NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

CHARLES JONES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The "Three Strikes" statute, 18 U.S.C. §3559(c) is one of the most severe recidivist enhancements under the law; it imposes mandatory life sentences. It contains a catch-all residual clause that is virtually identical to other statutory residual clauses previously found to be vague and unconstitutional. This Court first struck down the residual clause in the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA"), in its seminal case *Johnson v. United States,* 576 U.S. 591 (2015). Further progeny struck down similar residual clauses in *Sessions v. Dimaya*, 138 U.S. 1204 (2018) (recidivist statute, 18 U.S.C. §16(b)) and *United States v. Davis*, 139 S.Ct. 2319 (2019) (substantive crime, 18 U.S.C. §924(c)). Because this trilogy narrowed criminal statutes by striking down vague residual clauses, *Johnson* and its progeny were retroactively applicable, enabling defendants to seek relief through post-conviction proceedings, including second or successive motions to vacate sentence. *Welch v. United States*, 578 U.S. 120 (2016).

In light of the above, the question presented for review is:

> Whether a constitutional challenge to 18 U.S.C. §3559(c)'s residual clause predicated on *Johnson v. United States,* 576 U.S. 591 (2015), is cognizable in a second or successive motion to vacate sentence under 28 U.S.C. §2255(h)(2).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States v. Charles Jones, D.Ct. 02-cr-20875-Cr-Moore (S.D. Fla. 2002) (underlying criminal case).

In re Charles Jones, App. No. 16-12940 (11th Cir. 2016) (Pre-filing SOS §2255 authorization)

Charles Jones v. United States, D.Ct. No. 16-22268-cv-Moore (S.D. Fla. 2020) (instant SOS §2255 motion).

Charles Jones v. United States, App. No. 18-10027 (11th Cir. 2018) (*Jones I).*

Charles Jones v. United States, App. No. 20-13365 (11th Cir. 2020) (*Jones II).*

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Appendix B: Unpublished Legal Authorities and Court Orders From Other Jurisdictions Not Found in Standard Reporters[1]

[1] These authorities are not found in standard reporters and are included for the convenience of the court. Throughout this petition, "CR-DE" refers to the electronic criminal docket entry of the relevant United States District Court; "CV-DE" refers to the electronic civil docket entry of the relevant United States District Court; and "App-DE" refers to the electronic docket entry for the relevant United States Court of Appeals.

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

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PETITION FOR WRIT OF CERTIORARI

Charles Jones respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 20-13365 in that court on September 14, 2023, and the denial of rehearing dated December 8, 2023, which affirmed the decision of the United States District Court for the Southern District of Florida denying Petitioner's second or successive motion to vacate, set aside, or correct sentence under 28 U.S.C. §2255.

OPINION BELOW

A copy of the denial of rehearing *en banc* of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (A-1). A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the Order on Report and Recommendation of the United States District Court for the Southern District of Florida, and ordered dismissal of petitioner's successive §2255 motion is contained in the Appendix (A-2). The Order on Report and Recommendation of the United States District Court for the Southern District of Florida denying petitioner's successive §2255 motion and granting a certificate of appealability is contained in the Appendix (A-3). A copy of the Corrected Report and Recommendation of the Magistrate Judge of the United States District Court for the Southern District of Florida recommending denial of petitioner's successive §2255 motion is contained in the Appendix (A-4).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on September 14, 2023. The petition for rehearing *en banc* was denied on December 8, 2023. This Court granted a 30-day extension within which petitioner was permitted to file this petition. The petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because the court of appeals granted Petitioner leave to file a second or successive 28 U.S.C. §2255 motion.

The court of appeals had jurisdiction to consider Petitioner's appeal pursuant to 28 U.S.C. §§ 1291, 2253, and 2255, but ultimately dismissed the appeal for lack of jurisdiction because it concluded that Petitioner had not met the requirements for a second or successive §2255 motion in 28 U.S.C. §2255(h)(2).

CONSTITUTIONAL AND **STATUTORY PROVISIONS INVOLVED**

Petitioner intends to rely on the following constitutional and statutory provisions:

Amendment V

> No person shall be . . . . deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. §16(b)

> The term "crime of violence" means—
>
> * * *
>
> **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(c)(3)(B)

> **(3)** For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> * * *
>
> **(B)** that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(e)(2)(B)(ii)

(2) As used in this subsection—

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, . . . that—

* * *

(ii) . . . otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C. §3559(c)(1), (2)(F)(ii)

(c) Imprisonment of certain violent felons.—

(1) Mandatory life imprisonment.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies;

(2) Definitions.—For purposes of this subsection—

* * *

(F) the term "serious violent felony" means—

***** ***** *****

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that . . . . by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

28 U.S.C. §2244

(b) (3)
(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. §2255(h)(2)

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

* * *

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

INTRODUCTION

The "Three Strikes" law, 18 U.S.C. §3559(c), is a harsh recidivist enhancement that imposes mandatory life sentences on defendants who are convicted of at least one "serious violent felony" in federal court and two previous "serious violent felon[ies]" from either federal or state court. The statute is flawed, however, because its definition of "serious violent felony," incorporates a catch-all residual clause that this Court has found in other statutes to be unconstitutionally vague, fostering, "more unpredictability and arbitrariness than the Due Process Clause [can] tolerate[]." *Johnson v. United States,* 576 U.S. 591, 598 (2015).

In a series of cases beginning with *Johnson,* 576 U.S. 591, this Court announced a new rule of constitutional law declaring such catch-all residual clause statues to be vague and unconstitutional. This court also declared the rule to be retroactively applicable. In two subsequent cases, *Sessions v. Dimaya*, 138 U.S. 1204 (2018) and *United States v. Davis*, 139 S. Ct. 2319 (2019), the court applied the rule further, to strike down two other similar residual clause statutes. Thus after issuing the third case in the *Johnson* trilogy, it was established that the *Johnson* vagueness rule applied generally to similar residual clause statues across the criminal code.

At that time, courts across the country and the Department of Justice (DOJ) found it uncontroversial that the *Johnson* vagueness rule applied to invalidate §3559(c)'s residual clause. In fact, the issue was so clear, that DOJ submitted a

letter to Congress informing it of §3559(c)'s unconstitutionality and the fact that DOJ would no longer prosecute such §3559(c) residual clause enhancements. Accordingly, the courts and the government worked together to vacate mandatory life sentences that were based on §3559(c)'s residual clause in direct and collateral proceedings.

In Mr. Jones case, however, the Eleventh Circuit broke from this consensus and issued an anomalous decision stating that the constitutional issue of whether *Johnson* applied to §3559(c) had not yet been decided by this Court. Based on that erroneous conclusion, the Eleventh Circuit found that this Court had not yet issued a "new rule" of constitutional law that would provide jurisdiction for SOS §2255 motions challenging §3559(c)'s residual clause based on *Johnson*.

The Eleventh Circuit got to this result by vitiating the *Johnson* trilogy and by disregarding this Court's established habeas precedents that set out when "new rules" were created versus when applications of rules were dictated by precedent. Moreover, in breaking from the consensus, the Court effectively prevented further review of the underlying constitutional issue concerning *Johnson's* application to §3559(c), thus creating indelible disparities in the law. Due to the strong consensus joined in by the government, all pending cases were resolved and no new cases were initiated, leaving Mr. Jones' case as the only vehicle capable of reaching this Court. If the Court does not grant the writ of certiorari in this case, the question left open by the Eleventh Circuit regarding the constitutional viability of §3559(c)'s residual

clause will never be heard.

Mr. Jones' case, moreover, is uniquely qualified as an ideal vehicle for this Court. In the Eleventh Circuit's attempt to dispose of the case through other means, Mr. Jones' case was remanded to the very judge who imposed the §3559(c) mandatory life sentence. That judge was tasked with determining whether the sentence was based solely on §3559(c)'s residual clause or whether some alternative §3559(c) clause was at issue. The judge made an explicit finding in a written order stating that the sentence was based *solely* on §3559(c)'s residual clause. *Jones,* D.Ct. No. 16-CV-22268 (August 25, 2020) (CV-DE 60) (Appendix A-3). Thus, the only remaining issue was, "whether §3559(c)'s residual clause [was] unconstitutional in light of *Johnson*." *Id.* Mr. Jones' case is also free from procedural barriers. The government below -- in line with DOJ's national policy -- waived all procedural defenses, and instead continually argued for Mr. Jones' unconstitutional mandatory life sentence to be vacated.

This Court should grant the petition for writ of certiorari so it can address the underlying constitutional issue that is squarely presented and bring stability back to the law that the Eleventh Circuit's decision seeks to unravel. Alternatively, because the erroneous ruling attempts to "disregard a lesson so hard learned," and uphold the "lunatic practice" that this Court and the overwhelming legal consensus has "abandoned," this Court should grant summary reversal. *Dimaya,* 138 S.Ct. at 1223.

STATEMENT OF THE CASE

On April 24, 2003, a district court in the Southern District of Florida sentenced petitioner to a mandatory life sentence under the residual clause of the Three Strikes law, 18 U.S.C. 3559(c) based on a conviction for armed bank robbery pursuant to 18 U.S.C. §2113(a), (d); a concurrent sentence of 360 months under the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA"); and a consecutive sentence of 120 months pursuant to 18 U.S.C. §924(c)(1). *United States v. Jones*, D.Ct.No. 02-CR-20875 (2002). The alleged predicate necessary for the mandatory life sentence under §3559(c)'s residual clause was Florida burglary with assault or battery, Fla. Stat. §810.02(a). *Jones v. United States,* D.Ct.No. 16-CV-22268 (Appendix A-3).

Mr. Jones' guideline range was 360 months-life, plus a 10-year consecutive sentence. Due to the §3559(c) enhancement, however, he was sentenced to mandatory life plus 10 years consecutive. *United States v. Jones*, D.Ct.No. 02-CR-20875. Mr. Jones exhausted his direct appeal and post-conviction remedies.

On June 26, 2015, this Court declared a new rule of constitutional law in *Johnson v. United States*, 576 U.S. 591 (2015), when it found that ACCA's residual clause was unconstitutionally vague. The Court found it had two statutory flaws: (1) the text required a categorical approach which required courts to determine the theoretical "ordinary case" of a predicate offense; and (2) the text contained an imprecise "serious potential risk" standard. *Johnson,* 576 U.S. at 604-05. These two speculative statutory requirements combined to make ACCA's residual clause

void. Thereafter, this Court issued *Welch v. United States*, 578 U.S. 120 (2016) which recognized that *Johnson* narrowed the ACCA statute, and thus, was retroactively applicable on collateral review.

Within one year of *Johnson*, Mr. Jones sought authorization from the Eleventh Circuit to file a second-or-successive (SOS) §2255 motion pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §2255(h)(2). *In re Jones*, 11th Cir. No. 16-12940 (11th Cir. 2016). Mr. Jones challenged the constitutionality of §3559(c)'s residual clause in light of *Johnson,* arguing pursuant to §2255(h)(2) that *Johnson* was "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id*. The Eleventh Circuit held that Mr. Jones met the gatekeeping requirements for SOS §2255 motions found in 28 U.S.C. §2244, by making a *prima facie* showing to a three-judge panel that his motion predicated on *Johnson* contained §2255(h)(2)'s requisite retroactive new rule. As a result, the court of appeals granted him leave to file an SOS §2255 motion raising his *Johnson* challenge to §3559(c)'s residual clause.

After receiving the initial SOS authorization by the Court of Appeals, Jones was permitted to file his §2255 motion, but as part of that motion, he was required under 28 U.S.C. §2244(b)(4) to make a secondary showing to the district court concerning the new retroactive rule. After full briefing, the district court denied Mr.

Jones' §2255 motion, finding that *Johnson* did not apply to §3559(c). *Jones,* D.Ct. No. 16-CV-22268. The court, however, granted a certificate of appealability. *Id.*

Mr. Jones appealed. *Jones v. United States*, App. No. 18-10027 (11th Cir. 2018). (referenced as "*Jones I*"). While his appeal was pending, this Court issued *Sessions v. Dimaya*, 138 U.S. 1204 (2018) which applied *Johnson* to invalidate the residual clause of 18 U.S.C. §16(b) and *United States v. Davis*, 139 S.Ct. 2319 (2019) which applied *Johnson* to invalidate the residual clause of 18 U.S.C. §924(c). Both of these cases emphasized that *Johnson* error could be found on the face of residual clause statutes. *Dimaya*, 138 S.Ct. at 1212 (enforcing the "prohibition of vagueness in criminal statutes"); *Davis,* 139 S.Ct. at 2326 (finding that "the statutory text command[ed]" the same fatal flaws that made ACCA and §16(b) vague). And both *Dimaya* and *Davis* made clear that *Johnson* was not statute-specific. *Dimaya*, 138 S.Ct. at 1223 (comparing similar statutory texts to §16(b) and noting that it would approach "insanity" to interpret the similar statutory texts differently); *Davis*, 139 S.Ct. 2330 (finding that *Johnson*'s vagueness rule was to be applied across the criminal code to uphold the statutory canon that "the same language in related statutes carr[y] a consistent meaning," and to keep consistency in the criminal code).

Shortly after *Davis,* the Eleventh Circuit remanded Mr. Jones' case so the original sentencing court could determine if his mandatory life sentence had been based solely on §3559(c)'s residual clause, or alternatively, whether the sentence had been based on §3559(c)'s elements' clause. *Jones I; Jones,* D.Ct. No. 16-CV-22268.

The same district judge that originally sentenced Mr. Jones to mandatory life found that Mr. Jones' §3559(c) sentence had been based solely on §3559(c)'s residual clause. *Jones,* D.Ct. No. 16-CV-22268 (Appendix A-3). Nonetheless, the district court denied Mr. Jones' §2255 motion and granted a COA on the issue of "whether §3559(c)'s residual clause [was] unconstitutional in light of *Johnson*." *Id.*

Mr. Jones filed a second appeal. *Jones v. United States,* 20-13365 (11th Cir. 2020) ("*Jones II*"). While Mr. Jones' second appeal was pending, the Department of Justice (DOJ) submitted a letter pursuant to 28 U.S.C. §530D informing Congress that DOJ would no longer prosecute §3559(c) residual clause cases. Jeffrey B. Wall, *Letter to Hon. Nancy Pelosi, Speaker, U.S. House of Representatives* (Sept. 28, 2020), availableonline:https://www.justice.gov/oip/foia-library/osg-530dletters/wainwright_v_us_and_richitelli_v_us/dl (accessed April 1, 2024) (Appendix B-1) (hereinafter "*DOJ Letter to Congress*"). In this letter, DOJ singled out two pending SOS §2255 cases that raised *Johnson* challenges to §3559(c) as examples of cases that were entitled to relief. *Id.*

In accordance with DOJ's letter, the government in Mr. Jones' case requested a summary reversal and a remand for resentencing without the §3559(c) enhancement. *Jones II.* The Eleventh Circuit denied the request and appointed *amicus curiae* to defend the mandatory life sentence. *Jones II.*

In January 2022, oral argument was held. At oral argument both the government and court-appointed *amicus* agreed with Mr. Jones that § 2255(h)(2) was

satisfied based on Mr. Jones' reliance on the new rule established in *Johnson*. *Jones II* (oral argument Jan. 12, 2022) (Audio available online at https://www.ca11.uscourts.gov/oral-argumentrecordings?title=2013365&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D =&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D) (last accessed April 1, 2024); *see also Jones v. United States*, 82 F.4th 1039, 1061 (11th Cir. 2023) *(Wilson, J., dissenting).*

On September 14, 2023, the Eleventh Circuit panel issued a divided opinion ordering that Mr. Jones' SOS §2255 motion be dismissed for lack of jurisdiction. *Jones*, 82 F.4th 1043. It stated that after authorization had been obtained from the circuit court pursuant to 2255(h)(2), the district court was required to re-evaluate §2255(h)(2) and §2244's gatekeeping requirements as a jurisdictional matter. *Id.* at 1047-48. It noted that none of the parties had challenged the court's jurisdiction, but it was required to make an independent determination of jurisdiction nonetheless. *Id.* at 1046. It then found that §2255(h)(2)'s jurisdictional gatekeeping requirements were not met because there was no "new rule" of constitutional law that had been made retroactively applicable by the Supreme Court for collateral review to §3559(c). *Id.* at 1047-48. It rejected the parties' position that *Johnson's* vagueness rule was the new rule that was made retroactively applicable by this Court, and that its application to §3559(c) was dictated by

precedent. *Id*. 1055, 1061. Accordingly, it ordered that petitioner's case be dismissed.

The opinion drew a dissent. *Id. at* 1062. The dissent found that applying *Johnson*'s vagueness rule to §3559(c) was a straightforward application of *Johnson* that was dictated by precedent. *Id. at* 1061. It further found that three *Johnson* decisions applying the rule to three different statutory residual clauses was enough to find that *Johnson* was a new rule of constitutional law which this Court had made retroactively applicable to §3559(c). *Id*. The dissent did not believe that any fourth *Johnson* decision from this Court was necessary. Accordingly, the dissent found jurisdiction was proper under 28 U.S.C. §2255(h)(2) to adjudicate the merits of Mr. Jones' SOS §3559(c) motion based on *Johnson*. *Id.* at 1061, 1067-68. Over the dissent's objection, the panel ordered Mr. Jones' motion remanded and dismissed for lack of jurisdiction. Mr. Jones sought rehearing *en banc*. *Jones II*. Rehearing was summarily denied on December 8, 2023. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court Should Resolve the Important Question of Whether Constitutional Challenges to 18 U.S.C. §3559(c)'s Residual Clause Predicated on *Johnson v. United States,* 576 U.S. 591 (2015), Are Cognizable Claims in Second or Successive Motions to Vacate Sentences Under 28 U.S.C. §2255(h)(2).

This Court should resolve the important question of whether constitutional challenges to 18 U.S.C. §3559(c)'s residual clause predicated on *Johnson,* 576 U.S. 591, are cognizable claims in second or successive motions to vacate sentences under 28 U.S.C. §2255(h)(2). The Eleventh Circuit stands alone in its decision that a constitutional challenge to §3559(c)'s residual clause predicated on *Johnson* does not satisfy the requirements of a second or successive motion to vacate sentence. The question is important because the Eleventh Circuit's outlier decision prevents the underlying issue regarding §3559(c)'s constitutional validity from ever being resolved, and it creates unjust disparities in the law. The Eleventh Circuit's anomalous rule is also wrong. It violates habeas precedent which differentiates between the initial announcement of a "new rule" and the further application of a rule that is dictated by precedent. Additionally, it nullifies the *Johnson* Trilogy. This case is an ideal vehicle, and may be the only vehicle, to resolve the question presented.

I. The Eleventh Circuit Stands Alone In Its Decision That a Constitutional Challenge to §3559(c)'s Residual Clause Predicated on *Johnson v. United* States, Does Not Satisfy the Requirements of a Second or Successive Motion to Vacate Sentence.

When *Johnson v. United States,* 576 U.S. 591 (2015) first issued, there was no doubt that it was a ground-breaking decision. Since that time, defendants have sought relief from sentences and convictions that were based on vague catch-all residual clauses across the criminal code. The courts, at first, were uncertain about the scope of *Johnson.* However, after this Court completed its trilogy of *Johnson* cases ending with *Davis*, a profound legal consensus developed in the courts and with the government which found that *Johnson* was a general rule, rather than a statute-specific rule, that required similar vague catch-all residual clauses to be struck down. In particular, a consensus developed that *Johnson's* "new rule" of constitutional law was directly applicable to the Three Strikes law, 18 U.S.C. §3559(c). Moreover, the courts and the government agreed that *Johnson's* "new rule" status satisfied the "new rule" gatekeeping requirements for defendants who challenged mandatory life sentences based on §3559(c)'s residual clause under 18 U.S.C. §2255(h)(2).

Most of the courts in the consensus found that §3559(c) claims were cognizable under §2255(h)(2) as a result of *Johnson's* obvious direct application to §3559(c). In *United States v. Goodridge,* 392 F.Supp.3d 159, 172 (D. Mass. 2019) the district court found that "decisions applying *Johnson's* rule beyond the ACCA to other, similarly worded statutes [were] compelling." *Goodridge*, 392 F.Supp.3d at 172. Thus, it

found the defendant's SOS §2255 *Johnson* motion challenging §3559(c), "contained, by virtue of *Johnson* 'a new rule of constitutional law' . . . as required by 28 U.S.C. §2255(h)(2)." *Id.* Likewise, in *United States v. Milton*, 2021 WL 1554384, *11-*12 (W.D. Va. 2021), *appeal dismissed on other grounds,* 2022 WL 2355508 (4th Cir. 2022), the district court found that a "challenge to the residual clause in §3559(c) stem[med] from the Supreme Court's decision in *Johnson*, a new rule of constitutional law . . . ." *Milton,* 2021 WL 1554384, *11. *It* also found that "the holding in *Johnson* as to [] unconstitutional vagueness . . . [was] not ACCA specific," and the "statutory language held unconstitutional in *Dimaya* and *Davis* [was] largely the same as the residual clause in §3559(c)(2)(F)." *Id.* at *11-*12. In light of those findings, the court concluded that a constitutional challenge to §3559(c)'s residual clause based on *Johnson* contained a "new rule" of constitutional law as required by 28 U.S.C. §2255(h)(2). *Id.* at *12. Similarly – *United States v. Shabazz*, D.Ct. No. 11-cr-23 (M.D. Penn. 2019) (DE 253: 21-22 & n.11) (Appendix B-2); *Wainwright v. United States,* D.Ct. No. 19-cv-62364 (S.D. Fla. 2020) (DE 22:7-9, 22) (Appendix B-3), *appeal voluntarily dismissed by the government,* App. No. 20-12921 (11th Cir. 2020); and *United States v. Richitelli,* D.Ct. No. 09-cr-60229 (S.D. Fla. 2020) (DE: 448:2) (Appendix B-4), *appeal voluntarily dismissed by the defendant,* App. No. 21-10748 (11th Cir. 2021) – granted SOS §2255 relief for constitutional challenges to §3559(c)'s residual clause, indicating that the new rule of constitutional law for SOS §2255 purposes related back to *Johnson*.

Other courts in the consensus found *Johnson's* application to §3559(c) in SOS §2255 proceedings so clear that they summarily granted relief. *United States v. Gurule,* 2023 WL 3359416 (10th Cir. 2023)(unpubl.) (granting parties' joint motion for reversal of SOS §3559(c) claim); *United States v. Thompson,* App. No. 19-7775 (4th Cir. 2021) (unpubl.) (App-DE 47) (Appendix B-5) (remanding SOS §3559(c) claim to district court for merits determination based on government's waiver of procedural (h)(2) and (f)(3) defenses), *on remand*, *Thompson v. United States,* 585 F.Supp.3d 809, 811 n.2 (E.D. Va. 2022); *Sutton v. United States*, App. No. 18-56571 (9th Cir. 2020) (unpubl.) (App-DE 15) (Appendix B-6), (granting parties' joint motion for reversal of SOS §3559(c) claim based on government's agreement to waive §2255(f)(3) defenses), *on remand*, *United States v. Sutton,* D.Ct. No. 02-cr-106 (C.D. Cal. 2020) (CR-DE 321) (Appendix B-6); *Richitelli v. United States,* App. No. 17-10482 (11th Cir. 2020) (unpubl.) (Appendix B-4) (granting parties' joint motion for reversal of SOS §3559(c) claim based on district court's indicative ruling that it would vacate §3559(c) enhancement); *cf. also*, *Haynes v. United States*, 936 F.3d 683, 686 (7th Cir. 2019) (noting government's refusal to seek review of SOS §2255 order vacating §3559(c) enhancement).

Not only the courts, but the Department of Justice (DOJ) also recognized that SOS §3559(c) claims met cognizability requirements under §2255(h)(2). The government spelled out its position in its letter to Congress. *DOJ Letter to Congress* (Appendix B-1). It based its legal analysis on two SOS §3559(c) cases referenced

above, *Wainwright* and *Richitelli,* explaining that the movants in those cases were entitled to relief, and that DOJ was conceding error in those cases. *DOJ Letter to Congress.* DOJ also stated that it would resolve §3559(c) claims at all stages of litigation, and it would not prosecute §3559(c)-residual-clause enhancements in new cases. *DOJ Letter to Congress.*[2]

Contrary to this legal consensus, the Eleventh Circuit has issued its idiosyncratic decision refusing to acknowledge this Court's clear precedents that make *Johnson* directly applicable to §3559(c) and satisfy §2255(h)(2)'s requirements.

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[2] In addition to conceding error in SOS §3559(c) claims, the government also conceded error in first §2255 motions and direct appeals. **First §2255 Motions:** *Langford v. United States,* 993 F.3d 633, 637 (8th Cir. 2021) (government conceded §3559(c)'s residual clause was unconstitutional*;* enhancement affirmed on enumerated felonies clause); *Monroe v. United States*, 859 Fed. Appx. 198 (9th Cir. 2021) (unpubl.), (government conceded *Johnson's* applicability to §3559(c)), on *remand* 98-cr-60 (C.D. Cal. 2021) (enhancement vacated and sentence reduced); *Walker v. United States,* 2021 WL 3754596 (11th Cir. 2021) (unpubl.) (government conceded §3559(c)'s residual clause was unconstitutional*;* enhancement affirmed on elements and enumerated felonies' clauses); *Gatewood v. United States,* 979 F.3d 391 (6th Cir. 2020) (government conceded §3559(c)'s residual clause was unconstitutional*;* enhancement affirmed on procedural default grounds); *United States v. VanHooser*, 790 Fed. Appx. 55 (9th Cir. 2019) (unpubl.) (case reversed, §3559 enhancement vacated); *Arnold v. United States,* 632 F.Supp.3d 1005 (D. Az. 2022) (court found §3559(c)'s residual clause unconstitutional based on *Johnson;* granted first §2255 motion); *Watson v. United States,* 04-cr-591 (N.D. Ga. 2021) (government conceded §3559(c)'s residual clause was unconstitutional based on *Johnson, Dimaya, Davis;* first §2255 motion granted,); *United States v. Hakim Williams,* 2020 WL 3914759 (D. Nev. 2020) (court found that §3559(c)'s residual clause was unconstitutional in light of *Johnson, Dimaya, and Davis*; first §2255 motion granted*).* **Direct appeals:** *United States v. Jerry Davis,* Cir. No. 21-3322 (7th Cir. 2022) (court granted parties' joint motion for summary reversal; §3559(c) sentencing enhancement vacated); *United States v. Pryor*, 11th Cir. No. 16-10806 (2016) (government dismissed own appeal of sentence that did not impose §3559(c) enhancement*).*

Due to the Eleventh Circuit's outlier position, geography alone, will now determine whether SOS movants with clear cognizable substantive constitutional issues like the challenge to §3559(c)'s residual clause, can get into court. In Florida, Georgia, and Alabama, they will be shut out. In other jurisdictions across the United States such claims will be heard and adjudicated on the merits. Such disparate access to the courts should not be tolerated.

II. The Question is Important Because The Eleventh Circuit's Outlier Decision Prevents the Underlying Issue Regarding §3559(c)'s Constitutional Validity From Ever Being Resolved and It Creates Unjust Disparities in the Law.

In Mr. Jones' case, the Eleventh Circuit broke from the strong legal consensus that had developed. In doing so, it effectively buried the issue of §3559(c)'s constitutional validity from further review. In other jurisdictions the issue of *Johnson's* application to §3559(c) was considered a settled question based on this Court's *Johnson* precedents. However, the Eleventh Circuit's outlier decision keeps the constitutional issue open for defendants in Florida, Georgia, and Alabama. The legal impact of that decision is that defendants in the Eleventh Circuit are denied access to *Johnson's* new constitutional rule when challenging §3559(c) claims in SOS §2255 proceedings. The Eleventh Circuit got to this result by feigning ignorance that this Court's *Johnson* trilogy compels §3559(c)'s residual clause to be declared unconstitutional.

The Eleventh Circuit's errors will not be subject to correction through the normal process of intercircuit conflict. When the courts developed a legal consensus finding that *Johnson* was directly applicable to §3559(c), the circuit courts in that consensus considered the issue to be clearly cognizable in SOS §2255 proceedings. Therefore, those courts reversed sentences, usually by agreement of the parties, without the issuance of substantial orders or opinions. *Gurule,* 2023 WL 3359416 (granting parties' joint motion for summary reversal); *Thompson,* App. No. 19-7775 (App-DE 47) (Appendix B-5) (same); *Sutton,* App. No. 18-56571 (App-DE 15) (Appendix B-6)(same); *Richitelli,* App. No. 17-10482 (Appendix B-4) (same).

The substantive issues were then decided at the district court level. *Thompson,* 585 F.Supp.3d at 811 n.2; *Milton*, 2021 WL 1554384, *12; *Wainwright,* D.Ct. No. 19-cv-62364 (DE 22:7-9, 22) (Appendix B-3); *Richitelli,* 09-cr-60229 (DE: 448:2) (Appendix B-4); *Sutton* D.Ct. No. 02-CR-106 (CR-DE 321) (Appendix B-6); *Goodridge,* 392 F.Supp.3d at 172, 174; *Shabazz*, D.Ct. No. 11-cr-23 (DE 253: 21-22 & n.11) (Appendix B-2). In the district courts, cases were also usually resolved by agreement of the parties. And even when district courts issued written opinions, the decisions were not appealed. Thus, circuit cases raising the relevant issues have not entered the pipeline for review by this Court.

Moreover, the government proactively joined the consensus and stopped pursuing mandatory life enhancements that relied on §3559(c)'s residual clause. The government formalized its position in a letter to Congress. It acknowledged that

Johnson's ACCA statute was "worded similarly to Section 3559(c)(2)(F)(ii)'s substantial-risk clause," and that "no reasonable basis exist[ed] to distinguish the substantial-risk clause in Section 3559(c)(2)(F)(ii) from the provision the Supreme Court found to be unconstitutionally vague in *Davis*." *DOJ Letter to Congress* (Appendix B-1). It further stated that, "The substantial-risk clause in Section 3559(c)(2)(F)(ii) is almost identical to Section 924(c)(3)(B), which was at issue in *Davis*." *DOJ Letter to Congress.* DOJ also made clear that it would resolve all cases raising the issue, and it would not pursue any new mandatory life sentences that relied on §3559(c)'s residual clause. *DOJ Letter to Congress.* Consequently, no new cases will enter the pipeline for review by this Court. Thus, it is imperative that this Court grant the writ of certiorari in this case so the underlying constitutional issue can be finally determined.

The Eleventh Circuit's flawed reasoning has other far-reaching negative consequences because it distorts §2255(h)(2)'s gatekeeping requirements going forward. It will systematize the disparate treatment of future Eleventh Circuit defendants seeking to enforce substantive constitutional rights. This scenario is playing out in Mr. Jones' case, but its reach is not limited to Mr. Jones or his §3559(c) claims. In future, equally clear situations, where this Court has clearly announced and established further applications of a new rule of constitutional law, this Court can expect a repeat of the current scenario with defendants in all geographical areas except the Eleventh Circuit having access to the courts. Such a system is unjust,

and it detracts from the integrity and public reputation of judicial proceedings by denying relief that is clearly due, and by requiring lengthy litigation over legal questions that this Court has already soundly answered, and which the government and other circuits have already resolved. This Court should intervene to prevent further distortion of the law, and to finally settle the underlying issue regarding the unconstitutionality of §3559(c)'s residual clause in light of *Johnson*.

III. The Eleventh Circuit's Anomalous Rule is Wrong.

This Court should also intervene because the Eleventh Circuit's decision is legally erroneous. First, the Eleventh Circuit violates basic habeas law which differentiates between the initial announcement of a "new rule" and a "new rule's" further application that is dictated by precedent. Second, the Eleventh Circuit's decision effectively nullifies the clear import of the *Johnson* trilogy.

A. The Eleventh Circuit Violates Habeas Precedent Which Differentiates Between the Initial Announcement of a "New Rule" and the Further Application of a Rule that is Dictated by Precedent.

In *Tyler v. Cain,* the Court set out three elements for obtaining relief in SOS habeas proceedings:

> First, the rule on which the claim relies must be a "new rule" of constitutional law; second, the rule must have been "made retroactive to cases on collateral review by the Supreme Court"; and third, the claim must have been "previously unavailable."

Tyler, 533 U.S. 656, 662 (2001).[3]

In Mr. Jones' case, the Eleventh Circuit erroneously denied that it had jurisdiction under the "new rule" prong. It found that *Johnson's* application to §3559(c) was a "new rule" which required the Supreme Court to issue a separate decision for applying *Johnson* to §3559(c). The Eleventh Circuit erred, however, because *Johnson's* application to §3559(c) was not a "new rule," but merely an application of *Johnson* that was necessarily dictated by precedent.

Under *Teague,* "A case announces a new rule when it breaks new ground,". . . or when it applies a pre-existing rule to a "novel setting," thereby extending its reach in a way that was ***not*** expected or "not dictated by precedent" at the time the defendant's conviction became final. *Teague v. Lane,* 489 U.S. 288, 301 (1989). However, no new rules are created when an established rule is applied to different facts in an ***expected*** way. Instead, that is an application or enforcement of a

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[3] *Tyler* involved the parallel SOS state habeas provision 28 U.S.C. §2244(b)(2)(A) which is identical in all pertinent respects to §2255(h)(2). 28 U.S.C. §2244(b)(2)(A) states:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (A) the applicant shows that the claim relies on ***a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; . . . .***

Id. (emphasis added).

preexisting rule that is "dictated by precedent" . . . "based on an objective reading of the relevant cases." *Teague,* 489 U.S. at 307. Indeed, if the Supreme Court indicates that a " 'beginning point' . . . is a rule of 'general application, [–] a rule designed for the specific purpose of evaluating a myriad of factual contexts, [–] it [would] be the infrequent case that yields a result so novel that it forges a new rule, [i.e.,] one not dictated by precedent.' " *Chaidez v. United States*, 568 U.S. 342, 348 (2013), *citing Wright v. West,* 505 U.S. 277, 309 (1992) (Kennedy, J., concurring). Accordingly, this Court can announce a "new rule" in a seminal case and apply it across different statutes without creating any new rules, as it did in the case of *Stringer v. Black,* 503 U.S. 222, 225, 229, 237 (1992). New rules are not created when the application of the rule to a different statute is dictated by precedent. *Id.*

Moreover, contrary to the Eleventh Circuit's decision, there is no requirement for the Supreme Court to issue a separate express decision to spell out every application of its rules, not even in SOS *habeas* cases. And there is nothing in the text of §2255(h)(2)'s "new rule" prong that requires a new decision for every application of the "new rule." Additionally, when a Supreme Court holding is necessary in an SOS case – i.e., the retroactivity prong – singular decisions or "combination[s] of holdings," over "multiple cases" qualify. *Tyler,* 533 U.S. at 666; *id.* at 668 (O'Conner, J., concurring) (noting that a singular express decision was not the "*sine qua non"* for a Supreme Court holding).

Thus, while the "new rule" of *Johnson* was necessarily set out by the Supreme Court in *Johnson* and made retroactive in *Welch*, its application to §3559(c) in light of *Dimaya and Davis,* did not require any further opinion by this Court. The cases of *Johnson, Dimaya,* and *Davis,* necessarily dictate[d]" that *Johnson* applied to §3559(c), and – even if a Supreme Court holding was necessary – such a condition was fulfilled under *Tyler* because the combination of those three cases constituted a Supreme Court "holding" that established *Johnson's* direct application to §3559(c). In petitioner's case, the Eleventh Circuit's ruling erroneously applied *Teague's* "new rule" analysis out of context, and it missed the other half of *Teague* which explained when a rule's application to subsequent cases was "dictated by precedent."

B. The Eleventh Circuit Nullified The *Johnson* Trilogy.

The Eleventh Circuit also nullified the clear import of this Court's decisions setting out *Johnson, Dimaya,* and *Davis*. After initially setting out the vagueness rule in *Johnson,* the Court subsequently applied *Johnson* to a second statute, 18 U.S.C. §16(b). While doing so, it characterized *Johnson* as a "straightforward decision, with equally straightforward application here." *Dimaya,* 138 S.Ct. at 1213. Although §16(b) was similar, it was not an exact match to ACCA, but the Court found that "none of the minor linguistic disparities in the statutes ma[de] any real difference." *Dimaya*, 138 S.Ct. at 1223. The Court further stated that it was "[a]dhering to [its] analysis in *Johnson,"* and enforcing *Johnson's,* "prohibition of vagueness in criminal statutes." *Dimaya*, 138 S.Ct. at 1210, 1212. The Court also

gave guidance for future cases. It stated that similar residual clauses that defined predicates in terms of convictions, felonies, or offenses, or that used the phrase "by its nature," called for the speculative "ordinary case" test. *Dimaya*, 138 S.Ct. at 1217-1218. It further advised that words like "serious potential risk" or "substantial risk" both qualified as imprecise levels of risk. *Dimaya*, 138 S.Ct. at 1217-1218.

The Court then applied *Johnson* a third time to a substantive criminal offense, 18 U.S.C. §924(c). Section 924(c)'s residual clause was a virtual duplication of §16(b). Regardless of the different character of the statute, the evidence of vagueness in the statutory text could not be disputed, "the statutory text command[ed]" the same fatal flaws that made ACCA and §16(b) vague. *Davis*, 139 S.Ct. at 2326. The Court also indicated that *Johnson*'s vagueness rule was to be applied across the criminal code, invoking the normal statutory canon that "the same language in related statutes carries a consistent meaning," because to do otherwise "would make a hash of the federal criminal code." *Davis*, 139 S.Ct. 2330. Thus, after striking down three similar residual clause statutes, this Court had announced, applied, and established the *Johnson* rule as one of general application to other residual clause statutes. It is this Court's own language in setting out the *Johnson* vagueness rule that is the most important factor compelling the conclusion that *Johnson's* vagueness rule is directly applicable to §3559(c) for purposes of §2255(h)(2)'s gatekeeping requirements. The Eleventh Circuit's decision vitiated

this Court's directives in the *Johnson* trilogy. This erroneous end-run around *Johnson* should be corrected.

IV. This Case is an Ideal Vehicle to Resolve the Question Presented.

The Court should also grant a writ of certiorari because this case is an ideal vehicle to resolve the question presented. The constitutional *Johnson* error was front-and-center in this case because the district court that originally sentenced Mr. Jones made an explicit written finding that Mr. Jones' mandatory life sentence was based *solely* on §3559(c)'s residual clause. At the same time, that court found that §3559(c)'s elements' clause was not applicable. Accordingly, the district court itself recognized that the sole issue in the case was "whether §3559(c)'s residual clause [was] unconstitutional in light of *Johnson*."

Moreover, there are no procedural barriers that would interfere with the Court's ability to reach the constitutional issue. Mr. Jones obtained proper authorization for his SOS §2255 motion, and he filed the motion within one year of *Johnson*. Additionally, the government has not raised any procedural bars. Instead, it conceded error – not once – but three times. First it filed a motion for summary reversal, and when that was denied, it filed a responsive appellate brief that conceded error, and when that prompted the appointment of *amicus curiae*, it continued to argue for reversal at oral argument. Accordingly, there is no other legal issue that would prevent the Court from reaching the constitutional error here. The issue of *Johnson's* "new rule" of constitutional law is dispositive in Mr. Jones' case.

Not only is Mr. Jones' case the ideal vehicle, but it is the only vehicle through which these issues can be addressed. The legal consensus that developed after *Davis* has terminated further litigation on this issue in the other jurisdictions. Another vehicle will not arrive to fix the error or remedy its far-reaching consequences.

This Court should intervene to prevent further distortion of the law, and to finally settle the underlying issue regarding the constitutional invalidity of §3559(c)'s residual clause. There is no better vehicle through which to resolve the question presented.

CONCLUSION

Based upon the foregoing petition, the Court should grant the writ of certiorari to the Court of Appeals for the Eleventh Circuit. Alternatively, because the Eleventh Circuit's erroneous ruling attempts to "disregard a lesson so hard learned," and uphold the "lunatic practice" that this Court and the overwhelming legal consensus has "abandoned," this Court should grant summary reversal. *Dimaya,* 138 S.Ct. 1223.

Respectfully submitted,

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