No. 19-633

In the Supreme Court of the United States

EDWIN ARTHUR AVERY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in directing the dismissal of petitioner's second motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), where the motion contended that petitioner's sentence was invalid in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), and petitioner had previously raised the same claim in his first motion under 28 U.S.C. 2255.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Ohio):

Avery v. *United States*, No. 16-cv-02 (May 4, 2017)

United States Court of Appeals (6th Cir.):

Avery v. *United States*, No. 17-3628 (May 28, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 770 Fed. Appx. 741. The order of the district court (Pet. App. 5a-7a) is unreported but is available at 2017 WL 1787542.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2019. A petition for rehearing was denied on September 4, 2019 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on November 15, 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 Southern District of Ohio, petitioner was

convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 2a; see D. Ct. Doc. 35, at 1-3 (Aug. 24, 2019). Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, which the district court denied. D. Ct. Doc. 46 (Feb. 24, 2016). Petitioner did not appeal that denial. In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Pet. App. 43a-45a. The district court dismissed the motion and granted a certificate of appealability (COA). D. Ct. Doc. 57 (Jan. 20, 2017); Pet. App. 5a-7a. The court of appeals remanded the case with instructions to dismiss the second Section 2255 motion for lack of jurisdiction. Pet. App. 1a-4a.

1. In November 2007, petitioner fired a gun near a street intersection in Springfield, Ohio, and then threw the gun behind a tree. D. Ct. Doc. 21, at 6 (June 6, 2008); Presentence Investigation Report (PSR) ¶ 9. At the time of the incident, petitioner had five prior felony convictions. D. Ct. Doc. 21, at 6; PSR ¶ 11. A federal grand jury in the Southern District of Ohio charged petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1-2.

A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender 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 statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); *Custis* v. *United States*, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" as an offense punishable by more than a year in prison 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). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause." See *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016).

Petitioner pleaded guilty pursuant to a binding plea agreement entered under Federal Rule of Criminal Procedure 11(c)(1)(C). D. Ct. Doc. 21, at 1-7; Judgment 1. As part of the plea agreement, petitioner admitted that he had two Ohio convictions for robbery, one in 2002 and one in 2005, and a 2005 Ohio conviction for felonious assault. D. Ct. Doc. 21, at 6. Petitioner acknowledged that those three convictions "are each 'violent felonies' as defined in 18 U.S.C. § 924(e)(2)(B)," *id.* at 7, and the parties agreed that a sentence of 15 years of imprisonment, to be followed by five years of supervised release, was "the appropriate disposition" of petitioner's case. *Id.* at 2.

The district court accepted petitioner's plea and sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. Judgment

2-3. Petitioner appealed, and his attorney filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), stating that no meritorious issues for appeal existed. D. Ct. Doc. 35, at 1. The court of appeals affirmed. *Id.* at 1-3.

2. On June 26, 2015, this Court held in *Johnson* v. *United States*, *supra*, that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court subsequently held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. See *Welch*, 136 S. Ct. at 1268.

Petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence in light of *Johnson*. D. Ct. Doc. 41, at 3-4, 11 (Jan. 4, 2016); Pet. App. 2a. The district court dismissed the motion with prejudice, and denied a COA, without requesting a response from the government. D. Ct. Doc. 46. The court determined, among other things, that petitioner's prior Ohio convictions for robbery and felonious assault remained valid ACCA predicates after *Johnson* because their classification as violent felonies did not depend on the residual clause, Pet. App. 44a. Petitioner did not appeal. *Id.* at 2a.

Approximately three months after the district court denied his first Section 2255 motion, petitioner applied to the court of appeals for authorization under 28 U.S.C. 2255(h)(2) to file a second or successive Section 2255 motion that again challenged his ACCA sentence under *Johnson*. Pet. App. 43a-44a; see *id.* at 2a. Section 2255(h)(2) allows a second or successive collateral attack under Section 2255 if a court of appeals panel "certifie[s] as provided in [S]ection 2244" that the motion "contain[s]" 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).

The government filed a response to petitioner's application. That filing, which was the government's first filing in the postconviction proceedings, explained that the government "cannot determine, based on the documents presently before it, whether [petitioner's] prior convictions qualify him as an armed career criminal, notwithstanding *Johnson*." 16-3566 Gov't C.A. Response 1 (June 13, 2016). The government stated that, in such circumstances, it "would usually agree that [petitioner] has made a showing sufficient to satisfy 28 U.S.C. § 2255(h)(2)," while reserving the right to contest petitioner's proposed Section 2255 motion in the district court proceedings. *Ibid.* But because petitioner had "already made his *Johnson* claims in district court" in his first Section 2255 motion, the government suggested that the court of appeals construe petitioner's application as a request for a COA from the denial of his first Section 2255 motion and grant the COA. *Id.* at 2.

The court of appeals instead granted petitioner's application, as he had requested, and authorized the district court to consider petitioner's second Section 2255 motion. Pet. App. 43a-45a. As relevant here, the court of appeals stated that petitioner's two Ohio robbery convictions "do not categorically qualify as violent felonies without reference to the residual clause" and that, "without an expansion of the record, it cannot be determined whether [petitioner] qualifies as an armed career criminal after [*Johnson*]." *Id.* at 44a, 45a. The court accordingly transferred petitioner's second 2255 motion to the district court. D. Ct. Doc. 48, at 1-14 (Sept. 29, 2016).

3. a. A magistrate judge issued an initial report on petitioner's second Section 2255 motion and recommended that the district court dismiss the motion with prejudice. Pet. App. 25a-42a. The magistrate judge first determined that Section 2244(b)(1)'s requirement that a district court dismiss a habeas claim "that was presented in a prior application," 28 U.S.C. 2244(b)(1), was inapplicable to petitioner's second Section 2255 motion because that provision "applies only to petitions for writ of habeas corpus under § 2254." Pet. App. 32a. Instead, the magistrate judge considered whether, as required by Section 2255(h)(2), petitioner's motion contained a claim based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Ibid.* (quoting 28 U.S.C. 2255(h)(2)). Because the magistrate judge found that petitioner's *Johnson* claim "was fully available to him" at the time of his first Section 2255 motion and, indeed, "was in fact litigated" during the proceedings on that motion, the magistrate judge recommended that the district court dismiss petitioner's second Section 2255 motion as a refiling of the same claim made in petitioner's first motion. *Id.* at 33a. The magistrate judge additionally recommended that the district court dismiss the motion with prejudice on the ground that petitioner had "not established the merits of his [*Johnson*] 2015 claim as to the predicate offenses counted against him." *Id.* at 41a-42a; see *id.* at 37a-41a.

The district court adopted the magistrate judge's report and recommendation, dismissed petitioner's second Section 2255 motion, and denied a COA. D. Ct. Doc. 57.

b. Petitioner moved for reconsideration of the district court's order, and the magistrate judge issued a

second report and recommendation, again recommending that the district court dismiss petitioner's second Section 2255 motion with prejudice. Pet. App. 9a-10a, 22a-23a. As relevant here, the magistrate judge explained that petitioner's ACCA sentence was based on his prior Ohio convictions for robbery and felonious assault and that "[n]one of those convictions were found by this Court at sentencing to be predicate offenses on the basis of the residual clause." *Id.* at 16a.

The magistrate judge reasoned that *United States* v. *Anderson*, 695 F.3d 390 (6th Cir. 2012), established that petitioner's conviction for felonious assault is a violent felony under the elements clause, Pet. App. 16a-17a, and that petitioner's 2005 robbery conviction also "clearly qualifies as a predicate offense under the elements clause," *id.* at 17a n.2. As for petitioner's 2002 robbery conviction, the government acknowledged that the relevant state-court records did not reveal whether petitioner's conviction was under Ohio Revised Code Ann. § 2911.02(A)(1) or (A)(2) (LexisNexis 1999) and that an (A)(1) conviction would have qualified as a violent felony only under the residual clause. Pet. App. 17a. The magistrate judge found, however, that petitioner's 2002 robbery conviction "could fall under the elements clause, and most likely did, because it was a plea to a charge reduced from aggravated robbery." *Id.* at 20a. The magistrate judge further observed that "the burden of proof in a § 2255 proceeding is ordinarily on the movant" and that no circuit precedent required the lower courts "to shift that burden." *Ibid.* And although petitioner asserted, without documentary support, that he had been convicted of robbery under Ohio Revised

Code Ann. § 2911.02(A)(1) (LexisNexis 1999), the magistrate judge found that claim "inherently incredible." Pet. App. 22a; see *id.* at 20a.

The district court adopted the magistrate judge's report and recommendation in full, denied petitioner's motion for reconsideration, and granted petitioner a COA "on whether a person in [petitioner's] position is entitled to the benefit of the doubt about whether an ambiguous prior conviction was under a statute that qualifies under ACCA after *Johnson*." Pet. App. 7a; see *id.* at 6a-7a. The court of appeals later granted petitioner's motion to expand the COA to include whether petitioner's conviction for felonious assault qualifies as a predicate offense under the ACCA. C.A. Order 6 (Jan. 3, 2018). In the same order, the court of appeals "invite[d] the parties to address whether [petitioner's] *Johnson* claim was presented in his first § 2255 motion and thus is barred by § 2244(b)(1)." *Ibid.*

4. The court of appeals remanded with instructions to dismiss petitioner's second Section 2255 motion for lack of jurisdiction. Pet. App. 1a-4a. Although both parties had taken the position that 28 U.S.C. 2244(b)(1) did not apply to petitioner's motion, see Pet. C.A. Br. 33-39; Gov't C.A. Br. 15-16, the court of appeals disagreed, Pet. App. 3a-4a. The court observed that Section 2255(h) requires that a second or successive Section 2255 motion "be certified as provided in [S]ection 2244," *id.* at 3a (quoting 28 U.S.C. 2255(h)), and that Section 2244(b)(1) "instructs that '[a] claim presented in a second or successive habeas corpus application under [S]ection 2254 that was presented in a prior application shall be dismissed,'" *ibid.* (quoting 28 U.S.C. 2244(b)(1)) (first set of brackets in original). Although the court

acknowledged that Section 2244(b)(1) "explicitly references § 2254," the court stated that circuit precedent dictated that Section 2244(b)(1)'s bar on repetitive filings extends to Section 2255 motions. *Id.* at 4a. And because petitioner had presented his *Johnson* claim in a previous application, the court dismissed petitioner's second Section 2255 motion for lack of jurisdiction based on Section 2244(b)(1). *Ibid.*

Two weeks after its unpublished decision in petitioner's case, the court of appeals issued a published opinion in *Williams* v. *United States*, 927 F.3d 427 (6th Cir. 2019), in which a federal prisoner had filed a successive "and potentially duplicative" Section 2255 motion to vacate his ACCA sentence in light of *Johnson*, *supra*. *Id.* at 432. As relevant here, the court of appeals determined that Section 2244(b)(1) "does not apply to federal prisoners * * * who are seeking relief under § 2255." *Id.* at 435; see *id.* at 434-436. The court recognized that circuit precedent "suggested (though without any explanation) that § 2244(b)(1) *does* apply in § 2255 cases," *id.* at 435, but the court found that those prior statements did not constitute a holding that bound future panels, *id.* at 435-436.

5. Petitioner thereafter filed a petition for panel rehearing and rehearing en banc, contending that *Williams* "considered and rejected every argument" underlying the court of appeals' decision in his case. Pet. for Reh'g 2. Petitioner requested panel rehearing in light of *Williams* or, in the alternative, asked the court of appeals to grant rehearing en banc on the question whether Section 2244(b)(1) applies to federal prisoners seeking relief under Section 2255. *Ibid.* In response, the government argued in part that petitioner's case did not warrant rehearing en banc because, as the district

court had determined, the requirements of Section 2255(h) separately barred petitioner's second Section 2255 motion on multiple grounds. See Gov't 4Resp. to Pet. for Reh'g 1, 7-9. The court of appeals denied the rehearing petition. Pet. App. 47a-48a.

ARGUMENT

Petitioner contends (Pet. 15-20) that 28 U.S.C. 2244(b)(1) does not apply to motions filed under 28 U.S.C. 2255 and that his second Section 2255 motion should not have been dismissed based on Section 2244(b)(1). The government agrees that Section 2244(b)(1) does not apply to Section 2255 motions and that the court of appeals erred in concluding to the contrary. That conclusion, however, lacks practical significance in this case because, as the district court found, petitioner's second Section 2255 motion was subject to dismissal because it failed to satisfy the requirements of 28 U.S.C. 2255(h). In addition, after its unpublished decision in petitioner's case, the court of appeals issued a published opinion in *Williams* v. *United States*, 927 F.3d 427 (6th Cir. 2019), that correctly recognizes that 28 U.S.C. 2244(b)(1) does not apply to federal prisoners seeking relief under Section 2255. The petition thus reduces to a request that this Court intervene to give petitioner the benefit of the court of appeals' later decision in *Williams*, even though the court of appeals itself declined to rehear petitioner's case in light of *Williams*—potentially because it agreed that dismissal would be warranted even if Section 2244(b)(1) did not apply. And in any event, petitioner's case would be a poor vehicle for addressing the question presented because petitioner's *Johnson* claim lacks merit. Further review is unwarranted.

1. Although the court of appeals erred in applying Section 2244(b)(1), the district court correctly dismissed petitioner's second Section 2255 motion.

a. Section 2255 provides the general mechanism for a federal prisoner to obtain collateral review of his conviction or sentence. See 28 U.S.C. 2255(a). Subject to procedural limitations, such a prisoner may file a single motion under Section 2255 that asserts any ground eligible for collateral relief. See *ibid.* Under 28 U.S.C. 2255(h), a federal prisoner may not file a second or successive Section 2255 motion without obtaining pre-filing authorization from the court of appeals, "as provided in [S]ection 2244." 28 U.S.C. 2255(h). The court of appeals may grant authorization upon a prima facie showing that the proposed motion contains either "newly discovered evidence" that strongly indicates factual innocence, 28 U.S.C. 2255(h)(1), or "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 28 U.S.C. 2244(b)(3)(A). Authorization, when granted, vests the district court with jurisdiction that it would otherwise lack to entertain the successive motion. See *Burton* v. *Stewart*, 549 U.S. 147, 153 (2007) (per curiam) (finding similar authorization requirement for second or successive collateral attacks on state convictions to be jurisdictional).

"[O]nce the court of appeals grants authorization, the district court must determine whether the petition does, in fact, satisfy the requirements for filing a second or successive motion before the merits of the motion can be considered." *United States* v. *Murphy*, 887 F.3d 1064, 1067 (10th Cir.) (citation omitted), cert. denied, 139 S. Ct. 414 (2018). Section 2255(h) cross-references

the procedures in "section 2244," which specifies that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. 2244(b)(4). Accordingly, if the motion does not satisfy the statutory requirements for a second or successive collateral attack, then the court must dismiss the motion. If the motion does satisfy the statutory requirements, then the court addresses the merits of the motion along with any applicable defenses.

Petitioner contends (Pet. 15), and the government agrees, that Section 2244(b)(1) does not of its own force impose an additional limitation on second or successive Section 2255 motions. By its terms, Section 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus application under [S]ection 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. 2244(b)(1). Section 2254, in turn, provides a federal statutory remedy for "person[s] in custody pursuant to the judgment of a State court." 28 U.S.C. 2254(a) and (b)(1). "The requirement of custody *pursuant to a state-court judgment* distinguishes § 2254 from other statutory provisions authorizing relief from constitutional violations—such as § 2255, which allows challenges to the judgments of federal courts." *Magwood* v. *Patterson*, 561 U.S. 320, 333 (2010). Section 2254 has no application to Section 2255 motions, which must be filed by federal prisoners "in custody under sentence of a court established by Act of Congress." 28 U.S.C. 2255(a). Because Congress thus limited Section 2244(b)(1) to successive habeas applications by state prisoners, Section 2244(b)(1) does not, in itself, directly apply to federal prisoners who file successive Section 2255 motions.

b. The court of appeals' conclusion that Section 2244(b)(1) applies directly to petitioner's second Section 2255 motion is therefore inconsistent with the text of Section 2244. However, as the district court found and as the government argued below, see Gov't C.A. Br. 16-20, petitioner's motion was subject to dismissal on a different basis. In particular, the district court was required to dismiss the motion because it did not rely 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 28 U.S.C. 2244(b)(4).

Petitioner's second Section 2255 motion relied on *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), but as petitioner acknowledges (Pet. 7), he had previously raised "the same *Johnson* claim" in his first Section 2255 motion. See Pet. App. 2a, 31a-32a; D. Ct. Doc. 57. That first Section 2255 motion repeatedly cited *Johnson*, see D. Ct. Doc. 41, at 3, 4, 11, and the magistrate judge applied *Johnson* to petitioner's prior convictions, concluding that petitioner's "§ 2255 Motion should be dismissed with prejudice" because petitioner had "not three, but five, prior felony convictions which qualify under 18 U.S.C. § 924(e) without any reference to the residual clause declared unconstitutional in *Johnson*," D. Ct. Doc. 42, at 4-5 (Jan. 5, 2016); see D. Ct. Doc. 45, at 3 (Jan. 29, 2016) (noting in Supplemental Report and Recommendation that petitioner "does not take issue with" the magistrate judge's analysis under *Johnson*); D. Ct. Doc. 46 (order of district court adopting Supplemental Report and Recommendation and denying 2255 motion).

Accordingly, when petitioner refiled his *Johnson* claim in his second Section 2255 motion, *Johnson* was

not "a new rule * * * that was previously unavailable," so as to support the filing of a second or successive collateral attack. 28 U.S.C. 2255(h)(2). On the contrary, petitioner's "*Johnson* claim was fully available to him when he filed the First Motion and was in fact litigated and not appealed." Pet. App. 33a; see D. Ct. Doc. 57. The district court correctly dismissed petitioner's second Section 2255 motion on that ground. See Pet. App. 31a-33a; D. Ct. Doc. 57.

Petitioner contends (Pet. 7, 21 n.9) that a *Johnson* claim was "unavailable" to him at the time of his first Section 2255 motion because the district court denied that motion before this Court held in *Welch* v. *United States*, 136 S. Ct. 1257 (2016), that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. See *id.* at 1268. But by the time petitioner filed his first Section 2255 motion, the court of appeals had already concluded in *In re Watkins*, 810 F.3d 375 (6th Cir. 2015), that "the Supreme Court itself has made *Johnson* categorically retroactive to cases on collateral review." *Id.* at 383 (brackets and citation omitted); see also *Braden* v. *United States*, 817 F.3d 926, 931 n.3 (6th Cir. 2016) (explaining that the court of appeals' decision in *Watkins* "means that petitioners who were sentenced pre-*Johnson* can apply *Johnson*'s holding to attack the constitutionality of their sentences in a habeas petition"); Gov't C.A. Br. 17 (quoting *Watkins*, 810 F.3d at 383).

Petitioner contends that *Watkins* represented only a "preliminary" determination of "'possible merit'" to the argument that *Johnson* applied retroactively. Pet. 21 n.9 (quoting *In re Watkins*, 810 F.3d at 378-379). Regardless of whether that is true, *Watkins* at the very least confirms that an argument under *Johnson* was not

"unavailable" to a prisoner in petitioner's position at the time of his first Section 2255 motion. In fact, in ruling on petitioner's first Section 2255 motion—which addressed the *Johnson* claim on the merits—the district court expressly noted that "*Johnson* has been held to be retroactive," citing *Watkins* for that proposition. D. Ct. Doc. 45, at 7 n.1; see D. Ct. Doc. 46; see also Pet. App. 32a. The district court thus correctly determined that petitioner's *Johnson* claim was "fully available to him" at the time of his first Section 2255 motion, and that petitioner therefore did not satisfy the requirements for a second or successive collateral attack. Pet. App. 33a; see D. Ct. Doc. 57.

2. Petitioner asserts (Pet. 11-14) that the courts of appeals are divided on whether Section 2244(b)(1) applies to federal prisoners who file Section 2255 motions. Although the government agrees that the Sixth Circuit's recent decision in *Williams* v. *United States*, *supra*, conflicts with the Sixth Circuit's unpublished decision here and with the decisions of several other courts of appeals, that shallow circuit conflict is new and requires additional percolation. Accordingly, further review of the question presented would be premature at this time.

As petitioner observes (Pet. 11), the decision below accords with decisions from several other courts of appeals that stated that Section 2244(b)(1) applies to Section 2255 motions. See Pet. 11 n.4 (citing cases from the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits). Petitioner also contends (Pet. 12-13) that the First, Fourth, and Tenth Circuits have "'at least gestured' toward" the opposite conclusion, but petitioner acknowledges that none of those courts has "squarely adopt[ed]" that view. Pet. 12 (quoting *Williams*,

927 F.3d at 435); see, *e.g.*, *United States* v. *MacDonald*, 641 F.3d 596, 614 n.9 (4th Cir. 2011) ("[I]t is an open issue in this Circuit—one we need not resolve today—whether § 2244(b)(1) applies to successive claims presented in second or successive § 2255 applications.").

Petitioner accordingly acknowledges (Pet. 12) that only one circuit—the court of appeals from which this case arises—"has held that § 2244(b)(1) does not apply to federal prisoners." The court of appeals reached that conclusion in June 2019 in *Williams*, two weeks after directing the dismissal of petitioner's second Section 2255 motion. The court's recent analysis in *Williams* may well prompt other courts of appeals to reconsider whether Section 2244(b)(1) applies to federal prisoners filing Section 2255 motions, especially given the government's agreement—in *Williams* and here—that Section 2244(b)(1) does not pose a bar to such motions.

Although *Williams* abrogates the reasoning of the unpublished decision below, this Court does not grant review to resolve intra-circuit disagreements. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). The court of appeals had such an opportunity here, when petitioner sought rehearing or rehearing en banc in light of *Williams*. Its denial of relief may well reflect its agreement with the government that dismissal would be warranted regardless. Further review of this case would serve little practical purpose.

3. Furthermore, this case would be a poor vehicle for resolving the question presented because petitioner would not be entitled to relief from his ACCA sentence even if the court of appeals gave petitioner the benefit of its decision in *Williams*.

First, and as explained at pp. 13-15, *supra*, petitioner's second Section 2255 motion is subject to dismissal because the motion does not rely on "a new rule of constitutional law" that had been "previously unavailable" at the time of petitioner's first 2255 motion. 28 U.S.C. 2255(h)(2); see 28 U.S.C. 2244(b)(4).

Second, as the district court found, the sentencing court did not rely on the residual clause in determining that petitioner had three prior convictions for violent felonies. See Pet. App. 6a-7a, 16a-22a. The *Johnson* claim in petitioner's second Section 2255 motion thus does not warrant relief, because *Johnson* does not affect the ACCA classification of petitioner's prior convictions.

The court of appeals' recent decision in *United States* v. *Burris*, 912 F.3d 386 (6th Cir.) (en banc), cert. denied, 140 S. Ct. 90 (2019), does not change that conclusion. In *Burris*, issued while petitioner's appeal was pending, a majority of the en banc court found that a conviction for felonious assault, in violation of Ohio Revised Code Ann. § 2903.11(A)(1) (West 2006), is not a crime of violence under the elements clause in Sentencing Guidelines § 4B1.2(a)(1) (2007), which mirrors the ACCA's elements clause. 912 F.3d at 406 (principal opinion); *id.* at 417-418 (Cole, J., concurring in part and dissenting in part). The en banc court subsequently explained that *Burris* "held that a conviction for Ohio felonious assault no longer categorically qualifies as a violent felony predicate under the ACCA's elements clause." *Williams* v. *United States*, 924 F.3d 922, 923 (6th Cir. 2019) (en banc) (per curiam).

Petitioner contends (Pet. 9, 21) that *Burris* establishes that he is entitled to relief on the *Johnson* claim in his second Section 2255 motion, but that is incorrect.

Developments in statutory-interpretation case law years after petitioner's sentencing do not show that he was, or even that he may have been, sentenced under the residual clause at the time of his original sentencing. And to the extent that *Burris* suggests that petitioner's felonious assault conviction should not have been treated as a predicate conviction under the ACCA's elements clause, that statutory-interpretation claim is not a valid basis for a second or successive Section 2255 motion. See 28 U.S.C. 2255(h); see also 28 U.S.C. 2244(b)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2020