No. _____

In the Supreme Court of the United States

IN RE RONNIE GLENN TRIPLETT

PETITION FOR A WRIT OF HABEAS CORPUS

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QUESTION PRESENTED

Whether the Court should issue a writ of habeas corpus on the ground that *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), has been, or should be, made retroactively applicable by this Court to cases on collateral review.

In the Supreme Court of the United States

IN RE RONNIE GLENN TRIPLETT

Petitioner Ronnie Glenn Triplett respectfully petitions for a writ of habeas corpus.

JURISDICTION

This Court's jurisdiction to issue a writ of habeas corpus rests on 28 U.S.C. §§ 1651 and 2241.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in relevant part that no person shall "be deprived of life, liberty, or property, without due process of law."

STATEMENT

This original petition for a writ of habeas corpus presents the same question in the context of the same case as petitioner's concurrently-filed petition for a writ of mandamus. The petition here should be granted for all the same reasons, based upon all the same facts, as stated in that petition, which is hereby incorporated fully by reference.

1. In 2005, Petitioner Ronnie Glenn Triplett pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g). Judgment at 1, *United States* v. *Triplett*, No. 5:04-cr-00062-C (W.D. Okla. Feb. 1, 2008), ECF No. 33. The maximum sentence for a violation of Section 922(g) is ordinarily 120 months (18 U.S.C. § 924(a)(2)), but the Armed Career Criminal Act prescribes a mandatory 15-year minimum sentence for a violation of Section 922(g) when the defendant has three prior convictions for "a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1).

The district court found that the ACCA applied in this case and sentenced petitioner to 188 months for his violation of Section 922(g). Judgment at 2. One of the three predicate convictions upon which petitioner's enhanced sentence under the ACCA was based—his conviction in Oklahoma state court for possession of a sawed-off shotgun—qualified as a predicate offense under the residual clause. See *United States* v. *Triplett*, 160 F. App'x 753, 758 (10th Cir. 2005).

Petitioner has served more than eleven years in prison—already a longer term than he could have been sentenced to under Section 922(g) were it not for application of the ACCA's 15-year mandatory minimum sentencing enhancement.

2. At the end of the last Term, on June 26, 2015, this Court decided *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), in which it held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 135 S. Ct. at 2563. According to the Court, the language of the residual clause creates uncertainty both about "how to estimate the risk [of physical injury] posed by a crime" and "how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-2558. As a result, the clause "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557. The Court thus held that the residual clause is unconstitutionally vague. *Ibid.*

3. On September 2, 2015, petitioner filed a *pro se* motion before the U.S. Court of Appeals for the Tenth Circuit seeking authorization to file a second Section 2255 motion to vacate his enhanced ACCA sentence in light of *Johnson*. Petitioner argued that *Johnson* had announced a "new rule of constitutional law, made

retroactive to cases on collateral review" under Section 2255(h)(2). App., *infra*, 2a.

4. The Tenth Circuit denied the motion in light of its published decision in *In re Gieswein*, 2015 WL 5534388, No. 15-6138 (10th Cir. Sept. 21, 2015). See App., *infra*, 1a-3a.

Petitioner is barred by Section 2244(b)(3)(E) from seeking rehearing en banc or petitioning this Court for certiorari review.

REASONS FOR GRANTING THE PETITION

This original petition for a writ of habeas corpus is a companion filing to petitioner's concurrently-filed request for mandamus relief. The Court held in *Felker* v. *Turpin*, 518 U.S. 651, 661-662 (1996), that Section 2244(b)(3)(E) "does not repeal our authority to entertain a petition for habeas corpus." It therefore should grant habeas relief for all of the reasons stated in petitioner's mandamus petition, including because the circuits are divided, the issue is tremendously important, and time is of the essence.

Pursuant to this Court's Rule 20.4, petitioner states that he is presently detained at the Federal Correctional Institution in El Reno, Oklahoma, under the custody of Warden Thomas J. Scarantino, whose claim of authority over petitioner rests on the February 2, 2005 judgment of conviction entered by the United States District Court for the Western District of Oklahoma in Case No. 5:04-cr-62-C.

Petitioner is not seeking habeas corpus relief in the district court for the district in which he is incarcerated (which is the same district as the district in which he was convicted) because that court is within the Tenth Circuit, which held in *In re Gieswein* (reproduced at App., *infra*, 4a-14a) that this Court's decision in *Johnson*, is not retroactively applicable on collateral review.

The Western District of Oklahoma lacks the authority to overrule or otherwise circumvent the Tenth Circuit's holding in *Gieswein*. See *Prost* v. *Anderson*, 636 F.3d 578, 584 (10th Cir. 2011) (rejecting the "the erroneous circuit foreclosure test" as a basis for safety-valve relief under Sections 2255(e) and 2241). Only this Court, which is not subject to Section 2244(b)(3)'s gatekeeping mechanism for second or successive petitions (see *Felker*, 518 U.S. at 662), has the authority to correct the Tenth Circuit's mistaken holding in *Gieswein*.

The unavailability of relief in the lower courts, and the unavailability of this Court's certiorari review, present "exceptional circumstances warrant[ing] the exercise of th[is] Court's discretionary power[]" to grant habeas corpus relief. Sup. Ct. R. 20.4(a). Petitioner and other prisoners like him sentenced under the ACCA's residual clause are being held in violation of the Constitution, and this Court is the only court capable of granting them relief. The Court may grant relief either by clarifying the *Tyler* retroactivity framework and holding that *Gieswein* was wrongly decided, or, if there is any doubt about that conclusion, by electing instead to hold in express terms that *Johnson* is retroactively applicable.

Petitioner thus respectfully requests that the Court grant the petition, vacate his 188-month sentence under the ACCA, and thereafter transfer the case to the U.S. District Court for the Western District of Oklahoma for resentencing.

CONCLUSION

The Court should issue a writ of habeas corpus or otherwise set the case for argument.

Respectfully submitted.

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NOVEMBER 2015

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In re: RONNIE GLENN TRIPLETT,
Movant.

No. 15-6168
(D.C. Nos. 5:04-CR-00062-C-1 &
5:07-CV-00632-C) (W.D. Okla.)

ORDER

Before **LUCERO**, **EBEL**, and **HARTZ**, Circuit Judges.

Ronnie Glenn Triplett seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. We deny the motion and dismiss this proceeding.

Mr. Triplett pleaded guilty to two counts of distribution of methamphetamine, and one count of being a felon in possession of a firearm and ammunition. He appealed. We dismissed his appeal in part because certain issues were barred by the appeal waiver in his plea agreement. *See United States v. Triplett*, 160 F. App'x 753, 757 (10th Cir. 2005). As for the issues we considered on the merits, we affirmed. *See id*.

Mr. Triplett then filed a § 2255 motion, which the district court denied. He sought a certificate of appealability to appeal from the district court's decision, but we denied his request. *See United States v. Triplett*, 263 F. App'x 688, 689 (10th Cir. 2008).

Mr. Triplett now seeks authorization to file a second or successive § 2255 motion to challenge his sentence. He contends that the Supreme Court's recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), establishes a new rule of constitutional law that entitles him to authorization. In *Johnson*, the Supreme Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Id*. at 2563.

In order to meet the standard for authorization, the second or successive claim must be based 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). Mr. Triplett notes that the Seventh Circuit held in *Price v. United States*, 795 F.3d 731 (7th Cir. 2015), that *Johnson* announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Mot. for Auth. at 2 (internal quotation marks omitted). He "urge[s] us to hold likewise, for the same reasons in *Price*." *Id*.

We recently decided otherwise, declining to adopt the Seventh Circuit's approach in *Price*. *See In re Gieswein*, --- F.3d ---, 2015 WL 5534388, at *5 (10th Cir. Sept. 21, 2015). We explained that "[t]he Supreme Court has not held in one case, or in a combination of holdings that dictate the conclusion, that the new rule of constitutional law announced in *Johnson* is retroactive to cases on collateral review." *Id*. A motion for authorization that relies on *Johnson* therefore does not meet the standard for authorization. *See id*.

Accordingly, we deny Mr. Triplett's motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re:

SHAWN J. GIESWEIN,

Movant.

No. 15-6138
(D.C. Nos. 5:11-CV-00021-F &
5:07-CR-00120-F-1)
(W.D. Okla.)

ORDER

Before **KELLY**, **EBEL**, and **TYMKOVICH**, Circuit Judges.

PER CURIAM.

Shawn J. Gieswein, a federal prisoner, was convicted of possession of a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1), and witness tampering. Proceeding pro se, he seeks authorization to file a second or successive motion under 28 U.S.C. § 2255 challenging his sentence for his firearms conviction. We deny authorization.

I.

We may authorize Gieswein's claim only if it relies on (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on col-

lateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h); *see also id*. § 2244(b)(3)(C). Gieswein must make a prima facie showing that he can satisfy the gate-keeping requirements of § 2255(h). *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam). In this context, a prima facie showing requires Gieswein to make "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir.), *cert. denied*, 134 S. Ct. 269 (2013) (internal quotation marks omitted). "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive [motion], we shall grant the application." *Id*. (internal quotation marks omitted).

II.

Gieswein is serving a 240-month sentence on his firearms conviction. He asserts that sentence was improperly enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The ACCA dictates a minimum fifteen-year sentence if the offender violates § 922(g) and has "three previous convictions . . . for a violent felony or a serious drug offense." *Id*. Gieswein maintains that, under the Supreme Court's recent holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), none of his three prior felony convictions used to enhance his sentence qualifies as a "violent felony" under the ACCA. He seeks authorization to file a second or successive § 2255 motion asserting a claim under *Johnson*, which he contends announced "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).[1]

> Under the ACCA,
>
> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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) (emphasis added). The emphasized language is commonly referred to as the "residual clause." *Johnson*, 135 S. Ct. at 2556. In *Johnson*, the sentencing court determined that the defendant's previous conviction for unlawful possession of a short-barreled shotgun qualified as a violent felony under the residual clause and enhanced his sentence based, in part, on that conviction. *See id*. The Supreme Court ultimately held that enhancing a sentence under the residual clause violates a defendant's right to due process because that portion of the ACCA is unconsti-

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[1] Gieswein filed his first § 2255 motion in 2011, and the district court denied relief. This court denied a certificate of appealability ("COA") on one claim, granted a COA on two other claims, then affirmed the denial of relief on those claims. *See United States v. Gieswein*, 495 F. App'x 944, 945 (10th Cir. 2012).

tutionally vague. *See id*. at 2557, 2563. Gieswein asserts that all of his three prior convictions qualify as violent felonies only under the ACCA residual clause.[2]

A.

To obtain our authorization to file a second or successive § 2255 motion, Gieswein must demonstrate that *Johnson* announced "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). We first address whether *Johnson* announced a new rule of constitutional law, and we conclude that it did.

"A case announces a new rule . . . when it breaks new ground or imposes a new obligation on the government. To put it differently . . . a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (citation, internal quotation marks, and brackets omitted). *Johnson* held that a portion of the ACCA violates defendants' constitutional right to due process, overruling two prior Supreme Court cases that had con-

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[2] The holding in *Johnson* applies only to the residual-clause definition of "violent felony," and "does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." 135 S. Ct. at 2563. Gieswein indicates that his three underlying Oklahoma convictions were for destruction of property by explosive device, burglary, and lewd molestation. Although we do not determine the merits of the movant's claim in deciding a motion for authorization to file a second or successive § 2255 motion, we note that the surviving definition of "violent felony" under the ACCA includes a felony conviction for "burglary" as well as a felony conviction that "involves use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii).

cluded otherwise. *See* 135 S. Ct. at 2562-63. The Court thus applied a constitutional principle in a decision that was contrary to, rather than dictated by, its own precedent. Therefore, we hold that *Johnson* announced a new rule of constitutional law. *See Price v. United States*, __ F.3d __, 2015 WL 4621024, at *1 (7th Cir. Aug. 4, 2015) (holding *Johnson* announced a new rule of constitutional law); *In re Rivero*, __ F.3d __, 2015 WL 4747749, at *2 (11th Cir. Aug. 12, 2015) (same).

B.

Gieswein contends that we should authorize his second or successive § 2255 motion because the Supreme Court has made the new rule in *Johnson* retroactive to cases on collateral review. Under § 2255(h)(2), "'the Supreme Court is the only entity that can "make" a new rule retroactive.'" *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002) (quoting *Tyler v. Cain*, 533 U.S. 656, 663 (2001)) (brackets omitted). And the Supreme Court can only "make a rule retroactively applicable . . . through a 'holding' to that effect." *Id.* (quoting *Tyler*, 533 U.S. at 663).

1.

The Supreme Court has not explicitly held that the new rule in *Johnson* is retroactively applicable to cases on collateral review. Gieswein argues, however, that the rule in *Johnson* qualifies for retroactive application in cases on collateral review under the reasoning in *Teague v. Lane*, 489 U.S. 288 (1989), and therefore *should b*e applied retroactively. But "[i]t is clear that the mere fact a new rule *might fall* within the general parameters of overarching retroactivity principles established by the Supreme Court (i.e., *Teague*) is not sufficient." *Cannon*, 297 F.3d at 993. This is so because "[t]he Supreme Court does not make a rule retroactive when it merely establishes principles of retroactivity

and leaves the application of those principles to lower courts." *Id*. (internal quotation marks omitted). Thus, in the context of deciding a motion for authorization, it is not this court's task to determine whether (or not) a new rule fits within one of the categories of rules that the Supreme Court has held apply retroactively. *See id*. at 994. Our inquiry is statutorily limited to whether the Supreme Court *has made* the new rule retroactive to cases on collateral review.

2.

Gieswein also contends that the Supreme Court has made the rule in *Johnson* retroactive to cases on collateral review in a number of its holdings, read together. The Court has indeed recognized that "[m]ultiple cases can render a new rule retroactive"—"with the right combination of holdings"—but "only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Tyler*, 533 U.S. at 666. Gieswein directs our attention to the Seventh Circuit's decision in *Price*, 2015 WL 4621024, at *2-3, which held that a combination of Supreme Court holdings necessarily dictates the conclusion that the Supreme Court has made the new rule in *Johnson* retroactively applicable to cases on collateral review. In so holding, that court cited *Johnson*, *Teague*, *Tyler*, *Schriro v. Summerlin*, 542 U.S. 348 (2004), and several other Supreme Court decisions. *See id*.

We respectfully disagree that the Supreme Court's holdings in these cases necessarily dictate retroactivity of the new rule in *Johnson*. As Justice O'Connor posited in her *Tyler* concurrence,

> [I]f [the Supreme Court] hold[s] in Case One that a particular type of rule applies retroactively to cases on collateral review and hold[s] 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. In such circumstances, [the Court] can be said to have 'made' the given rule retroactive to cases on collateral review.

Tyler, 533 U.S. at 668-69 (O'Connor, J., concurring); *see also Cannon*, 297 F.3d at 993 n.3 (quoting this portion of Justice O'Connor's concurrence). Here there is no "Case Two." The Supreme Court has not held that the rule announced in *Johnson* is of a particular type that the Court previously held applies retroactively. And the Supreme Court—not this court—must make that determination. *See Cannon* 297 F.3d at 993-94.

As we stated in *Cannon*, "The Court's recognition in *Tyler* of the possibility that multiple cases can render a new rule retroactive does not . . . give this court license to grant permission to file a second [§ 2255 motion] premised on our own determination that a new rule fits within [a] *Teague* exception." *Id*. at 994. In the limited time we are statutorily permitted to consider and decide motions for authorization, we do not "engage in the difficult legal analysis that can be required to determine questions of retroactivity in the first instance." *Id*. (internal quotation marks omitted). Rather, we look for Supreme Court *holdings* that, "by strict logical necessity," dictate that the Supreme Court, itself, has made a new rule retroactive on collateral review. *Id*. (internal quotation marks omitted). There is no such combination of Supreme Court holdings necessarily dictating retroactive application of the new rule announced in *Johnson*.

C.

We acknowledge that the Seventh Circuit reached a different conclusion in *Price*. It pointed to the Supreme Court's statement in *Summerlin* that "'[n]ew *substantive* rules generally apply retroactively . . . because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.'" 2015 WL 4621024, at *2 (quoting *Summerlin*, 542 U.S. at 351-52) (internal quotation marks omitted). *Price* also noted *Summerlin's* holding that new substantive rules include " 'constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.' " *Id.* (quoting *Summerlin*, 542 U.S. at 352). And *Price* pointed to Justice O'Connor's concurrence in *Tyler*, in which she stated:

> It is relatively easy to demonstrate the required logical relationship with respect to the first exception articulated in *Teague*. Under this exception, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. When the Court holds as a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it 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) (citations and internal quotation marks omitted); *see Price*, 2015 WL 4621024, at *2.

Applying these retroactivity principles to the new rule in *Johnson*, *Price* first held that *Johnson* announced a new substantive rule of constitutional law. *See* 2015 WL 4621024, at *3. It further held that pursuant to this new rule "[a] defendant who was sentenced under the residual clause necessarily bears a significant risk of facing 'a punishment that the law cannot impose upon him.'" (quoting *Summerlin*, 542 U.S. at 352). On the basis of these two predicate holdings—*neither of which had been made by the Supreme Court*—the Seventh Circuit then held that "[t]here is no escaping the logical conclusion that the Court itself has made *Johnson* categorically retroactive to cases on collateral review." *Price*, 2015 WL 4621024, at *3.

We decline to adopt the Seventh Circuit's approach in *Price*, under which that court applied the Supreme Court's retroactivity principles to determine, for itself in the first instance, whether the rule in *Johnson* is of a type that the Supreme Court has held applies retroactively. Our sister circuit did what we have said we cannot do: it made its "own determination that a new rule fits within [a] *Teague* exception [to non-retroactivity]." *Cannon*, 297 F.3d at 994.

The Eleventh Circuit followed a similar path in *Rivero*. It concluded, however, that "[n]o combination of holdings of the Supreme Court necessarily dictate that *Johnson* should be applied retroactively on collateral review." 2015 WL 4747749, at *2 (internal quotation marks omitted). *Rivero* began by noting that the Supreme Court did not expressly state in *Johnson* that its holding applies retroactively, nor has the Court applied the *Johnson* holding on collateral review in a later case. *See id*. But the Eleventh Circuit then proceeded to conclude that "the rule announced in

Johnson does not meet the criteria the Supreme Court uses to determine whether the retroactivity exception for new substantive rules applies." *Id.* *Rivero* reasoned—contrary to the holding in *Price*—that although *Johnson* announced a new substantive rule of constitutional law, it did not "suggest[] that 'certain kinds of primary, private individual conduct are beyond the power of Congress to proscribe.'" *Id.* (quoting *Teague*, 489 U.S. at 311 (plurality opinion)) (brackets omitted).

Our sister circuits' holdings in *Price* and *Rivero* illustrate the difficulty with their approach to determining whether the Supreme Court has made a new rule of constitutional law retroactive to cases on collateral review. Both courts applied the Supreme Court's retroactivity principles, yet they reached opposite conclusions. This is unsurprising, as the Supreme Court has recognized "the difficult legal analysis that can be required to determine questions of retroactivity in the first instance." *Tyler*, 533 U.S. at 664. And that is why the Court has said we need not (and should not) "do more than simply rely on Supreme Court holdings on retroactivity." *Id.*

III.

The Supreme Court has not held in one case, or in a combination of holdings that dictate the conclusion, that the new rule of constitutional law announced in *Johnson* is retroactive to cases on collateral review. Therefore, Gieswein's motion does not "satisf[y] the stringent requirements for the filing of a second or successive [motion]." *Case*, 731 F.3d at 1028 (internal quotation marks omitted). Accordingly, we deny Gieswein's motion for authorization to file a second or successive § 2255 motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28

U.S.C. § 2244(b)(3)(E). Gieswein's Motion for Resentencing is denied.

APPENDIX C

In The
United States Court of Appeals
FOR THE TENTH CIRCUIT

No. 15-8098

IN RE: BRYAN LEE JACKSON,
Petitioner.

COURT-ORDERED RESPONSE OF THE UNITED STATES TO PETITION FOR INITIAL HEARING EN BANC

Bryan Lee Jackson applied to this Court for an order authorizing him to file a successive motion to vacate his enhanced sentences imposed under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (ACCA), based on *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). See 28 U.S.C. § 2255(h)(2). While his application was pending, this Court – in direct conflict with the Seventh Circuit and without the benefit of the government's views – issued a published decision denying another ACCA defendant's application for leave to file a successive Section 2255 motion based on *Johnson*, holding that the Supreme Court has not "made" *Johnson* retroactive to cases on collateral review, as Section 2255(h)(2) requires. See *In re Gieswein*, --- F.3d ---, 2015 WL 5534388 (10th Cir. Sept. 21, 2015). Two days later, Jackson filed a petition for initial hearing en banc, urging the full Court to reconsider *Gieswein*, and the Court then requested a response.

In the government's view, this Court should grant en banc review in an appropriate case to reconsider and overrule *Gieswein*: the decision is wrong and

creates a circuit conflict on a recurring question of exceptional importance. Jackson's case is not a suitable one in which to grant further review, however, because his ACCA-enhanced sentences were later reduced and no longer exceed the unenhanced statutory maximum. Accordingly, Jackson's petition for initial hearing en banc should be denied.

STATEMENT OF THE CASE

1. On September 18, 2003, a federal grand jury in the District of Wyoming indicted Jackson for unlawful possession of a firearm by a convicted felon. While on release, Jackson was arrested for possession of drugs and firearms. On October 12, 2004, following the return of a nine-count superseding indictment, Jackson pleaded guilty to four charges: possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count 1); possession of a firearm by a fugitive, in violation of 18 U.S.C. § 922(g)(2) (Count 4); carrying and possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Count 6); and contempt of court, in violation of 18 U.S.C. § 401(3) and 18 U.S.C. § 3147(1) (Count 7).

2. a. An individual who violates Section 922(g) faces a maximum sentence of 10 years' imprisonment with no minimum sentence. See 18 U.S.C. § 924(a)(2). If, however, the offender's criminal history includes at least three prior convictions for a "violent felony" or "serious drug offense," then the ACCA mandates a minimum sentence of 15 years' imprisonment and authorizes a maximum sentence of life. See 18 U.S.C. § 924(e)(2); *Custis* v. *United States*, 511 U.S. 485, 487 (1994). The ACCA thus mandates the imposition of an enhanced sentence (at least 15 years) that exceeds the

otherwise-applicable unenhanced statutory maximum for the crime (10 years).

b. The Probation Officer recommended that the court sentence Jackson as an armed career criminal on Counts 1 and 4 because he had three "violent felony" convictions: (i) a 1979 Wyoming conviction for burglary, PSR ¶ 21; (ii) a 1991 Utah conviction for second-degree burglary, PSR ¶ 25; and (iii) a 1998 federal conviction for possession of an unregistered firearm, PSR ¶ 32. The district court agreed and sentenced Jackson to 240 months' imprisonment – 180 months on Counts 1 and 4, to run concurrently to each other and to a 120-month sentence on Count 7, and a 60-month consecutive sentence on Count 6, see 18 U.S.C. § 924(c)(1)(D)(ii).[1]

c. Jackson appealed, arguing that his 1979 burglary conviction was not an ACCA "violent felony." This Court rejected that claim, and his other claims of error, and affirmed. *United States* v. *Jackson*, 2006 WL 991114 (10th Cir. Apr. 17, 2006) (unpub.).

d. While Jackson's direct appeal was pending, the government filed a motion under Fed. R. Crim. P. 35 requesting a sentence reduction for Jackson based on his substantial post-sentencing assistance. On January 6, 2006, the district court granted the motion, "reduce[d] [Jackson's] original sentence as to Counts 1 and 4 from 180 months to 120 months," and left undisturbed his consecutive 60-month sentence on Count 6 and his concurrent 120-month sentence on Count 7, for a total term of 180 months' imprisonment. Dkt. 88 (Order 1/6/06); see Fed. R. Crim. P. 35(b)(4)

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[1] Jackson's 120-month sentence on Count 7 should have been ordered to run consecutively to his other sentences. See 18 U.S.C. § 3147.

(permitting court to reduce a sentence below a statutory mandatory minimum).

e. Jackson filed a timely *pro se* motion to vacate sentence under 28 U.S.C. § 2255(a), reasserting the same claims he raised on direct appeal. The district court denied the motion and declined to issue a certificate of appealability.

3. On June 26, 2015, the Supreme Court issued its decision in *Johnson*, holding that the residual clause in the ACCA's definition of a "violent felony" is unconstitutionally vague. 135 S. Ct. at 2557.

a. Defendants may not file a "second or successive" Section 2255 motion without obtaining prefiling authorization from the court of appeals. 28 U.S.C. § 2244(b)(3)(A); *Burton* v. *Stewart*, 549 U.S. 147, 152 (2007) (per curiam). The courts of appeals may grant authorization when a defendant makes a "prima facie" showing – *i.e.*, "a sufficient showing of possible merit to warrant fuller exploration by the district court," *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) – that (as relevant here) his claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2).

b. On September 3, 2015, Jackson, through counsel, applied to this Court for an order authorizing him to file a second Section 2255 motion. He alleged his classification as an armed career criminal was erroneous because his 1998 federal firearms conviction qualified as a violent felony under the ACCA's now-invalid residual clause. He further asserted that his corresponding "180 month [sentences] on each Section 922(g) charge" exceeded the unenhanced statutory

maximum. C.A. 10 Dkt. 1, at 2.[2] Because the government's position is that *Johnson* meets the criteria in Section 2255(h)(2) for ACCA cases, including the requirement that the Supreme Court must have "made" the decision retroactive to cases on collateral review, see *Price* v. *United States*, 795 F.3d 731, 734 (7th Cir. 2015), the government joined Jackson's application.

c. On September 21, 2015, this Court issued its decision in *Gieswein*, in which it held, without the benefit of the government's views, that the Supreme Court has not "made" *Johnson* retroactive to cases on collateral review.

d. On September 23, 2015, Jackson, whose application was still pending, filed a petition for initial hearing en banc, urging the Court to reconsider and overrule *Gieswein* and adopt the Seventh Circuit's view in *Price*. The Court then asked the government to file a response to the petition. See Fed. R. App. P. 35(e).

REASONS FOR DENYING THE PETITION

Gieswein was wrongly decided and should be overruled: the Supreme Court has necessarily "made" *Johnson's* new substantive rule retroactive to cases on collateral review. Jackson's case is not an appropriate one in which to reconsider *Gieswein*, however, because Jackson's sentences on Counts 1 and 4 do not exceed the unenhanced statutory maximum for his crimes. Accordingly, the petition should be denied. The Court,

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[2] Jackson also asserted that, absent the ACCA error, he would be entitled to "immediate release." App. 4. Not so. Jackson's 180-month sentence – 120 months on Counts 1, 4 and 7, plus the consecutive 60-month sentence on Count 6, see 18 U.S.C. § 924(c)(1)(D)(ii) – corresponds to a projected release date of February 11, 2017.

however, may wish to grant rehearing en banc *sua sponte* in another case in order to reexamine *Gieswein*.

I. A. *Gieswein's* holding that the Supreme Court has not "made" *Johnson* retroactive to cases on collateral review is wrong, and creates a circuit conflict on an important issue with recurring significance. And the stakes are high: in cases where a defendant was sentenced above the unenhanced 120-month statutory maximum, *Gieswein* will force the defendant to serve an illegal prison term – a sentence exceeding the otherwise-applicable statutory maximum for the crime. This spectacle raises "serious, constitutional, separation-of-powers concerns," *Bryant* v. *Warden*, 738 F.3d 1253, 1283 (11th Cir. 2013), because federal courts have no power to impose a sentence outside the range fixed by Congress. To alleviate these concerns, the Court should overrule *Gieswein* and hold, in line with the Seventh Circuit, that the Supreme Court has "made" *Johnson* retroactive to ACCA cases on collateral review.

B. Jackson's case is not an appropriate one in which to reconsider *Gieswein*, however, because his ACCA-enhanced sentences on Counts 1 and 4 were later reduced. Because his reduced sentences on those counts do not exceed the unenhanced 120- month statutory maximum, his case does not raise the specter of incarceration beyond the maximum term provided by law, and does not implicate the separation-of-powers concerns that arise from the imposition of a sentence above the statutory maximum.

II. The Court may wish to grant rehearing en banc *sua sponte* in *Gieswein* itself or *In re Triplett*, No. 15-6168 (10th Cir. Sept. 23, 2015), both of which denied applications for leave to file successive Section 2255 motions filed by defendants who received ACCA-

enhanced sentences above the 120-month statutory maximum based on a residual clause conviction. Although the parties in those cases may not file a petition for rehearing en banc, see 28 U.S.C. § 2244-(b)(3)(E), this Court retains the power to grant rehearing en banc *sua sponte*. And *Gieswein* and *Triplett* are better vehicles for reconsidering this issue because, unlike Jackson, those defendants' erroneously-enhanced ACCA sentences exceed the unenhanced statutory maximum.

I. In An Appropriate Case, The Full Court Should Reconsider *Gieswein*.

A. *Gieswein* Was Wrongly Decided.

Section 2255(h)(2) permits the courts of appeals to authorize the filing of a successive Section 2255 motion when the defendant raises a claim that relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). In *Gieswein*, this Court correctly held that *Johnson* announced "a new rule of constitutional law"; and, although the Court did not say so, the Court did not dispute that the rule that the ACCA's residual clause was vague was "unavailable" before *Johnson*. Thus, the determinative question is whether the Supreme Court has "made" *Johnson* retroactive to cases on collateral review. As *Gieswein* recognized, *Tyler* v. *Cain*, 533 U.S. 656 (2001), provides the framework for answering that question, but the panel relied on an overly restrictive reading of *Tyler* to conclude that *Johnson* has not been "made" retroactive. The profound and far-reaching consequences of that erroneous ruling justify its reconsideration.

1. 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." 533 U.S. at 656 (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 held a Louisiana jury instruction defining "reasonable doubt" to be constitutionally defective, had been "made" retroactive by the later decision in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), which held that *Cage* errors defy harmless-error review. Although the Supreme Court accepted the premise that multiple cases can in theory "make" a new rule retroactive, it held that *Sullivan*'s holding that *Cage* errors are structural did not mean that *Cage* was a watershed rule entitled to retroactive application, and thus, that *Cage* had not been "made" retroactive. 533 U.S. at 656-658.

Justice O'Connor wrote separately to explain – in language that the four dissenting Justices endorsed and that 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." *Tyler*, 533 U.S. at 668-669 (O'Connor, J., concurring); see also *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* v. *Lynaugh*, 492 U.S. 302 (1989), abrogated on other grounds, 536 U.S. 304 (2002), which held that a substantive rule includes a rule that "prohibits a certain category of punishment for a class of defendants because of their status or offense." *Id*. 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 [the Supreme] Court has 'made' that new rule retroactive to cases on collateral review." *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring); see also *id*. at 675 (Breyer, J., dissenting).

2. *Gieswein* acknowledged that *Tyler* recognized the doctrine of retroactivity-by-necessary-implication; noted Justice O'Connor's views on how the doctrine applies when a new substantive rule is at issue; and accepted (or at least did not dispute) that *Penry* qualified as "Case One." But the Court concluded that "there is no Case Two" because the Supreme Court "has not held that the rule announced in *Johnson* is of a particular type that the Court previously held applies retroactively." That is incorrect: *Johnson* is Case Two. *Johnson* announced a new substantive rule as applied to the ACCA because the decision means that a defendant who received an enhanced sentence based on the residual clause has received "a punishment that the law cannot impose," *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) – a mandatory 15-year sentence when the unenhanced maximum sentence is 10 years' imprisonment. "A defendant who does not constitute an armed career criminal after [an intervening decision] has received a punishment that the law cannot impose upon him.'" *United States* v. *Welch*, 604 F.3d 408, 413-414 (7th Cir. 2010); see also *United*

States v. *Shipp*, 589 F.3d 1084, 1089-1090 (10th Cir. 2009) (holding that *Chambers* v. *United States*, 555 U.S. 122 (2009), was a new substantive rule in ACCA cases because it means the defendant received a sentence "that exceeds the statutory maximum"). And because *Penry* holds that a rule like *Johnson* establishing that a punishment is not authorized by law is a substantive rule, there is no room to "escap[e] the logical conclusion" that the Supreme Court has "made" *Johnson* retroactive to ACCA cases on collateral review. See *Price*, 795 F.3d at 735.

In concluding otherwise, *Gieswein* over-emphasized *Tyler's* statement that the Supreme Court must make the rule retroactive and that the courts of appeals have no authority to make the retroactivity determination for themselves. What *Tyler* held is simply that Supreme Court precedent must be the *source* of the new rule and the *basis* for deeming it retroactive. The decision did not purport to deny the courts of appeals the ability to review the pertinent Supreme Court precedents and bring their own independent judgment to bear about whether the "right combination" of Supreme Court holdings exist to establish that the Supreme Court's precedents have necessarily "made" the rule retroactive. Insofar as *Gieswein* reasoned that *Tyler* is triggered only when "Case Two" expressly labels the rule in question "substantive," it was mistaken: the relevant inquiry is whether the rule's retroactivity is clear as a matter of logical necessity, not magic words. Indeed, as a practical matter, the Supreme Court will rarely, if ever, decide whether a new rule is "substantive" in Case Two: the Court generally announces new rules in cases that arise on direct review, at which time the "substantive" status of the rule is irrelevant. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987) (all new rules, both substantive

and procedural, apply to cases on direct review). The lack of an express statement in *Johnson* describing its rule as "substantive" is thus unsurprising – because the case arose on direct appeal – and beside the point – because this Court can review the Supreme Court's precedents and decide for itself that *Johnson* is a substantive rule in ACCA cases that has been "made" retroactive.[3]

Gieswein also failed to appreciate that *Tyler* was a case explaining why a new procedural rule was not watershed and thus had not been "made" retroactive. *Sullivan* may have supported *Cage's* treatment as a watershed rule of procedure, but it did not dictate that conclusion, and thus, *Cage* had not been "made" retroactive. See *Cannon* v. *Mullin*, 297 F.3d 989, 993-994 (10th Cir. 2002) (fact that a new procedural rule "might fall within the general parameters of overarching retroactivity principles" does not mean the rule has necessarily been "made" retroactive). *Gieswein* extended *Cannon* and other similar decisions involving procedural rules to the distinct setting of new substantive rules like *Johnson*, which stand on very different footing as far as retroactivity is concerned. See *Ochoa* v. *Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (granting authorization to file successive petition

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[3] *Dodd* v. *United States*, 545 U.S. 353 (2005), held that the one-year limitations period governing Section 2255 motion applies to successive motions, and that the period runs from the date of the decision recognizing the new right. *Id*. at 359. The Court recognized that the application of the limitations period to successive motions will "make[] it difficult" for defendants to timely file a successive Section 2255 motion because the Court "rarely decides that a new rule is retroactive within one year of initially recognizing th[e] right," *id*. *Tyler's* retroactivity-by-logical-implication approach obviates this "potential for harsh results" and thereby harmonizes these two provisions.

to raise a claim based on the substantive rule of *Atkins* v. *Virginia*, 536 U.S. 304 (2002)). Where a new substantive rule is at issue – as it is here but was not in *Tyler* or *Cannon* – the "legal analysis * * * required to determine questions of retroactivity in the first instance" is not "difficult," *Tyler*, 533 U.S. at 664, and merely requires the Court to ask if the rule is substantive under the Supreme Court's definition of that term. *Gieswein's* unduly cramped reading of *Tyler* leaves little, if any, room for the doctrine to operate and comes perilously close to endorsing the since-discarded view that an explicit statement of retroactivity is required.

B. *Gieswein* Creates A Circuit Conflict.

In *Price*, the Seventh Circuit held, "consistently with the government's position," that "*Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions," 795 F.3d at 732, and granted Price's application for leave to file a successive Section 2255 motion challenging his erroneous ACCA sentence, *id*. at 735. *Gieswein* expressly "decline[d] to adopt the Seventh Circuit's approach in *Price*," 2015 WL 5534388, at *5, and denied authorization to file a successive Section 2255 motion, *id*. at *5.[4] A decision,

[4] *Gieswein* relied on *In re Rivero*, 797 F.3d 986 (11th Cir. 2015), but this Court's reading of *Tyler* parts company with the reasons given by *Rivero* for denying authorization to file a successive Section 2255 motion challenging a guidelines enhancement. On September 28, 2015, the government filed a court-ordered post-ruling brief in *Rivero* defending the judgment but explaining that the *Johnson* rule is not "substantive" as applied to the guidelines, as *Rivero* found, because it does not subject the defendant to a punishment that the law cannot impose: guidelines sentences can never exceed statutory limits. See Supp. Br. for the U.S., No. 15-13089 (11th Cir.).

like *Gieswein*, that creates a circuit conflict on an important question of law is a "strong candidate" for en banc review because reconsideration could eliminate the conflict. Fed. R. App. P. 35, adv. comm. notes (1998 amend.). And circuit uniformity is vitally important here because of the unavailability of Supreme Court certiorari review. See 28 U.S.C. § 2244(b)(3)(E)

C. The Issue Presented Is Recurring And Exceptionally Important.

A sentence above the statutory maximum is a "punishment in excess of that authorized by the legislature." *Jones* v. *Thomas*, 491 U.S. 376, 383 (1989). Yet it is axiomatic that "a defendant may not receive a greater sentence than the legislature has authorized." *United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980). An Article III court that imposes criminal sanctions without statutory authorization has acted *ultra vires*. See *Williams* v. *New York*, 337 U.S. 241, 247 (1949) (sentencing judge must act "within fixed statutory or constitutional limits"). The imposition of a 15-year sentence when the otherwise-applicable maximum is 10 years offends these separation-of-powers norms.

II. Jackson's Case Is Not A Suitable One In Which To Reconsider *Gieswein*.

A. Jackson's statement that he was sentenced to 180 months' imprisonment on Counts 1 and 4 overlooks the fact that those sentences were reduced to 120 months. Because his sentences do not exceed the unenhanced 120-month statutory maximum, Jackson cannot make a *prima facie* showing that he is entitled to file a successive Section 2255 motion. The government regrets its failure to appreciate that Johnson's sentences were reduced when it joined Jackson's application, but it remains the case that

Jackson's sentences on Counts 1 and 4 do not exceed the statutory maximum. Jackson's case thus is not a suitable one in which to grant initial hearing en banc to reexamine *Gieswein*.

B. The Court nevertheless may wish to grant rehearing en banc *sua sponte* in another case, including either *Gieswein* or *Triplett*, which involve ACCA sentences that exceed the 120-month statutory maximum. Orders denying authorization to file successive Section 2255 motions "shall not be the subject of a petition for rehearing," 28 U.S.C. § 2244(b)(3)(E), which includes a petition for rehearing en banc, see *Lykus* v. *Corsini*, 565 F.3d 1, 1 (1st Cir. 2009) (en banc), but the statute – by its terms and read in light of the "basic principle" that federal courts "read limitations on [their] jurisdiction to review narrowly," *Castro* v. *United States*, 540 U.S. 375, 381 (2003) – "does not preclude the Court of Appeals from rehearing such a decision *sua sponte*." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015); see also *United States* v. *Springfield*, 337 F.3d 1175, 1176 (10th Cir. 2003) (*sua sponte* granting rehearing of an order denying authorization).[5]

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[5] While Jackson's petition should be denied, the filing of the petition does not offend Section 2244(b)(3)(E) because Jackson has not filed a petition for "rehearing" en banc of an order denying authorization; rather, he has filed a petition for initial "hearing" en banc on whether to grant authorization. See *Browning* v. *United States*, 241 F.3d 1262, 1264 (10th Cir. 2001) (en banc) (granting initial hearing en banc to decide authorization issue). *Bryan* v. *Mullin*, 100 F. App'x 783 (2004) (unpub.), which struck a petition for initial hearing en banc in analogous circumstances, reasoned that "there is no provision in 28 U.S.C. § 2244(b)(3) for the filing of a request for initial en banc consideration of a request to file a second or successive Section 2254 habeas petition." *Id.* at 785. This reasoning is faulty. Section 2244(b)(3)(E) is a limitation

Two other subsections in Section 2244(b)(3) bear on the availability of en banc consideration in this context, but neither precludes such review. The first provision states that an application for "an order authorizing the district court to consider a second or successive [motion] shall be determined by a three-judge panel of the court of appeals." 28 U.S.C. § 2244(b)(3)(B). This provision does not prevent the courts of appeals from convening en banc to resolve an overarching question of law that informs whether a successive motion should be authorized, and then remanding the case to a "three-judge panel" to "determine[]," based on the en banc court's ruling, whether authorization should be granted or denied. The second provision, which requires the courts of appeals to "grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the application," 28 U.S.C. § 2244(b)(3)(D), does not render en banc review impractical: as this Court has recognized, this time limit is advisory, not mandatory, and can be exceeded in "complex situation[s]" when compliance "is not practicable." *Browning*, 241 F.3d at 1264.

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on the ability of a party to file a "petition for rehearing"; it does not speak to (and thus does not displace) a party's right to file a petition for initial hearing en banc, see Fed. R. App. P. 35(a) (appeal may be "heard *or* reheard en banc"), and it does not impliedly repeal the Court's independent statutory authority to grant "a hearing * * * before the court in banc." 28 U.S.C. § 46(c); see also *Western Pac. R. Corp*. v. *Western Pac. R. Co*., 345 U.S. 247, 250 (1953) (Section 46(c) "vests in the court the power to order hearings en banc").

CONCLUSION

The petition for initial hearing en banc should be denied.

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