No. _____

IN THE
Supreme Court of the United States

In re JUAN DESHANNON BUTLER, *Petitioner.*

PETITION FOR A WRIT OF HABEAS CORPUS

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QUESTION PRESENTED

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), has been "made retroactive" to second or successive petitions for habeas corpus within the meaning of 28 U.S.C. § 2255(h)(2), as the First, Seventh and Ninth Circuits have held in conflict with the Tenth and Eleventh Circuits.

II. If not, whether this Court should now make *Johnson* retroactive.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 29.6, Petitioner makes the following disclosures:

This Petition stems from a habeas corpus proceeding in which Petitioner Juan Deshannon Butler was the movant before the United States Court of Appeals for the Tenth Circuit. Petitioner is a prisoner in federal custody at Tucson Federal Correctional Institution, in Tucson, Arizona.

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Juan Deshannon Butler respectfully petitions this Court for a writ of habeas corpus.

OPINION AND ORDER BELOW

The Tenth Circuit's order denying Petitioner's application for authorization to file a successive motion under 28 U.S.C. § 2255 is unreported, but reprinted in the appendix to this petition, Pet. App. 1a.

STATEMENT OF JURISDICTION

The Tenth Circuit denied Petitioner's application for authorization to file a successive motion on September 23, 2015. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1651(a), 2241, 2255, and Article III of the U.S. Constitution.

STATEMENT PURSUANT TO RULE 20.4(A) AND 28 U.S.C. § 2242

Pursuant to Rule 20.4(a), Petitioner states that he has not filed this Petition in "the district court of the district in which [Petitioner] is held," Sup. Ct. R. 20.4(a) (quoting 28 U.S.C. § 2242), because Petitioner has no avenue for doing so. The Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, Title I, 110 Stat. 1214 ("AEDPA"), permits a prisoner in federal custody to file a petition for habeas corpus in the district in which he is held *only* when filing a motion in the district which sentenced him would be "inadequate or ineffective." 28 U.S.C. § 2255(e).

Pursuant to 28 U.S.C. § 2255(h), Petitioner requested authorization to file a successive motion in the district in which he was sentenced, which was denied by the Tenth Circuit. Pet. App. 1a. The Ninth Circuit (where Petitioner is in custody)—like all other circuits—has held that the denial of authorization to file a successive motion under § 2255(h) does not render § 2255 "inadequate or ineffective." *Alaimalo v. United States*, 645 F.3d 1042, 1062 (9th Cir. 2011) ("Obviously, a prisoner's inability to comply with [§ 2255(h)] does not render the remedy pursuant to § 2255 'inadequate or ineffective to test the legality of his detention.'" (citation omitted)); *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999).[1] Petitioner thus has no avenue for making an "application to the district court of the district in which the applicant is held." Sup. Ct. R. 20.4(a) (quoting 28 U.S.C. § 2242).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent excerpts of The Due Process Clause, U.S. Const. amend. V, and 28 U.S.C. §§ 2241(a), 2244(b),

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[1] *See also United States v. Barrett*, 178 F.3d 34, 50 (1st Cir. 1999) (collecting cases); *Jiminian v. Nash*, 245 F.3d 144, 147-48 (2d Cir. 2001) (collecting cases); *Surace v. Nash*, 147 F. App'x 287, 289 (3d Cir. 2005); *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997); *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001); *Charles v. Chandler*, 180 F.3d 753, 757-58 (6th Cir. 1999); *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998); *United States v. Lurie*, 207 F.3d 1075, 1077 (8th Cir. 2000); *Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999); *Darby v. Hawk-Sawyer*, 405 F.3d 942, 945 (11th Cir. 2005); *Neal v. Gonzales*, 258 F. App'x 339, 340 (D.C. Cir. 2007).

2255(f)(3), (h), have been reprinted at Pet. App. 60a-63a.

INTRODUCTION

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague because it "denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557. The Court explained that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 2560. That decision was of great importance. ACCA has been used to extend the prison terms of thousands of people, each of whom is serving at least five additional years as a result and many of whom—like Petitioner—would be free from custody but for its application to their offense.

In the wake of *Johnson*, Petitioner filed an application in the Tenth Circuit requesting authorization to file a successive motion under 28 U.S.C. § 2255, arguing that he is actually innocent of being an armed career criminal because he qualified under ACCA only by application of the residual clause. The Tenth Circuit denied Petitioner's request on the basis that *Johnson* did not announce "'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" Pet. App. 2a-3a (quoting 28 U.S.C. § 2255(h)(2)).

That decision places the Tenth Circuit, along with the Eleventh Circuit, in direct conflict with the First, Seventh and Ninth Circuits, which have recognized—

consistent with the position of the United States—that this Court's case law necessarily dictates the retroactive application of *Johnson* to second or successive motions.

The importance of this split cannot be overstated: Prisoners who are in the same circumstance as Petitioner, but were convicted in the First, Seventh or Ninth Circuits, are being released from custody and sent home to their families. Meanwhile, prisoners—like Petitioner—who were convicted in the Tenth and Eleventh Circuits, have been told that they will remain in prison and be required to carry out sentences that exceeded the statutory maximum for their offense. Absent this Court's intervention, this gross inequity will persist.

Moreover, the split over whether *Johnson* has been made retroactive carries a hard deadline for meaningful resolution. Because of the one-year statute of limitations for filing a successive petition, the split among the circuits must be resolved before June 26, 2016, *i.e.*, one year from the date *Johnson* was decided. It is thus both impractical and unnecessary to wait for every other Circuit to address this issue.

Finally, this Court has no realistic means of resolving the circuit split but for exercising its original habeas jurisdiction. Under 28 U.S.C. § 2244(b)(3)(E), Petitioner and all other prisoners in the Tenth and Eleventh Circuits are prohibited from seeking rehearing of denials of authorization to file successive motions and from proceeding through this Court's ordinary certiorari process. Moreover, the issue presented is unlikely to arrive at this Court in any

posture other than an original petition. The issue will not be resolved through certiorari review of an *initial* § 2255 motion because there is no split among the lower courts with respect to whether *Johnson* applies retroactively to initial motions—they agree that it does. Even assuming the Court would grant certiorari in the absence of a split, it would not have the opportunity to do so because the United States agrees that *Johnson* is retroactive and is thus unlikely to appeal in the first place. This Court's original habeas jurisdiction is, practically speaking, the *only* avenue for resolving the split as to whether *Johnson* has been "made retroactive" to successive motions. 28 U.S.C. § 2255(h)(2). Without resolving that question, thousands of prisoners will needlessly serve longer sentences extended unconstitutionally by ACCA's residual clause.

This Court's immediate intervention is required.

STATEMENT OF THE CASE

I. Petitioner's Conviction, Sentencing, And Initial Motion Under 28 U.S.C. § 2255.

On September 20, 2005, Petitioner was found guilty of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 2a-3a, 28a. The uncontroverted facts at trial showed that Petitioner voluntarily turned over a gun in his possession to authorities who were investigating a bank robbery. Pet. App. 28a. Petitioner had been forced to accept the gun several weeks earlier at

gunpoint, and on threat of harm to his family. Pet. App. 29a-30a.

Petitioner's offense carried a maximum sentence of 10-years' imprisonment. 18 U.S.C. § 924(a)(2). His presentencing investigation report ("PSR") concluded that he was an armed career criminal, however, and thus subject to a mandatory minimum of 15-years' imprisonment, because he had three prior convictions that qualified as a "violent felony": two Oklahoma convictions for robbery with a firearm and one Oklahoma conviction for escape from a penal institution. PSR at 7.[2] Petitioner had no other prior convictions that could qualify as ACCA predicates.

Petitioner sought to challenge whether his conviction for a "walk-away" escape qualified as a predicate under ACCA, but acknowledged the existence of binding Tenth Circuit case law holding that all escape convictions qualify under ACCA's residual clause, regardless of whether violence is involved. Pet. App. 54a & n. 24 (citing *United States v. Moudy*, 132 F.3d 618 (10th Cir. 1998)). The government specifically invoked this Tenth Circuit precedent to argue that "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so." Pet. App. 51a-52a (citing *United States v. Moudy*, 132 F.3d 618, 620 (10th Cir. 1998)).

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[2] For the convenience of the Court, Petitioner has filed a copy of the PSR under seal.

At sentencing, the court departed downwards based on the unique circumstances that gave rise to Petitioner's possession and voluntarily turnover of his firearm. Pet. App. 28a-30a, 46a-47a. However, the Court adopted the PSR's conclusion that Petitioner qualified as an armed career criminal based on his three predicate convictions. Pet. App. 2a, 49a. The court thus sentenced Petitioner to ACCA's mandatory minimum of 15 years. Pet. App. 2a, 56-57a.

On September 10, 2008, Petitioner filed an initial motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Petitioner's motion was denied, Pet. App. 27a, and he was denied a certificate of appealability, Pet. App. 19a-20a.

II. This Court's Decision In *Chambers*, The Tenth Circuit's Holding That "Walk-away" Escape No Longer Qualifies Under The Residual Clause, And Petitioner's Inability To Benefit.

In *Chambers v. United States*, 555 U.S. 122 (2009), this Court held that a petitioner's prior conviction for escape by failing to report to a penal institution could not qualify as a "violent felony" under ACCA's residual clause, under any of the enumerated offenses in § 924(e)(2)(B)(ii), or under the "elements" clause, § 924(e)(2)(B)(i). *Id.* at 128-29. Thereafter, the Tenth Circuit reversed its prior holding that escape necessarily qualifies as a "violent felony" under the residual clause and held that "walkaway" escape under Oklahoma law—the very same conviction upon which Petitioner had been sentenced under ACCA—does not

qualify under the residual clause. *United States v. Shipp*, 589 F.3d 1084, 1090-91 & n.3 (10th Cir. 2009).

However, because *Chambers* was decided after Petitioner had already filed an initial motion under § 2255 and because *Chambers* rested on statutory, not constitutional grounds, Petitioner was and remains unable to benefit from *Chambers* and the Tenth Circuit's new position. Pet. App. 14a-15a; 28 U.S.C. § 2255(h)(2) (allowing successive motions only in the context of "a new rule of *constitutional* law" (emphasis added)).

III. This Court's Decision In *Johnson*.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this 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.

The Court explained that two aspects of the residual clause render it unconstitutionally vague—"grave uncertainty about how to estimate the risk posed by a crime" and "uncertainty about how much risk it takes for a crime to qualify." *Id.* at 2557-58. In demonstrating the residual clause's inherent uncertainty and arbitrariness, the Court revisited its own attempts to apply the clause in *Chambers*, *James v. United States*, 550 U.S. 192 (2007), *Begay v. United States*, 553 U.S. 137 (2008), and *Sykes v. United States*, 131 S. Ct. 2267 (2011), and explained that none of these causes prevented "the residual clause from devolving into guesswork and intuition." *Johnson*, 135 S. Ct. at 2559. The Court observed, for instance, that the

determination of whether failure to report qualified under the residual clause in *Chambers* was based on arbitrary reliance on a statistical report prepared by the Sentencing Commission. *Id.* at 2558-59.

As a result of the residual clause's inherent uncertainty, the Court held that the clause "denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557. According to the Court, "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 2560.

IV. Petitioner's Application For Leave To File A Successive Petition Under 28 U.S.C. § 2244.

On September 15, 2015, Petitioner filed an application for authorization to file a second or successive motion under § 2255 in the Tenth Circuit, in accordance with 28 U.S.C. § 2244(b)(3)(A), on the basis that he is actually innocent of being an armed career criminal under 18 U.S.C. § 924(e). *See* Application for Leave to File Second or Successive Petition, *In re Butler*, No. 15-5087 (10th Cir. Sept. 15, 2015).

On September 23, 2015, the Tenth Circuit denied Petitioner's application. Pet. App. 3a. The court held that *Johnson* is not "a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable." Pet. App. 2a (quoting 28 U.S.C. § 2255(h)(2)). Relying upon its decision in *In re Gieswein*, No. 15-6138, ___ F.3d ___, 2015 WL 5534388, at *5 (10th Cir. Sept. 21, 2015) (per curiam), the Tenth Circuit reasoned that this 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." Pet. App. 2a-3a.

Petitioner is statutorily barred from seeking rehearing of the Tenth Circuit's denial of authorization. 28 U.S.C. § 2244(b)(3)(E). In a separate proceeding, the Tenth Circuit considered and denied a petition to engage in initial *en banc* review of whether *Johnson* has been "made retroactive" to successive petitions. *See* Order, *In re Jackson*, No. 15-8098 (10th Cir. Nov. 2, 2015).

REASONS FOR GRANTING THE WRIT

This case presents an exceptionally rare instance that warrants the exercise of this Court's original habeas jurisdiction.

This Court's Rule 20.4(a) "delineates the standards under which" the Court will grant an original writ of habeas corpus. *Felker v. Turpin*, 518 U.S. 651, 665 (1996). First, "the petitioner must show . . . that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). Second, "the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers." *Id.* (citing 28 U.S.C. § 2242).[3]

[3] This Court's rules also require that the issuance of a writ "be in aid of the Court's appellate jurisdiction." Sup. Ct. R. 20.1. There is no question that Petitioner's request for a writ of habeas corpus

This case satisfies both requirements.

I. Petitioner Cannot Obtain Adequate Relief In Any Other Form Or From Any Other Court.

AEDPA requires that a petitioner seeking to file a successive petition for a writ of habeas corpus first request authorization in the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A); *see also id.* § 2255(h) (incorporating the gatekeeping procedures of § 2244).[4] Under § 2244(b)(3)(E), the denial of such authorization "shall not be the subject of a petition for rehearing or for a writ of certiorari." Thus, there is no way for Petitioner (or the government) to ask the Tenth Circuit to reconsider its order, nor is there any way for this Court to review the Tenth Circuit's order by writ of certiorari.

As this Court has recognized, however, § 2244(b)'s gatekeeping mechanism does not deprive this Court of

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would be in exercise of this Court's appellate jurisdiction. *See Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807) (the Court's statutory authority to issue a writ of habeas corpus is "clearly *appellate*" because it involves "the revision of a decision of an inferior court"); *Ex Parte Hung Hang*, 108 U.S. 552, 553 (1883).

[4] There is uniform agreement that the gatekeeping mechanisms of § 2244(b)(3), including the bar on rehearing and certiorari, apply to successive petitions brought under § 2255(h). *See, e.g.*, *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013); 11th Cir. R. 22-3(b); *Triestman v. United States*, 124 F.3d 361, 366-67 (2d Cir. 1997); *United States v. Wyatt*, 672 F.3d 519, 524 (7th Cir. 2012). To the extent that this Court believes that Petitioner is not precluded from seeking certiorari upon the denial of certification under § 2255(h), Petitioner asks the Court to construe this Petition, in the alternative, as a petition for certiorari.

its authority to entertain original habeas petitions. *Felker*, 518 U.S. at 660-61. The exercise of that authority provides the appropriate—and the only—avenue for resolving the circuit split described below and for correcting the Tenth Circuit's erroneous decision. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 674 (10th ed. 2013). Indeed, as described below, this case presents the exceedingly rare circumstance in which there is no realistic possibility that this issue will arrive at this Court in any other posture (such as through appeal of an initial § 2255 motion), and the Court's habeas jurisdiction is thus the only way that the Court can correct the Tenth Circuit's erroneous decision and resolve the split among the circuits.

II. Exceptional Circumstances Warrant The Exercise Of This Court's Habeas Jurisdiction.

This case presents a rare confluence of circumstances warranting the exercise of this Court's habeas jurisdiction. The courts of appeals are openly split on a question unique to the context of second or successive petitions. That question is of the utmost importance to thousands of prisoners across the country serving sentences that exceed the statutory maximum for their offense, many of whom—like Petitioner—would now be free from custody but for application of this unconstitutionally vague statute. Prisoners in this circumstance who were convicted in the First, Seventh or Ninth Circuits have accordingly been released from custody and sent home to their families, while prisoners who—like Petitioner—had the misfortune of being convicted in the Tenth or Eleventh

Circuits will be forced to carry out their unconstitutionally-imposed sentences. And this issue of immense importance carries a hard deadline for meaningful resolution: June 26, 2016. Finally, this question realistically can be resolved only through the exercise of this Court's original habeas jurisdiction. These exceptional circumstances warrant the exercise of this Court's habeas authority.

A. The Circuits Are Split Regarding Whether *Johnson* Has Been "Made Retroactive" For The Purpose Of Second Or Successive Petitions.

The First, Seventh, and Ninth Circuits have held that prisoners who were sentenced as an armed career criminal under ACCA's residual clause have a prima facie claim that *Johnson* announced "a new rule of constitutional law, made retroactive to cases on collateral review [and] that was previously unavailable." 28 U.S.C. § 2255(h)(2); *see Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015); *Pakala v. United States*, No. 15-1799, 2015 WL 6158150 (1st Cir. Oct. 20, 2015); Order, *United States v. Striet*, No. 15-72506 (9th Cir. Aug. 25, 2015).

In each of *Price, Pakala*, and *Striet*, prisoners sought authorization to file a successive petition following *Johnson*, on the basis that they are actually innocent of being an armed career criminal. In each case, the government agreed, explaining that this Court's decisions in *Teague v. Lane*, 489 U.S. 288 (1989), and *Bousley v. United States*, 523 U.S. 614, 620 (1998), logically dictate the retroactive application of new substantive rules and that, because *Johnson*

announced a substantive rule, this Court's case law dictates the retroactive application of *Johnson*. *See* Joint Motion at 5-9, *Striet v. United States*, No. 15-72506 (9th Cir. Aug. 12, 2015) (ECF No. 1); Response to Application at 7-18, *Price v. United States*, No. 15-2427 (7th Cir. July 14, 2015) (ECF No. 4); Government's Response at 9-18, *Pakala v. United States*, No. 15-1799 (10th Cir. Sept. 1, 2015). The First, Seventh, and Ninth Circuits accordingly held that a prisoner who qualified as an armed career criminal pursuant to the residual clause has stated a prima facie claim for relief under *Johnson*, and the courts granted authorization to file a successive petition in district court.

Upon filing their successive petitions in the district court, Mr. Price and Mr. Striet were promptly released from custody, *see* Order at 2, *Price v. United States*, No. 2:04-cr-81 (N.D. Ind. Aug. 25, 2015); Amended Judgment at 2, *Striet v. United States*, No. 2:03-cr-00097 (W.D. Wash. Aug. 27, 2015), and the merits of Mr. Pakala's immediate release are being briefed on an emergency basis.

In conflict with the Seventh and Ninth Circuits (and the position of the United States), the Tenth and Eleventh Circuits have denied prisoners authorization to file successive petitions under *Johnson*. Pet. App. 2a-3a; *Gieswein*, 2015 WL 5534388 at *3-4; *In re Rivero*, 797 F.3d 986 (11th Cir. 2015).

In *Rivero*, the Eleventh Circuit held in a 2-1 decision that although *Johnson* announced a new rule of constitutional law that was previously unavailable, the rule has not been "made retroactive" by this Court's case law. 797 F.3d at 991-92. The Eleventh

Circuit majority reasoned that the rule of *Johnson*, although substantive in nature, nonetheless does not fall within the category of rules that apply retroactively under *Teague*. *Id.* at 989-90. In dissent, Judge Jill Pryor argued that *Teague* and *Bousley* logically dictate the retroactive application of all substantive rules and thus the "inquiry should end there." *Id.* at 995. She noted that the circuit was parting ways not only with the Seventh Circuit but also with the United States, which "does not contest *Johnson*'s retroactivity." *Id.* at 993, 999.[5]

The Tenth Circuit, though reaching the same result, has expressly disavowed the Eleventh Circuit's reasoning. According to the Tenth Circuit's reasoning, adopted and applied in this case, both the Seventh and Eleventh Circuits erred by "appl[ying] 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" and instead should have "simply rel[ied] on Supreme Court holdings on retroactivity." *Gieswein*, 2015 WL 5534388 at *5 (alteration in original); Pet. App. 2a-3a. Because "[t]he Supreme Court has not held that the rule announced in *Johnson* is of a particular type that the Court previously held applies retroactively," the rule was not made

[5] Although the Eleventh Circuit's holding in *Rivero* arose in the context of the career offender guidelines, the Eleventh Circuit has relied upon *Rivero* to deny numerous applications for authorization based on ACCA. *See, e.g.*, Order, *In re Sharp*, No. 15-13795 (11th Cir. Sept. 14, 2015).

retroactive to successive motions. *Gieswein*, 2015 WL 5534388, at *3; Pet. App. at 2a-3a.

Notwithstanding the Tenth and Eleventh Circuits' decisions, the government has continued to acknowledge that *Johnson* has been "made retroactive" by this Court. *See, e.g.*, Brief of the United States at 2, *In re Rivero*, No. 15-13089 (11th Cir. Sept. 28, 2015); Response of the United States, *In re Boyett*, No. 15-5824 (6th Cir. Sept. 2, 2015) (ECF No. 4).[6]

This rare circumstance—a split among the circuits that is specific to successive petitions, which by statute may not be appealed to this Court in any way other than an original petition—is precisely the sort of extraordinary circumstance in which this Court should exercise its habeas jurisdiction.

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[6] The government's concession that *Johnson* has been "made retroactive" to successive petitions within the meaning of § 2255(h) makes the exercise of habeas jurisdiction even more compelling than in *In re Smith*, 526 U.S. 1157 (1999), in which three Justices of this Court voted to allow full briefing. The issue presented in *Smith* concerned whether this Court's rule in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), had been "made retroactive" to successive petitions. There, although the government expressed support for the exercise of this Court's habeas jurisdiction in the context of such splits, it observed that *Cage* had not been made retroactive—in other words, there was no error to correct. *See* Amicus Br. of the United States 7, *In re Smith*, No. 98-5804 (U.S. May 6, 1999); *see also Tyler v. Cain*, 533 U.S. 656, 664-65 (2001) (holding that *Cage* was not "made retroactive"). Here, however, the government has consistently agreed that *Johnson* has been "made retroactive" to successive petitions, even following the Tenth and Eleventh Circuits' decisions to the contrary. Moreover, as explained below, the Tenth and Eleventh Circuits are plainly wrong. *See infra* Part II.B.

B. The Tenth And Eleventh Circuits Are Clearly Wrong.

Contrary to the decision of the Tenth Circuit in this case, *Johnson* is "[1] a new rule [2] of constitutional law, [3] made retroactive to cases on collateral review by the Supreme Court, [4] that was previously unavailable." 28 U.S.C. § 2255(h)(2).[7]

First, *Johnson* undoubtedly announced "a new rule." As this Court has explained, a rule is "new" if it 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) (quoting *Teague*, 489 U.S. at 301)). The rule announced in *Johnson* was not dictated by precedent—much to the contrary, this Court's prior case law had dictated the opposite result. *See Johnson*, 135 S. Ct. at 2563 ("Our contrary holdings in *James* and *Sykes* are overruled.").

Second, *Johnson* plainly announced a rule "of constitutional law." *See Johnson*, 135 S. Ct. at 2563 (holding that "imposing an increased sentence under

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[7] This Court may not even be bound by the restrictions in 28 U.S.C. §§ 2244(b)(1),(2) or 2255(h)(1),(2) when exercising its habeas jurisdiction. *Felker*, 518 U.S. at 663 (leaving the question open and stating that the restrictions "certainly inform our consideration of original habeas petitions"). To the extent that the Court is not bound by the additional restrictions that apply to successive petitions, Petitioner would be entitled to relief for the same reason that all lower courts have held that *Johnson* and all of this Court's other ACCA decisions are retroactive in the context of initial petitions. *See, e.g.*, *Rivero*, 797 F.3d at 991 ("If Rivero . . . were seeking a first collateral review of his sentence, the new substantive rule from Johnson would apply retroactively.").

the residual clause of the [ACCA] violates the Constitution's guarantee of due process.").

Third, the facts of this case easily demonstrate that *Johnson* was "previously unavailable" to Petitioner. At the time that Petitioner's conviction became final, this Court had expressly upheld ACCA's residual clause over protests that it was unconstitutionally vague. *See James*, 550 U.S. at 210 & n.6 ("we are not persuaded . . . that the residual provision is unconstitutionally vague"). Moreover, it was settled law in the Tenth Circuit that Petitioner's escape conviction qualified under the residual clause. Pet. App. 54a & n. 24 (citing *United States v. Moudy*, 132 F.3d 618 (10th Cir. 1998)).[8]

Fourth, *Johnson* is "made retroactive to cases on collateral review." A new rule is made retroactive not only through an express pronouncement of retroactivity, but also "through multiple holdings that logically dictate the retroactivity of the new rule." *Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring). This Court's decisions in *Teague* and *Bousley* logically dictate the retroactivity of *Johnson*.

In *Teague*, this Court held that new constitutional rules are retroactively applicable to cases on collateral review if they fall within one of two exceptions. First,

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[8] Unsurprisingly, even the Tenth and Eleventh Circuits found it uncontroversial that *Johnson* satisfies these three prongs of § 2255(h)(2). *See Gieswein*, 2015 WL 5534388 at *2 ("we hold that *Johnson* announced a new rule of constitutional law"); *Rivero*, 797 F.3d at 989 (agreeing "that *Johnson* announced a new substantive rule of constitutional law").

rules that are substantive in nature—such as those that "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"—apply retroactively. 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)); *Beard v. Banks*, 542 U.S. 406, 411 n.3 (2004) ("Rules that fall within what we have referred to as *Teague*'s first exception 'are more accurately characterized as substantive rules not subject to [*Teague*]'s bar'"). Second, rules that are procedural in nature apply retroactively if they are a "watershed rule[]" of criminal procedure. *Teague*, 489 U.S. at 311.

In *Bousley*, the Court further expanded upon the first exception, providing for the retroactive application of substantive rules. There, the Court explained that "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct," including the example given in *Teague* of "decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,'" always apply retroactively. 523 U.S. at 620 (quoting *Teague*, 389 U.S. at 311); *see also id.* (recognizing that *Teague*'s general bar on retroactivity "by its terms applies only to procedural rules").

The Court reiterated this exception in *Schriro v. Summerlin*, 542 U.S. 348 (2004), which recognized that retroactive effect must be given to "[n]ew substantive rules . . . includ[ing] decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the

State's power to punish." *Id.* at 351-52 (internal citations omitted). "Such rules apply retroactively," this Court explained, "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." *Id.* (quoting *Bousley*, 523 U.S. at 620).

Under *Bousley* and *Summerlin*, the rule of *Johnson* is plainly substantive and thus applies retroactively. By striking down ACCA's residual clause, the Court held that "a substantive federal criminal statute does not reach certain conduct." *Bousley*, 523 U.S. at 620. As the United States has recognized, *Johnson* "does not simply alter sentencing procedures; it specifically forbids substantive application of a statute." Joint Motion at 8, *Striet v. United States*, No. 15-72506 (9th Cir. Aug. 12, 2015); Response to Application at 10, *Price v. United States*, No. 15-2427 (July 14, 2015) (ECF No. 4). After *Johnson*, ACCA does not reach defendants who were convicted of certain prior offenses—including Petitioner's escape conviction. "As such, [*Johnson*] constitutionally narrows the class of offenders covered by ACCA and places certain offenders beyond the government's power to punish under the statute." Joint Motion at 8, *Striet v. United States*, No. 15-72506 (9th Cir. Aug. 12, 2015).[9]

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[9] For the same reasons, *Johnson* did not announce a procedural rule. Procedural rules "regulate only the *manner of determining* the defendant's culpability" and thus "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352-53. Such rules are thus too "speculative" to warrant

As described above, the Tenth Circuit concluded that *Johnson* has not been "made retroactive" to successive petitions because "[this Court] has not held that the rule announced in *Johnson* is of a particular type that the Court previously held applies retroactively." *Gieswein*, 2015 WL 5534388, at *3. That reasoning is plainly wrong. In *Bousley*, this Court held that a decision "holding that a substantive federal criminal statute does not reach certain conduct" is to be retroactively applied. 523 U.S. at 620. And in *Johnson*, this Court held that ACCA, a substantive criminal statute, does not reach certain conduct—namely, that "[i]ncreasing a defendant's sentence under the [residual] clause denies due process of law." 135 S. Ct. at 2557. The rule of *Johnson* is thus of a type that the Supreme Court has held to apply retroactively.

The Eleventh Circuit's reasoning in *Rivero* is similarly unavailing. There, the court "agree[d] that *Johnson* announced a new substantive rule of constitutional law." *Rivero*, 797 F.3d at 989. It reasoned, however, that *Johnson* is not retroactive because the Court in *Teague* described its first exception as applying to decisions that "place[] certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe." *Id.* at 988, 990 (quoting *Teague*, 489 U.S. at 311). According to the majority, this exception did not apply because "*Johnson* did not hold that Congress *could not*

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retroactive application. *Id.* at 352. Here, there is nothing speculative about whether a person whose prior convictions qualified only under the residual clause would be innocent of being an armed career criminal under *Johnson*.

impose a punishment for that same prior conviction in a statute with less vague language. Indeed, the day after the Supreme Court decided *Johnson*, Congress could have amended the residual clause" to constitutionally provide a greater sentence for a defendant with the same prior convictions as Petitioner. *Id.* at 989-90.

That theory is erroneous for several reasons. First, the Eleventh Circuit artificially narrows *Teague*'s first exception to apply only to rules that place certain conduct "beyond the power of criminal law-making authority to proscribe." That cannot be reconciled with *Bousley* or *Summerlin*, each of which explained that the first exception *also* includes rules which "hold[] that a substantive federal criminal statute does not reach certain conduct," *Bousley*, 523 U.S. at 620, or that "narrow the scope of a criminal statute by interpreting its terms," *Summerlin*, 542 U.S. at 351-52. As explained above, *Johnson* held that "a substantive federal criminal statute does not reach certain conduct."

Second, the rule of *Johnson also* had the effect of "plac[ing] certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311 (quotation marks omitted). In particular, *Johnson* places beyond the power of criminal law-making authority the ability to impose a 15-year mandatory minimum sentence under ACCA's residual clause. The Eleventh Circuit's reasoning that *Johnson* is not retroactive because "Congress could have amended the residual clause" finds no support in this Court's prior cases and, as the dissenting judge in *Rivero* observed,

directly contradicts *Bousley*. *See Rivero*, 797 F.3d at 999 (Pryor, J., dissenting) (explaining that subsequent amendment was equally possible, and in fact materialized after *Bousley*, but that it had "no bearing whatsoever on the Supreme Court's decision").

This Court's decision in *Johnson* plainly applies retroactively to successive petitions, and the Tenth and Eleventh Circuits are thus wrongly denying authorization to file successive petitions.

C. This Issue Is Of Exceptional Importance To Thousands Of Prisoners, Whose Ability To Seek Relief Will Become Time-Barred By The End Of This Term.

There are many thousands of prisoners across the country who were sentenced under ACCA.[10] In fiscal year 2014 alone, approximately 550 firearm offenders were sentenced under ACCA.[11] Many of these prisoners likely had at least one predicate conviction

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[10] *See* U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 293 (2011), http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system (finding 2.9% of federal prisoners qualified as armed career criminals under ACCA); Federal Bureau of Prisons, Statistics, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Oct. 4, 2015) (reporting a total of 205,795 federal inmates).

[11] U.S. Sentencing Commission, Quick Facts http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY14.pdf (last visited Oct. 4, 2015).

which qualified under ACCA's residual clause—particularly in light of the "wide-ranging inquiry required by the residual clause" which caused this Court to find it unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557.[12]

Furthermore, "[l]et us not forget that [Petitioner] and other persons sentenced under the residual clause . . . are serving lengthy sentences." *Rivero*, 797 F.3d at 1002 (Pryor, J., dissenting). Each prisoner who was sentenced based on a predicate that qualified under the residual clause is serving *at least* five additional years in prison—and in many cases more—for violating a provision that, according to this Court, "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. And many of those prisoners—like Petitioner—would today be free from custody but for application of that unconstitutionally vague statute.[13]

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[12] These figures do not include the thousands more who were sentenced under the parallel language of the career offender guideline, U.S.S.G. § 4B1.2(a)(2). Although a decision on Petitioner's writ would not necessarily govern in the context of the guidelines, it would likely be relevant to any future amendment by the U.S. Sentencing Commission. *See United States v. Rollins*, 800 F.3d 859, 865 (7th Cir. 2015) (recognizing that the sentencing guidelines may not be susceptible to vagueness challenges, but that the Sentencing Commission has proposed amendments in light of *Johnson*).

[13] In addition to having to serve sentences imposed as a result of a statutory provision that denied them fair notice, prisoners sentenced pursuant to ACCA are generally ineligible for sentence reductions to which they would otherwise be entitled. *See, e.g.*, U.S. Sentencing Commission, *Frequently Asked Questions:*

Petitioner's circumstances are exemplary of the arbitrariness and lack of notice that led this Court to strike down the residual clause. He was sentenced to an additional five years in jail only because at the time of his conviction, the Tenth Circuit had interpreted the shapeless provision to include all convictions for escape, including for simple failure to report. This Court then overruled that approach, "rel[ying] principally on a statistical report prepared by the Sentencing Commission to conclude that an offender who fails to report to prison is not 'significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a "serious potential risk of physical injury."'" *Johnson*, 135 S. Ct. at 2558-59 (quoting *Chambers*, 555 U.S. at 128-29). Yet because of the uncertainty and arbitrariness that led to the Tenth Circuit's initial position, Petitioner remains in prison beyond the statutory maximum sentence for his offense.

Prisoners like Petitioner have only until June 26, 2016, to file their applications for relief (one year from this Court's decision in *Johnson*). *See Dodd v. United States*, 545 U.S. 353, 357 (2005) (holding that the one-year statute of limitations for § 2255 motions premised on a new rule begins to run on the date on which the right asserted was initially recognized); 28 U.S.C. § 2255(f)(3) (statute of limitations begins on "the date on

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Retroactive Application of the 2014 Drug Guidelines Amendment 1-2, http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ.pdf (last visited Oct. 4, 2015).

which the right asserted was initially recognized by the Supreme Court").

And, in the meantime, prisoners in the Tenth and Eleventh Circuits face great uncertainty as to how to best preserve their rights: Do they file requests for authorization to file a successive motion from the court of appeals, with full knowledge that they will be denied and that they will be precluded from seeking rehearing even if this Court later rules in their favor? Or do they hold off from asserting their right under *Johnson*, at the risk that they are viewed as having failed to preserve their rights within the limitations period? Many of these prisoners lack counsel to advise them about this challenge, and absent clarity from this Court they will almost certainly lose the ability to reduce their sentences. Unless this Court acts immediately to intervene and correct the Tenth and Eleventh Circuits' erroneous decisions, the prisoners' choice will not matter: the effect of this Court's decision in *Johnson* will be substantially blunted and these prisoners will remain in prison based on a "shapeless provision . . . [that] does not comport with the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2560.

Given the deadline and given the serious consequences of waiting any longer, it is incumbent upon this Court to intervene now.

D. An Original Habeas Petition Is The Only Way To Resolve The Circuit Split On Whether *Johnson* Is Retroactive.

There is virtually no possibility that this Court will have the opportunity to resolve the circuit split on

Johnson's retroactivity in any other posture other than an original petition.

As discussed above, the Court will not be able to review the decisions of the Tenth or Eleventh Circuits through the ordinary certiorari process because the denial of authorization to file a second or successive motion may not be the subject of a petition for certiorari. 18 U.S.C. § 2244(b)(3)(E).[14]

In theory, the Court could resolve the question of *Johnson*'s retroactive effect in the context of an initial petition, which is filed in the district court, appealed, and then proceeds through the certiorari process. If that were a possibility, the Court's holding that *Johnson* is or is not retroactive with respect to that initial motion would likely also resolve whether *Johnson* has been "made retroactive" for the purposes of successive petitions within the meaning of § 2255(h)(2).

That is not an option here. There is no dispute among the lower courts that *Johnson* applies retroactively in the context of an *initial* § 2255 motion. As the Tenth and Eleventh Circuits have expressly acknowledged, there is little doubt that if a prisoner "were seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively." *Rivero*, 797 F.3d at 991; *Gieswien*, 2015

[14] Lower courts have even concluded that § 2244(b)(3)(E) divests them of jurisdiction to certify this question to this Court pursuant to this Court's Rule 19.1 or to issue any interlocutory order that would permit review of the issue by certiorari. *See* Order at 2 n.1, *In re Hammons*, No. 15-13606 (11th Cir. Aug. 31, 2015).

WL 5534388, at *3 (limiting its holding to the context of successive petitions, where the "inquiry is statutorily limited to whether the Supreme Court *has made* the new rule retroactive to cases on collateral review" (emphasis in original)). Nor would it be reasonable to expect any split to emerge—the lower courts to consider the issue have been unanimous in concluding that this Court's prior ACCA decisions apply retroactively in the context of initial motions and there is no reason to believe that they would conclude otherwise in the context of *Johnson*.[15]

The unanimity with respect to initial petitions makes it very unlikely that this Court could resolve the present split without exercising its habeas jurisdiction. As an initial matter, it is unlikely that the Court would grant certiorari in the context of initial petition where the lower courts are unanimous, given its ordinary practice of granting certiorari only where there is a conflict among the circuits. *See* Sup. Ct. R. 10(a); *see also Vial*, 115 F.3d at 1196 n.8 ("[I]t seems unlikely that the Supreme Court would grant certiorari to declare the applicability of a rule announced on direct review to collateral proceedings when . . . lower federal courts uniformly rule in favor of collateral availability."); Amicus Br. of the United States 9, *In re Smith*, No. 98-5804 (U.S. May 6, 1999) (observing the same).

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[15] *See, e.g.*, *United States v. Doe*, No. 13-4274, 2015 WL 5131208, at *15 & n.12 (3d Cir. Sept. 2, 2015); *Jones v. United States*, 689 F.3d 621, 624-26 (6th Cir. 2012); *Welch v. United States*, 604 F.3d 408, 415 (7th Cir. 2010); *Lindsey v. United States*, 615 F.3d 998, 1000 (8th Cir. 2010); *Shipp*, 589 F.3d at 1091; *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1276 (11th Cir. 2013)

Moreover, even if the Court wanted to grant certiorari in the context of an initial motion in the absence of a split, it will not get the opportunity. The United States agrees that *Johnson* applies retroactively to initial motions, and thus the government would never contest a district court's retroactive application of *Johnson* to an initial § 2255 motion, let alone appeal to the circuit court and then seek certiorari on the issue.

Failure to exercise this Court's habeas petition in these circumstances would lead to an "anomalous result." Amicus Br. of the United States 9-10, *In re Smith*, No. 98-5804 (U.S. May 6, 1999). In particular, if the retroactivity of *Johnson* were more debatable, such that there was some disagreement among the lower courts with respect to initial petitions, this Court would plausibly grant certiorari and, upon holding that *Johnson* is retroactive, the rule would be "made" retroactive for the purposes of successive petitions. If this Court does not exercise its habeas authority where there is no such disagreement, "[t]he net result is that a claim whose retroactive application is uniformly accepted by the courts of appeals would remain unavailable on a second or successive federal habeas petition, while other claims, with a more controversial basis for retroactive application, could possibly become available on second or successive federal habeas petitions." *Id.* at 10.

"[T]here is no reason to believe that Congress intended to create such an unusual system of collateral review." *Id.* at 11. Thus, the exercise of habeas jurisdiction in this unique instance, "far from

interfering with the accomplishment of Congress's objectives in the AEDPA, would assist in effectuating in a sensible fashion the system of collateral review Congress created." *Id.* at 11-12.

Accordingly, an original petition is the best and only procedural posture by which the Court may decide whether the thousands of prisoners who may be serving unconstitutional sentences under ACCA are entitled to be resentenced. The exercise of this Court's habeas jurisdiction is eminently justified in this rare circumstance.

E. This Case Presents The Ideal Vehicle To Resolve The Circuit Split.

This case presents the unique circumstance in which *this Court* has recognized that Petitioner's predicate conviction for escape could not have qualified under any of ACCA's surviving provisions. In *Chambers*, this Court expressly recognized that a conviction for escape does not qualify under the "elements" clause of ACCA because it does not categorically "have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'" 555 U.S. at 127-28 (quoting 28 U.S.C. § 924(e)(2)(B)(i)). It also recognized that escape is not one of ACCA's enumerated offenses. *Id.* at 128. It is thus clear from this Court's own precedent that the retroactive application of *Johnson* would be dispositive to this case, a circumstance that does not always exist in cases presenting this issue. *E.g.*, *Gieswein*, 2015 WL 5534388, at *2 n.2 (raising the possibility that retroactive application of *Johnson* would not be dispositive because that particular

petitioner's convictions qualify under other provisions of ACCA); *United States v. Hill*, 799 F.3d 1318, 1322-23 (11th Cir. 2015) (rejecting petitioner's argument under *Johnson* because his predicate conviction also qualified under elements clause).

This case also presents a strong vehicle because—unlike the vast majority of ACCA cases—Petitioner was convicted under § 922(g)(1) by jury, as opposed to a plea agreement. The case thus avoids any threshold issue of whether Petitioner waived his right to collaterally attack his conviction pursuant to a plea agreement.

For the foregoing reasons, the Court should grant this petition, correct the Tenth Circuit's erroneous decision, and authorize Petitioner to file his successive motion under § 2255. In the alternative, the Court should immediately order further briefing and/or schedule argument to allow prompt resolution of this fundamental issue that affects many thousands of prisoners.[16]

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[16] Upon correcting the Tenth Circuit's erroneous decision, the Court would have authority to transfer this case to the district court pursuant to 28 U.S.C. §§ 1651(a) and 2241(b). *See Felker*, 518 U.S. at 666 (Stevens, J., concurring) (observing that AEDPA did not purport to limit the Court's jurisdiction under § 1651(a)); *In re Davis*, 130 S. Ct. 1 (2009) (transferring petition to district court); *Ex Parte Hayes*, 414 U.S. 1327 (1973) (same). Or, in the alternative, the Court may order the Tenth Circuit to authorize Petitioner's application to file a successive petition pursuant to 28 U.S.C. § 1651(a).

III. If *Johnson* Has Not Already Been "Made Retroactive," This Court Should Make It So Now.

Even if this Court has not previously made *Johnson* retroactive, within the meaning of § 2255(h)(2), the Court should exercise habeas jurisdiction now and make it retroactive. *See* Amicus Br. of the United States 8, *In re Smith*, No. 98-5804 (U.S. May 6, 1999) ("[T]he purpose of requiring this Court to determine the retroactivity of a new rule before it may be invoked in a successive habeas petition is satisfied if the Court makes that determination in the consideration of an original habeas petition itself.").

Doing so would be an appropriate exercise of this Court's habeas jurisdiction for the same reasons as above: This case presents an issue of fundamental importance to prisoners across the country, upon which the circuits are split—allowing some prisoners to be resentenced immediately, while others continue to serve sentences that were unconstitutional in the first place. Moreover, assuming that this Court has not already made *Johnson* retroactive, Petitioner cannot obtain adequate relief "in any other form or from any other court." Sup. Ct. Rule 20.4(a). Indeed, as described above, given the unanimity of the lower courts with respect to initial petitions and agreement of the United States that *Johnson* is retroactive, this Court's habeas jurisdiction is the *only* avenue through which this Court could make *Johnson* retroactive for the purposes of successive petitions.

CONCLUSION

The petition for a writ of habeas corpus should be granted.

Respectfully submitted,

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