No. 15-758

# In the Supreme Court of the United States

IN RE ANTHONY ALLEN WILLIAMS, PETITIONER

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether this Court should issue a writ of mandamus ordering the court of appeals to grant petitioner's application for leave to file a second or successive motion to vacate his sentence under 28 U.S.C. 2255(a), on the ground that *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), is a new substantive rule that has been "made" retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2).

## TABLE OF CONTENTS

Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 1
Argument ..... 8
Conclusion ..... 26
Appendix ..... 1a

## TABLE OF AUTHORITIES

Cases:

*Begay* v. *United States*, 553 U.S. 137 (2007) ..... 11
*Bryant* v. *Warden*, 738 F.3d 1253 (11th Cir. 2013) ..... 10
*Burton* v. *Stewart*, 549 U.S. 147 (2007) ..... 6
*Cage* v. *Louisiana*, 498 U.S. 39 (1990) ..... 11
*Cheney* v. *United States D. Ct. for D.C.*, 542 U.S. 367 (2004) ..... 16, 20, 22
*Custis* v. *United States*, 511 U.S. 485 (1994) ..... 3
*Descamps* v. *United States*, 133 S. Ct. 2276 (2013) ..... 19
*Dodd* v. *United States*, 545 U.S. 353 (2005) ..... 24
*Felker* v. *Turpin*, 518 U.S. 651 (1996) ..... 15
*Gieswein, In re*, 802 F.3d 1143 (10th Cir. 2015) ..... 14
*Graham* v. *Collins*, 506 U.S. 461 (1993) ..... 10
*James* v. *United States*, 550 U.S. 192 (2007) ..... 10
*Johnson* v. *United States*, 559 U.S. 133 (2010) ..... 18, 19
*Johnson* v. *United States*, 135 S. Ct. 2551 (2015) ..... 2, 6, 8, 10, 17
*Lane* v. *State*, 763 S.W.2d 785 (Tex. Ct. Crim. App. 1989) ..... 18
*Logan* v. *United States*, 552 U.S. 23 (2007) ..... 3
*McNeill* v. *United States*, 131 S. Ct. 2218 (2011) ..... 6

Cases—Continued: Page

*Omargharib* v. *Holder*, 775 F.3d 192 (4th Cir. 2014) ..... 19
*Pakala* v. *United States*, 804 F.3d 139 (1st Cir. 2015) ..... 13
*Penry* v. *Lynaugh*, 492 U.S. 302 (1989), abrogated on other grounds, 536 U.S. 304 (2002) ..... 10, 12
*Price* v. *United States*, 795 F.3d 731 (7th Cir. 2015) ..... 13, 21, 23
*Puckett* v. *United States*, 556 U.S. 129 (2009) ..... 20
*Rendon* v. *Holder*, 764 F.3d 1077 (9th Cir. 2014) ..... 19
*Republic of Venezuela* v. *Philip Morris, Inc.*, 287 F.3d 192 (D.C. Cir. 2002) ..... 22
*Reyes-Requena* v. *United States*, 243 F.3d 893 (5th Cir. 2001) ..... 7
*Rivero, In re*, 797 F.3d 986 (11th Cir. 2015) ..... 13, 14, 15, 21, 23
*Schriro* v. *Summerlin*, 542 U.S. 348 (2004) ..... 10, 23
*Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) ..... 11
*Sykes* v. *United States*, 131 S. Ct. 2267 (2011) ..... 10
*Taylor* v. *United States*, 495 U.S. 575 (1990) ..... 4
*Teague* v. *Lane*, 489 U.S. 288 (1989) ..... 8, 13
*Tyler* v. *Cain*, 533 U.S. 656 (2001) ..... 7, 11, 12
*United States* v. *Carter*, 752 F.3d 8 (1st Cir. 2014) ..... 19
*United States* v. *Castillo-Estevez*, 597 F.3d 238 (5th Cir.), cert. denied, 562 U.S. 961 (2010) ..... 20
*United States* v. *Castleman*, 134 S. Ct. 1405 (2014) ..... 18, 19
*United States* v. *Constante*, 544 F.3d 584 (5th Cir. 2008) ..... 4
*United States* v. *Davis*, 487 F.3d 282 (5th Cir. 2007) ..... 4, 17

Cases—Continued: Page

*United States* v. *Espinoza*, 733 F.3d 568 (5th Cir. 2013), cert. denied, 134 S. Ct. 1936 (2014) ..... 19, 20
*United States* v. *Herbert*, 860 F.2d 620 (5th Cir. 1988), cert. denied, 490 U.S. 1070 (1989) ..... 5
*United States* v. *Hill*, 799 F.3d 1318 (11th Cir. 2015) ..... 17
*United States* v. *Hinojosa*, 349 F.3d 200 (5th Cir. 2003), cert. denied, 541 U.S. 1070 (2004) ..... 5
*United States* v. *Marrero*, 743 F.3d 389 (3d Cir. 2014), cert. denied, 135 S. Ct. 950 (2015) ..... 19
*United States* v. *Teague*, 443 F.3d 1310 (10th Cir.), cert. denied, 549 U.S. 911 (2006) ..... 21
*United States* v. *Williams*, 469 F.3d 963 (11th Cir. 2006) ..... 21
*Watkins, In re*, No. 15-5038, 2015 WL 9241176 (6th Cir. Dec. 17, 2015) ..... 13, 21
*Wood* v. *Milyard*, 132 S. Ct. 1826 (2012) ..... 24
*Woods* v. *United States*, 805 F.3d 1152 (8th Cir. 2015) ..... 13

Statute and rules:

All Writs Act, 28 U.S.C. 1651(a) ..... 9, 15, 24
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) ..... 2, 4, 10, 17
18 U.S.C. 924(e)(2)(A)(ii) ..... 3
18 U.S.C. 924(e)(2)(B)(i)-(ii) ..... 3
18 U.S.C. 924(e)(2)(B)(i) ..... 17
18 U.S.C. 922(g)(1) ..... 1, 2, 16
18 U.S.C. 924(a)(2) ..... 2, 10
28 U.S.C. 1254(1) ..... 15
28 U.S.C. 1254(2) ..... 15

Statutes and rules—Continued: Page

28 U.S.C. 2241 ..... 24
28 U.S.C. 2244(b)(2)(A) ..... 22
28 U.S.C. 2244(b)(3)(A) ..... 6
28 U.S.C. 2244(b)(3)(C) ..... 7
28 U.S.C. 2244(b)(3)(E) ..... 9, 15, 22, 25
28 U.S.C. 2255 ..... *passim*
28 U.S.C. 2255(a) ..... 2, 6
28 U.S.C. 2255(f) ..... 24
28 U.S.C. 2255(h) ..... 6, 12, 22
28 U.S.C. 2255(h)(2) ..... 7, 9, 11, 12, 13, 23
Tenn. Code Ann. § 39-13-101(a)(1) (2014) ..... 19
Tex. Penal Code Ann. (West 2011):
§ 1.07(a)(8) ..... 18
§ 29.02(a)(1) ..... 18
§ 30.02(a)(3) ..... 4
Fed. R. Crim. P. 52(b) ..... 20
Sup. Ct. R.:
Rule 20.1 ..... 22
Rule 20.4(b) ..... 25
Rule 46.1 ..... 25

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The order of the court of appeals denying petitioner's application for leave to file a second or successive Section 2255 motion (Pet. App. 1a-8a) is reported at 806 F.3d 322. A prior opinion of the court of appeals in petitioner's case is reported at 423 Fed. Appx. 405.

## JURISDICTION

The judgment of the court of appeals was entered on November 12, 2015. The petition for a writ of mandamus was filed on December 11, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

## STATEMENT

In 2010, following a guilty plea in the United States District Court for the Western District of Louisiana, petitioner was convicted of possession of firearms by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. 10-cr-00094 Docket entry No. (Dkt. No.) 27, at 1-3 (Aug. 11,

2010). The court of appeals affirmed. 423 Fed. Appx. 405.

In 2012, petitioner filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. 2255(a). Dkt. No. 42 (May 23, 2012). The district court denied the motion. *Id.* Nos. 52-53 (June 11, 2013).

In 2015, petitioner filed an application in the court of appeals requesting authorization to file a second Section 2255 motion based on *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). 15-30731 Docket entry (5th Cir. Aug. 18, 2015). The court of appeals denied the application. Pet. App. 1a-8a.

1. On August 31, 2009, petitioner, a previously convicted felon, pawned three rifles at Pendleton Gun and Pawn in the town of Many, Louisiana. In March 2010, petitioner was arrested in Hemphill, Texas. Following his arrest, petitioner admitted to pawning the firearms. Dkt. No. 20-2, at 1-2 (May 11, 2010).

2. On March 25, 2010, a federal grand jury in the Western District of Louisiana returned an indictment charging petitioner with possession of three firearms by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Dkt. No. 1, at 1. Pursuant to a written plea agreement, petitioner pleaded guilty to the charge. Dkt. No. 20, at 1 (Mar. 11, 2010) (Plea Agreement).

3. a. A conviction for violating Section 922(g)(1) ordinarily exposes the offender to a statutory maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug offense" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a minimum sentence of at least 15 years of

imprisonment and authorizes a maximum sentence of life. See *Logan* v. *United States*, 552 U.S. 23, 26 (2007); *Custis* v. *United States*, 511 U.S. 485, 487 (1994).

The ACCA defines a "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). It further defines "violent felony" to include "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)(i)-(ii). Subsection (i) is known as the elements clause; the first half of Subsection (ii) ("is burglary, arson, or extortion, involves use of explosives") is known as the enumerated-crimes clause; and the second half of Subsection (ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as the residual clause.

b. The Probation Office recommended that petitioner be sentenced pursuant to the ACCA. Presentence Investigation Report (PSR) ¶¶ 21, 59. The PSR identified four qualifying prior convictions: a 1985 Texas conviction for robbery (with physical contact) (PSR ¶ 26); two 1990 Texas convictions for delivery of a controlled substance (PSR ¶¶ 29, 31); and a 2000 Texas conviction for burglary of a habitation (PSR

¶ 33). See also Dkt. No. 20-2 (factual basis for Plea Agreement, listing those convictions). The Probation Office explained that, under the ACCA, the sentencing range for petitioner's conviction was 15 years of imprisonment to life. PSR ¶ 59; see 18 U.S.C. 924(e).

c. Before sentencing, petitioner objected to the application of the ACCA on several grounds, including that his robbery conviction did not qualify as a "violent felony." Add. to PSR 2-3. The government, in response, pointed out that, in *United States* v. *Davis*, 487 F.3d 282, 287 (2007), the Fifth Circuit concluded that a conviction for robbery under Texas law qualified as a violent felony under the residual clause. Add. to PSR 3.

d. At petitioner's sentencing, the district court heard argument from the parties on petitioner's objections. At the outset, the court agreed with the parties that petitioner's burglary conviction could not be considered a "violent felony" in light of a recent Fifth Circuit decision. 08/10/10 Sent. Tr. (Tr.) 2 (citing *United States* v. *Constante*, 544 F.3d 584 (2008) (per curiam), which held that burglary under Texas Penal Code Annotated § 30.02(a)(3) (West 2011) does not qualify as "generic" burglary under the definition adopted in *Taylor* v. *United States*, 495 U.S. 575 (1990)). But the court concluded that petitioner's three remaining convictions triggered the ACCA.

The district court rejected petitioner's argument that his two drug convictions should be treated as a single offense because they were consolidated for sentencing. The court explained that the offenses were committed "[t]wo weeks apart," Tr. 6, and therefore, they were "two separate, completely separate felonies," Tr. 9, even though they were consolidated

for disposition. Tr. 8 ("[I]f it happened on separate days, it's a separate offense."); see *United States* v. *Herbert*, 860 F.2d 620, 622 (5th Cir. 1988) ("[W]e hold that where, as here, a defendant is convicted in a single judicial proceeding for multiple counts arising from separate distinct criminal transactions that those convictions should be treated as multiple convictions under [Section] 924(e)."), cert. denied, 490 U.S. 1070 (1989).

Next, the district court rejected petitioner's argument that his two state drug offenses should not be considered "serious drug offenses" because the offenses, although punishable by a statutory maximum term of more than ten years of imprisonment at the time they were committed, were no longer punishable by that term of imprisonment on the date of his federal sentencing. Tr. 7-8. Petitioner conceded that this argument was foreclosed by *United States* v. *Hinojosa*, 349 F.3d 200, 204 (5th Cir. 2003), cert. denied, 541 U.S. 1070 (2004), but raised the point to preserve it for further review. Tr. 8. With respect to the robbery conviction, petitioner's counsel stated that the offense was a violent felony, "not for the reasons the [g]overnment states," Tr. 3—*i.e.*, because it satisfied the residual clause—but because the state-court indictment charged petitioner with robbery "causing bodily injury." *Ibid.*

The district court sentenced petitioner to 180 months of imprisonment (the statutory mandatory minimum sentence), to be followed by three years of supervised release. Dkt. No. 27, at 2-3.[1]

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[1] Petitioner contends (Pet. 4) that he was sentenced to "twenty years" of imprisonment for his offense, but the sentence was 15 years (180 months). Dkt. No. 27, at 2.

4. The court of appeals affirmed. 423 Fed. Appx. 405. Relying on *Hinojosa*, the court rejected petitioner's argument that his drug convictions should not be considered "serious drug offense[s]" because they were not punishable by a maximum term of at least ten years of imprisonment at the time of his federal sentencing. *Id.* at 406. This Court denied certiorari. 132 S. Ct. 175 (No. 10-10807).[2]

5. On May 23, 2012, petitioner filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. 2255(a), claiming that his trial counsel was constitutionally ineffective for failing to object to the omission from the indictment of the specific predicate offenses used to trigger the ACCA. Dkt. No. 42, at 5. The district court denied the motion. *Id.* Nos. 52-53.

6. On June 26, 2015, this Court held in *Johnson*, *supra*, that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557.

a. Federal defendants who have previously filed a motion to vacate under Section 2255 may not file a "second or successive" Section 2255 motion without obtaining authorization from the court of appeals. See 28 U.S.C. 2244(b)(3)(A), 2255(h); *Burton* v. *Stewart*, 549 U.S. 147, 152 (2007) (per curiam). The courts of appeals may authorize the filing of a successive Section 2255 motion if the defendant makes a "prima facie" showing that (as relevant here) his claim relies

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[2] Several months before denying certiorari, this Court issued a decision on the temporal question that petitioner had raised. The Court held that "[t]he plain text of [the] ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." *McNeill* v. *United States*, 131 S. Ct. 2218, 2221-2222 (2011).

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)(3)(C). A prima facie showing means "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Reyes-Requena* v. *United States*, 243 F.3d 893, 899 (5th Cir. 2001) (citation omitted).

In *Tyler* v. *Cain*, 533 U.S. 656 (2001), the Court explained that the state prisoner analogue to Section 2255(h)(2) vests this Court alone with the authority to "ma[k]e" a new constitutional rule retroactive to cases on collateral review and that the Court "ma[k]e[s]" a new rule retroactive by holding it to be retroactive. *Id.* at 663. The Court further explained that, although an express statement that a new rule is retroactive is sufficient, an express statement is not necessary because the Court can "make" a new rule retroactive "over the course of two cases * * * with the right combination of holdings." *Id.* at 666.

b. On August 18, 2015, petitioner filed an application in the court of appeals requesting leave to file a successive Section 2255 motion challenging his ACCA sentence in light of *Johnson*. 15-30731 Docket entry (5th Cir.) In its court-ordered response, the government acknowledged that the holding in *Johnson* is a "substantive, constitutional holding [that] is fully retroactive in ACCA cases." *Id.* at 3-4 (Sept. 24, 2015) (Gov't Resp. to Section 2255 Mot.). The government explained, however, that petitioner's ACCA status depended on whether his robbery conviction was properly treated as a violent felony. *Id.* at 4-6.

The government noted that, although it had argued at sentencing that the robbery conviction was a violent

felony under the residual clause, petitioner's counsel appeared to concede that the conviction was a violent felony under the elements clause because petitioner was charged with robbery "causing bodily injury" to the victim. Gov't Resp. to Section 2255 Mot. 5; see *Johnson,* 135 S. Ct. at 2563 (reiterating that the decision "does not call into question * * * the remainder of the [ACCA's] definition of a violent felony"). The government did not oppose petitioner's application, however, because petitioner had made a "sufficient showing of possible merit to warrant a fuller exploration by the district court." Gov't Resp. to Section 2255 Mot. 6 (citation omitted).

c. The court of appeals denied petitioner's application. Pet. App. 1a-8a. The court acknowledged that *Johnson* announced a new rule of constitutional law. *Id.* at 3a-4a. The court held, however, that the holding of *Johnson* was not a new "substantive" rule entitled to retroactive effect within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. App. 4a-6a. The court reasoned that "*Johnson* does not forbid the criminalization of any of the conduct covered by the ACCA—Congress retains the power to increase punishments by prior felonious conduct" if it acts with sufficient clarity. *Id.* at 5a. The court further reasoned that *Johnson* "does not forbid a certain category of punishment," because Congress could constitutionally impose a 15-year sentence on a defendant with the same prior convictions as Williams after *Johnson*. *Id.* at 5a-6a.

## ARGUMENT

Petitioner seeks review of the court of appeals' determination that the holding of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), is not a substantive rule

that applies retroactively to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2). Because Congress has eliminated statutory certiorari review of denials of authorization to file second or successive collateral attacks, see 28 U.S.C. 2244(b)(3)(E), petitioner has sought review in this Court by filing a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. 1651(a). Petitioner asks this Court to "direct[] the Fifth Circuit to issue an order authorizing a second [Section] 2255 motion in this case." Pet. 8.

The courts of appeals are divided on the question whether *Johnson* announced a new substantive rule that is available on collateral review, and they are further divided on the question whether this Court has "made" *Johnson* retroactive to cases on collateral review within the meaning of Section 2255(h)(2). Although the government agrees with petitioner that *Johnson* is a substantive rule and that this Court has "made" *Johnson* retroactive to cases on collateral review, petitioner has failed to meet the strict criteria that govern the issuance of the extraordinary writ that he seeks. Accordingly, the petition for a writ of mandamus should be denied.

1. a. The government agrees with petitioner that the holding of *Johnson* is a new substantive rule and that this Court has "made" *Johnson* retroactive to cases on collateral review within the meaning of Section 2255(h)(2).

i. *Johnson*'s holding that the ACCA's residual clause is unconstitutionally vague represents "a new rule of constitutional law * * * that was previously unavailable." 28 U.S.C. 2255(h)(2). No pre-*Johnson* precedent dictated that the residual clause was unconstitutionally vague. To the contrary, the pre-*Johnson*

decisions in *James* v. *United States*, 550 U.S. 192 (2007), and *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), expressly rejected the dissents' claim that the residual clause was vague. To conclude as it did, *Johnson* had to "overrule[]" the "contrary holdings in *James* and *Sykes*," 135 S. Ct. at 2563, and "there can be no dispute that a decision announces a new rule it if expressly overrules a prior decision." *Graham* v. *Collins*, 506 U.S. 461, 467 (1993).

ii. *Johnson*'s new rule invalidating the ACCA's residual clause is a "substantive" rule. In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), abrogated on other grounds, 536 U.S. 304 (2002), this Court held that a substantive rule includes a rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 329-330. As applied to the ACCA, *Johnson* has precisely that effect. As the Court has more recently explained, a new rule that alters the statutory sentencing range for a crime and results in the imposition of a "punishment that the law cannot impose," *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004), is a substantive rule.

In cases where a prisoner's ACCA sentence depended on the residual clause, the defendant has received an enhanced sentence of at least 15 years of imprisonment (the statutory mandatory minimum), when the correct statutory maximum for the crime is ten years of imprisonment. Compare 18 U.S.C. 924(e), with 18 U.S.C. 924(a)(2). The misapplication of the ACCA resulting from *Johnson*'s invalidation of the residual clause thus has clear substantive effect, just as pre-*Johnson* decisions that narrowed the interpretation of the ACCA had substantive effect. See, *e.g.*, *Bryant* v. *Warden*, 738 F.3d 1253, 1278 (11th Cir.

2013) (holding that a misapplication of the ACCA based on *Begay* v. *United States*, 553 U.S. 137 (2007), was a substantive rule under *Summerlin*).

iii. Because the new, previously unavailable rule of constitutional law announced in *Johnson* is substantive, it follows that the rule has been "made retroactive to cases on collateral review by [this] Court." 28 U.S.C. 2255(h)(2). The Court's decision in *Tyler* v. *Cain*, 533 U.S. 656 (2001), provides the framework for analyzing that question. In *Tyler*, all nine Justices agreed that the statutory term "made" is synonymous with "held" and that, while an explicit statement of retroactivity is sufficient to make a rule retroactive, it is not necessary because a rule can be "made" retroactive "over the course of two cases * * * with the right combination of holdings." *Id.* at 666 (majority); *id.* at 668-669 (O'Connor, J., concurring); *id.* at 672-673 (Breyer, J., dissenting). Tyler's claim was that *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), which found a Louisiana jury instruction defining "reasonable doubt" constitutionally defective, had been "made" retroactive by the later decision in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), which held that *Cage* errors are "structural" errors that are not subject to harmless-error review. Although the Court accepted the premise that multiple cases could "make" a new rule retroactive, it rejected the view that *Cage* had been "made" retroactive by *Sullivan*. *Tyler*, 533 U.S. at 656-658.

Justice O'Connor wrote separately to explain—in language that the four dissenting Justices endorsed and the majority did not dispute—that, unlike the new procedural rule at issue in *Tyler*, a new *substantive* rule of constitutional law has been "made" retroactive

to cases on collateral review. As Justice O'Connor explained, "if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review." 533 U.S. at 668-669 (O'Connor, J., concurring); see *id.* at 672-673 (Breyer, J., dissenting) ("The matter is one of logic. If Case One holds that all men are mortal and Case Two holds that Socrates is a man, we do not need Case Three to hold that Socrates is mortal."). Justice O'Connor further explained that, when a new substantive rule is at issue, the required "Case One" is *Penry*, *supra*, which defined a substantive rule to include a rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." 492 U.S. at 329-330. Accordingly, when a later case ("Case Two") announces "a given rule * * * of that particular type"—*i.e.*, a substantive rule as defined by *Penry*—then it logically and "necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring); see *id.* at 675 (Breyer, J., dissenting).

Accordingly, if an ACCA defendant can demonstrate that, without the residual clause, he would not have been subject to the ACCA's enhanced penalties, then he has made at least a prima facie showing that his claim satisfies Section 2255(h)(2) by relying on a new rule of constitutional law that has been made retroactive by this Court. In that circumstance, a court of appeals should grant an application for leave to file a successive Section 2255 motion.

b. The courts of appeals that have considered gatekeeping motions under 28 U.S.C. 2255(h) are divided on the question whether *Johnson* announced a new substantive rule, and they are further divided on the question whether this Court has "made" *Johnson* retroactive to cases on collateral review.

The Sixth and Seventh Circuits have agreed with the government that *Johnson* announced a new "substantive" rule that has therefore been "made" retroactive to ACCA cases on collateral review. See *In re Watkins*, No. 15-5038, 2015 WL 9241176 (6th Cir. Dec. 17, 2015); *Price* v. *United States*, 795 F.3d 731, 734-735 (7th Cir. 2015). The Sixth Circuit explained that, "[b]ecause *Johnson* prohibits the imposition of an increased sentence on those defendants whose *status* as armed career criminals is dependent on offenses that fall within the residual clause," it is a substantive rule entitled to retroactive effect within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989). *Watkins*, 2015 WL 9241176, at *6.

The First and Eighth Circuits have relied on the government's concession that the Court has made *Johnson* retroactive to cases on collateral review to conclude that petitioners seeking authorization to file successive Section 2255 motions based on *Johnson* have made a prima facie showing that their claims fall within the scope of Section 2252(h)(2). See *Pakala* v. *United States*, 804 F.3d 139, 139 (1st Cir. 2015) (per curiam); *Woods* v. *United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam).

The Eleventh Circuit agrees with the Sixth and Seventh Circuits that *Johnson* announced a new substantive rule of constitutional law. See *In re Rivero*, 797 F.3d 986, 989-990 (2015). But the court neverthe-

less denied a prisoner's request for authorization to file a successive Section 2255 motion in light of *Johnson*, reasoning that because Congress could have authorized the same sentence for the defendant's conduct had it done so with language that was not vague, the rule announced in *Johnson* has not been "made" retroactive to cases on collateral review by this Court. *Ibid.* The court issued its decision without requesting a response from the United States to the prisoner's application, and it later requested additional briefing from both parties. 9/14/15 Order, *Rivero, supra* (No. 15-13089). The Eleventh Circuit has taken no further action since receiving that briefing.

The Tenth Circuit has also denied a prisoner's application for leave to file a second or successive Section 2255 motion challenging his ACCA sentence based on *Johnson*. See *In re Gieswein*, 802 F.3d 1143 (2015) (per curiam). The court acknowledged that *Tyler* recognized the doctrine of retroactivity-by-necessary-implication, but the court concluded that a court of appeals cannot "determine, for itself in the first instance, whether the rule in *Johnson* is of a type that the Supreme Court has held applies retroactively"; in its view, only this Court can do so. *Id.* at 1148.

And, as described above, the Fifth Circuit concluded in petitioner's case that the holding of *Johnson* was not a new substantive rule at all, and thus it is "not available * * * on collateral review," because "*Johnson* does not forbid the criminalization of any of the conduct covered by the ACCA—Congress retains the power to increase punishments by prior felonious conduct" if it uses language that is not vague. Pet. App. 5a-6a. The court of appeals acknowledged disagreement with the decisions in *Price* and *Pakala*. *Id.*

at 6a-7a. The court stated that its "decision and reasoning align with the majority" in *Rivero*, *id.* at 7a, but that statement overlooked the Eleventh Circuit's conclusion that "[t]he new rule announced in *Johnson* is substantive rather than procedural." 797 F.3d at 989 (brackets and citation omitted).

2. Although the circuits have reached different conclusions on whether *Johnson* is a substantive rule and whether this Court has "made" *Johnson* retroactive to cases on collateral review, Section 2244(b)(3)(E) prevents certiorari review of gatekeeping determinations of the courts of appeals addressing that question. Petitioner does not dispute that this provision applies to his case (Pet. 3), and he acknowledges that it "bar[s]" him from "petitioning this Court for certiorari review of the court's decision" (Pet. 7).

In *Felker* v. *Turpin*, 518 U.S. 651 (1996), this Court rejected various constitutional challenges to Section 2244(b)(3)(E), reasoning that Congress's decision to eliminate certiorari jurisdiction under 28 U.S.C. 1254(1) did not preclude all review in this Court because it did not disturb this Court's authority to entertain petitions for original writs of habeas corpus. 518 U.S. at 661. Three concurring Justices further noted that Section 2244(b)(3)(E) "does not purport to limit [this Court's] jurisdiction" to review interlocutory orders under 28 U.S.C. 1254(1), to give instructions in response to certified questions from the courts of appeals under 28 U.S.C. 1254(2), or to issue a writ of mandamus under 28 U.S.C. 1651(a). *Felker*, 518 U.S. at 666 (Stevens, J., concurring); *id.* at 667 (Souter, J., concurring). Petitioner seeks review of the court of

appeals' adverse gatekeeping determination through a petition for a writ of mandamus. See Pet. 1.[3]

In *Cheney* v. *United States District Court for the District of Columbia*, 542 U.S. 367 (2004), this Court held that the extraordinary remedy of mandamus will not issue unless three conditions are met. First, the petitioner must demonstrate that he has "no other adequate means to attain the relief he desires." *Id.* at 380 (citation omitted). Second, the petitioner "must satisfy [his] burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* at 381 (brackets, citation, and internal quotation marks omitted). Third, "even if the first two prerequisites have been met," the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Ibid.* Petitioner accepts that those conditions apply and that they govern his right to the relief he seeks. Pet. 22. Petitioner has failed to satisfy those criteria, however, and accordingly, his petition should be denied.

a. i. Petitioner has not demonstrated that "his right to issuance of the writ is clear and indisputable," *Cheney*, 542 U.S. at 381 (brackets, citation, and internal quotation marks omitted), because petitioner has failed to establish that, without the residual clause, he would not otherwise have been subject to the ACCA's enhanced penalties.

The ACCA mandates a minimum sentence of 15 years of imprisonment if a defendant convicted under Section 922(g)(1) has at least three prior convictions for a "violent felony" or a "serious drug offense" that

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[3] Petitioner has also sought review by separately filing a petition for an original writ of habeas corpus. See *In re Williams*, No. 15-759 (Dec. 11, 2015); see also Pet. 8 n.2, 22.

were "committed on occasions different from one another." 18 U.S.C. 924(e). Petitioner no longer disputes that his two drug offenses qualify as "serious drug offenses," but focuses exclusively on whether his Texas robbery conviction qualifies as a "violent felony." Pet. 5. As petitioner notes (Pet. 5 n.1), in *United States* v. *Davis*, 487 F.3d 282 (2007), the Fifth Circuit concluded that a conviction for robbery under Texas law qualifies as a violent felony "under the residual clause" because it creates a "substantial risk that physical injury will result." *Id.* at 287. In light of *Johnson*, however, the residual clause cannot be relied upon to classify petitioner's conviction as a "violent felony."

Yet, as petitioner's counsel recognized at sentencing (Tr. 3), the residual clause is not the exclusive means by which a court could conclude that a prior conviction for robbery qualifies as a violent felony. If, for example, a defendant were convicted of a robbery offense under a statute that had "as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. 924(e)(2)(B)(i), then the offense would qualify as a violent felony under the elements clause, which *Johnson* did not disturb. 135 S. Ct. at 2563; see *United States* v. *Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015) (per curiam) ("[I]n *Johnson*, the Supreme Court expressly limited its holding to the ACCA's residual clause, leaving undisturbed 'the remainder of the [ACCA's] definitions of a violent felony,' which would include the ACCA's definition of a violent felony under its elements clause."). The Court has stated that the term "physical force" in the elements clause means "the intentional application of * * * force" that is "capable of causing physical pain or

injury to another person." *Johnson* v. *United States*, 559 U.S. 133, 139-140 (2010).

Under Texas law, a person commits the offense of robbery in the second degree if, "in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another." Tex. Penal Code Ann. § 29.02(a)(1) (West 2011). Texas law provides that "[b]odily injury means physical pain, illness, or any impairment of physical condition." *Id.* § 1.07(a)(8); see *Lane* v. *State*, 763 S.W.2d 785, 786-787 (Tex. Ct. Crim. App. 1989). In this case, the state-court indictment specifically charged that petitioner and a co-defendant "*intentionally*, while in the course of committing theft of property and with the intent to obtain and maintain control of said property[,] cause[d] bodily injury to [the victim] by hitting him in the face with their fist." App., *infra*, 1a (emphasis added). And the judgment in petitioner's robbery case reflects that he "pleaded guilty to the charge[s] contained in the indictment," *id.* at 3a, which confirms that petitioner not only intended to steal from the victim, but that he intentionally used physical force in carrying out the robbery. See *United States* v. *Castleman*, 134 S. Ct. 1405, 1414 (2014) ("[A] bodily injury must result from 'physical force'"; reserving whether the injuries cognizable under Tennessee's domestic-assault statute "necessitate violent force"); *id.* at 1417 (Scalia, J., concurring in part and concurring in the judgment) (explaining that Tennessee's causation-of-bodily-injury element did entail the use of violent force because it "categorically involves the use of 'force capable of causing physical pain or injury to another person'") (quoting

*Johnson*, 559 U.S. at 140). Petitioner's robbery conviction therefore qualifies as an ACCA predicate under the elements clause. *Johnson*, 559 U.S. at 139-140; *Descamps* v. *United States*, 133 S. Ct. 2276, 2283-2284 (2013) (explaining that a statute is divisible if comprises multiple, alternative versions of the crime).[4]

Although the government noted in the court of appeals that petitioner had made a prima facie showing sufficient to justify the filing of a Section 2255 motion, Gov't Resp. to Section 2255 Mot. 5, and although some courts of appeals (but not the Fifth Circuit) would require a further inquiry into state law before concluding that the Texas robbery statute is divisible into

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[4] After this Court decided *Descamps*, at least three courts of appeals (including the Fifth Circuit) have applied the modified categorical approach to statutes, like the Texas robbery statute, that require the defendant to have acted intentionally, knowingly, or recklessly. See *United States* v. *Marrero*, 743 F.3d 389, 396 (3d Cir. 2014) (Pennsylvania assault statute), cert. denied, 135 S. Ct. 950 (2015); *United States* v. *Carter*, 752 F.3d 8, 14, 17 (1st Cir. 2014) (Maine assault statute); *United States* v. *Espinoza*, 733 F.3d 568, 571-572 (5th Cir. 2013) (Texas assault statute), cert. denied, 134 S. Ct. 1936 (2014); cf. *Castleman*, 134 S. Ct. at 1414 (noting that the parties did not "contest" that Tennessee statute making it an offense to commit a bodily-injury assault "[i]ntentionally, knowingly or recklessly," Tenn. Code Ann. § 39-13-101(a)(1) (2014), was a "divisible statute" and therefore applying the modified categorical approach to determine that the defendant was convicted of the generic federal offense when he pleaded guilty to "intentionally or knowingly caus[ing] bodily injury").

Some courts, however, have held that a state statute is divisible only if state law would require jurors to be unanimous as to the form of the offense committed. See *Rendon* v. *Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014); *Omargharib* v. *Holder*, 775 F.3d 192, 198-199 (4th Cir. 2014). On December 17, 2015, the United States filed a brief acquiescing in certiorari review of that question. See U.S. Br. at 16-21, *Mathis* v. *United States*, No. 15-6092.

three versions of the offense with different *mens rea* requirements, see note 4, *supra*, petitioner seeks an extraordinary writ of mandamus in this Court, which requires him to show that "his right to issuance of the writ is clear and indisputable" and that an exercise of the Court's discretion "is appropriate under the circumstances." *Cheney*, 542 U.S. at 381 (brackets, citation, and internal quotation marks omitted). Given that petitioner's robbery conviction appears to be unaffected by *Johnson* under controlling circuit precedent on divisibility, see *United States* v. *Espinoza*, 733 F.3d 568, 571-572 (5th Cir. 2013), cert. denied, 134 S. Ct. 1936 (2014), petitioner has not shown that his classification and sentence as an armed career criminal necessarily depended on the now-invalid residual clause.

ii. Even if petitioner had shown that his ACCA sentence necessarily depended on a residual-clause conviction, he still would not be able to show that his right to issuance of the writ is clear and indisputable. *Cheney*, 542 U.S. at 381.

As petitioner acknowledges, the courts of appeals are "split" (Pet. 2) and "openly divided" (Pet. 15) on the question whether this Court has "made" *Johnson* retroactive to cases on collateral review. The absence of a definitive ruling from this Court on that question, coupled with the division of opinion on the issue in the courts of appeals, shows that petitioner's right to relief, if any, is not "clear and indisputable." Cf., *e.g.*, *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (holding that an error is not "clear or obvious" within the meaning of the plain-error rule of Federal Rule of Criminal Procedure 52(b) when it is "subject to reasonable dispute"); *United States* v. *Castillo-Estevez*,

597 F.3d 238, 241 (5th Cir.) (no plain error when there is no controlling case law and other circuits are split), cert. denied, 562 U.S. 961 (2010); *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (per curiam) (same); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006).

The courts of appeals are also divided on the antecedent question of whether *Johnson* announced a new "substantive" rule. In *Price*, the Seventh Circuit held that *Johnson* was a new substantive rule that had therefore been "made" retroactive to cases on collateral review. 795 F.3d at 733. In *Watkins*, the Sixth Circuit held that "[b]ecause *Johnson* prohibits the imposition of an increased sentence on those defendants whose *status* as armed career criminals is dependent on offenses that fall within the residual clause," it is a substantive rule entitled to retroactive effect. 2015 WL 9241176, at *6. And in *Rivero*, the Eleventh Circuit, while denying authorization to file a successive Section 2255 motion in a guidelines case based on the conclusion that this Court had not "made" *Johnson* retroactive to cases on collateral review, nevertheless "agree[d] that *Johnson* announced a new substantive rule of constitutional law" that would be retroactively applicable in an *initial* Section 2255 motion. 797 F.3d at 989; see also *id.* at 991 ("If Rivero * * * were seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively."). In the decision below, however, the Fifth Circuit reached the opposite conclusion after analyzing this Court's cases. Pet. App. 4a-6a. Those conflicting decisions, not only on whether *Johnson* has been "made" retroactive to

cases on collateral review, but also on whether *Johnson* is a substantive rule, undermine petitioner's claim that he has a "clear and indisputable" right to the extraordinary relief he seeks. See, *e.g.*, *Republic of Venezuela* v. *Philip Morris, Inc.*, 287 F.3d 192, 199 (D.C. Cir. 2002) (presence of conflicting decisions on a legal question justified the conclusion that a mandamus petitioner's right to relief was not clear and indisputable).

b. In any event, petitioner has not demonstrated the existence of "exceptional circumstances" warranting the exercise of this Court's discretionary powers. Sup. Ct. R. 20.1; *Cheney*, 542 U.S. at 381 (even where criteria for mandamus are met, the Court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances"). Petitioner's essential argument is that the circuits are divided on whether *Johnson* is a substantive rule that has been "made" retroactive to cases on collateral review and that Section 2244(b)(3)(E) blocks traditional certiorari review of that conflict, which might otherwise be worthy of this Court's statutory certiorari review. Pet. 8-20. Those considerations, standing alone, do not constitute "exceptional circumstances" justifying mandamus, especially where the issue of *Johnson*'s retroactivity could reach the Court in a more traditional way.

The question whether *Johnson* has been "made" retroactive to cases on collateral review is unique to second or successive collateral motions, and Congress has barred certiorari review of a gatekeeping determination denying leave to file such an attack. See 28 U.S.C. 2244(b)(2)(A), 2255(h). But, as outlined above, the courts of appeals are also divided on an antecedent

issue bearing on that question, which is whether *Johnson* announced a new "substantive" rule. The answer to that question not only informs the analysis of whether *Johnson* has been "made" retroactive within the meaning of Section 2255(h)(2), but it also bears on the question whether *Johnson* is retroactively applicable in an *initial* Section 2255 motion. See *Summerlin*, 542 U.S. at 351-352 (explaining that new substantive rules are retroactively applicable to cases on collateral review).

The Fifth Circuit's decision in this case addresses both issues: it precluded a second or successive Section 2255 motion based on *Johnson*, but its reasoning (that *Johnson* is not substantive) would also seem to preclude initial Section 2255 relief as well. One district court within the Fifth Circuit has so held, stating that *Williams* "unmistakably forecloses" a federal prisoner from raising a *Johnson*-based ACCA challenge to his sentence in a first Section 2255 motion. See *Harrimon* v. *United States*, No. 15-cv-00152 Docket entry No. 9 (N.D. Tex. Nov. 19, 2015), appeal pending, No. 15-11175 (filed Nov. 23, 2015), petition for cert. pending, No. 15-7426 (filed Dec. 11, 2015). Unless the Fifth Circuit narrows its holding in *Williams*, a conflict exists on the threshold question whether *Johnson* announced a "substantive" rule. See *Rivero*, 797 F.3d at 989-990; *Price*, 795 F.3d at 734-735.

In light of that conflict, it is reasonably possible that the retroactivity of *Johnson* to cases on collateral review could be reviewed by this Court through a grant of certiorari from an order affirming the denial of an initial Section 2255 motion (or from the denial of a certificate of appealability on that issue). The con-

tinued availability of certiorari review in that context undercuts petitioner's suggestion that exceptional circumstances exist that warrant the exercise of mandamus jurisdiction.

Petitioner correctly points out (Pet. 19-21) 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). See *Dodd* v. *United States*, 545 U.S. 353, 357 (2005) (one-year statute of limitations applies to all Section 2255 motions, including successive motions, and it runs from the date of the decision announcing the new right, not a later decision making that right retroactive); but see *Wood* v. *Milyard*, 132 S. Ct. 1826, 1830 (2012) (court may not "bypass, override, or excuse" the government's "deliberate waiver of a limitations defense" in a habeas case). But that consideration does not make it appropriate to conduct review through mandamus where the strict conditions for issuing the writ are not otherwise satisfied.

3. In addition to this petition for a writ of mandamus, another pending mandamus petition asks the Court to address *Johnson*'s retroactivity through its authority under the All Writs Act, 28 U.S.C. 1651(a). See *In re Triplett*, No. 15-625 (Nov. 10, 2015) (response filed Dec. 14, 2015). Three pending petitions for original writs of habeas corpus under 28 U.S.C. 2241, including one filed by petitioner, also ask the Court to address *Johnson*'s retroactivity. See *In re Sharp*, No. 15-646 (Nov. 16, 2015) (response filed Dec. 16, 2015); *In re Triplett*, No. 15-626 (Nov. 10, 2015); *In*

*re Williams*, No. 15-759 (Dec. 11, 2015).[5] Sharp requests that his petition be construed in the alternative as a petition for a writ of mandamus. See Pet. at 31 n.13, *Sharp, supra* (No. 15-646).

Additionally, a pending petition for a writ of certiorari asks the Court to review a gatekeeping determination that denied authorization to file a successive Section 2255 motion based on *Johnson*, arguing that Section 2244(b)(3)(E) does not eliminate the Court's statutory certiorari jurisdiction to review gatekeeping determinations concerning federal prisoners. *Hammons* v. *United States*, No. 15-6110 (Sept. 15, 2015) (response filed Dec. 2, 2015). Another pending petition for a writ of certiorari asks the Court to grant certiorari before judgment to review a case currently pending in the Fifth Circuit, in which the district court concluded that the court of appeals' decision in petitioner's case foreclosed relief based on *Johnson* in a prisoner's first Section 2255 motion and denied a certificate of appealability. *Harrimon* v. *United*

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[5] "Habeas corpus proceedings, except in capital cases, are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted." Sup. Ct. R. 20.4(b). The Court ordered the United States to respond to Sharp's habeas petition, but it did not request a response to the habeas petitions filed by Triplett or Williams (although the United States responded to the mandamus petitions filed by those petitioners). The Court ordered the United States to respond to another petition for a writ of habeas corpus that was previously pending, *In re Butler*, No. 15-578 (Nov. 3, 2015). On December 9, 2015, Butler obtained habeas corpus relief and an order directing his immediate release from the District of Arizona (the district of his confinement). See 15-cv-00321 Docket entry No. 20 (D. Ariz.). On December 14, 2015, Butler's petition was dismissed under Sup. Ct. R. 46.1.

*States*, No. 15-7426 (Dec. 11, 2015). The government's response in *Harrimon* is currently due without any extension on January 19, 2016, but is being filed contemporaneously with this brief on December 22, 2015.[6] In light of those other petitions pending before the Court, the Court may wish to hold this petition until it acts on those petitions and then determine whether any of them affords an appropriate vehicle for review.

**CONCLUSION**

The petition for a writ of mandamus should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
LESLIE R. CALDWELL
*Assistant Attorney General*
MICHAEL A. ROTKER
*Attorney*

DECEMBER 2015

[6] The government is doing so in order to permit all of these related cases to be considered at the Court's conference on January 8, 2016, if the petitioners in *Harrimon* and this case waive their time for filing a reply brief. That would allow the Court, if it wishes, to grant review and consider *Johnson*'s retroactivity during the current Term.

**APPENDIX**

CAUSE NO. 19,277C BOND: 3000.00

DEFENDANT: DOUGLAS UNDERHILL and ALLEN WILLIAMS

CHARGE: ROBBERY

WITNESS: DETECTIVE YARBROUGH, DPD

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS, in and for the county of Denton, State of Texas, duly organized, impaneled, and sworn as such, at the January Term, A.D., 1985 of the District Court of the 158th Judicial District in and for said county and state, upon their oaths, present in and to said Court that DOUGLAS UNDERHILL and ALLEN WILLIAMS, who are hereinafter styled defendants, on or about the 21st day of February, A.D., 1985 and anterior to the presentment of this Indictment, in the county and state aforesaid, did then and there intentionally, while in the course of committing theft of property and with intent to obtain and maintain control of said property cause bodily injury to Stephen Craig Hurst by hitting him in the face with their fist; against the peace and dignity of the State.

/s/ ILLEGIBLE
Foreman of Grand Jury

[STAMP OMITTED]

211TH JUDICIAL DISTRICT COURT OF
DENTON COUNTY, TEXAS

No. 19,277C

THE STATE OF TEXAS

*v.*

ALLEN WILLIAMS

Oct. 31, 1985

**JUDGMENT**

The defendant, ALLEN WILLIAMS, having been indicted in the above-entitled and -numbered cause for the felony offense of ROBBERY, as alleged in the indictment, and this cause being this day called, the State appeared by her Assistant Criminal District Attorney, Ian Gabriel, and the defendant appeared in person and his counsel, Illegible, also being present and both parties announced ready and the defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of Denton County, Texas, in writing, signed by him, and filed in the papers of this cause before the defendant entered his plea herein, the defendant was

duly arraigned and in open Court pleaded guilty to the charged contained in the indictment; thereupon the defendant was admonished by the Court of the consequences of the said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the plea herein of the defendant. The defendant in open court, in writing, having waived the reading of the indictment, the appearance, confrontation and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and any other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; and, the Court having heard the defendant's waiver of the reading of the indictment, the defendant's plea thereto, the evidence submitted, and the argument of counsel, is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE FOUND AND ADJUDGED BY THE COURT, that the said defendant is guilty of the felony offense of ROBBERY, as alleged in the indictment, and that the said defendant committed said offense on the 21st day of February, 1985, and that he be punished by confinement in the Texas Department of Corrections for SEVEN (7) years and a fine of $___—___, and that the State of Texas do have and

recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Denton County, Texas, to await the further order of the Court herein; and it is further ordered by the Court that the imposition of sentence of the Judgment of conviction of the Court herein shall be suspended for a period of SEVEN (7) years, and that the defendant be placed on probation during the period of time fixed by the Court, under the conditions to be determined by the Court in accordance with the provisions of the law governing Adult Probation of this State.

IT APPEARING to the Court that the defendant is mentally competent and understanding of the English language, the Court, in the presence of said defendant and his counsel, proceeded to place the defendant on probation as heretofore determined by the Court.

IT IS THE ORDER OF THE COURT, that the said defendant, who has been adjudged by the Court to be guilty of ROBBERY, as alleged in the indictment, and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for SEVEN (7) years and a fine of $___—___, in accordance with the provisions of the law governing Adult Probation of this State, it appearing to the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved by suspending the imposition of the sentence herein and placing the defendant on probation.

* * * * *

SIGNED this 31 day of Oct., 1985.

/s/ [ILLEGIBLE]
JUDGE PRESIDING

RECEIVED COPY: 10-31-85

/s/ ALLEN WILLIAMS
DEFENDANT/DATE

I AM THE DEFENDANT WHO
RECEIVED THIS JUDGMENT AND
SENTENCE ASSESSED ON THIS DATE

/s/ ALLEN WILLIAMS

[STAMP OMITTED]