-writs [perma.cc/8LTY-PQNB].

55. *See, e.g.*, Gov't's Response to Appellant's Motion for Summary Action at 5, United States v. Imm, No. 14-4809 (3d Cir. Aug. 6, 2015), ("The government further waives any objection based on procedural default . . . ."); Joint Emergency Motion Under Circuit Rule 27-3 for

until the end of November, uniformly accepted the government's concessions in first petitions for postconviction review. Because these cases are favorable to prisoners, and the United States agrees that prisoners should be resentenced, there is no first petition for postconviction review that the Court could take to make *Johnson* retroactive.

The government has also taken pains to avoid having to fall back on an original writ of habeas corpus. The United States has urged courts of appeals to grant prisoners authorization to file second or successive petitions, at least if prisoners were sentenced under ACCA's residual clause.[56] Some courts have turned these concessions into a reason why the courts are granting authorization to file second or successive petitions.[57] But the Fifth Circuit, for example, ignored the United States' submission that "[t]he government does not object to the defendant's motion for leave to file a successive § 2255 motion."[58]

In several writings, Professor Vladeck has also urged the Court to use its power to entertain original writs to resolve the circuit split about whether the Supreme Court has made *Johnson* retroactive.[59] Vladeck notes that the Court

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an Order Authorizing District Court to Consider a Successive Motion Under 28 U.S.C. § 2255 at 4, United States v. Striet, No. 15-72506 (9th Cir. Aug. 25, 2015) ("In light of *Johnson*, the parties agree that Mr. Striet is actually innocent of being an armed career criminal . . . .").

56. Joint Emergency Motion Under Circuit Rule 27-3 for an Order Authorizing District Court to Consider a Successive Motion Under 28 U.S.C. § 2255, United States v. Striet, No. 15-72506 (9th Cir. Aug. 25, 2015); Joint Emergency Motion for an Order Authorizing District Court to Reconsider a Successive Motion Under 28 U.S.C. § 2255, Reliford v. United States, No. 15-3224 (8th Cir. Oct. 6, 2015).

57. *E.g.*, Pakala v. United States, 804 F.3d 139, 139–40 (1st Cir. 2015) (quoting Evans-Garcia v. United States, 744 F.3d 235, 240 (1st Cir. 2014)) ("In view of the government's concessions, we certify that Pakala has made the requisite *prima facie* showing that the new constitutional rule announced in *Johnson* 'qualifies as a basis for habeas relief on a second or successive petition . . . .' "); Woods v. United States, 805 F.3d 1152, 1154 (8th Cir. 2015) (citing Martin v. Symmes, 782 F.3d 939, 945 (8th Cir. 2015) ("[W]e have previously accepted the government's concession of retroactivity of a new Supreme Court rule as a sufficient prima facie showing to allow a second or successive § 2255 petition.").

58. Response by the United States to Defendant's Motion for Authorization to File a Successive or Second Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 at 6, *In re* Williams, No 15-30731 (5th Cir. Sept. 24, 2015).

59. *See, e.g.*, Stephen I. Vladeck, *Using the Supreme Court's Original Habeas Jurisdiction to "Ma[k]e" New Rules Retroactive*, 28 FED. SENT'G REP. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698351 [perma.cc/Y36N-F7MM] [hereinafter Vladeck, New Rules]; Brief of Law Professors As *Amicus Curiae* In Support of Petitioners (U.S. No. 15-578), https://www.justsecurity.org/wp-content/uploads/2015/11/In-re-Butler_Amicus_LawProfs.pdf [perma.cc/5JHU-LYTD]; Steve Vladeck, *The* Johnson *Retroactivity Circuit Split Plot Thickens*, PRAWFSBLAWG (Dec. 4, 2015, 10:28 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/12/the-johnson-retroactivity-circuit-split-plot-thickens.html [perma.cc/4QJ2-6SJ7]; Steve Vladeck, *How an Obscure SCOTUS Procedure Can Solve AEDPA's Retroactivity Catch-22 (and a Growing Circuit Split)*, PRAWFSBLAWG (Nov.

has said it might not entertain a petition for an original writ if federal statutes restrict the Court's ability to grant relief on the claim being raised in the petition.[60] For example, AEDPA restricts the standards by which federal courts review claims of error if a state court has adjudicated those claims.[61] But the Court's review of whether it has made *Johnson* retroactive would be de novo, although there are other statutory restrictions on the availability of habeas corpus.[62] Moreover, only the Supreme Court can make *Johnson* retroactive for purposes of AEDPA's gatekeeping provisions. And *Dodd* acknowledged that, under AEDPA, Congress contemplated that the Court would have the means to do so—that the Court could "announce[] a new rule of constitutional law and make[] it retroactive within one year."[63] Vladeck also notes that there have been few situations in which federal courts have been divided over whether the Supreme Court has made a rule retroactive.[64] Therefore, using the Court's original jurisdiction to resolve those disputes would not lead to a large number of original habeas petitions.[65]

The nature of *Johnson* claims also means that other ways in which the Court could make *Johnson* retroactive would not provide "adequate relief" to prisoners with *Johnson* claims. For example, the Supreme Court could grant review in a case in which a court of appeals authorized the filing of a second or successive petition and the district court and court of appeals then heard the petition on the merits.[66] But the sheer length of time it would take these petitions to reach the Court would mean that such a decision would certainly happen outside of the year-long window prisoners have to file second or successive petitions. And a later-in-time decision holding *Johnson* retroac-

16, 2015, 10:54 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/11/how-an-obscure-scotus-procedure-can-solve-aedpas-retroactivity-catch-22-and-a-growing-circuit-split.html [perma.cc/GXN6-VPGN].

60. *See, e.g.*, Vladeck, *New Rules*, *supra* note 59.

61. 28 U.S.C. § 2254(d) (2012).

62. 28 U.S.C. § 2255(e) provides that "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [§ 2255], shall not be entertained if it appears that . . . [a] court has denied him relief [under § 2255], unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." § 2255(e); *see* Litman, *supra* note 2, at 75–76 (suggesting § 2255 remedy would be inadequate for *Johnson* claims if the Court did not make *Johnson* retroactive).

63. Dodd v. United States, 545 U.S. 353, 354 (2005).

64. *See, e.g.*, Vladeck, *New Rules*, *supra* note 59.

65. *Id.*

66. *See, e.g.*, Tyler v. Cain, 533 U.S. 656 (2001) (reviewing postconviction proceedings that had been adjudicated on the merits after permission was granted to file such a petition).

tive might mean that many prisoners serve more than their lawful ten-year terms of imprisonment.[67]

B. *Other Extraordinary Writs*

In addition to an "original" writ of habeas corpus, the Court has two other options that it could use to make *Johnson* retroactive. Both are other kinds of extraordinary writs: the writ of mandamus and the writ of certiorari before judgment. While mandamus is unlikely, the Court could grant a writ of certiorari before judgment in *Harrimon*. The United States appears to prefer a grant of certiorari in *Harrimon* over an original writ of habeas corpus. The United States' stated preference might, by itself, be reason enough for the Court to grant certiorari in *Harrimon* instead of an original writ even if the United States' explanation for its preference is not persuasive. The Court should not, however, defer consideration of *Johnson* retroactivity in the hope that the United States will waive any statute of limitations defense it might have.

One alternative to granting certiorari in a case seeking an original writ of habeas corpus would be to grant certiorari in a case seeking a writ of mandamus. A writ of mandamus orders a court of appeals (or district court) to take some action.[68] The AEDPA provision barring petitions for certiorari from a court of appeals decision granting or denying authorization to file a successive petition doesn't bar petitions seeking writs of mandamus.[69] And there is currently a petition before the Supreme Court in which the prisoner is seeking a writ of mandamus ordering the court of appeals to grant him authorization to file a successive petition.[70]

But writs of mandamus, like original writs of habeas corpus, are reserved for "exceptional circumstances."[71] The Court has also said that writs of mandamus are available only when it is "clear and indisputable" that the petitioner is entitled to relief.[72] The petition seeking mandamus may not satisfy that criteria for two reasons. First, it is not clear that the petitioner in that

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67. *See* Leah M. Litman, *Resentencing in the Shadow of* Johnson v. United States, 28 FED. SENT'G REP. 45 (2015).

68. *See generally* Cheney v. United States Dist. Court for D.C., 542 U.S. 367 (2004). Writs of mandamus are available under the All Writs Act. 28 U.S.C. § 1651(a) (2012).

69. 28 U.S.C. § 2244(b)(3)(E) (2012); *see also* Felker v. Turpin, 518 U.S. 651, 666 (1996) (Stevens, J., concurring); *id.* at 667 (Souter, J., concurring).

70. Brief for the United States in Opposition, *In re* Triplett, No 15-625 (U.S. Dec. 9, 2015). The petitioner in *In re Sharp* asked for a writ of mandamus as an alternative to an original writ of habeas corpus. Brief for the United States in Opposition at 11 n.5, *In re* Sharp, No. 15-646 (U.S. Dec. 16, 2015).

71. SUP. CT. R. 20.4(a).

72. *Cheney*, 542 U.S. at 381.

case received an unlawful sentence—as the United States noted in its brief in opposition, the prisoner had three convictions for "serious drug offenses."[73] ACCA imposes a fifteen-year mandatory minimum if the prisoner had three or more convictions for violent felonies *or* serious drug offenses,[74] and *Johnson* did not invalidate the provision imposing an enhanced sentence when a prisoner has convictions for three or more serious drug offenses. Because the petitioner seeking mandamus did not necessarily receive an unlawful sentence, he may not have a "clear and indisputable" claim to relief. Second, it is not necessarily "clear and indisputable" that the court of appeals erred by concluding the Court has not made *Johnson* retroactive. *Tyler v. Cain* held that the "only way the Supreme Court" can "make" a rule retroactive "is through a holding,"[75] and three courts of appeals have relied on *Tyler* to say that the Supreme Court has not made *Johnson* retroactive.

The Court could also grant a petition seeking certiorari before judgment in a case involving a first petition for postconviction review. No court of appeals has held that *Johnson* is not retroactive in a first petition for postconviction review. But one district court has, and it is conceivable that the Supreme Court could review the judgment of that district court without waiting for a court of appeals decision. Federal law provides that "[a]n application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."[76] But petitions for certiorari before judgment—like petitions seeking original writs of habeas corpus or writs of mandamus—are not frequently granted. The Supreme Court's rules state that a petition seeking certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court."[77]

The prisoner in *Harrimon*—the district court decision finding that *Johnson* is not retroactive—has filed a petition seeking certiorari before judgment.[78] And although the government's response wasn't due until January 19, 2016,[79] the United States filed its brief in opposition on December 22,

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73. Brief of United States in Opposition at 17–20, *In re* Triplett, No 15-625, (U.S. Dec. 9, 2015).

74. 18 U.S.C. § 924(e) (2012).

75. 553 U.S.656, 663 (2001).

76. 28 U.S.C. § 2101(e).

77. SUP. CT. R. 11.

78. Petition for a Writ of Certiorari Before Judgment and Motion for Leave to Proceed in Forma Pauperis, Harrimon v. United States, No. 15-7426 (U.S. Dec. 11, 2015).

79. *Id.*

2015.[80] The Court will consider the petition at its January 8 conference. Typically, cases granted before the middle of January are heard during the Court's current Term, and so a decision in *Harrimon* could come before June 2016.[81]

The United States appears to prefer the Court grant the petition seeking certiorari before judgment rather than one of the petitions seeking an original writ of habeas corpus, as its expedited reply in *Harrimon* suggests. The United States argued that the Court "should . . . den[y]" the petitions of prisoners seeking original writs of habeas corpus because they have "not shown that exceptional circumstances exist to warrant" an original writ of habeas corpus.[82] But it used more tepid language in its brief in opposition to the petition for certiorari before judgment in *Harrimon*: "The petition for a writ of certiorari before judgment should be denied unless this Court concludes that the criteria [for granting such a petition] are satisfied, in which case the petition should be granted."[83] And the United States suggested there might be an argument for why the criteria were satisfied: "[R]esolution of the retroactivity of *Johnson* in petitioner's case would have wider legal and practical importance for the larger class of prisoners who need authorization to file second or successive motions."[84]

However, the reason the United States prefers a petition for certiorari before judgment over an original writ of habeas corpus is a bit odd. The United States suggested that the prisoners seeking original writs of habeas corpus had not met the "strict criteria that govern the issuance of the extraordinary writ" because "other, more traditional ways exist by which the issue could reach th[e] Court," and named *Harrimon* as such a vehicle.[85] But certiorari before judgment is not a "traditional" way an issue reaches the Court, and there are similarly "strict criteria" that govern when the Court grants certiorari before judgment.[86] The United States also did not concede that those criteria were satisfied, nor did it explicitly urge the Court to grant certiorari in *Harrimon*. Rather, it urged the Court to deny the petition, unless the Court concluded the criteria for granting certiorari before judgment

80. Brief for the United States, Harrimon v. United States, No. 15-7426 (U.S. Dec. 22, 2015).

81. SCOTUSBLOG, STATISTICS: PACE OF GRANTS, http://www.scotusblog.com/statistics/ [perma.cc/J5N6-S9YX].

82. Brief for the United States in Opposition at 14, *In re* Sharp, No. 15-646 (U.S. Dec. 16, 2015).

83. Brief for the United States at 32, Harrimon v. United States, No. 15-7426 (U.S. Dec. 22, 2015).

84. *Id.* at 12.

85. Brief for the United States in Opposition at 14, *In re* Sharp, No. 15-646 (U.S. Dec. 16, 2015).

86. *Id.* at 11.

were satisfied. And it suggested that *Harrimon*, "standing on its own, does not appear to satisfy the 'very demanding standard' " for "certiorari [before judgment]."[87]

The United States is correct that petitions for certiorari before judgment are more "traditional" than original writs of habeas corpus in one sense: the Court has occasionally granted certiorari before judgment. But the Court has often done so when the *United States* has sought certiorari and urged the Court to grant certiorari before judgment.[88] Given that the United States' views appear to be a factor in whether the Court grants certiorari before judgment, it's unfortunate that the United States did not argue that the Court should grant certiorari before judgment in *Harrimon*. It's doubly unfortunate because the United States suggested that the possibility of certiorari in *Harrimon* was a reason not to grant the petitions seeking original writs of habeas corpus. And it's triply unfortunate because the United States' position is that prisoners sentenced under ACCA are entitled to relief on the merits: it represented to district courts, courts of appeals, and now the Supreme Court, that it believes both that *Johnson* is a substantive rule that applies retroactively, and that the Court has made *Johnson* retroactive such that prisoners should be granted authorization to file successive petitions for postconviction review.

The United States represented that *Harrimon* is meaningfully different from cases in which the Court granted certiorari before judgment to resolve the constitutionality of a wide-reaching federal statute, such as the Sentencing Guidelines, which apply in every sentencing in every federal court.[89] But it offered that "the Court may conclude that petitioner's case is of 'imperative public importance' " because it is "important to the fair and proper administration of federal criminal justice" that prisoners not serve more than their lawful terms of imprisonment.[90] In these respects, *Harrimon* is similar to *Barefoot v. Estelle*, which granted certiorari before judgment to resolve the

87. Brief for the United States at 12, Harrimon v. United States, No. 15-7426 (U.S. Dec. 22, 2015).

88. United States v. Fanfan, 542 U.S. 956 (2004); United States v. Nixon, 418 U.S. 683 (1974). Several of these cases involved international or military affairs. *See* James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 SUP. CT. REV. 259 (1986) (listing cases). Other times the Court has granted certiorari before judgment to consolidate cases when it is already hearing a similar case. *See, e.g.*, Gratz v. Bollinger, 537 U.S. 1044 (2002); *Fanfan*, 542 U.S. 956.

89. *See* United States v. Booker, 543 U.S. 220 (2005); Mistretta v. United States, 488 U.S. 361 (1989); Brief for the United States at 26, Harrimon v. United States, No. 15-7426 (U.S. Dec. 22, 2015).

90. Brief for the United States at 24, 26, Harrimon v. United States, No. 15-7426 (U.S. Dec. 22, 2015).

proper standard for granting stays of execution.[91] The number of affected prisoners may not be large,[92] but the import of the issue for the affected prisoners, and for the broader criminal justice system, is.

There is one additional point about *Harrimon*: the case is (currently) in a somewhat quirky procedural posture—the issuance of a certificate of appealability (COA). Appeals are ordinarily available as a matter of right. But AEDPA does not allow a prisoner to appeal from the denial of a petition for postconviction review unless the prisoner obtains a COA from the district court or court of appeals.[93] The district court, in the order denying *Harrimon*'s petition, also denied him a COA.[94] The prisoner has filed a notice of appeal—effectively a request for a COA—to the Fifth Circuit.[95] A COA is "jurisdictional"—meaning an appellate court does not have the power to adjudicate the petition for postconviction review on the merits until a COA has issued.[96] But the Supreme Court nonetheless has "jurisdiction" over *Harrimon* because the application for a COA in the court of appeals is a "case before the court of appeals" that the Supreme Court has the power to review.[97]

If the Fifth Circuit does not issue a COA before the Court hears *Harrimon*, however, the Supreme Court would technically be reviewing, before judgment in the court of appeals, whether Harrimon is entitled to a COA. Whether a prisoner is entitled to a COA is not exactly the same question as whether the prisoner is entitled to relief. Rather, in determining whether a COA should issue, the question is whether "reasonable jurists could debate whether . . . [the district court's decision] should have been resolved in a different manner."[98] Because the COA standard would not require the Court to say whether *Johnson* is or is not retroactive, but instead whether reasonable jurists could debate that it's not, granting a COA in *Harrimon* might not definitely make *Johnson* retroactive. The Court could, however, in granting the

91. 463 U.S. 880 (1983).

92. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *Death Row U.S.A.*, April 1, 2015, http://www.naacpldf.org/files/publications/DRUSA_Spring_2015.pdf [perma.cc/VM7K-GAPX] (estimating 3,000 prisoners are on death row in the United States). About 600 prisoners are sentenced each year under ACCA. The number of individuals in prison who were sentenced under ACCA, therefore, may be over 6,000, given that each prisoner would have been sentenced to fifteen years in prison. Litman, *supra* note 2 at 59. Of course, not all of these prisoners were sentenced under ACCA's residual clause.

93. *See, e.g.*, 28 U.S.C. § 2253 (2012); Gonzalez v. Thaler, 132 S. Ct. 641, 647–49 (2012).

94. Harrimon v. United States, No. 15-cv-00152 (N.D. Tex. Nov. 19, 2015).

95. United States v. Harrimon, No. 15-11175 (5th Cir. Nov. 23, 2015).

96. *Gonzalez*, 132 S. Ct. at 647–49.

97. Hohn v. United States, 524 U.S. 236, 241 (1998) ("There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under § 1254(1).").

98. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

COA make *Johnson* retroactive by stating that it had determined all "reasonable jurists . . . [would] agree that" *Johnson* is retroactive.[99]

Finally, the reasons *Johnson* retroactivity is of "exceptional public importance" fit naturally into the equitable analysis that has traditionally governed habeas corpus. When *Holland v. Florida* held that AEDPA's statute of limitations was subject to equitable tolling, it acknowledged that Congress, in AEDPA, had generally sought to restrict the availability of postconviction review.[100] But *Holland* explained: "'[E]quitable principles' have traditionally 'governed' the substantive law of habeas corpus."[101] And while Congress had, in AEDPA, restricted federal postconviction review, it sought "to do so without undermining basic habeas corpus principles False [I]t did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.' "[102] The reasons to resolve *Johnson* retroactivity are to do just that—to ensure that prisoners do not serve more than their lawful terms of imprisonment; to provide a remedy that is only a real remedy if it is available before prisoners serve their lawful terms of imprisonment; and to compensate for the government's litigation posture, which, while admirable, effectively foreclosed other avenues to make *Johnson* retroactive. The Court should not shy away from acknowledging that, even after AEDPA, considerations of fairness and solicitude for constitutional rights continue to have a role in federal postconviction review.

The United States suggested, between the lines, that if the Court were to wait for the perfect vehicle to make *Johnson* retroactive it might "waive" its statute of limitations defense as a reason for a court not to grant a successive petition for postconviction review in the event the Court eventually makes *Johnson* retroactive.[103] The Court should not use that a reason to wait for the perfect vehicle. One, there is no guarantee that the United States—especially in an unknown future administration that will come into office in January 2017—will waive the statute of limitations defense. Two, even if the United States does waive that defense, courts do not uniformly accept the United States' concessions, even if they are supposed to. Courts denied authoriza-

99. *Id.*

100. 560 U.S. 631 (2010).

101. *Holland*, 560 U.S. at 646.

102. *Id.* at 648–49.

103. Brief of United States in Opposition at 19, *In re* Sharp, No 15-646 (U.S. Dec. 2015) ("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)."); *but see* Wood v. Milyard, 132 S. Ct. 1826, 1830 (2012) (explaining that a court may not "bypass, override, or excuse" the government's "deliberate waiver of a limitations defense" in a habeas case).

tion to file successive petitions for postconviction review even though the United States urged them to grant authorization. And courts have refused to resentence defendants who were sentenced under the career-offender Guideline even though the United States has maintained that they should be resentenced.[104] Therefore, unless the Court wants to police when courts are abusing their discretion by overriding the United States' waiver of its statute of limitations defense, it should say, this Term, that *Johnson* is retroactive.[105]

CONCLUSION

The petitions for original writs of habeas corpus raising questions about *Johnson*'s retroactivity will test whether the Court will keep its word that original writs of habeas corpus are a real backstop for AEDPA's restrictions on postconviction review. Concurring in *Felker*, Justice Souter envisioned the Court could use one of the other writs at its disposal in a case in which "the courts of appeals adopted divergent interpretations of the gatekeeper standard."[106] These circumstances have come to pass: the circuits disagree about whether the Court has "made" a rule retroactive. There are also features unique to the *Johnson* litigation that constitute the kinds of "exceptional circumstances" that should warrant a rare exercise of the Court's power to entertain original writs of habeas corpus. The government's litigation posture—and the near unanimity among the courts that prisoners sentenced under ACCA are entitled to some relief—removed other, more traditional vehicles for the Supreme Court to make *Johnson* retroactive. The rule in *Johnson* also concerns the legality of a term of years sentence, and some prisoners have already served much of—if not more than—their lawful terms of imprisonment, which now cannot exceed ten years. A remedy for a *Johnson* claim must be made available now to ensure that prisoners do not serve more than their lawful terms of imprisonment.

If the Court does not entertain a petition seeking an original writ of habeas corpus, however, it should grant certiorari in *Harrimon* before a judgment of the court of appeals. There is no perfect vehicle for resolving whether the Court has made *Johnson* retroactive. But the Court should not wait for one. Time is more important than a case in the perfect procedural posture, both with respect to the petitions seeking original writs of habeas corpus and with respect to the petition seeking certiorari before judgment in *Harrimon*.

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104. United States v. Matchett, 802 F.3d 1185, 1194 (11th Cir. 2015).

105. *See Wood*, 132 S. Ct. at 1830 (reversing court of appeals decision for overriding the government's "deliberate waiver of a limitations defense" in a habeas case).

106. Felker v. Turpin, 518 U.S. 651, 667 (1996) (Souter, J., concurring).