No. 18-7449

IN THE SUPREME COURT OF THE UNITED STATES

JOEL DARNELL PATTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment denying his collateral attack on his sentence, which asserted a claim seeking relief on the merits, was properly classified as an unauthorized "second or successive" collateral attack under 28 U.S.C. 2255(h).

2. Whether an unauthorized "second or successive motion" under 28 U.S.C. 2255(h), when labeled by counsel as a motion to amend the judgment under Federal Rule of Civil Procedure 59(e), tolls the time for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is reprinted at 750 Fed. Appx. 259. The order of the district court (Pet. App. 28a-30a) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 263 F.3d 166.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2018. A petition for rehearing was denied on October 12, 2018 (Pet. App. 10a). The petition for a writ of certiorari was filed

on January 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Sent. Tr. 5-7. He was sentenced to 210 months of imprisonment, to be followed by three years of supervised release. Id. at 7. The court of appeals affirmed, 263 F.3d 166, and this Court denied a petition for a writ of certiorari, 534 U.S. 1007 (No. 01-6384).

Petitioner subsequently filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255, which the district court denied. See Pet. App. 28a. The court of appeals later granted petitioner authorization to file a successive Section 2255 motion. See id. at 2a. The district court denied petitioner's successive motion and his request for a certificate of appealability (COA), see id. at 3a, and denied relief on a filing labeled as a motion to reopen the judgment and for reconsideration under Federal Rules of Civil Procedure 52 and 59, see Pet. App. 28a-30a. The court of appeals granted a COA and then dismissed petitioner's appeal for lack of jurisdiction. Id. at 1a-9a.

1. On November 8, 1999, petitioner was involved in a dispute with his girlfriend. Presentence Investigation Report (PSR) ¶ 4.

Petitioner became angry, threw his girlfriend, and started choking her. Ibid. Petitioner then retrieved a .22 caliber revolver, and he and his girlfriend began to fight over the weapon. PSR ¶ 5. Petitioner's girlfriend ultimately gained control of the weapon, fled, and called the police. Ibid. Petitioner, who was a convicted felon, admitted to police that the gun was in his possession during the incident. PSR ¶ 6.

A grand jury indicted petitioner on one count of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1. A conviction for violating Section 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the defendant has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause" or "force clause," and the portion beginning with "otherwise" is known as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016). Petitioner entered into a plea agreement with the government and pleaded guilty to the indicted offense. Sent. Tr. 2-3.

The Probation Office classified petitioner as an armed career criminal under the ACCA based on four prior Texas state convictions for robbery, as well as a conviction for aggravated assault. PSR ¶¶ 24-29. The district court adopted the Probation Office's calculations, see Sent. Tr. 5, and sentenced petitioner to 210 months of imprisonment, id. at 7.

The court of appeals affirmed, 263 F.3d 166, and this Court denied a petition for a writ of certiorari, 534 U.S. 1007 (No. 01-6384).

2. Almost eight years later, petitioner filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255, arguing that his sentence should be recalculated and reduced under Amendment 709 of the U.S. Sentencing Guidelines. 9/22/09 Order 2. The district court denied petitioner's motion as untimely, id. at 1, 6, and petitioner's appeal was ultimately dismissed for want of prosecution, Order, No. 09-11104 (May 10, 2010).

On two subsequent occasions, petitioner sought authorization from the court of appeals to file second or successive Section 2255 motions, but both requests were denied. See 3/17/15 COA Denial 1-2; 3/17/16 COA Denial 1-2.

3. In Johnson v. United States, 135 S. Ct. 2551 (2015) (Samuel Johnson), this Court invalidated the ACCA's residual clause as impermissibly vague, in violation of the Due Process Clause. See id. at 2563. In Welch, supra, the Court determined that the ruling in Samuel Johnson was a "substantive decision that is retroactive in cases on collateral review." 136 S. Ct. at 1261; see id. at 1265. On August 1, 2016, the court of appeals tentatively granted petitioner's application to file a successive 28 U.S.C. 2255 motion based on this Court's decisions in Samuel Johnson and Welch. Pet. App. 11a-12a. The court of appeals ordered its clerk to transfer the application for authorization and its pleadings to the district court and instructed that "the district court must dismiss the § 2255 motion without reaching the merits if it determines that [petitioner] has failed to make the showing required to file such a motion." Id. at 12a (citing 28 U.S.C. 2244(b)(4)).

On February 9, 2017, the district court denied and dismissed petitioner's Section 2255 motion. It rejected petitioner's argument that his sentence had been unconstitutionally enhanced, by reliance on the residual clause of the ACCA, to classify his

Texas robbery convictions as "violent felonies." Pet. App. 13a-14a. The court determined that petitioner had failed to demonstrate that the sentencing court had "regarded his robberies as violent felonies under the residual clause of the ACCA." Id. at 14a. The court also found that petitioner's "robbery convictions continue to qualify as violent felonies under the force clause of the ACCA," and that he therefore "continues to have at least three qualifying convictions." Ibid. The court also denied a COA. Ibid.

On February 22, 2017, petitioner, with the assistance of counsel, made a filing in which he requested that the district court "amend its findings, re-open the judgment, amend its conclusions of law or make new ones, and alter or amend the judgment" pursuant to Federal Rules of Civil Procedure 52(b) and 59(a) and (e). Pet. App. 19a. In his motion, petitioner argued that an intervening court of appeals case, United States v. Rico-Mejia, 853 F.3d 731 (5th Cir.), withdrawn and superseded on panel reh'g, 859 F.3d 318 (2017), provided grounds for reconsideration of the district court's application of the elements clause to his Texas robbery convictions. Pet. App. 19a-27a.

The district court denied relief. Pet. App. 28a-30a. The court explained that the court of appeals had authorized "a narrow opportunity for [petitioner] to make a challenge to his ACCA sentence" under the holding of Samuel Johnson, 135 S. Ct. 2551,

rather than "a broad opportunity to challenge other provisions of the ACCA or [rely on] any holding not made retroactive." Pet. App. 29a. The district court also denied a COA. Id. at 30a.

4. On August 23, 2017, petitioner filed a notice of appeal. Pet. App. 3a. The court of appeals granted petitioner a COA on three issues: (1) whether petitioner's post-judgment filing invoking Rules 52 and 59 was an unauthorized, successive Section 2255 motion; (2) whether an unauthorized, successive Section 2255 motion extends the period for filing a timely notice of appeal; and (3) whether petitioner's convictions for Texas robbery qualify as violent felonies under the ACCA's elements clause. Ibid. The court ultimately dismissed petitioner's appeal for lack of jurisdiction in an unpublished opinion. Id. at 1a-9a.

The court of appeals first determined that petitioner's post-judgment filing was properly construed as an unauthorized, successive Section 2255 petition. Pet. App. 4a-8a. The court observed that in Gonzalez v. Crosby, 545 U.S. 524, 530-532 (2005), this Court held that, in the context of a collateral attack under 28 U.S.C. 2254 by a state prisoner, a post-judgment motion under Federal Rule of Civil Procedure 60(b) should be construed as a successive habeas petition if it "raises new claims for relief, presents new evidence in support of a claim that has already been litigated, contends that a subsequent change in decisional law justifies relief from the judgment, or otherwise challenges the

district court's resolution of the underlying claim on the merits." Pet. App. 4a (footnote omitted). By contrast, if a post-judgment motion "'attacks[] not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings,' courts should not construe the motion as a successive petition." Id. at 5a (quoting Gonzalez, 545 U.S. at 532). The court of appeals further observed that "[c]ourts have extended the logic of Gonzalez beyond its specific procedural posture," applying it to Section 2255 motions, as well as to motions under Federal Rule of Civil Procedure 59(e). Pet. App. 5a. And while the court recognized that "differences exist between Rule 59(e) and Rule 60(b), it emphasized that both Rules 'permit the same relief -- a change in judgment.'" Ibid. (quoting Williams v. Thaler, 602 F.3d 291, 303 (5th Cir.), cert. denied, 562 U.S. 1006 (2010)).

The court of appeals accordingly determined that "the answer to the successive petition inquiry turns on the actual substance of [petitioner's] post-judgment motion -- not the motion's technical title." Pet. App. 6a. The court explained that if petitioner's "motion attacks the merits of the district court's ruling on his § 2255 petition, it is an unauthorized, successive habeas petition, regardless of the fact that it was self-styled as a Rules 52(b) and 59(a), (e) motion." Ibid. And the court of appeals found that, because petitioner's post-judgment filing

attacked the district court's merits determination, "it is an unauthorized, successive § 2255 petition under Gonzalez and its progeny." Id. at 7a-8a. The court of appeals observed that the district court had made a finding that petitioner's "robbery convictions continued to qualify as violent felonies under the force clause of ACCA"; that the finding was "a resolution of the force clause argument [petitioner] raised in his motion for authorization and implicated in his § 2255 petition on the merits"; and that the post-judgment filing's focus on that "merits-based ruling" belied petitioner's argument that his post-judgment motion was "merely challenging the district court's refusal to reach the merits of his underlying claim." Id. at 6a-7a.

The court of appeals then reasoned that, as a consequence of petitioner's post-judgment filing being an unauthorized successive Section 2255 motion, petitioner's notice of appeal was untimely, and the court dismissed the appeal for lack of jurisdiction. Pet. App. 8a-9a. The court observed that a petitioner generally has 60 days from the denial of his Section 2255 motion to file a notice of appeal, id. at 8a (citing 28 U.S.C. 2107(b); Fed. R. App. P. 4(a)(1)(B)), a limit that is "prescribed by statute" and thus "jurisdictional," ibid. (citing Bowles v. Russell, 551 U.S. 205, 210-213 (2007)). The court explained that, while "[p]ost-judgment motions will ordinarily toll the filing period, and the deadline for filing a notice of appeal will be 60 days from the entry of an

order disposing of the motions," when "a post-judgment motion is in fact an unauthorized, successive § 2255 petition, the filing period is not tolled." Id. at 8a-9a (citing Uranga v. Davis, 893 F.3d 282, 284 (5th Cir. 2018), cert. denied, 139 S. Ct. 1179 (2019)).

The court of appeals rejected petitioner's argument that this Court's decision in Castro v. United States, 540 U.S. 375 (2003), prevented the court of appeals from construing his post-judgment filing as an unauthorized successive Section 2255 motion. Pet. App. 9a n.6. The court explained that Castro "dealt with the recharacterization of a post-judgment motion to the detriment of a pro se litigant," and that "[t]he equitable considerations underlying the Supreme Court's reasoning in Castro are inapplicable where the petitioner is represented by competent legal counsel," as petitioner was in this case. Ibid.

ARGUMENT

Petitioner contends (Pet. 6-10) that this Court should grant certiorari to determine whether 28 U.S.C. 2255(h)'s gatekeeping provisions for "second or successive" collateral attacks apply to a motion for reconsideration under Federal Rule of Civil Procedure 59(e). Although the circuits are in some disagreement on aspects of that question, this case presents an unsuitable vehicle to resolve such disagreement. Petitioner would not be entitled to relief even if the court resolved the issue in his favor, and his

collateral attack on his sentence is moot because he has now been released from prison. Petitioner also contends (Pet. 10-19) that this Court should determine whether an unauthorized "second or successive" motion, styled by counsel as a motion to amend the judgment under Federal Rule of Civil Procedure 59(e), tolls the time for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A). Petitioner does not allege any conflict among the circuits on that issue; none exists; and the case would be unsuitable for addressing the second question presented for the same reasons that it is unsuitable for addressing the first. No further review is warranted.

1. Petitioner contends (Pet. 4-10) that the court of appeals incorrectly treated a Rule 59(e) motion to alter or amend the judgment as a "second or successive" Section 2255 motion under 28 U.S.C. 2255(h) and that this Court's review is necessary to resolve a conflict among the circuits on whether Rule 59(e) motions can ever be classified as "second or successive" collateral attacks. This case does not present a suitable vehicle to address that question, because petitioner is ineligible for relief regardless of how his Rule 59(e) motion is classified.

a. Under 28 U.S.C. 2255(h), any "second or successive motion" for relief under Section 2255 must first be certified by a panel of the court of appeals. For the motion to proceed, the court of appeals must certify that the motion involves a new rule of

constitutional law made retroactive on collateral review by this Court or newly discovered evidence that sufficiently undermines a guilty verdict. Ibid.

In Gonzalez v. Crosby, 545 U.S. 524 (2005), this Court addressed a related restriction under 28 U.S.C. 2244(b) on "second or successive" habeas petitions seeking to vacate state-court criminal judgments. See 28 U.S.C. 2255(h) (cross-referencing Section 2244). The Court held that a motion for relief from final judgment under Federal Rule of Civil Procedure 60(b) will be considered a "second or successive" habeas petition under Section 2244(b) if it contains one or more "claims" -- i.e., "an asserted federal basis for relief from a state court's judgment of conviction." Gonzalez, 545 U.S. at 530-531. The Court thus held that a Rule 60(b) motion will be treated as a "second or successive" habeas petition if it asserts "a new ground for relief" or "attacks the federal court's previous resolution of a claim on the merits." Id. at 532 & n.4 (emphasis omitted). In contrast, the Court held, if a Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," such as fraud on the court or a misapplication of the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it will not be deemed a "second or successive" habeas petition. Id. at 532; see id. at 532 n.5, 533.

Although Gonzalez arose in the context of a Section 2254 habeas petition challenging a state-court judgment, courts of appeals have uniformly applied the holding of Gonzalez to Section 2255 motions attacking federal judgments, in light of the similar restriction on "second or successive" motions contained in Section 2255(h). See Gilbert v. United States, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc) (collecting cases), cert. denied, 565 U.S. 1116 (2012). Petitioner does not challenge in his certiorari petition the application of Gonzalez to Section 2255(h). Rather, petitioner contends (Pet. 8-9) that Section 2255(h)'s restrictions on "second or successive" motions do not apply to filings that invoke Rule 59(e), as opposed to Rule 60(b), even if they contain "claims" within the meaning of Gonzalez. In petitioner's view, because a Rule 59(e) motion suspends the finality of a judgment, so long as a filing challenging the district court's resolution of an initial Section 2255 motion is labeled a Rule 59(e) motion and complies with the rule's requirement that it be filed within 28 days of the judgment, Section 2255(h)'s restrictions on "second or successive" motions for collateral relief have no application.

That argument is unsound. As the court below has previously explained, "[k]eeping in mind AEDPA's basic premises -- avoiding piecemeal litigation and encouraging petitioners to bring all their substantive claims in a single filing -- * * * Rule 59(e) gives rise to concerns similar to those the Supreme Court addressed

in Gonzalez" in the context of Rule 60(b). Williams v. Thaler, 602 F.3d 291, 303 (5th Cir.), cert. denied, 562 U.S. 1006 (2010). Although the two rules do not function identically, "[i]n practice * * * Rules 59(e) and 60(b) permit the same relief -- a change in judgment" -- and a habeas petitioner should not "have the opportunity to circumvent AEDPA's jurisdictional bar on second or successive applications based on little more than the petitioner's ability to file his or her motion within" the time period provided by the rule. Id. at 303-304 (citation and internal quotation marks omitted); see Howard v. United States, 533 F.3d 472, 476-477 (6th Cir. 2008) (Boggs, J., dissenting) ("I do not see how many filings labeled as 59(e) motions can escape being ruled out by the basic premise of AEDPA: that all habeas claims should generally be brought at one time and that piecemeal habeas litigation should be discouraged to the greatest extent possible, permitted only by Court of Appeals permission.").

Accordingly, a putative Rule 59(e) motion that, like petitioner's here, asserts a "claim" within the meaning of Gonzalez should be treated as a "second or successive motion" within the meaning of Section 2255(h). Petitioner does not meaningfully dispute that his pleading, though styled as a Rule 59(e) motion, raised a "claim" as defined by Gonzalez. See Pet. 15 (asserting only that the issue "is at least debatable"). As the court of appeals found, petitioner's motion asserted a new ground to

challenge the district court's ruling on its merits, see Pet. App. 6a, and a post-judgment motion that "attacks the federal court's previous resolution of a claim on the merits" is a "second or successive" Section 2255 motion, Gonzalez, 545 U.S. at 532 & n.4 (emphasis omitted). Therefore, petitioner's filing required authorization from a panel of the court of appeals under Section 2255(h), which petitioner failed to obtain.

Courts of appeals have disagreed about the applicability of Gonzalez to Rule 59(e) motions. The Fifth Circuit has, in Williams v. Thaler, supra, and in the unpublished decision below, applied Gonzalez to filings invoking Rule 59(e). The Eighth and Tenth Circuits have done so in the context of "Rule 59(e) motions to reconsider the dismissal of Rule 60(b) motions that the district court had determined to be second or successive petitions requiring court of appeals permission." Blystone v. Horn, 664 F.3d 397, 415 n.12 (3d Cir. 2011); see Ward v. Norris, 577 F.3d 925 (8th Cir. 2009), cert. denied, 559 U.S. 1051 (2010); United States v. Pedraza, 466 F.3d 932 (10th Cir. 2006).

The Third and Sixth Circuits have declined to apply the gatekeeping provisions of 28 U.S.C. 2244(b) and 2255(h) to Rule 59(e) motions. See Blystone, 664 F.3d at 413-415 (3d Cir.); Howard, 533 F.3d at 476 (6th Cir.). In Curry v. United States, 307 F.3d 664 (2002), cert. denied, 538 U.S. 989 (2003), the Seventh Circuit expressed agreement with that position, but its discussion

was "not strictly necessary to the holding," Howard, 533 F.3d at 474, and therefore was dictum. And the Ninth Circuit has adopted a hybrid approach under which "a Rule 59(e) motion that raises entirely new claims should be construed as a second or successive habeas petition subject to AEDPA's restrictions," but "a timely Rule 59(e) motion that asks the district court to 'correct manifest errors of law or fact upon which the judgment rests' should not be construed as a second or successive habeas petition." Rishor v. Ferguson, 822 F.3d 482, 492 (2016) (citation and emphasis omitted), cert. denied, 137 S. Ct. 2213 (2017).

b. This case would be an unsuitable vehicle to address the question presented because petitioner would not be entitled to relief even if Section 2255(h)'s restriction on "second or successive" motions did not apply to his filing, both because his claim lacks merit and because his term of imprisonment has concluded.

First, the district court denied petitioner's post-judgment filing on the merits, Pet. App. 29a, and its determination that petitioner's Texas robbery convictions "continue to qualify as violent felonies under the force clause of the ACCA" even after Samuel Johnson, Pet. App. 14a, is clearly correct. As this Court recently reiterated in Stokeling v. United States, 139 S. Ct. 544 (2019), an offender uses "physical force" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(i), when he uses or threatens the use of

"violent force -- that is, force capable of causing physical pain or injury to another person." Stokeling, 139 S. Ct. at 553 (quoting Johnson v. United States, 559 U.S. 133, 140 (2010)) (emphasis omitted). Because a conviction for Texas robbery requires either the causation of bodily injury or the threat of bodily injury, see Tex. Penal Code Ann. § 29.02(a), it necessarily requires "force capable of causing physical pain or injury." Accordingly, relying on Stokeling and United States v. Castleman, 572 U.S. 157, 164-165 (2014), the court of appeals has recognized (along with the only other circuit to address the issue) that Texas robbery qualifies as a violent felony under the ACCA's elements clause. United States v. Burris, 920 F.3d 942, 945 (5th Cir. 2019); see United States v. Hall, 877 F.3d 800, 808 (8th Cir. 2017) (holding that Texas robbery is a violent felony under the elements clause), cert. denied, 139 S. Ct. 1254 (2019). Petitioner's collateral attack on his ACCA sentence was therefore unavailing irrespective of the resolution of the procedural arguments he makes in this Court.

Second, petitioner's ACCA sentence is now over, so his challenge to it is moot. According to the Federal Bureau of Prisons, petitioner was released on September 18, 2018. See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (February 19, 2019) (search for register number 34351-077). Because petitioner's challenge affects only the length of his

sentence rather than his underlying conviction, the case became moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "'likely to be redressed by a favorable judicial decision,'" id. at 7 (citation omitted).

Petitioner cannot make that showing here. The only portion of petitioner's sentence to which he is still subject is his three-year term of supervised release. And in United States v. Johnson, 529 U.S. 53, 54 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. The Court in Johnson

recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." See 529 U.S. at 60. But, as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).* In addition, petitioner's three-year supervised-release term will likely have run its course by the time of any merits decision in this case, if certiorari were granted.

2. Petitioner further argues (Pet. 10-19) that this Court should grant certiorari to determine whether a pleading that is in

* Other courts of appeals have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant's supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006). Those decisions, however, failed to address this Court's decision in Johnson. Regardless, the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the underlying question.

substance an unauthorized "second or successive" Section 2255 motion, but is styled by counsel as a motion for reconsideration filed pursuant to Federal Rule of Civil Procedure 59(e), tolls the time for filing a notice of appeal from the underlying judgment pursuant to Federal Rule of Appellate Procedure 4(a)(4)(A). For the reasons just discussed, this case would be an unsuitable vehicle for review of that issue as well. In any event, the court of appeals correctly determined that a pleading that is in substance a "second or successive" Section 2255 motion does not toll the time for filing a notice of appeal. The unpublished decision in this case does not conflict with any decision of this Court or another court of appeals, and further review is unwarranted.

As the court of appeals has previously explained, although Appellate Rule 4 provides that a timely motion under Rule 59(e) suspends the time for filing a notice of appeal, "a purported Rule 59(e) motion that is, in fact, a second or successive [habeas petition] is subject to the restrictions of [AEDPA] and [does] not toll the time for filing a notice of appeal." Uranga v. Davis, 893 F.3d 282, 284 (5th Cir. 2018), cert. denied, 139 S. Ct. 1179 (2019); see Williams, 602 F.3d at 303 ("We have held that a properly filed Rule 59(e) motion voids a previously-filed notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv)."). That interpretation of Appellate Rule 4(a)(4)(A)

is sound. The rule lists the specific types of motions that will suspend the finality of the judgment for purposes of filing a notice of appeal, and "[t]he title of [a] pleading does not control [the] determination" whether it falls within one of those categories, Havensight Capital LLC v. Nike, Inc., 891 F.3d 1167, 1172 (9th Cir. 2018). Rather, courts "'look to the substance' of the pleading 'to determine whether it is in substance a motion to alter or amend the judgment.'" Ibid. (quoting United States ex rel. Hoggett v. University of Phoenix, 863 F.3d 1105, 1108 (9th Cir. 2017)). Therefore, if a post-judgment filing is not in substance a Rule 59(e) motion, but is instead a "second or successive" collateral attack, it does not toll the time to file the notice of appeal.

Petitioner errs in suggesting (Pet. 16-17) that the unpublished decision below conflicts with this Court's decision in Castro v. United States, 540 U.S. 375, 377 (2003). In Castro, this Court explained that a court may treat "as a request for habeas relief under 28 U.S.C. § 2255 a motion that a pro se federal prisoner has labeled differently." 540 U.S. at 377 (emphasis omitted). But because "[s]uch recharacterization can have serious consequences for the prisoner" -- by subjecting "any subsequent motion under § 2255 to the restrictive conditions that federal law imposes upon a 'second or successive' (but not upon a first) federal habeas motion" -- a court cannot "recharacterize a pro se

litigant's motion as the litigant's first § 2255 motion unless the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's 'second or successive' restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing." Ibid. (citation and emphasis omitted). "Recharacterizing a prisoner's successive collateral motions in the sentencing court as within the scope of § 2255," however, "does not pose any similar risk," because the "initial round of collateral review has been enjoyed * * * , and the only question is whether the court will permit the prisoner to use nomenclature to defeat the rules established by Congress." Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004). Nor do counseled filings like petitioner's present the same equitable concerns as pro se filings. See Pet. App. 9a n.6.

Petitioner identifies no conflict in the circuits on the second question presented. And he fails to identify how it would have any practical significance independent of the first question presented. If a post-judgment filing is in fact an unauthorized successive collateral attack, it cannot provide a basis for relief, irrespective of whether an appeal of its denial is timely. See 28 U.S.C. 2255(h). For that reason as well, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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