

NOTES

USING *JOHNSON V. UNITED STATES* TO REFRAME RETROACTIVITY FOR SECOND OR SUCCESSIVE COLLATERAL CHALLENGES

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The Armed Career Criminal Act (ACCA) provides a fifteen-year mandatory minimum sentence in federal prison for persons with at least three prior “violent felony” convictions who are subsequently convicted of being in possession of a firearm. In Johnson v. United States, the U.S. Supreme Court struck down one portion of this statute on the ground that it was unconstitutionally vague. In addition to an enumerated list of “violent felonies” that can result in a conviction, this portion included a catchall category that defined a violent felony as a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

This Note examines whether federal prisoners, whose convictions and sentences under this now-unconstitutional prong of the ACCA were final before Johnson, and who have previously petitioned for habeas corpus, may again petition in federal court based on Johnson’s holding. In other words, the question, which has become the subject of a widening circuit split and is under review by the Supreme Court, is whether Johnson’s new rule about the unconstitutionality of the ACCA has been “made retroactive . . . by the Supreme Court” to federal prisoners seeking habeas corpus relief in federal court. This Note addresses this question and the circuit split that has emerged on the issue and concludes that Johnson has indeed been “made retroactive.” Finally, this Note offers a modified framework for assessing the retroactivity of new rules to second or successive habeas petitions.

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INTRODUCTION

Consider Abe and Ben, two life-long criminals.¹ Abe’s criminal playground is Florida, whereas Ben spends his time breaking the law in Missouri. During the course of their respective criminal careers, they are each convicted of three “violent felonies,”² including attempted burglary.

1. This hypothetical is loosely adapted from the facts of *In re Rivero*, 797 F.3d 986 (11th Cir. 2015), and *Woods v. United States*, 805 F.3d 1152 (8th Cir. 2015) (per curiam).

2. For a definition of “violent felony,” see *infra* note 50 and accompanying text.

They are each arrested a fourth time and convicted of being felons in possession of a firearm.³ This subjects each to mandatory minimum sentences of fifteen years in prison, because they have three prior violent felony convictions.⁴ The federal appellate court affirms their convictions and the U.S. Supreme Court denies certiorari, rendering their convictions final.⁵

End of story? Not quite. During their incarcerations, the Supreme Court limits the scope of the statute that characterizes a prior conviction as a “violent felony”—the same statute under which Abe and Ben were both sentenced.⁶ Abe and Ben, each with a penchant for jailhouse lawyering, decide to collaterally challenge their sentences in federal court⁷ under 28 U.S.C. § 2255.⁸ But, their petitions are denied.⁹

After several years, the Supreme Court holds unconstitutional the provision under which Abe and Ben were sentenced; a prior conviction of attempted burglary no longer constitutes a violent felony.¹⁰ Thus, if Abe and Ben had been sentenced now, they would have been sentenced to a *maximum* of ten years, not a *minimum* of fifteen.¹¹ They both petition again under § 2255 to challenge their sentences.¹² Ben is successful but Abe is not. Because this is their second time filing § 2255 motions, the procedural threshold they must overcome is much more burdensome than the first instance threshold.¹³ The federal jurisdiction in which Ben is incarcerated finds that Ben has met this threshold but the jurisdiction in which Abe finds

3. See 18 U.S.C. § 922(g) (2012) (rendering it unlawful for a felon to be in possession of a firearm); *infra* note 45 and accompanying text.

4. See 18 U.S.C. § 924(e) (codifying the Armed Career Criminal Act); *infra* Part I.A.

5. A conviction and sentence are considered final when the defendant has completed a direct appeal and petitioned to the Supreme Court for a writ of certiorari. See Lyn S. Entzeroth, *Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court’s Doctrine*, 35 N.M.L. REV. 161, 169–70 (2005).

6. See, e.g., *Chambers v. United States*, 555 U.S. 122, 130 (2009) (holding that failure to report to a penal institution is not a violent felony); *Begay v. United States*, 553 U.S. 137, 148 (2008) (holding that driving under the influence is not a violent felony).

7. A collateral challenge—also known as a collateral attack or collateral motion—is one that occurs after a judgment becomes final. See Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1413 n.1 (2002) (“Collateral review refers to review subsequent to direct appeal . . .”).

8. Entitled “Federal custody; remedies on motion attacking sentence,” § 2255 codifies the writ of habeas corpus for federal prisoners and provides a collateral mechanism for challenging a sentence, called a motion to “vacate, set aside or correct” a sentence. See 28 U.S.C. § 2255 (2012); *infra* Part I.C.

9. A petition under § 2255 may be denied for various reasons unrelated to the merits of the claim, including failure to file within the one-year statute of limitations. See 28 U.S.C. § 2255(f).

10. See *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

11. See 18 U.S.C. § 924(a)(2) (2012) (providing a maximum term of ten years imprisonment for violation of § 922(g)).

12. This is considered a “second” petition. See *infra* note 28.

13. In the first instance, they must satisfy the requirements of § 2255(f)(3), while in the second instance they are subject to § 2255(h)(2). See 28 U.S.C. § 2255; *infra* Part I.C, I.D.2, I.D.3.

himself determines that Abe has not.¹⁴ Had Abe been incarcerated within the same jurisdiction as Ben, he too would have obtained relief.¹⁵

Since the Supreme Court's 2015 decision in *Johnson v. United States*,¹⁶ such disparate treatment of inmates across jurisdictions has become commonplace.¹⁷ In *Johnson*, the Court held that a portion of the Armed Career Criminal Act¹⁸ (ACCA), known as the "residual clause,"¹⁹ was unconstitutionally vague.²⁰ The ACCA is a sentencing enhancement statute that mandates a fifteen-year minimum sentence in federal prison to persons with at least three prior violent felony convictions who are subsequently convicted of being in possession of a firearm under 18 U.S.C. § 922(g).²¹ The now unconstitutional residual clause was a catchall phrase that expanded the definition of violent felony beyond an enumerated list also to encompass crimes punishable by a term of imprisonment of at least one year that involve "conduct that presents a serious potential risk of physical injury to another."²² *Johnson* held that "[i]nvolving 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."²³

The *Johnson* decision has already had significant implications for various areas of the law.²⁴ But perhaps most important is the question of to what extent inmates previously sentenced under the residual clause, and thereby unjustly serving at least five additional years in prison, may use *Johnson* as

14. Compare *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam) (authorizing a successive § 2255 petition), with *In re Rivero*, 797 F.3d 986, 992 (11th Cir. 2015) (denying a successive § 2255 petition). See also *infra* Part II.

15. See, e.g., *Menteer v. United States*, 806 F.3d 1156, 1157 (8th Cir. 2015) (authorizing a successive § 2255 petition). Moreover, had this been their first § 2255 motions (i.e., had they never previously filed § 2255 motions), they both also likely would have obtained relief. See *infra* note 27 and accompanying text; *infra* Part II.

16. 135 S. Ct. 2551 (2015).

17. See *infra* note 29 and accompanying text.

18. See 18 U.S.C. § 924(e) (2012); see also *infra* Part I.A.

19. See 18 U.S.C. § 924(e)(2)(B)(ii); see also *infra* Part I.A.

20. See *Johnson*, 135 S. Ct. at 2557.

21. See 18 U.S.C. § 924(e)(1).

22. *Id.* § 924(e)(2)(B)(ii).

23. *Johnson*, 135 S. Ct. at 2560.

24. See Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2109–13 (2015) (discussing *Johnson's* impact on the vagueness doctrine); Stephen R. Sady & Gillian R. Schroff, *Johnson: Remembrance of Illegal Sentences Past*, 28 FED. SENT'G. REP. 58, 60 (2015) (arguing that because the United States Sentencing Guidelines define "crime of violence" in a similar manner to the ACCA's definition of "violent felony," the Guidelines residual clause analogue should also be subject to a vagueness challenge under *Johnson*, and suggesting *Johnson* may have implications for, inter alia, restitution, mandatory life imprisonment, extradition, sex offender registration, money laundering, racketeering, restrictions on use of ammunition, and use of minors in crimes of violence); Leading Cases, *Johnson v. United States*, 129 HARV. L. REV. 301, 310 (2015) ("*Johnson's* impact may well be broader than the majority admits."); see also Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Adopts Amendment to Definition of "Crime of Violence" in Federal Sentencing Guidelines and Proposes Additional Amendments (Jan. 8, 2016), <http://www.usc.gov/news/press-releases-and-news-advisories/january-8-2016> (adopting amendment for the portion of the Sentencing Guidelines that resembles the residual clause) [perma.cc/ZZU7-XUEA].

a basis for resentencing or release.²⁵ Indeed, in the wake of *Johnson*, some inmates previously sentenced under the residual clause have been able to obtain relief by using the *Johnson* ruling as the basis of a direct appeal²⁶ or as the basis of an initial petition under § 2255.²⁷ By contrast, inmates petitioning under § 2255 for at least a second time²⁸ have not been uniformly granted relief, resulting in a circuit split on whether the rule announced in *Johnson* can be used as the basis of a new motion under § 2255.²⁹

The key inquiry that the courts have splintered on is whether the new rule in *Johnson*—that the residual clause is unconstitutionally vague—has been “made retroactive to cases on collateral review by the Supreme Court.”³⁰

25. Although no definitive figure exists, it is estimated that approximately 6000 prisoners have been sentenced under the ACCA. See Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson’s Potential Ruling on ACCA’s Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 56 (2015); see also U.S. SENTENCING COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY14.pdf (last visited Feb. 26, 2015) (noting that 10 percent of the 5498 individuals convicted of violating 18 U.S.C. § 922(g) in 2014 were sentenced under the ACCA) [perma.cc/N7A5-MSJM]. While it is also unknown how many offenders have been sentenced under the residual clause specifically, there are potentially hundreds. See Douglas Berman, *How Many Federal Prisoners Have “Strong Johnson Claims” (and How Many Lawyers Will Help Figure This Out)?*, SENT’G L. & POL’Y (June 26, 2015, 11:53 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/06/how-many-federal-prisoners-have-strong-johnson-claims-and-how-many-lawyers-will-help-figure-this-out.html [perma.cc/8L2C-XHHJ].

26. See, e.g., *United States v. Abbott*, No. 14-4764, 2015 WL 7888162, at *1 (4th Cir. Dec. 4, 2015) (per curiam) (vacating sentence and remanding for resentencing on direct appeal in light of *Johnson*); *United States v. Munoz-Navarro*, 803 F.3d 765, 766 (5th Cir. 2015) (same); *United States v. Clark*, 619 F. App’x 512, 512 (6th Cir. 2015) (per curiam) (same); *United States v. Langston*, 800 F.3d 1004, 1005 (8th Cir. 2015) (per curiam) (same, but after remand from the Supreme Court in light of *Johnson*); *United States v. Dixon*, 805 F.3d 1193, 1194 (9th Cir. 2015) (same); *United States v. Snyder*, 793 F.3d 1241, 1246 (10th Cir. 2015) (same); *United States v. Braun*, 801 F.3d 1301, 1302 (11th Cir. 2015) (same).

27. See Leah Litman, *Circuit Splits & Original Writs*, CASETEXT (Dec. 17, 2015), <https://casetext.com/posts/circuit-splits-original-writs> [http://perma.cc/S96H-6EDL]. But see *Harrimon v. United States*, No. 15-CV-00152 (N.D. Tex. Nov. 19, 2015) (denying an initial petition based on *Johnson* error in light of the Fifth Circuit’s holding in *In re Williams*), petition for cert. filed, No. 15-7426 (Dec. 11, 2015). Both *Harrimon* and *Williams*, however, are outliers. See Litman, *supra*; *infra* Part II.B.3.

28. Anything other than an inmate’s initial attempt at a collateral challenge under § 2255 is more precisely referred to as a “second or successive” petition. See 28 U.S.C. § 2255(h)(2) (2012); Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 88 (2005). In the interest of concision, this Note refers to motions other than a first motion under § 2255 simply as “successive.”

29. As of this writing, the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits have authorized successive § 2255 motions based on *Johnson*, while the Fifth, Tenth, and Eleventh Circuits have denied authorization. See *infra* notes 187–88 and accompanying text; see also *infra* Part II. This Note refers to petitions for habeas relief founded upon the *Johnson* ruling as petitions alleging “*Johnson* error” or “*Johnson* claims.” Cf. Leah Litman, *Resentencing in the Shadow of Johnson v. United States*, 28 FED. SENT’G REP. 45, 45 (2015) (characterizing § 2255 motions founded on *Johnson* as “*Johnson* claims”).

30. 28 U.S.C. §§ 2244(b)(2)(A), 2255(h)(2). Whether a rule has been “made retroactive to cases on collateral review by the Supreme Court” is a prerequisite finding that a court of

While in *Teague v. Lane*³¹ the Court described its foundational approach to retroactivity, in *Tyler v. Cain*³² the Supreme Court specifically articulated the standard by which a court determines whether a rule has been “made retroactive” by the Supreme Court to cases on collateral review.³³ This inquiry is distinct from determining whether a new rule is simply “retroactive” under the Court’s general retroactivity doctrine as detailed in *Teague*.³⁴ The *Tyler* standard for assessing whether a rule has been made retroactive has been criticized as an onerous one,³⁵ and its inconsistent application lies at the heart of the current circuit split.

Although scholars have extensively covered the evolution of the ACCA’s tortured residual clause,³⁶ few have yet to examine thoroughly the circuit split on *Johnson* retroactivity while concurrently revisiting the Court’s precedent on the retroactivity of new rules to successive petitions for writs of habeas corpus.³⁷ Accordingly, this Note examines the circuit split, revisits the standard outlined in *Tyler*, and concludes that *Johnson* has in fact been “made retroactive” and should thus uniformly be given retroactive effect to successive § 2255 motions. In doing so, this Note suggests a resolution to the circuit split and proposes a modified approach toward determining retroactivity for successive collateral challenges.

While the Court has recently granted certiorari on the *Johnson* retroactivity question and will likely decide it this term³⁸—a fortunate

appeals must make for a successive motion under § 2255 to be authorized. *See id.* § 2244(b)(2)(A); *infra* Part I.C.

31. 489 U.S. 288 (1989).

32. 533 U.S. 656 (2001).

33. *See id.* at 663 (“[A] new rule is not ‘made retroactive to cases on collateral review’ [by the Supreme Court] unless the Supreme Court holds it to be retroactive.”).

34. *See infra* Part I.D.2–3. Indeed, this Note specifically addresses the difficulty in applying the phrasing “made retroactive . . . by the Supreme Court” in accordance with the standard articulated in *Tyler*.

35. *See Hoffstadt, supra* note 7, at 1489 (“The Supreme Court implied, in *Tyler v. Cain*, that a more stringent [retroactivity] standard applies due to the statutory language in § 2255.”); *infra* Part I.D.4.

36. *See, e.g.,* Douglas J. Bench, Jr., *Collateral Review of Career Offender Sentences: The Case for Coram Nobis*, 45 U. MICH. J. L. REFORM 155 (2011); David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209 (2010); James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537 (2009); Hayley A. Montgomery, Note, *Remedying the Armed Career Criminal Act’s Ailing Residual Provision*, 33 SEATTLE U. L. REV. 715 (2010); Jonathan Robe, Note, *Violently Possessed: Johnson As the Vehicle for Limiting Sentencing Enhancement Under the Armed Career Criminals Act*, 10 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 105 (2015); Brett T. Runyon, Comment, *ACCA Residual Clause: Strike Four? The Court’s Missed Opportunity to Create a Workable Residual Clause Violent Felony Test*, 51 WASHBURN L.J. 447 (2012).

37. While limited, there has been excellent coverage. *See, e.g.,* Litman, *supra* note 25; Litman, *supra* note 27; Litman, *supra* note 29; Low & Johnson, *supra* note 24; Stephen I. Vladeck, *Using the Supreme Court’s Original Habeas Jurisdiction to “Ma[k]e” New Rules Retroactive* (Dec. 2, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2698351> [<https://perma.cc/5TXE-LH7V>]; Sady & Schroff, *supra* note 24.

38. *See Welch v. United States*, 136 S. Ct. 790 (2016) (granting certiorari); Petition for Writ of Certiorari at 8, *Welch*, 136 S. Ct. 790 (No. 15-6418) (“Petitioner asks this Court to address the question of [*Johnson*] retroactivity as it applies to cases on collateral review.”). Although not discussed at length herein, the avenue by which the *Johnson* retroactivity

development as the one-year statute of limitations under § 2255 for *Johnson* claims is nearing expiration³⁹—this Note respectfully calls on the Court to find not just that *Johnson* is retroactive under general retroactivity doctrine, but also that it has previously been made retroactive. Doing so would allow the Court simultaneously to cause meritorious *Johnson* claims to be reviewed and to remedy the Court’s overall approach toward retroactivity for successive collateral challenges.⁴⁰

Accordingly, Part I of this Note provides an overview of the relevant legal background, including the ACCA, *Johnson*, habeas corpus, and the retroactivity doctrine. Part II addresses the circuit split on *Johnson*’s retroactive application to successive motions under § 2255. Part III posits that *Johnson* has been made retroactive and discusses how a Supreme Court holding stating that it has been made retroactive will allow the Court to reframe its problematic approach toward retroactivity for successive collateral challenges. In particular, Part III argues that *Johnson* has been made retroactive by the Court because, to quote from key Supreme Court precedent, the rule “narrow[ed] the scope of a criminal statute by interpreting its terms.”⁴¹ Part III also proposes a modified framework that the Supreme Court might consider adopting to determine whether a new rule has been made retroactive.⁴² This regime entails a liberal reading of

question has made it to the Supreme Court is also an intricate issue because denials of authorizations to file successive collateral challenges are not reviewable via certiorari. See *infra* note 94 and accompanying text. See generally Vladeck, *supra* note 37; Steve Vladeck, *Vehicle Problems Vs. Unusual Vehicles: The Supreme Court’s Bizarre Cert. Grant in Welch*, PRAWFSBLAWG (Jan. 8, 2016, 4:22 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/01/vehicle-problems-vs-unusual-vehicles-the-supreme-courts-bizarre-cert-grant-in-welch.html> (discussing the unusual procedural posture of *Welch*) [perma.cc/9HPF-X3FZ].

39. See *infra* notes 87–88 and accompanying text.

40. See *infra* Part III. Although this Note calls on the Court to find that *Johnson* was “made retroactive” in the pending *Welch* case, and a holding in *Welch* stating that *Johnson* is retroactive would reconcile the circuit split, this Note recognizes that the case could also theoretically—and unfortunately—leave unresolved the question of whether *Johnson* had already been “made retroactive.” The petitioner in *Welch* is contesting the denial of a certificate of appealability, after a dismissal of an *initial* § 2255 motion. See *Petition for Writ of Certiorari*, *supra* note 38, at 4. The Court could therefore feasibly hold *Johnson* retroactive, but not address, nor need to address, whether *Johnson* has been “made retroactive.” Cf. Vladeck, *supra* note 37, at 5–6 (discussing *Harrimon v. United States*, a pending petition for certiorari before judgment petition on a denial of a first *Johnson*-based § 2255 motion that, if granted, could make *Johnson* retroactive but still leave open the question of whether it was “made retroactive”). For discussions of the other ways in which the Court could have specifically addressed the “made retroactive” question, see, e.g., Leah M. Litman, *The Exceptional Circumstances of Johnson v. United States*, 114 MICH. L. REV. FIRST IMPRESSIONS 81, 85–86 (2016) (arguing the Court should grant a petition for an original writ of habeas corpus or a petition for a writ of certiorari before judgment); Vladeck, *supra* note 37 (arguing that the Court should consider the issue in an original writ of habeas corpus); Steve Vladeck, *Is the Solicitor General Playing a Shell Game with the Supreme Court Over Johnson Retroactivity?*, PRAWFSBLAWG (Dec. 16, 2015, 5:33 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/12/is-the-solicitor-general-playing-a-shell-game-with-the-supreme-court-over-johnson-retroactivity.html> (recognizing several currently pending Supreme Court petitions for “extraordinary writs”) [perma.cc/F4BK-D9KP].

41. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (citing *Bousley v. United States*, 523 U.S. 614, 620–21 (1998)).

42. See *infra* Part III.B.

Justice O'Connor's concurrence in *Tyler* and results in the general retroactivity inquiry as described in *Teague* as the sole test for determining whether a rule has been made retroactive.⁴³ Finally, Part III concludes by discussing the policy benefits that would result were the Court to hold that *Johnson* has been made retroactive.⁴⁴

I. THE ACCA, *JOHNSON*, HABEAS CORPUS,
AND THE RETROACTIVITY DOCTRINE COLLIDE

This part provides the legal background necessary to understand the circuit split on *Johnson* retroactivity. Part I.A discusses the ACCA's mandatory minimum sentence and the residual clause. Part I.B discusses the *Johnson* decision. Part I.C discusses habeas corpus. Finally, Part I.D discusses the retroactivity doctrine.

A. *The ACCA and the Residual Clause*

The ACCA imposes a mandatory minimum sentence of fifteen years on an offender who (1) is guilty of being in possession of a firearm in violation of 18 U.S.C. § 922(g)⁴⁵ and (2) has been convicted three times for prior violent felonies or serious drug offenses.⁴⁶ Congress passed the ACCA in 1984, as a part of a larger act, in an effort to curb the number of crimes committed by repeat violent crime offenders by severely punishing their possession of firearms.⁴⁷ Congress intended that only prior crimes indicating that a felon is especially dangerous when in possession of a firearm should qualify.⁴⁸ In defining "violent felony," the statute includes both an enumerated list of violent felonies and a catchall provision.⁴⁹ The ACCA defines a violent felony as

any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves

43. See *infra* Part III.B.

44. See *infra* Part III.C. While the change to retroactivity analysis proposed herein could also be realized through an amendment to § 2255, that avenue is beyond this Note's scope. For a discussion on legislative solutions, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 774–76 (2002).

45. Section 922(g) makes it unlawful for a felon to "possess . . . any firearm or ammunition; or to receive any firearm or ammunition . . ." 18 U.S.C. § 922(g) (2012). Without the ACCA's enhancement, violation of § 922(g) carries a ten-year maximum sentence. See *supra* note 11 and accompanying text.

46. See 18 U.S.C. § 924(e)(1).

47. See H.R. REP. NO. 98-1073, at 1 (1984), reprinted in 1984 U.S.C.C.A.N. 3661, 3661. Congress passed the ACCA in 1984 and in 1986 amended it to its current form. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, ch. XVIII, 98 Stat. 1837, 2185 (1984); Anti-Drug Abuse Act of 1986, Pub. L. 99-570, §§ 1401–1402, 100 Stat. 3207 (1986) (codified as amended at 18 U.S.C. § 924(e) (2006)); see also Holman, *supra* note 36, at 211 n.1.

48. See Montgomery, *supra* note 36, at 717.

49. See *id.* at 717–18.

*conduct that presents a serious potential risk of physical injury to another.*⁵⁰

The emphasized portion of § 924(e)(2)(B)(ii) is the unconstitutional portion known as the “residual clause.”⁵¹

*B. Johnson v. United States Holds the Residual Clause
Void-for-Vagueness*

In 2010, Samuel Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g).⁵² In light of Johnson’s extensive criminal record, the Government requested an enhanced sentence under the ACCA,⁵³ arguing that “three of Johnson’s previous offenses—including unlawful possession of a short-barreled shotgun . . . qualified as violent felonies.”⁵⁴ The district court agreed with the Government and sentenced Johnson under the ACCA to the mandatory minimum fifteen years in prison.⁵⁵

While Johnson’s other predicate offenses were listed in the statute, his prior offense of possession of a short-barreled shotgun was not; it fell under the residual clause.⁵⁶ After Johnson unsuccessfully appealed his sentence to the Eighth Circuit,⁵⁷ the Supreme Court granted certiorari (on direct appeal) to decide whether unlawful possession of a short-barreled shotgun qualifies as a violent felony under the residual clause of the ACCA⁵⁸ and later requested reargument addressing the residual clause’s compatibility with the “Constitution’s prohibition of vague criminal laws.”⁵⁹

50. 18 U.S.C. § 924(e)(2)(B) (emphasis added).

51. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). In the interest of completeness, this Note recognizes that a new bill, if passed, will reduce the ACCA’s mandatory minimum sentence from fifteen years to ten years. This would create an overlapping sentencing range and be applicable retroactively, thus potentially rendering the circuit split on *Johnson* retroactivity moot. *See Sentencing Reform and Corrections Act of 2015*, S. 2123, 114th Cong. (2015). This Note, however, analyzes the circuit split as is, because while such legislation would be a welcome reform to the federal sentencing structure, it would not address the problematic holding in *Tyler*.

52. *See Johnson*, 135 S. Ct. at 2556.

53. *See id.*

54. *Id.*

55. *See id.*

56. *See id.*

57. *See United States v. Johnson*, 526 F. App’x 708 (8th Cir. 2013) (per curiam).

58. *See Johnson*, 135 S. Ct. at 2556.

59. *Id.*; *see also* U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”). The void-for-vagueness doctrine “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Moreover, “The prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,’ and a statute that flouts it ‘violates the first essential of due process.’ These principles apply . . . to statutes fixing sentences.” *Johnson*, 135 S. Ct. at 2556–57 (citations omitted) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) and citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

A six-justice majority held that the residual clause was void-for-vagueness.⁶⁰ Recognizing that the residual clause had “‘created numerous splits among the lower federal courts,’ where it has proved ‘nearly impossible to apply consistently,’”⁶¹ the Court held that it was so vague that applying an increased sentence under it violated the Due Process Clause of the Fifth Amendment.⁶² The Court reasoned that two facets of the clause created “a black hole of confusion and uncertainty”⁶³ and rendered it unconstitutionally vague.⁶⁴ First, the residual clause fostered uncertainty about *how* to evaluate the risk a crime carried.⁶⁵ In applying the residual clause, judges estimated the level of risk using the “judicially imagined ‘ordinary case’ of a crime,” and not “real-world facts or statutory elements.”⁶⁶ Accordingly, the Court was unable to articulate a viable method for assessing which kind of conduct the “ordinary case” of a crime entailed.⁶⁷ Second, the residual clause presented uncertainty as to *how much* risk the ordinary case had to pose to be considered a violent felony.⁶⁸ Therefore, by “combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony,” the Court held that “the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”⁶⁹ The Court ultimately granted Johnson relief and remanded the case for further proceedings.⁷⁰ Although Johnson’s successful challenge was on direct appeal of his ACCA conviction, the Supreme Court’s holding opened the door to potential federal habeas corpus petitions under § 2255 by prisoners previously sentenced under the residual clause.

*C. 28 U.S.C. § 2255 Provides a Habeas Corpus
Mechanism for Federal Inmates*

When the Supreme Court issues a new ruling rendering a criminal statute unconstitutional, defendants convicted of a crime under the now-unconstitutional statute have several options for utilizing the new ruling as a potential route to a remedy. For recently convicted prisoners, a direct

60. *Johnson*, 135 S. Ct. at 2563. Although the residual clause has been deemed unconstitutional, the remainder of the statute remains in force. *See id.*

61. *Id.* at 2560 (quoting *Chambers v. United States*, 555 U.S. 122, 133 (2009) (Alito, J., concurring)). Indeed, *Johnson* was the fifth Supreme Court case to address the residual clause. *See id.* at 2559.

62. *See id.* at 2563.

63. *Id.* at 2562 (quoting *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)).

64. *See id.* at 2557.

65. *See id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2558.

69. *Id.*

70. *See id.* at 2563.

appeal⁷¹ is the procedural path to judicial relief, whether release or a new trial.⁷² Inmates who have already lost on direct appeal may instead seek postconviction relief by petitioning for a writ of habeas corpus *ad subjiciendum*.⁷³

Habeas corpus, Latin for “that you have the body”⁷⁴ and known as the Great Writ,⁷⁵ is a centuries-old means for contesting the lawfulness of detention.⁷⁶ Habeas corpus is a “collateral” way for a prisoner to challenge a sentence—meaning without directly challenging substantive guilt of the offense charge.⁷⁷ Although of common law origin, the writ of habeas corpus is presently codified in several places in the U.S. Code.⁷⁸ The general provision is 28 U.S.C. § 2241, which grants the Supreme Court and lower federal courts the power to grant writs of habeas corpus.⁷⁹ For prisoners convicted of *federal* crimes, the more typically utilized § 2255 allows federal prisoners to collaterally challenge a sentence in federal court.⁸⁰ Section 2255 provides in pertinent part:

71. A direct appeal involves appealing the conviction and sentence to the relevant court of appeals and petitioning for a writ of certiorari from the Supreme Court. *See* 28 U.S.C. §§ 1291, 1254 (2012). Afterward, a sentence is deemed final. *See Entzeroth, supra* note 5, at 169–70.

72. *See supra* note 26 and accompanying text.

73. *See* A. Christopher Bryant, *Retroactive Application of “New Rules” and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 4 (2002).

74. *See Habeas corpus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

75. *See Entzeroth, supra* note 28, at 78.

76. *See United States v. Hayman*, 342 U.S. 205, 210 (1952) (“[The] [p]ower to issue the writ of habeas corpus, ‘the most celebrated writ in the English law,’ was granted to the federal courts in the Judiciary Act of 1789.” (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129)).

77. *See Goto v. Lane*, 265 U.S. 393, 401 (1924); *supra* note 7; *see also Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (“[Habeas corpus] seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.”); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1245 (6th ed. 2009) (noting that “habeas lies when the sentencing court lacked jurisdiction—and that jurisdiction is lacking when the statute under which the defendant was convicted is unconstitutional”). For further discussion of the Great Writ, *see* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010).

78. *See* 28 U.S.C. §§ 2241, 2254, 2255 (2012). The Great Writ is also enshrined in the Constitution. *See* U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended . . .”). For a discussion of the Suspension Clause, *see* generally Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475 (2005).

79. *See* 28 U.S.C. § 2241; Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 94 (2012).

80. *See* 28 U.S.C. § 2255; *Bench, supra* note 36, at 172. Section 2255 provides an identical remedy to the common law writ of habeas corpus. *See Hill v. United States*, 368 U.S. 424, 427 (1962) (noting that § 2255 was enacted to provide “a remedy exactly commensurate” with habeas corpus relief). Although not of primary relevance to this Note, § 2254 is the state analogue to § 2255 and allows state prisoners to collaterally challenge their sentences in federal court. *See Brandon L. Garrett, Accuracy in Sentencing*, 87 S. CAL. L. REV. 499, 524 (2014). In fact, the vast majority of federal habeas petitions are filed under § 2254 by prisoners convicted of state crimes. *See* U.S. DEP’T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 (2002),

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.⁸¹

Simply stated, § 2255 allows for an inmate to collaterally challenge⁸² a sentence that was imposed in violation of the Constitution or laws of the United States.⁸³

Nearly fifty years after the enactment of § 2255, Congress promulgated the Antiterrorism and Effective Death Penalty Act of 1996⁸⁴ (AEDPA), which amended § 2255 and established several statutory constraints.⁸⁵ Relevant for present purposes, AEDPA amended § 2255 to include a one-year statute of limitations on an inmate's claim,⁸⁶ which, in the case of inmates seeking to rely on a new rule as the basis of a claim, "run[s] from . . . the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and *made retroactively applicable to cases on collateral review.*"⁸⁷

<http://www.bjs.gov/content/pub/pdf/ppfusd00.pdf> (finding that 80 percent of federal habeas petitions filed in 2000 were from state inmates) [perma.cc/ZR4W-S7ZL].

81. 28 U.S.C. § 2255(a). While a motion for resentencing or release under § 2255 provides the predominant collateral mechanism for a federal prisoner seeking postconviction relief, there are other avenues a federal prisoner could pursue—which themselves carry procedural hurdles—such as a petition under § 2241. *See* Bench, *supra* note 36, at 175; *supra* note 79 and accompanying text. Although rare, a federal prisoner may also seek an "extraordinary writ" from the Supreme Court, such as an original writ of habeas corpus or an original writ of mandamus. *See* Felker v. Turpin, 518 U.S. 651, 658 (1996); Litman, *supra* note 27; Stevenson, *supra* note 44, at 756–57; Vladeck, *supra* note 37, at 7–9. While these mechanisms are not addressed here, they are additional ways the question of whether *Johnson* was made retroactive can be heard by the Supreme Court. *See supra* note 40 and accompanying text.

82. For ease of exposition, this Note refers to § 2255 motions, habeas petitions, collateral challenges, and variations thereof interchangeably.

83. *See* FALLON ET AL., *supra* note 77, at 1303, 1307. Although a simplified explanation of claims cognizable under § 2255, it is sufficient for the purposes of this Note, as *Johnson* claims are widely regarded as constitutional. *See* Litman, *supra* note 29, at 47; *see also infra* Part II. Nevertheless, other claims of sentencing error, including nonconstitutional error, may be cognizable under § 2255 if the alleged error involves "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)); *see also* Russell, *supra* note 79, at 96, 105–06.

84. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S.C.).

85. *See* Garrett, *supra* note 80, at 524; Russell, *supra* note 79, at 96–97.

86. *See* 28 U.S.C. § 2255(f). This statute of limitations was a departure from traditional habeas doctrine, which recognized no limitations period. *See* Hoffstadt, *supra* note 7, at 1414.

87. 28 U.S.C. § 2255(f)(3) (emphasis added). For inmates seeking to allege *Johnson* error, the limitations period began on June 26, 2015, and will expire in June 2016. This Note only considers the retroactivity problem for timely filed successive § 2255 motions alleging *Johnson* error. There are ways, however, for an untimely motion still to obtain review,

In effect, under § 2255 an inmate can only assert a claim anchored upon a new Supreme Court ruling within one year of that ruling, so long as that ruling is retroactively applicable to cases on collateral review.⁸⁸

In addition to the one-year statute of limitations, AEDPA established several “gatekeeping” restrictions on successive § 2255 petitions.⁸⁹ As relevant here, AEDPA imposed § 2255(h)(2), which mandates that before an inmate relying on a new rule of constitutional law may move for a successive time under § 2255, the motion “must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . a new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavailable.”⁹⁰ Section 2244, in turn, provides that the movant must first petition to the circuit court in the jurisdiction where he or she was sentenced for an order authorizing the district court to consider the successive motion.⁹¹ The circuit court may only authorize the motion if it determines that the petitioner made a prima facie showing that the new rule was made retroactive by the Supreme Court per the requirements of § 2255(h)(2).⁹² If such showing is made, only then will the inmate have leave to file a successive § 2255 motion with the district court.⁹³ Finally, the grant or denial of an authorization “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”⁹⁴

including equitable tolling in situations involving a fundamental miscarriage of justice or actual innocence. *See* Litman, *supra* note 40, at 87.

88. *See infra* Part I.D (discussing AEDPA’s interaction with the Court’s retroactivity doctrine). An additional hurdle is procedural default. Briefly, if an inmate could have, but failed to raise a claim on direct appeal, the doctrine of procedural default prevents the inmate from raising that claim on collateral review. *See* Litman, *supra* note 27. Although *Johnson* was not previously available to petitioners now seeking relief for *Johnson* error, a petitioner would still have to establish cause and prejudice for failing to raise the claim previously. *See id.* Nevertheless, the Government has been waiving such procedural arguments on defaulted *Johnson* claims. *See id.*

89. *See* Vladeck, *supra* note 37, at 1; Entzerth, *supra* note 28, at 90.

90. 28 U.S.C. § 2255(h)(2) (emphasis added). Note that the emphasized language is similar, although not identical, to the retroactivity language in § 2255(f)(3). *See supra* note 87 and accompanying text. This nuanced difference is of central importance to this Note.

91. *See* 28 U.S.C. § 2244. Section 2244 also governs the requirements for successive petitions by state inmates under § 2254. *See id.*

92. *See id.* A prima facie showing requires a showing of potential merit sufficient to “warrant a fuller exploration by the district court.” *In re Lott*, 366 F.3d 431, 432–33 (6th Cir. 2004) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)); *see also In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003) (collecting cases). Furthermore, the court of appeals shall grant or deny the authorization “not later than 30 days after the filing of the motion.” 28 U.S.C. § 2244(a)(3)(D).

93. *See* Entzerth, *supra* note 28, at 90 (“Under the certification process of the AEDPA, the circuit courts of appeals serve a ‘gatekeeping’ function, and keep the courthouse doors closed unless an individual meets the narrow criteria of new evidence or new constitutional law entitling one to a second or successive motion. . . . [I]ts function is to prevent a hearing on the merits.”).

94. 28 U.S.C. § 2244(a)(3)(E).

These austere retroactivity provisions⁹⁵ significantly limit the availability of collateral relief even on a colorable claim of a new rule, especially on a successive collateral challenge.⁹⁶ Before examining how the Supreme Court has most recently interpreted these retroactivity requirements, this Note turns to a discussion of the retroactivity doctrine generally.

*D. The Retroactivity Doctrine Dictates Whether New Rules
May Be Applied to Habeas Corpus Petitions*

The retroactivity doctrine is instrumental in determining whether a court will review an initial or successive § 2255 motion, assuming the motions are anchored on a new rule of constitutional law made by the Supreme Court.⁹⁷ Current retroactivity doctrine dictates that newly decided rules of constitutional law should not, save for certain exceptions, be available to defendants whose convictions have become final prior to the new rule's announcement.⁹⁸ The retroactivity doctrine—along with AEDPA—is consequently a substantial barrier to federal habeas petitions.⁹⁹

This section begins by providing a brief discussion of the early retroactivity doctrine in Part I.D.1, before examining the modern *Teague* approach in Part I.D.2. Part I.D.3 then addresses the Court's *Tyler* decision on retroactivity for successive collateral attacks. This section ends with a discussion of the criticisms of *Tyler* in Part I.D.4.

95. See Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on Miller v. Alabama*, 48 IND. L. REV. 931, 984 (2015) (discussing the AEDPA provisions that implicate retroactivity).

96. See Entzeroth, *supra* note 28, at 90–91 (“[E]ven if the prisoner has a meritorious claim, if he cannot survive the certification process, the federal court cannot hear his claim . . . and cannot grant appropriate relief. . . . AEDPA not only restricts the remedies available to prisoners, but also limits the power of federal courts.”); Ronn Gehring, *Tyler v. Cain: A Fork in the Path for Habeas Corpus or the End of the Road for Collateral Review?*, 36 AKRON L. REV. 181, 205 (2002) (“[T]he gatekeeper provision of section 2244(b) is perhaps the most challenging obstacle inmates must overcome to have a court grant a second or successive petition.”). Consequently, AEDPA has been heavily criticized. See, e.g., John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 289 (2006) (arguing AEDPA’s statute of limitations “has deprived thousands of potential habeas petitioners of any federal review of their convictions”); Stevenson, *supra* note 44, at 735 (examining AEDPA’s virtual foreclosure on certain constitutional claims that are sometimes unreviewable until the successive petition stage).

97. A case announces a new rule “if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). Whether a case presents a new rule is itself a hot-button issue, but one that is beyond the scope of this Note. See generally Bryant, *supra* note 73.

98. See Brandon Buskey & Daniel Korobkin, *Elevating Substance Over Procedure: The Retroactivity of Miller v. Alabama Under Teague v. Lane*, 18 CUNY L. REV. 21, 27 (2014); see also Zarrow & Milliken, *supra* note 95, at 932.

99. See Benjamin Robert Ogletree, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603, 673 (1998). Although this Note is solely concerned with the retroactivity of new criminal rules, retroactivity doctrine is also implicated in the civil context. See generally Pamala J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance, and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998).

1. The Early Retroactivity Doctrine

Traditionally, new rules applied without distinction to cases on both direct and collateral review.¹⁰⁰ Under this traditional view of retroactivity, judges did not create new law, but rather discovered and applied preexisting law.¹⁰¹ Accordingly, the idea that a particular rule of law did not apply across the board to all cases was anathema.¹⁰² But this view severely constrained the capacity for the Supreme Court to recognize revolutionary new rules, especially in the federal constitutional criminal procedure context.¹⁰³ And so it came under attack in the mid-twentieth century during the Warren Court era.¹⁰⁴

The Warren Court's doctrinal solution was articulated in *Linkletter v. Walker*.¹⁰⁵ The specific question in *Linkletter* was whether the new exclusionary rule derived from *Mapp v. Ohio*¹⁰⁶ should apply to state criminal cases on federal collateral review.¹⁰⁷ The Court devised a three-prong balancing test involving an examination of the prior history of the rule, its purpose and effect, and whether retroactive application would advance its operation.¹⁰⁸ This case-by-case approach was theoretically useful because it enabled the Court to continue expanding criminal defendants' rights without the danger of a flood of habeas petitions from previously sentenced defendants, as there was then no statute of limitations on habeas petitions.¹⁰⁹ The functional result of the *Linkletter* standard, however, was disparate treatment of similarly situated individuals and arbitrary retroactive application of new rules.¹¹⁰ Consequently, many

100. See Kendall Turner, Note, *A New Approach to the Teague Doctrine*, 66 STAN. L. REV. 1159, 1163 (2014). The retroactivity doctrine is also implicated in the Constitution. See, e.g., U.S. CONST. art. I, § 9, cl. 3 ("No . . . *ex post facto* Law shall be passed."); see also *Calder v. Bull*, 3 U.S. 386, 390 (1798) (defining *ex post facto* laws). The prohibition against *ex post facto* laws is primarily concerned with barring the retroactive application of new criminal laws to criminalize previously lawful conduct. See *Calder*, 3 U.S. at 390. This is distinct from the retroactivity issue discussed herein.

101. See Matthew R. Doherty, Note, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 VAL. U. L. REV. 445, 450–51 (2004).

102. See *id.* at 451.

103. See Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 113 (2010) ("[I]t became increasingly likely that any given state prisoner could point to some federal procedural right . . . that was violated during that prisoner's trial. Thus, an unbridled application of the general retroactivity principle could truly have resulted in the states being required to throw open their prison doors.")

104. See Turner, *supra* note 100, at 1163–64.

105. 381 U.S. 618 (1965); see also Bryant, *supra* note 73, at 30.

106. 367 U.S. 643 (1961).

107. See *Linkletter*, 381 U.S. at 619–20.

108. See Gehring, *supra* note 96, at 187. Incidentally, the *Linkletter* Court held that *Mapp* was not retroactive. *Linkletter*, 381 U.S. at 620.

109. See Allen, *supra* note 103, at 114.

110. See *id.* ("As between petitioners, the *Linkletter* approach was in effect a lottery . . .").

judges and legal scholars, led by Justice Harlan, criticized the *Linkletter* approach to retroactivity.¹¹¹

2. *Teague v. Lane* Provides the Modern Framework for the Retroactivity Doctrine

The *Linkletter* years ended in 1989 with the Court's decision in *Teague*,¹¹² in which Justice O'Connor, writing for a plurality, largely adopted Justice Harlan's proffered solution to the retroactivity puzzle.¹¹³ In *Teague*, the Court recognized the inherent problems with *Linkletter*¹¹⁴ and determined that its approach to retroactivity for cases on collateral review "require[d] modification."¹¹⁵ Following Justice Harlan, the Court held that new constitutional rules are always applicable to all cases on direct appeal and generally not retroactive to cases on collateral review.¹¹⁶ The Court emphasized the interest in finality, which it characterized as "essential to the operation of our criminal justice system."¹¹⁷ The Court did, however,

111. See Doherty, *supra* note 101, at 453–54; Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 57–58 (1965). In particular, Justice Harlan grew frustrated with the lack of an established dichotomy for cases on direct appeal and collateral review and formulated a new approach to retroactivity. See, e.g., *Desist v. United States*, 394 U.S. 244, 258, 263 (1969) (Harlan, J., dissenting) (arguing that new rules should be applied retroactively to cases on direct review, but generally not to cases on collateral review); *Mackey v. United States*, 401 U.S. 667, 688–89, 701 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (same).

112. *Teague v. Lane*, 489 U.S. 288 (1989); see Entzeroth, *supra* note 5, at 184 (“*Teague v. Lane* [is] the pivotal case establishing the modern retroactivity doctrine . . .”). While *Teague* and its progeny originated mostly from state prisoners petitioning for federal habeas relief, the holdings on retroactivity also apply to petitions from federal prisoners. See Christopher S. Strauss, *Collateral Damage: How the Supreme Court’s Retroactivity Doctrine Affects Federal Drug Prisoners’ Apprendi Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1240 (2003). See generally *Bousley v. United States*, 523 U.S. 614 (1998) (discussing *Teague* in the context of a federal inmate’s habeas motion).

113. See *Teague*, 489 U.S. at 305–10, 312; see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1746 (1991) (“[In *Teague*] the Supreme Court accepted the outlines of Justice Harlan’s approach to retroactivity on habeas corpus.”).

114. See *Teague*, 489 U.S. at 305 (“*Linkletter* . . . led to unfortunate disparity in the treatment of similarly situated defendants on collateral review.”).

115. *Id.* at 301.

116. See *id.* at 308.

117. *Id.* at 309; see also Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146 (1970) (suggesting finality as a reason for limited collateral review); Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL’Y 179, 185 (2014) (“[T]he government has a strong interest in preserving . . . a judgment.”). A related theory for limited retroactivity is to prevent a flood of litigation. See *supra* note 103 and accompanying text. Still, and of particular importance to this Note, some argue that finality and floodgate interests are not implicated when a petitioner seeks resentencing as opposed to a modification of a criminal conviction. See, e.g., *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005) (finding that “the cost of correcting a sentencing error is far less than the cost of a retrial” because “resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel”); Russell, *supra* note 79, at 82–83 (“Concerns about finality are much less pressing when a court reconsiders the length of a sentence rather than the validity of a conviction.”); *id.* at 135

carve out two exceptions to the general presumption of nonretroactivity on collateral review: (1) if the new rule places “certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe,”¹¹⁸ or (2) if the new rule “requires the observance of ‘those procedures that . . . are ‘implicit in the concept of ordered liberty.’”¹¹⁹

The Supreme Court has on several occasions elaborated on *Teague*’s first exception to nonretroactivity.¹²⁰ The first such elaboration came in *Penry v. Lynaugh*,¹²¹ where the Court was faced with deciding whether the execution of the mentally handicapped is unconstitutional and, if so, whether that decision was retroactively applicable to the petitioner’s claim on collateral review.¹²² The Court held that “the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.”¹²³ While the Court ultimately ruled that executing the mentally handicapped was not unconstitutional (at the time),¹²⁴ its discussion of *Teague*’s first exception remains good law.¹²⁵

In *Bousley v. United States*,¹²⁶ the Court further expanded its retroactivity approach when it determined that *Bailey v. United States*¹²⁷ was retroactive on collateral review.¹²⁸ In *Bousley*, the Court emphasized that the *Teague*

(arguing that in the career offender sentencing context, the number of resentencings would be “contained”).

118. *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

119. *Id.* (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in judgments in part and dissenting in part)). “Although *Teague* was a plurality opinion . . . the *Teague* rule was affirmed and applied by a majority of the Court shortly thereafter.” *Danforth v. Minnesota*, 552 U.S. 264, 266 n.1 (2008) (citing *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989)).

120. *See, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Bousley v. United States*, 523 U.S. 614 (1998); *Penry*, 492 U.S. 302, *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also* Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 965–66 (2015) (discussing the development of the substantive rule exception to nonretroactivity). While the first exception has been expanded, the second *Teague* exception—the “watershed” rule exception—has yet to be applied to a new rule. *See FALLON ET AL., supra* note 77, at 1246.

121. 492 U.S. 302 (1989), *abrogated by Atkins*, 536 U.S. 304.

122. *See id.* at 329.

123. *Id.* at 330.

124. *Id.* at 340. This point was overruled thirteen years later. *See Atkins*, 536 U.S. at 321.

125. *See Allen, supra* note 103, at 125 (“Lower courts, both state and federal, have unanimously concluded that the *Teague* discussion in *Penry* remains in force and that *Atkins* is entitled to retroactive application.”). *Penry* also extended *Teague*’s applicability from convictions to sentences. *See Zarrow & Milliken, supra* note 95, at 960. Nevertheless, the *Penry* approach to the first *Teague* exception is rarely invoked. *See Turner, supra* note 100, at 1168 (“*Penry* has proven to be an anomaly, and its approach contrasts starkly with later applications of *Teague*.”).

126. 523 U.S. 614 (1998).

127. 516 U.S. 137 (1995) (holding the word “uses” in 18 U.S.C. § 924(c)(1) to mean active employment of a firearm and not mere possession).

128. *See Bousley*, 523 U.S. at 621. In *Bousley*, the petitioner pleaded guilty to “using” a firearm “during and in relation to a drug trafficking crime.” *See id.* at 616. On the petitioner’s first § 2255 motion, the Supreme Court considered whether the new rule in *Bailey* should have retroactive effect on the theory that the petitioner’s guilty plea for

nonretroactivity rule is only applicable to procedural rules, not “to the situation in which th[e] Court decides the meaning of a criminal statute enacted by Congress,” which is substantive in nature.¹²⁹ The Court then relied on the doctrinal foundations of habeas corpus to draw an analogy as to why substantive rules, similar to certain procedural rules exempt from nonretroactivity under *Teague*, are also entitled to retroactive application.¹³⁰ The Court asserted that the *Teague* exceptions are founded upon a principle function of habeas corpus—“to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.”¹³¹ The Court then asserted that much like the *Teague* exceptions, including “decisions placing conduct ‘beyond the . . . law-making authority to proscribe,’”¹³² decisions holding that a federal criminal statute does not reach certain conduct are also retroactive.¹³³ This is so because their retroactive application similarly advances a core principle of habeas corpus—mitigating “a significant risk that a defendant stands convicted of an ‘act that the law does not make criminal.’”¹³⁴ The Court therefore determined that “the doctrinal underpinnings of habeas review” supported the retroactive application of *Bailey* to the petitioner’s claim.¹³⁵ In short, *Bousley* provides that a substantive change in law is retroactive.¹³⁶

“using” a firearm during a drug trafficking crime was not fully informed and therefore unlawful. *See id.* at 617–18. Although *Bailey* did not provide a new rule of constitutional law, and hence would not qualify for application to a successive motion under § 2255, this was a first § 2255 motion, and that requirement was not implicated. *Compare* 28 U.S.C. § 2255(h)(2) (2012) (requiring new rules to be constitutional in nature for use on successive motions), *with id.* § 2255(f)(3) (exhibiting no such requirement for using new rules on initial motions).

129. *Bousley*, 523 U.S. at 620. The Court essentially combined the two *Teague* exceptions into one: certain procedural rules, such as those that place certain conduct beyond the lawmaking authority to proscribe, and watershed rules of criminal procedure, are entitled to retroactive application. After combining the two *Teague* exceptions into one, the Court simultaneously created an additional species of retroactive rules: rules that are substantive. *See FALLON ET AL.*, *supra* note 77, at 1246.

130. *See Bousley*, 523 U.S. at 620–21.

131. *Id.* at 620 (quoting *Teague v. Lane*, 489 U.S. 288, 312 (1989)).

132. *Id.* (quoting *Teague*, 489 U.S. at 311).

133. *See id.* at 620–21.

134. *Id.* at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). By citing *Davis*, the Court invoked an older case that, in addressing whether a certain claim was cognizable on collateral review, discussed the core purposes of habeas corpus. *See Davis*, 417 U.S. at 346–47 (holding the petitioner’s claim—that he was convicted for an act that the law does not make criminal—is cognizable under § 2255 because a core function of habeas is to protect against such risks); *see also Doherty*, *supra* note 101, at 460 (“The importance of the distinction between substance and procedure in the habeas context is rooted in concern for the principal function of habeas corpus relief, which is to assure that an innocent person will not stay convicted or incarcerated under a law that is no longer criminal.”); *supra* note 77 and accompanying text.

135. *Bousley*, 523 U.S. at 621.

136. *See Entzerth*, *supra* note 5, at 197 (“*Bousley* appeared to provide that changes in substantive law would not be subject to the *Teague* analysis and, as such, substantive decisions would apply to cases pending in habeas review.”); *Doherty*, *supra* note 101, at 460 n.87 (“*Bousley* stands for the proposition that a change in substantive law must be given retroactive affect [sic].”). At least one scholar, however, points out that the holding of

In *Schriro v. Summerlin*,¹³⁷ the Court echoed its *Bousley* approach to the *Teague* doctrine. In *Summerlin*, the petitioner collaterally challenged his death penalty sentence, arguing that the new rule announced in *Ring v. Arizona*¹³⁸ rendered his sentence unlawful.¹³⁹ The Court found that *Ring* was not entitled to retroactive effect because it was not substantive and did not meet the *Teague* exceptions.¹⁴⁰ But more importantly, the Court reiterated its ruling in *Bousley*, stating new substantive rules, including “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,” generally apply retroactively.¹⁴¹ Such rules, the Court emphasized, are entitled to retroactive effect “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.”¹⁴²

In the days leading up to this Note’s publication, the Supreme Court’s retroactivity jurisprudence evolved again with the Court’s decision in *Montgomery v. Louisiana*.¹⁴³ The Court reemphasized that *Teague*’s first exception stands for the proposition that substantive rules are entitled to retroactive effect.¹⁴⁴ The Court also stated that *Teague* requires the retroactive application of new substantive rules¹⁴⁵ and that “when a new substantive rule of constitutional law controls the outcome of a case, the *Constitution* requires state collateral review courts to give retroactive effect

Bousley is not so clear. See Litman, *supra* note 29, at 49 (“[I]t’s not clear whether the ‘holding’ of *Bousley* is that all decisions altering the meaning of a criminal statute are substantive, or whether the ‘holding’ of *Bousley* is that all decisions interpreting what conduct the law proscribes are substantive. There is language in the decision to support either reading.”).

137. 542 U.S. 348 (2004).

138. 536 U.S. 584 (2002) (holding it unconstitutional for a sentencing judge to find an aggravating circumstance necessary for the imposition of the death penalty).

139. See *Summerlin*, 542 U.S. at 350–51.

140. See *id.* at 353, 357–58.

141. *Id.* at 351–52 (citations omitted). The Court reiterated that rules placing the particular conduct covered by the statute beyond the state’s power to punish, which traditionally were considered a *Teague* exception, are more accurately characterized as substantive rules not subject to *Teague*. See *id.* at 352 n.4. Accordingly, like *Bousley*, at least one scholar suggests that *Summerlin* also “eliminate[d] the first *Teague* exception and recognize[d] simply that changes in substantive law are not subject to *Teague* at all.” Entzeroth, *supra* note 5, at 209. Because the substantive rule exception to nonretroactivity evolved from *Teague*’s original first exception, this Note refers to such rules as falling within *Teague*’s “substantive rule exception” or the “first exception,” although substantive rules are more precisely not subject to *Teague*. For a thorough analysis of the substantive rule exception, see Zarrow & Milliken, *supra* note 95, at 952–64.

142. *Summerlin*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

143. No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016) (holding that the rule announced in *Miller v. Alabama*—that mandatory imprisonment for life without parole for juvenile homicide offenders is unconstitutional—is substantive and thus retroactive to cases on collateral review).

144. See *id.* at *5.

145. See *id.* at *6.

to that rule.”¹⁴⁶ Moreover, the Court provided a general principle: “[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.”¹⁴⁷

3. *Tyler v. Cain* Controls Retroactivity for Successive Collateral Challenges

The pertinent question now becomes, how does the Court’s retroactivity jurisprudence, as explained by *Teague* and its progeny, interact with the retroactivity requirements imposed by AEDPA? Recall that a showing of retroactivity is necessary for an inmate seeking to rely on a new rule in a § 2255 motion.¹⁴⁸ For first § 2255 motions,¹⁴⁹ an inmate may only use a new rule within a year of its announcement if the new rule was recognized by the Supreme Court and retroactively applicable to cases on collateral review.¹⁵⁰ Hence, Courts assess both whether the rule is new and whether it is retroactive under *Teague*.¹⁵¹ But despite the fact that § 2255(f)(3) and § 2255(h)(2) exhibit very similar retroactivity language, courts do not employ the same approach in determining the retroactivity of a new rule for the purposes of successive § 2255 motions. Under § 2255(h)(2), a petitioner may not file a successive motion unless it is predicated on a new rule of law that was made retroactive to cases on collateral review “by the Supreme Court.”¹⁵² Section 2255(h)(2)’s use of the operative phrase “by the Supreme Court” has resulted in a distinct inquiry for establishing retroactivity for successive § 2255 motions—an inquiry not governed solely by *Teague*, but also by the Court’s decision in *Tyler*.¹⁵³

146. *Id.* at *7 (emphasis added).

147. *Id.* at *10.

148. *See* 28 U.S.C. §§ 2255(f)(3), (h)(2) (2012); *supra* notes 87–93 and accompanying text.

149. Recall that “first” or “initial” § 2255 motions refer to an inmate’s first attempt at a § 2255 motion, after his or her conviction and sentence have become final. *See supra* notes 27–28 and accompanying text.

150. *See* 28 U.S.C. § 2255(f)(3).

151. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) (“[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised.”); Doherty, *supra* note 101, at 465 (“[T]he *Teague* analysis remains a seminal inquiry in analyzing retroactivity.”); Scott, *supra* note 117, at 190 (“The Supreme Court . . . has consistently applied *Teague*’s non-retroactivity approach to collateral attacks on sentences.”). In fact, there is a presumption that at some level, AEDPA codified *Teague*. *See Entzeroth, supra* note 5, at 198 (“Congress used concepts and incorporated language from *Teague* in several specific attempts to restrict the scope of habeas review.”); Zarrow & Milliken, *supra* note 95, at 933 n.16 (collecting cases debating whether AEDPA codified *Teague*). *But see* *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (asserting that AEDPA did not codify *Teague*). Still, the *Greene* Court recognized that while *Teague* and AEDPA are discrete, “neither abrogates or [sic] qualifies the other.” *Id.*

152. 28 U.S.C. § 2255(h)(2).

153. *Tyler v. Cain*, 533 U.S. 656 (2001); *see also* Ellen F. Carey, *Closing the Door on Successive Habeas Petitions: Supreme Court Must Expressly Hold That New Rule Is Retroactively Available for Collateral Review Under the AEDPA*, 36 SUFFOLK U. L. REV. 273, 278–79 (2002).

Tyler is the chief case addressing the retroactivity of new rules to successive habeas petitions. In *Tyler*, the Court was tasked with determining, under AEDPA, whether *Cage v. Louisiana*¹⁵⁴ was entitled to retroactive effect on a successive collateral challenge.¹⁵⁵ The 5-4 Court determined that the new rule had not been made retroactive by the Supreme Court because the Court had not expressly held *Cage* to be retroactive.¹⁵⁶ The Court interpreted the word “made” to mean “held” and established that the requirements for successive collateral challenges are only satisfied when the Court expressly holds a new rule to be retroactive.¹⁵⁷ The Court further implied that even if *Cage*—or any new rule—superficially met one of the *Teague* exceptions, it still would not be made retroactive unless the Court expressly held so.¹⁵⁸ Moreover, the Court held that a rule is not made retroactive if the Court establishes principles of retroactivity and leaves the finding of retroactivity to the lower courts.¹⁵⁹ Such a strict interpretation of the statute was necessary, the Court reasoned, “for the proper implementation of the collateral review structure created by AEDPA” because the thirty-day time limit for considering authorizations to file successive habeas motions implies that the lower courts were not intended

154. 498 U.S. 39 (1990) (per curiam) (finding unconstitutional a jury instruction that could have been interpreted to allow for conviction without proof beyond a reasonable doubt).

155. *Tyler*, 533 U.S. at 658–59. The inmate in *Tyler* filed a successive motion under § 2254, which is the state analogue to § 2255. See *supra* note 80. Accordingly, the Court in *Tyler* interpreted the “made retroactive by the Supreme Court” language as stated in § 2244(b)(2)(A) and in the state context. See *supra* note 91 and accompanying text. Nevertheless, the language in § 2244(b)(2)(A) also applies to federal prisoners seeking to file successive motions under § 2255 and is identical to the threshold language in § 2255(h)(2). See *supra* notes 89–93 and accompanying text. Thus, the holding in *Tyler* also applies to the federal successive habeas context. See Hoffstadt, *supra* note 7, at 1489 n.430 (“*Tyler* involved an interpretation of § 2244, but its holding presumably would apply to § 2255, given the same statutory language.”).

156. See *Tyler*, 533 U.S. at 663–64.

157. See *id.* The Court decided that “made” meant “held,” in part through reliance on an earlier Supreme Court case that invoked a strict reading of a different provision of AEDPA. See *id.* at 664 (“To be sure, the statute uses the word ‘made,’ not ‘held.’ But we have already stated, in a decision interpreting another provision of AEDPA, that Congress need not use the word ‘held’ to require as much.” (referring to *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (holding the phrase “clearly established Federal law, as determined by the Supreme Court of the United States,” in § 2254(d)(1) refers to holdings of the Supreme Court))). Therefore, *Tyler* is not the only Supreme Court case to produce a conservative reading of AEDPA. See generally Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741 (2010) (criticizing the *Williams* holding).

158. See *Tyler*, 533 U.S. at 666 (“The most [the petitioner] can claim is that, based on . . . *Teague*, this Court *should* make *Cage* retroactive to cases on collateral review. What is clear, however, is that we have not ‘made’ *Cage* retroactive to cases on collateral review.”); Hoffstadt, *supra* note 7, at 1489 (“Even if a claim is not ‘*Teague*-barred’ by application of *Teague* itself, the claim may still be barred if it is raised in a second or successive § 2255 motion. . . . [T]he Supreme Court itself has to declare the ‘new rule’ retroactive.”). Notably, while the Court held that *Cage* had not been made retroactive, the Court suggested that *Cage* was not even retroactive under *Teague*. See Entzeroth, *supra* note 5, at 214 (“Although the Court declined to state definitively whether *Cage* is retroactive or not, the majority certainly hinted that it was not.”).

159. See *Tyler*, 533 U.S. at 663.

to employ “the difficult legal analysis” necessary to resolve questions of retroactivity.¹⁶⁰ The Court did, however, remark that multiple holdings may be used to surmise the retroactivity of a new rule, but “only if the holdings in those cases necessarily dictate” that result.¹⁶¹

In her *Tyler* concurrence, Justice O’Connor agreed with the majority that the clearest instance of when the Court has made a rule retroactive is when the Court has expressly held that the new rule is retroactive.¹⁶² Justice O’Connor emphasized, however, as did Justice Breyer writing for the four-justice dissent, that two or more cases can logically dictate that a new rule has been made retroactive by the Supreme Court:

[A] single case that expressly holds a rule to be retroactive is not a *sine qua non* for the satisfaction of this statutory provision. This Court instead may “ma[k]e” a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule. To apply the syllogistic relationship described by Justice Breyer, if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have “made” the given rule retroactive to cases on collateral review.¹⁶³

Justice O’Connor further explained that the Court can be said to have made a rule retroactive “only where the Court’s holdings logically permit no other conclusion than that the rule is retroactive.”¹⁶⁴ Justice O’Connor also invoked *Teague*’s first exception to provide an “easy to demonstrate” example of the multiple holdings principle: “When the Court holds as a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it necessarily follows that this Court has ‘made’ that new rule retroactive to cases on collateral review.”¹⁶⁵ Since the *Tyler* decision, courts have come to follow Justice O’Connor’s approach in determining whether a rule is made retroactive.¹⁶⁶

160. *Id.* at 664; *see also supra* note 92 and accompanying text.

161. *Tyler*, 533 U.S. at 666.

162. *Id.* at 668 (O’Connor, J., concurring).

163. *Id.* at 668–69 (citations omitted); *see also id.* at 672–73 (Breyer, J., dissenting).

164. *Id.* at 669 (O’Connor, J., concurring).

165. *Id.* When this occurs, Justice O’Connor explained, the Court has made the rule retroactive “through its holdings alone, without resort to dicta and without any application of principles by lower courts.” *Id.* Justice Breyer, for the dissent, agreed. *See id.* at 675 (Breyer, J., dissenting).

166. *See Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) (“Several courts of appeals have adopted Justice O’Connor’s *Tyler* analysis to determine whether a recent decision by the Supreme Court satisfies the standards for authorization under § 2255(h)(2).”); Nishi Kumar, *Cruel, Unusual, and Completely Backwards: An Argument for Retroactive Application of the Eighth Amendment*, 90 N.Y.U. L. REV. 1331, 1367 (2015) (“[A]lthough AEDPA seems to explicitly require that the Supreme Court make a rule retroactive . . . this requirement has not been consistently applied by the lower courts. The more common practice is for lower courts to discern whether the Supreme Court would have found a decision to be retroactive and deny or grant a petition on that basis.”); Vladeck, *supra* note 37, at 4 (“[A]fter *Tyler*, lower courts have generally agreed that, if a new rule is

4. Criticisms of *Tyler*

The *Tyler* decision has been criticized on several grounds, including its effect on Congress's intent in promulgating AEDPA and its highly preclusive effect on successive habeas petitions.¹⁶⁷ AEDPA's legislative history suggests that Congress indeed intended to make it harder for successive petitions to be reviewed, but query whether Congress intended the *Tyler* majority's exacting interpretation of the statute.¹⁶⁸ Also unclear is whether Congress intended the slight difference in the syntax of § 2255(f)(3) and § 2255(h)(2) to have such a substantial impact on the way retroactivity is assessed for first as opposed to successive § 2255 motions.¹⁶⁹ Further complicating matters is the general understanding that, on some level, AEDPA was "intended to incorporate, in wholesale fashion, the Court's retroactivity jurisprudence."¹⁷⁰ But under the Court's prior retroactivity jurisprudence, successive petitions based on new rules of constitutional law were not nearly as burdensome a showing to make.¹⁷¹

Even taking *Tyler* at face value, it is unclear when the Court has "held" a rule to be retroactive, and the *Tyler* majority's holding and Justice

unambiguously retroactive based upon prior Supreme Court precedents (say, for example, because it is clearly 'substantive' under *Teague*), then there need not be a subsequent Supreme Court decision in which the new rule is 'made retroactive'; it was already 'made retroactive' by dint of the prior holdings that all 'substantive' new rules are retroactively enforceable.").

167. See *infra* notes 169, 176, 178–79, 181–82 and accompanying text.

168. See *supra* text accompanying notes 87, 90, 152–53; see also H.R. REP. NO. 104-518, at 111 (1996) ("This title incorporates reforms to curb the abuse of . . . habeas corpus Successive petitions must be approved by a panel of the court of appeals and are limited to those petitions that . . . involve new constitutional rights that have been retroactively applied by the Supreme Court."). Congress was also concerned with preventing "successive bites at the apple," that is, multiple habeas petitions by the same petitioner. See, e.g., 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein) ("[T]his bill provides habeas petitioners with one bite of the apple. It assures that no one convicted of a capital crime will be barred from seeking habeas relief in Federal court . . . [and] it appropriately limits second and subsequent habeas appeals to narrow and appropriate circumstances."); 137 Cong. Rec. 16,538 (1991) (statement of Sen. Hatch) (recognizing a problem when prisoners take "a 10th bite of the apple, even a 20th bite of the apple").

169. See Stevenson, *supra* note 44, at 772–73 ("Congress intended to ensure that petitioners would have at least one full, fair opportunity to raise each meritorious claim [But] those who voted for the legislation surely did not anticipate or intend the severe ripple effects that the preclusive successive petition rules have had"); see also *id.* at 771 (arguing that Congress likely did not intend to constrict successive federal habeas corpus in a way that prejudices meritorious claims that can only be litigated on successive collateral review). Indeed, AEDPA was hastily drafted after the Oklahoma City bombing and has not "been hailed as an epitome of sophisticated statutory drafting." Angela Ellis, "Is Innocence Irrelevant" to AEDPA's Statute of Limitations? *Avoiding a Miscarriage of Justice in Federal Habeas Corpus*, 56 VILL. L. REV. 129, 148 (2011); see *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."). It is therefore not unfathomable that the hasty creation of the act unintentionally led to the *Tyler* holding.

170. Zarrow & Milliken, *supra* note 95, at 981; see also *supra* note 151 and accompanying text.

171. See Stevenson, *supra* note 44, at 710–11 ("The substantive standard that this 'gatekeeping panel' is to apply . . . is far more restrictive and unforgiving than its antecedent.").

O'Connor's multiple holdings approach are in tension. On the one hand, the Court has stated that only the Court itself can make a rule retroactive under § 2244(b)(2)(A) through an express holding to that effect.¹⁷² On the other hand, the majority suggested, and both Justice O'Connor and the dissent agreed, that multiple holdings can logically dictate the Court has held a new rule retroactive.¹⁷³ Finally, Justice O'Connor's easy example—that a rule is made retroactive when it is a type contemplated by *Teague*'s first exception—only further obfuscates the inquiry.¹⁷⁴

Although there is a dearth of scholarship on *Tyler*, the existing scholarly reactions to the decision are largely critical of its narrow interpretation of § 2244(b)(2)(A).¹⁷⁵ Some have argued that *Tyler* erodes the established retroactivity approach and renders *Teague* an obsolete doctrine in the successive habeas context.¹⁷⁶ While the Court maintains that *Teague* is still its own standard under AEDPA,¹⁷⁷ by creating an inquiry that requires both examining whether the Supreme Court has expressly held a new rule retroactive and performing a *Teague* retroactivity analysis, *Tyler* has reduced the significance of the *Teague* analysis. The *Tyler* decision also arguably impedes the traditional notions of the purpose of habeas corpus¹⁷⁸ and unreasonably limits lower federal courts' jurisdiction over habeas petitions.¹⁷⁹ In addition, some argue that *Tyler*'s virtual elimination of the availability of successive habeas petitions is a violation of the Suspension Clause.¹⁸⁰ Indeed, *Tyler* may result in situations where a petitioner is never able to bring a successive claim based on a new ruling that would otherwise be classified as retroactive under *Teague*, because for all practical purposes the Supreme Court is unlikely to expressly hold a new rule retroactive when announcing the rule.¹⁸¹ Finally, *Tyler* leads to inequitable results for

172. See *Tyler v. Cain*, 533 U.S. 656, 663–64 (2001).

173. See *id.* at 666; *id.* at 668–69 (O'Connor, J., concurring); *id.* at 672–73 (Breyer, J., dissenting).

174. See *id.* at 669 (O'Connor, J., concurring).

175. See sources cited *infra* notes 176, 178, 181, 182.

176. See, e.g., Gehring, *supra* note 96, at 210 (“[T]he Court’s decision in *Tyler* effectively eliminates the two exceptions found in *Teague v. Lane*, which in turn makes . . . *Teague* obsolete.”).

177. See generally *Horn v. Banks*, 536 U.S. 266 (2002).

178. Because the *Tyler* reading of § 2255(h)(2) “forecloses meritorious [habeas] claims,” Litman, *supra* note 29, at 52, it prevents habeas review for prisoners who have been “incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted,” *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting); see also *supra* notes 77, 134 and accompanying text.

179. See Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1914–15 (2008) (discussing how the Supreme Court has used textualism to narrow courts’ jurisdiction in a variety of ways, and stating that *Tyler* limited federal courts’ ability to entertain habeas petitions).

180. See Allen, *supra* note 103, at 127 n.114; Gehring, *supra* note 96, at 211; see also U.S. CONST. art. I, § 9, cl. 2.

181. See *Tyler*, 533 U.S. at 677 (Breyer, J., dissenting) (“After today’s opinion . . . [w]e will be required to restate the obvious, case by case, even when we have explicitly said, but not ‘held,’ that a new rule is retroactive.”); see also Doherty, *supra* note 101, at 481 & n.196 (suggesting that, after *Tyler*, to avoid the waste and delay in waiting for a new rule to be held retroactive, the Court should describe the retroactivity of a new rule when announced, but

similarly situated habeas petitioners.¹⁸² The current circuit split on *Johnson* retroactivity exemplifies this inequity.

II. THE CIRCUIT SPLIT ON *JOHNSON* RETROACTIVITY

Before *Johnson*, inmates petitioning for habeas relief founded on erroneous applications of the residual clause generally relied on a line of cases that began with *Begay v. United States*.¹⁸³ The ruling in *Johnson*, however, has supplanted those cases as the basis for habeas relief from sentences imposed under the residual clause.¹⁸⁴ Inmates sentenced under the residual clause now have a new, and certainly more salient, argument for relief—they were deprived of due process of law.

The circuit split on whether the new rule announced in *Johnson* can be used in successive petitions under § 2255 and overcome the § 2255(h)(2) approval requirement¹⁸⁵ serves as a major impediment to petitioners in certain jurisdictions.¹⁸⁶ As of the writing of this Note, the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits have authorized successive habeas petitions and found that *Johnson* has been made retroactive by the Supreme Court under § 2255(h)(2) and *Tyler*.¹⁸⁷ On the other hand, the

also recognizing that such a scenario is unlikely); Strauss, *supra* note 112, at 1247 (“The Supreme Court’s *Tyler* decision simply forecloses the possibility that a second or successive § 2255 motion will be entertained without a Supreme Court holding of retroactivity.”); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. REV. 1389, 1444 n.260 (2005) (“[T]he Court would have no reason when establishing a new constitutional rule in a direct appeal to speak to the applicability of the new rule to collateral cases.”).

182. See Strauss, *supra* note 112, at 1247–48 (“[After *Tyler*] even the *Teague* bright-line definition of ‘similarly situated,’ meaning all litigants in the same procedural posture, does not operate evenly.”). Still, maintaining some restrictions on successive habeas motions does secure finality interests. See, e.g., *Gilbert v. United States*, 640 F.3d 1293, 1311 (11th Cir. 2011) (“The statutory bar against second or successive motions is one of the most important AEDPA safeguards for finality of judgment. . . . If second and successive motions are not ‘greatly restrict[ed],’ there will be no end to collateral attacks on convictions and sentences, and there will be no finality of judgment.” (alterations in original)).

183. 553 U.S. 137 (2008); see, e.g., *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (applying *Begay* but denying relief for lack of cognizability); *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (same); *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011) (applying *Begay* and *Chambers v. United States* retroactively); see also Runyon, *supra* note 36, at 448 (discussing the pre-*Johnson* Supreme Court cases that construed the residual clause).

184. See *Price v. United States*, 795 F.3d 731, 732 (7th Cir. 2015) (recognizing *Johnson* as overruling *Begay*).

185. See *supra* text accompanying note 90.

186. To be clear, the split is on whether *Johnson* has been “made retroactive” and not on whether *Johnson* is retroactive under *Teague* or whether it announced a new constitutional rule. In fact, at least one circuit that has held that *Johnson* has not been made retroactive recognizes that *Johnson* is substantive and thus likely retroactive under *Teague*. See *In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015).

187. See, e.g., *Pakala v. United States*, 804 F.3d 139, 140 (1st Cir. 2015) (per curiam); *Rivera v. United States*, No. 13-4654 (2d Cir. Oct. 5, 2015); *In re Watkins*, No. 15-5038, 2015 WL 9241176, at *1 (6th Cir. Dec. 17, 2015); *Price*, 795 F.3d at 734–35; *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam); *Striet v. United States*, No. 15-72506 (9th Cir. Aug. 25, 2015). Moreover, the U.S. Department of Justice regularly concedes that *Johnson* is retroactive for both initial and successive § 2255 motions. See Letter, *In re Jackson*, No. 15-8098 (10th Cir. Oct. 20, 2015) (urging the court to reconsider

Fifth, Tenth, and Eleventh Circuits have denied authorizations on the ground that *Johnson* has not been made retroactive by the Supreme Court.¹⁸⁸ Accordingly, Part II.A examines select decisions from several of the circuits that have held that *Johnson* has been made retroactive, and Part II.B examines select decisions from the circuits that have found that *Johnson* has not been made retroactive.¹⁸⁹

*A. The Majority View: The Supreme Court Has Made
Johnson Retroactive to Cases on Collateral Review*

Although the Seventh, Sixth, First, and Eighth Circuits agree that *Johnson* has been made retroactive, they are not in complete agreement as to why. Part II.A.1 details Seventh and Sixth Circuit opinions holding that *Johnson* has been made retroactive. Part II.A.2 highlights First and Eighth Circuit opinions granting authorization to file successive § 2255 motions based primarily on the Government's concession that *Johnson* has been made retroactive.

1. The Seventh and Sixth Circuits:
Johnson Was Made Retroactive Under Tyler

The Seventh Circuit was the first federal appellate court to rule on whether *Johnson* can be applied retroactively to a successive § 2255 motion. In *Price v. United States*,¹⁹⁰ Price was convicted in 2006 of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).¹⁹¹ Price had three prior convictions that qualified him for the ACCA's sentencing enhancement,¹⁹² and the court sentenced him to twenty years and ten months imprisonment,¹⁹³ a term exceeding the fifteen-year mandatory minimum sentence under the ACCA.¹⁹⁴ Price's sentence was affirmed on direct appeal and his subsequent § 2255 motion was denied.¹⁹⁵

After the Supreme Court decided *Johnson*, Price petitioned the Seventh Circuit to authorize the district court to entertain a successive § 2255

its holding in *In re Gieswein*, and indicating that the Government believes that *Johnson* has been made retroactive); Litman, *supra* note 40, at 82.

188. See, e.g., *In re Williams*, 806 F.3d 322, 324 (5th Cir. 2015); *In re Gieswein*, 802 F.3d 1143, 1148–49 (10th Cir. 2015) (per curiam); *Rivero*, 797 F.3d at 989. As of this writing, only *Williams* holds that *Johnson* is not retroactive under *Teague*. Although scholars believe *Johnson* is retroactive under *Teague*, they are not in agreement that it has been made retroactive. See, e.g., Litman, *supra* note 29, at 48–49 (arguing that *Johnson* is retroactive under *Teague* but conceding uncertainty on whether it has been made retroactive); Vladeck, *supra* note 37 (arguing the Court should make *Johnson* retroactive but not weighing in on whether it has already done so).

189. The cases this part discusses were selected because they were either the first cases in their circuits to encounter the issue or were the first to provide substantive analysis beyond that of a summary order granting or denying authorization.

190. 795 F.3d 731 (7th Cir. 2015).

191. *Id.* at 732.

192. See *id.*; 18 U.S.C. § 924(e) (2012).

193. See *Price*, 795 F.3d at 732.

194. See 18 U.S.C. § 924(e)(1).

195. See *Price*, 795 F.3d at 732.

motion¹⁹⁶ on the basis that his prior sentence, invoked under the unconstitutional residual clause, was unlawful.¹⁹⁷ In determining whether to authorize Price's successive motion, the court first engaged in a *Teague* analysis and established that the *Johnson* rule was one of constitutional law because it "rests on the notice requirement of the Due Process Clause of the Fifth Amendment" to the Constitution.¹⁹⁸ The court next found that the rule was a new rule, because it was not dictated by prior precedent nor previously available to Price.¹⁹⁹ The court then determined that *Johnson* was also a substantive rule, because in striking down the residual clause, the Court prohibited a "certain category of punishment for a class of defendants because of their status."²⁰⁰ The court held that a prisoner sentenced under the residual clause thus bears substantial risk of receiving "a punishment that the law cannot impose upon him."²⁰¹

In finally determining that *Johnson* was "made retroactive to cases on collateral review by the Supreme Court,"²⁰² the court reasoned that the Supreme Court need not expressly hold *Johnson* retroactive.²⁰³ The court relied on Justice O'Connor's concurrence in *Tyler*,²⁰⁴ which stated that the Court can make a rule retroactive "through multiple holdings that logically dictate the retroactivity of the new rule."²⁰⁵ As such, and because Justice O'Connor in *Tyler* explained that when the Court creates a new rule protecting a particular class of primary conduct from the criminal lawmaking authority's power to proscribe,²⁰⁶ the *Price* court recognized that "it necessarily follows that [the Supreme Court] has 'made'" the new substantive *Johnson* rule retroactive.²⁰⁷ The *Price* court, in essence, used the *Bousley* and *Summerlin* expansions of *Teague*'s first exception²⁰⁸ to characterize *Johnson* as substantive and as one of the easy cases that Justice O'Connor has said the Court has necessarily made retroactive. In sum, because of the substantive nature of the *Johnson* rule, the court reasoned that the Supreme Court had made *Johnson* retroactive.²⁰⁹

196. See *id.*; *supra* notes 90–93 and accompanying text.

197. See *Price*, 795 F.3d at 732.

198. *Id.*

199. See *id.* at 732–33.

200. *Id.* at 734 (quoting *Saffle v. Parks*, 494 U.S. 484, 494 (1990)). *Saffle* derived this language from *Penry v. Lynaugh*, 492 U.S. 302 (1989). See *supra* Part I.D.2.

201. *Price*, 795 F.3d at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)). *Summerlin*, in turn, was quoting *United States v. Davis*, 417 U.S. 333 (1974)—via *Bousley v. United States*, 523 U.S. 614, 620 (1998)—to invoke a traditional purpose of habeas corpus. See *Summerlin*, 542 U.S. at 352; see also *supra* note 134 and accompanying text. See generally *supra* Part I.D.2.

202. 28 U.S.C. § 2255(h)(2) (2012); see *Price*, 795 F.3d at 734.

203. See *Price*, 795 F.3d at 734.

204. *Tyler v. Cain*, 533 U.S. 656 (2001).

205. *Price*, 795 F.3d at 733 (quoting *Tyler*, 533 U.S. at 668 (O'Connor, J., concurring)); see also *supra* notes 163–65 and accompanying text.

206. See *Price*, 795 F.3d at 733 (quoting *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring)).

207. *Id.* at 734 (quoting *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring)).

208. See *supra* Part I.D.2.

209. See *Price*, 795 F.3d at 734.

The Sixth Circuit, in *In re Watkins*,²¹⁰ took a similar approach. Like the other circuits to consider the issue, the court first asserted that *Johnson* announced a new rule of constitutional law that was previously unavailable to the petitioner.²¹¹ The court then invoked Justice O'Connor's concurrence in *Tyler* and determined that the *Johnson* rule fell within the easy to demonstrate logical relationships that Justice O'Connor articulated.²¹² Accordingly, the court held that because *Johnson* disallows "the imposition of an increased sentence on those defendants whose *status* as armed career criminals is dependent on offenses that fall within the residual clause . . . '[t]here is no escaping the logical conclusion that the [Supreme] Court itself has made *Johnson* categorically retroactive to cases on collateral review.'"²¹³

2. The First and Eighth Circuits: Accepting the Government's Concession of Retroactivity

Like the Seventh Circuit, the First Circuit in *Pakala v. United States*²¹⁴ authorized a petitioner's request to file a successive § 2255 motion based on *Johnson*.²¹⁵ In *Pakala*, the Government conceded that the petitioner "ha[d] at least made a prima facie showing that *Johnson* ha[d] been made retroactive by the Supreme Court."²¹⁶ In light of this concession, the court authorized the motion, but noted that the *Johnson* retroactivity question has divided the circuit courts.²¹⁷

The Eighth Circuit has also authorized a petitioner's request to file a successive § 2255 motion alleging *Johnson* error.²¹⁸ In *Woods v. United States*,²¹⁹ the court granted deference to the Government's position that *Johnson* has been made retroactive: "Here, the United States concedes that *Johnson* is retroactive, and it joins Woods's motion. Based on the [G]overnment's concession, we conclude that Woods has made a prima facie showing" that *Johnson* has been made retroactive.²²⁰ In a subsequent case, however, the Eighth Circuit again granted authorization to a petitioner but qualified its position on *Johnson* retroactivity: "The district court—unencumbered by the 'stringent time limit' that applies to the court of appeals—should [consider] the views of the other circuit courts."²²¹ In

210. No. 15-5038, 2015 WL 9241176 (6th Cir. Dec. 17, 2015).

211. *See id.* at *3.

212. *See id.* at *5; *see also supra* note 165 and accompanying text.

213. *See Watkins*, 2015 WL 9241176, at *6 (quoting *Price*, 795 F.3d at 734); *supra* notes 105–09 and accompanying text.

214. 804 F.3d 139 (1st Cir. 2015) (per curiam).

215. *See id.* at 140.

216. *Id.* at 139.

217. *See id.* at 139 n.1.

218. *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam).

219. 805 F.3d 1152 (8th Cir. 2015) (per curiam).

220. *Id.*

221. *Menteer v. United States*, 806 F.3d 1156, 1156–57 (8th Cir. 2015) (citation omitted) (quoting *Tyler v. Cain*, 533 U.S. 656, 664 (2001)). While the First and Eighth Circuits accepted the Government's concession that *Johnson* was made retroactive, it is unclear whether courts can in fact accept such a concession. *See Litman, supra* note 27. If the

effect, the Eighth Circuit, although finding that on a prima facie level *Johnson* has been made retroactive, left open the possibility that on remand the district court might disagree.

*B. The Minority View: The Supreme Court Has Not Made
Johnson Retroactive to Cases on Collateral Review*

In contrast to the aforementioned circuits, the Eleventh and Tenth Circuits have held that *Johnson* has not been made retroactive, and the Fifth Circuit has gone so far as to suggest that *Johnson* is not retroactive under *Teague*.²²² Part II.B.1 begins with the Eleventh Circuit's viewpoint that no series of holdings dictate that *Johnson* has been made retroactive, and Part II.B.2 addresses the Tenth Circuit's textualist reasoning that led to its determination that *Johnson* has not been made retroactive. Finally, Part II.B.3 details the Fifth Circuit's outlier opinion.

1. The Eleventh Circuit: *Johnson* Has Not Been Made
Retroactive Under *Tyler*

In *In re Rivero*,²²³ the petitioner was found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).²²⁴ In 2015, following the ruling in *Johnson*, Rivero filed an application with the Eleventh Circuit seeking an order permitting the district court to entertain a successive motion under § 2255.²²⁵

The court began by conceding that *Johnson* announced a new substantive constitutional rule, because it “narrow[ed] the scope of [§] 924(e) by interpreting its terms, specifically, the term violent felony.”²²⁶ The court recognized, however, that under *Tyler* only the Supreme Court can make a new rule retroactive and that when it does so, “it does so unequivocally, in

gatekeeping requirements are jurisdictional, and some courts have held that they are, a court must decide for itself if the rule has been made retroactive. *See id.*

222. This is the minority view even among the circuit courts denying authorizations. *See Litman, supra* note 27.

223. 797 F.3d 986 (11th Cir. 2015). As of this writing, the *Rivero* court has sua sponte appointed counsel for the petitioner and ordered briefing on the *Johnson* retroactivity question. *See* Order at 1–2, *In re Rivero*, No. 15-13089 (11th Cir. Sept. 14, 2015). This section, however, only considers the opinion denying authorization for failing to make a prima facie showing that *Johnson* has been made retroactive. Because the dissenting opinion provides exceptional insight into the argument that *Johnson* has been made retroactive, this section discusses the dissent's counter arguments to the majority's points in corresponding footnotes.

224. *See* *United States v. Rivero*, 141 F. App'x 800, 800–01 (11th Cir. 2005) (per curiam).

225. *See Rivero*, 797 F.3d at 988. Notably, Rivero's original sentence was based on the United States Sentencing Guidelines' career offender residual clause—which uses identical language as the ACCA's residual clause—and not the ACCA. *See id.* at 988. Although this might be viewed as a distinction from the other *Johnson*-based petitions, the Eleventh Circuit has subsequently denied a *Johnson* claim from a prisoner sentenced under the ACCA, solidifying its view that *Johnson* has not been made retroactive. *See In re Franks*, No. 15-15456-G, 2016 WL 80551, at *4 (11th Cir. Jan. 6, 2016).

226. *Rivero*, 797 F.3d at 989 (alterations in original) (quoting *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1278 (11th Cir. 2013)).

the form of a holding.”²²⁷ Although the court recognized, like the *Price* court, that a rule could be made retroactive through multiple holdings that logically dictate the rule’s retroactivity,²²⁸ the court nevertheless found that no combination of holdings necessarily dictated that *Johnson* was made retroactive.²²⁹

The court also suggested that there are only “two types of new substantive rules of constitutional law” that the Supreme Court has “necessarily dictated” apply retroactively on collateral review: new rules that prohibit the punishment of certain primary conduct, which place specific conduct or persons covered by a statute beyond the state’s power to punish,²³⁰ and new rules that prohibit “a category of punishment for certain offenders or offenses.”²³¹ The court subsequently reasoned that the *Johnson* rule neither prohibits Congress from punishing a criminal who has a prior conviction for attempted burglary nor prohibits Congress from increasing that criminal’s sentence because of his prior conviction.²³² In short, the *Rivero* court did not find that *Johnson* prevents a defendant from facing a punishment that the law cannot impose upon him.²³³

The majority responded to the dissent’s argument—that *Bousley* logically dictates that *Johnson* was made retroactive—by asserting that in *Bousley* the Court did not apply a new constitutional rule; rather, it applied a new rule that narrowed the scope of a criminal statute by interpreting its

227. *Id.* (quoting *In re Anderson*, 396 F.3d 1336, 1339 (11th Cir. 2005)).

228. *See id.*; *see also In re Gieswein*, 802 F.3d 1143, 1148 (10th Cir. 2015) (per curiam) (recognizing that “[t]he Eleventh Circuit followed a similar path [as *Price*] in *Rivero*”).

229. *See Rivero*, 797 F.3d at 989. The *Rivero* court also explicitly referenced *Price*: “We acknowledge that one of our sister circuits has held that *Johnson* applies retroactively . . . but we are unpersuaded by that decision.” *Id.* at 990.

230. *See id.* (citing *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)).

231. *Id.* The *Rivero* court listed, as an example of this type of rule, the rule from *Atkins v. Virginia*. *See id.* The *Rivero* court presumably derived the “category of punishment” language from *Penry*. *See supra* Part I.D.2. The majority further asserted that the retroactive application of new substantive rules to cases on collateral review is “limit[ed] . . . to those rules that ‘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.’” *Rivero*, 797 F.3d at 988 (quoting *Summerlin*, 542 U.S. at 352). Judge Pryor in dissent argued that the majority eschewed *Bousley*, which held that decisions that narrow the scope of a statute by interpreting its terms are examples of precisely such a substantive rule. *See id.* at 996 (Pryor, J., dissenting).

232. *See Rivero*, 797 F.3d at 990. The court stated that if Congress wished to impose lengthier sentences based on prior convictions, like those of *Rivero*, it could do so under a clear statute. *See id.* at 989. The dissent responded by asserting that “[r]eliance upon what Congress *could do* to salvage what the Supreme Court has declared unconstitutional is without legal foundation.” *See id.* at 999 (Pryor, J., dissenting).

233. *See id.* at 991 (majority opinion). The dissent counter argued that *Johnson* has been made retroactive because the rule it established both narrows the scope of a criminal statute *and* places conduct or persons covered by the statute beyond the State’s authority to punish. *See id.* at 997 (Pryor, J., dissenting). The dissent specifically relied on the multiple holdings approach outlined in Justice O’Connor’s *Tyler* concurrence, arguing that in *Bousley* the Court held that rules limiting the reach of a federal criminal statute are not barred by *Teague* nonretroactivity and that *Johnson* is the same *type* of case as *Bousley* because it too narrowed the scope of a criminal statute by interpreting its terms. *See id.* at 997–98. She thus concluded that *Bousley* and *Johnson* taken together necessarily dictate *Johnson*’s retroactivity. *See id.* at 998.

terms.²³⁴ It reasoned that, per *Summerlin*, examples of new substantive rules include “‘decisions that narrow that scope of [a statute’s] terms’ and ‘constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.’”²³⁵ Therefore, the court held, the *Bousley* holding cannot necessarily dictate that *Johnson* (which announced a new constitutional rule) was made retroactive because *Bousley* did not rely on a new rule of constitutional law,²³⁶ and § 2255(h)(2) allows successive motions based only on new rules of constitutional law.²³⁷ The majority also asserted that the dissent’s approach was markedly different from the Seventh Circuit’s approach, as *Price* surmised *Johnson*’s retroactivity because the rule prohibited a certain category of punishment for a class of defendants and not specifically that *Bousley* dictated *Johnson*’s retroactivity.²³⁸

2. The Tenth Circuit: The Supreme Court Has Not Made *Johnson* Retroactive Because It Has Yet to Expressly Hold It Retroactive

Like the Eleventh Circuit, the Tenth Circuit, in *In re Gieswein*,²³⁹ declined to hold that *Johnson* was made retroactive by the Supreme Court.²⁴⁰ The *Gieswein* court, however, employed a different approach than that of the *Rivero* court.²⁴¹ Instead of initially surveying retroactivity case law and determining that no series of holdings logically dictates that *Johnson* has been made retroactive, the *Gieswein* court relied chiefly on the *Tyler* majority’s overarching principle—that “the Supreme Court is the only

234. *See id.* at 992 (majority opinion).

235. *See id.* at 991 (quoting *Summerlin*, 542 U.S. at 351–52). The court implied both criteria must be met for a rule to be substantive. *See id.* at 991. *But see id.* at 997 (Pryor, J., dissenting) (“*Summerlin* could not be clearer that a rule is retroactive if it falls into one of the two related categories the Supreme Court described. So requiring a new rule to check the boxes of both types of substantive, retroactive decisions—when the two types are listed disjunctively—is directly contrary to *Summerlin*.”).

236. *See id.* at 992 (majority opinion).

237. The dissent responded that *Johnson* is “precisely the kind of rule” the Court has held applies retroactively, as it “‘necessarily carr[ies] a significant risk that a defendant’ . . . faces a punishment that the law cannot impose upon him.” *Id.* at 998 (Pryor, J., dissenting) (alteration in original) (quoting *Summerlin*, 542 U.S. at 352). The dissent noted that *Summerlin* does not require the new rule to both narrow the scope of a statute and place conduct beyond the state’s power to punish—rather these are distinct ways a rule can be substantive and retroactive. *See id.* at 997–98. The dissent continued that although *Bousley* did not announce a new constitutional rule, it is not precluded from dictating *Johnson*’s retroactivity. *See id.* at 998 n.7. The dissent asserted that retroactivity is logically dictated when the Supreme Court holds in one case that a particular *type* of rule applies retroactively and in a subsequent case that a given rule is of that *type*. *See id.* *Tyler*, the dissent argued, does not require that Case One hold that a particular *type of constitutional rule* applies retroactively because “[t]hat would conflate the elements of a successive motion that the *Tyler* majority made clear were distinct.” *Id.*

238. *See id.* at 992 (majority opinion). Conversely, the dissent asserted that “[t]o the extent there is any discrepancy [between the *Rivero* dissent and *Price*], it is only a matter of emphasis.” *Id.* at 999 n.8 (Pryor, J., dissenting).

239. 802 F.3d 1143 (10th Cir. 2015) (per curiam).

240. *See id.* at 1148–49.

241. *See id.* at 1148.

entity that can ‘make’ a new rule retroactive” and only through a “holding to that effect.”²⁴² The court reasoned that its “inquiry is statutorily limited to whether the Supreme Court *has made* the new rule retroactive to cases on collateral review.”²⁴³ The court found it could not apply *Johnson* retroactively simply because the Supreme Court has not held that the new rule in *Johnson* is retroactive.²⁴⁴ Although the *Gieswein* court then acknowledged the multiple holdings approach, the court rejected the petitioner’s argument that the Supreme Court had made the rule in *Johnson* retroactive because it found that no series of holdings *necessarily dictate* that *Johnson* was made retroactive.²⁴⁵ The court reiterated that it cannot “do more than simply rely on Supreme Court holdings on retroactivity.”²⁴⁶ Without a holding on *Johnson* retroactivity specifically, the court declined to grant the petitioner authorization to file a successive § 2255 motion.²⁴⁷

3. The Fifth Circuit: *Johnson* Is Not Substantive and Therefore Not Retroactive

Like the Eleventh and Tenth Circuits, the Fifth Circuit, in *In re Williams*,²⁴⁸ declined to grant a petitioner’s request to file a successive § 2255 motion.²⁴⁹ Unlike its sister circuits, however, the Fifth Circuit did not analyze the petitioner’s claim under *Tyler*, but rather suggested that *Johnson* was not retroactive under *Teague*.²⁵⁰ The court began by stating that *Johnson* announced a new rule of constitutional law.²⁵¹ But the court then asserted that *Johnson* does not fall within *Teague*’s watershed rule exception nor is it substantive.²⁵² The court concluded that *Johnson* does not forbid a certain category of punishment because, after *Johnson*,

242. *See id.* at 1146 (quoting *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002)).

243. *See id.*

244. *See id.* at 1147. Ergo, the court asserted, “[T]he mere fact a new rule *might* fall within the general parameters of overarching retroactivity principles established by the Supreme Court (i.e., *Teague*) is not sufficient.” *Id.* at 1146.

245. *Id.* at 1147. Although they reached different conclusions, both the *Price* and *Rivero* courts emphasized the multiple holdings approach and examined whether certain holdings dictated that *Johnson* was made retroactive. In sidestepping the multiple holdings method, the *Gieswein* court emphasized “the difficult legal analysis that can be required to determine questions of retroactivity in the first instance” and opted to adhere to *Tyler* and a plain reading of AEDPA. *Id.*

246. *Id.* at 1148.

247. *See id.* at 1149. The court also declined “to adopt the Seventh Circuit’s approach in *Price*” because *Price* “did what we have said we cannot do: it made its ‘own determination that a new rule fits within [a] *Teague* exception [to nonretroactivity].” *Id.* at 1148 (alterations in original) (quoting *Cannon*, 297 F.3d at 994).

248. 806 F.3d 322 (5th Cir. 2015).

249. *See id.* at 326.

250. *See id.* at 325–26. Indeed, after *Williams*, a petitioner’s *first* § 2255 motion alleging *Johnson* error was denied. *See* *Harrimon v. United States*, No. 15-CV-00152 (N.D. Tex. Nov. 19, 2015), *petition for cert. filed*, No. 15-7426 (Dec. 11, 2015). These cases, however, represent the ultra minority view. *See* Litman, *supra* note 27.

251. *See Williams*, 806 F.3d at 325 (“Joining the four other circuits that have decided this issue, we hold that *Johnson* announced a new rule of constitutional law.”).

252. *See id.* at 325–26.

individuals may still be sentenced to fifteen years in prison for possession of a firearm, albeit not under a vague statute.²⁵³

The court then discussed *Bousley*, but instead of examining it in the context of the *Teague* exceptions, it proceeded to rebut the *Rivero* dissent's argument that *Bousley* logically dictates *Johnson* retroactivity.²⁵⁴ The court asserted that *Bousley* does not control the *Johnson* retroactivity inquiry because the rule announced in *Bousley* emerged from the Court's interpretation of a statute—which is substantive and not subject to *Teague*—while *Johnson* resulted in the complete invalidation of a statute—which the *Williams* court likened to a new procedural rule.²⁵⁵

In sum, with the exception of the *Williams* decision, the cases discussed in this part reveal that the courts of appeals are largely in agreement that *Johnson* announced a new substantive constitutional rule that is retroactive under *Teague* and should be applied to initial collateral challenges. They are split, though, over whether *Johnson* has been made retroactive by the Supreme Court so as to permit its utilization on successive collateral challenges. With the circuit split explored, this Note next puts forth a solution to the split and to the overall approach to retroactivity for successive collateral challenges.

III. A PROPOSED RESOLUTION TO THE CIRCUIT SPLIT AND THE TYLER APPROACH

With the current circuit split resulting in the disparate treatment of similarly situated prisoners, a Supreme Court decision on *Johnson* retroactivity—which will hopefully materialize in *Welch v. United States*²⁵⁶ this Term—would bring welcome clarification to the circuits' conflicting viewpoints. But while a Supreme Court holding adopting the majority view and stating that *Johnson* is retroactive under *Teague* would reconcile the circuit split,²⁵⁷ this part proposes that the Supreme Court explicitly hold that *Johnson* has been *made retroactive*. By finding that *Johnson* has been made retroactive under Justice O'Connor's multiple holdings principle—specifically that *Bousley* dictates that *Johnson* was made retroactive²⁵⁸—the Court would still allow for those prisoners sentenced above the statutory maximum under the unconstitutional residual clause to seek relief uniformly.

Indeed, while such a holding would facilitate relief for those with meritorious *Johnson* claims otherwise foreclosed by an overly strict interpretation of *Tyler* and § 2255(h)(2), it would also be an important first

253. *See id.* The *Rivero* court also made this assertion, *see In re Rivero*, 797 F.3d 986, 990–91 (11th Cir. 2015), although unlike *Williams*, it found *Johnson* to be substantive, *see id.* at 989.

254. *See Williams*, 806 F.3d at 326. In fact, the *Williams* court never explicitly mentioned *Tyler*.

255. *See id.*

256. 136 S. Ct. 790 (2016) (granting petition for certiorari).

257. *See supra* notes 38–40 and accompanying text.

258. *Cf. supra* notes 233, 237 (describing the *Rivero* dissent's argument that *Bousley* logically dictates that *Johnson* was made retroactive). *See generally supra* Part I.D.2.

step in recalibrating the overall approach to assessing retroactivity for successive habeas petitions. If the Court were to then take an additional step and find that *Johnson* falls within the easy example articulated by Justice O'Connor in her *Tyler* concurrence, the Court would effectively reframe its whole approach to retroactivity for successive habeas petitions and abrogate the problem-ridden *Tyler* majority method.²⁵⁹

By emphasizing Justice O'Connor's easy example of when a rule has logically been made retroactive as the standard by which a court determines whether a rule is made retroactive under AEDPA, the Court would establish that when it announces a new substantive rule in accordance with the *Teague* doctrine—like the rule in *Johnson*—the Court has simultaneously made the rule retroactive. Such an approach would effectively cause the *Tyler* majority's method to collapse back into its *Teague* origins, rendering *Teague* once again the primary, and only, inquiry for assessing retroactivity for successive collateral challenges.²⁶⁰ In effect, this would place the “made retroactive” determination in the hands of the lower courts and allow them to assess retroactivity in accordance with *Teague* principles and without waiting for a Supreme Court holding specifically addressing the new rule's retroactivity.²⁶¹ Ultimately, this approach would liberalize a portion of the overly restrictive successive petition statutes and allow for easier successive collateral review of meritorious claims based on new constitutional rules.²⁶²

By demonstrating that *Bousley* logically dictates that *Johnson* is substantive and retroactive, Part III.A posits that the Supreme Court has made *Johnson* retroactive to cases on collateral review. In doing so, Part III.A also rebuts the arguments made by the courts that have held that *Johnson* has not been made retroactive.²⁶³ Part III.B then explains the additional step the Supreme Court should consider taking in finding that *Johnson* was made retroactive, a step that entails a liberal reading of Justice O'Connor's easy example of when a new rule is made retroactive. Part III.B also explains how finding that *Johnson* was made retroactive under the easy example would recast the Supreme Court's retroactivity approach for successive habeas petitions. Finally, Part III.C examines the policy benefits that would result were the Court to hold that *Johnson* has been made retroactive.

259. See *Tyler v. Cain*, 533 U.S. 656, 660 (2001) (O'Connor, J., concurring); *supra* note 165 and accompanying text.

260. See *supra* notes 112, 151, 176 and accompanying text. See generally *supra* Part I.D.2.

261. Cf. *supra* note 181 and accompanying text.

262. See Litman, *supra* note 29, at 52 (noting the current approach prematurely forecloses upon otherwise meritorious claims).

263. See *supra* Part I.B.

A. The Multiple Holdings Approach

As a preliminary matter, *Johnson* is retroactive under general retroactivity doctrine as established by *Teague* and its progeny.²⁶⁴ First, *Johnson* announced a new rule, as it was not dictated by prior precedent nor was it previously available.²⁶⁵ The *Johnson* rule is also one of constitutional law, because it stems from the Court's determination that the residual clause violated the Due Process Clause of the Constitution.²⁶⁶ Furthermore, the *Johnson* rule is exempt from nonretroactivity because it is substantive per *Teague*'s first exception.²⁶⁷ As exemplified by *Bousley* and restated in *Summerlin*, *Johnson* narrows the scope of a criminal statute—on constitutional grounds—by interpreting its terms, which is necessarily a substantive rule because failure to apply it carries a significant risk that a defendant will face “a punishment that the law cannot impose upon him.”²⁶⁸

But has *Johnson* been made retroactive? While the Court in *Tyler* established that the word “made” is equivalent to “held,”²⁶⁹ the majority stated—and Justice O'Connor's concurrence and the dissent emphasized—that a new rule can be made retroactive through a series of holdings that logically dictate that result.²⁷⁰ This is precisely the situation at bar. In *Bousley*, the Court held that rules limiting the scope of a criminal statute by narrowing its terms are retroactive.²⁷¹ In *Johnson*, the Court narrowed the

264. See Litman, *supra* note 27; *supra* note 187 and accompanying text. See generally *supra* Parts I.D.2, II.

265. See *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013). Indeed, this point is seemingly uncontested. See *supra* text accompanying notes 199, 211, 226, 251.

266. See *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); see also *supra* text accompanying notes 198, 211, 226, 251.

267. See Litman, *supra* note 29, at 47; Litman, *supra* note 27; *supra* Parts I.D.1, II.

268. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004); see also *supra* Part I.D.2; cf. *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *13 (U.S. Jan. 25, 2016) (holding the rule in *Miller* retroactive because as a substantive rule, it “set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. . . . [W]hen a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful”). The *Rivero* and *Williams* courts suggest that the *Johnson* rule does not mitigate the risk that a defendant faces a punishment that the law cannot impose because if Congress so chooses, it can still mandate a sentence of fifteen years—via a clear statute—upon someone convicted of possession of a firearm with three prior violent felony convictions. See *In re Rivero*, 797 F.3d 986, 990 (11th Cir. 2015); *In re Williams*, 806 F.3d 322, 325–26 (5th Cir. 2015). But what Congress could do through tighter language would not cure prior injustices, and neither court produced authority for this proposition. See *In re Watkins*, No. 15-5038, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015). Such rationale also overlooks the Court's *Bousley* decision, where Congress too could have enacted a statute that criminalized mere possession of a weapon during the course of a felony, but such speculation had no bearing on whether *Bailey* was retroactive. See *Bousley v. United States*, 523 U.S. 614, 619–21 (1998); *supra* Part I.D.2; cf. *Montgomery*, 2016 WL 280758, at *13 (“The fact that life without parole could be a proportionate sentence for . . . [some] juvenile offender[s] does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.”).

269. *Tyler v. Cain*, 533 U.S. 656, 663 (2001).

270. See *id.* at 666; *id.* at 668–69 (O'Connor, J., concurring); *supra* Part I.D.3.

271. See *Bousley*, 523 U.S. at 620.

scope of a criminal statute.²⁷² Simply stated, under the multiple holdings framework²⁷³ recognized by the *Tyler* majority, emphasized by the *Tyler* dissent, and endorsed by Justice O'Connor's *Tyler* concurrence, the Court has made *Johnson* retroactive to cases on collateral review.²⁷⁴

B. Justice O'Connor's Easy Example

In deciding whether *Johnson* was made retroactive, the Supreme Court might also consider recasting the entire *Tyler* approach to § 2255(h)(2). It could do so by invoking in its analysis the doctrinal underpinnings of habeas corpus²⁷⁵ in conjunction with Justice O'Connor's easy example of when a rule has logically been made retroactive.²⁷⁶ Crucially, the language

272. See *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); Litman, *supra* note 29, at 47. The *Williams* court argued that the distinction between a decision narrowing the terms of a statute and complete invalidation of a statute is enough to break any chain of logic between *Bousley* and *Johnson*. See *Williams*, 806 F.3d at 326. But this is merely a distinction without a difference. See Litman, *supra* note 29, at 47 (“It is hard to see how a decision ‘interpreting’ ACCA’s scope would be substantive, but a decision invalidating ACCA’s residual clause—which also alters ACCA’s scope—would not be. Both . . . decisions modify the elements of an offense and alter a defendant’s eligibility for a 15-year term of imprisonment.”).

273. While this section emphasizes that *Bousley* logically dictates that *Johnson* was made retroactive, it is also feasible that the Court’s recent *Montgomery* decision, see *supra* notes 143–47 and accompanying text, which states that *Teague* and the Constitution require the retroactive application of substantive rules, also dictates that the Court has made the substantive *Johnson* rule retroactive, see *Montgomery*, 2016 WL 280758, at *6, *7.

274. Cf. *supra* notes 233, 237 (describing the *Rivero* dissent’s argument that *Bousley* logically dictates that *Johnson* was made retroactive). The *Rivero* and *Williams* courts’ rejection of this approach is flawed because both courts declined to analyze the *Bousley* rule as articulated in *Summerlin* and to recognize that rules that narrow the scope of a criminal statute operate retroactively because failure to apply them carries the risk that a defendant would face a punishment that the law cannot impose upon him. See *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004); see also *supra* Parts I.D.2, II. Furthermore, the *Rivero* court’s argument that *Bousley* cannot logically dictate *Johnson*’s retroactivity, because *Bousley* did not announce a new rule of constitutional law, is also misplaced. See *In re Rivero*, 797 F.3d 986, 992 (11th Cir. 2015). The court understood *Summerlin* to require that a decision interpreting a statute also announce a constitutional rule and therefore concluded that because the *Bousley* rule is not constitutional, it cannot dictate the retroactivity of the constitutional *Johnson* rule. See *id.* But the *Summerlin* Court did not hold as such, and the *Tyler* court did not suggest that the multiple holdings approach requires all holdings involved to be constitutional in nature. See generally *Summerlin*, 542 U.S. 348; *Tyler*, 533 U.S. 656; *supra* note 237. The *Gieswein* court’s conservative approach—framed by plain meaning statutory interpretation and a close reading of *Tyler*—also falls short. See *In re Gieswein*, 802 F.3d 1143, 1146–49 (10th Cir. 2015). While logical, it disregards the multiple holdings method that all of the justices in *Tyler* endorsed to varying degrees of warmth. See *supra* Part I.D.3. Finally, the *Williams* court’s analysis is flawed because *Johnson* is not a procedural rule that is barred from retroactive application under *Teague*—it falls precisely within the *Bousley* and *Summerlin* definitions of substantive rules. See *Williams*, 806 F.3d at 325–26; *supra* Part I.D.2; cf. *Montgomery*, 2016 WL 280758, at *14 (stating that the argument that *Miller* announced a procedural rule “conflates a procedural requirement necessary to implement a substantive guarantee with a rule that ‘regulate[s] only the manner of determining the defendant’s culpability’” (quoting *Summerlin*, 542 U.S. at 353 (alteration in original))).

275. See *supra* notes 77, 134, 201 and accompanying text.

276. See *Tyler*, 533 U.S. at 669 (O’Connor, J., concurring); *supra* note 165 and accompanying text.

Justice O'Connor used in her easy example is identical to the language used by the Court in *Teague* to describe the first exception,²⁷⁷ which entitles certain rules to retroactive effect because they “assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.”²⁷⁸ The first exception has since evolved into the substantive rule exception.²⁷⁹ The Court applies substantive rules retroactively because failure to do so would denature the core purposes of habeas corpus.²⁸⁰

Indeed, in *Teague* and its progeny, the Court has routinely invoked the common theme of habeas corpus's purpose when determining the retroactivity of new rules.²⁸¹ Accordingly, if one reads Justice O'Connor's easy example to stand for the proposition that rules falling within *Teague*'s first exception have necessarily been made retroactive,²⁸² and one simultaneously grafts the Court's analogy in *Bousley* upon Justice O'Connor's reasoning,²⁸³ what survives is the notion that substantive rules—like those that limit the reach of statutes and the application of which serve the core functions of habeas corpus²⁸⁴—have also necessarily been made retroactive. Applying this method to the instant situation, the substantive rule announced in *Johnson* is entitled to retroactive effect on successive collateral challenges because failure to do so would impede habeas corpus's remedial purpose.²⁸⁵ In short, if the Court were to establish that *Johnson* has been made retroactive under Justice O'Connor's easy example, it would set a precedent dictating that new substantive rules have necessarily been made retroactive.²⁸⁶

277. See *Tyler*, 533 U.S. at 669.

278. *Teague v. Lane*, 489 U.S. 288, 312 (1989) (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

279. See *supra* notes 129–47 and accompanying text.

280. See *supra* notes 130–36, 141, 142 and accompanying text.

281. See *supra* notes 130–36, 141, 142 and accompanying text.

282. See *supra* notes 165, 174 and accompanying text.

283. See *supra* notes 130–36 and accompanying text.

284. See *supra* notes 130–36, 141, 142 and accompanying text.

285. *Johnson* invalidated a criminal statute on constitutional grounds, thus limiting the ability of the government to punish certain career offenders erroneously as violent felons and impose fifteen-year mandatory minimum sentences on these individuals. See Litman, *supra* note 29, at 47. This type of error, i.e., sentencing above the statutory maximum and under an unconstitutional statute, is precisely the type of error that habeas is designed to protect against. See *supra* notes 77, 134 and accompanying text. The *Price* and *Watkins* courts employed similar reasoning, concluding that the new rule in *Johnson* fell squarely within the first *Teague* exception and was thus made retroactive. See *supra* Part II.A.1. The *Rivero* dissent also proffered this same argument in describing *Johnson* as having been made retroactive. See *supra* Part II.B.1. Although these courts relied on Justice O'Connor's easy to demonstrate example as a basis for the deduction that *Johnson* has been made retroactive, no court called specifically for an expansion of the easy example, and both courts invoked iterations of *Penry* language in their reasoning. See *supra* Part II. This Note adheres to a broader view of *Teague*—that substantive rules operate retroactively.

286. The Supreme Court's recent *Montgomery* decision further supports expanding Justice O'Connor's easy example to mean that substantive rules have necessarily been made retroactive. See *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *6, *7 (U.S. Jan. 25, 2016). Indeed, if, as the Court articulated in *Montgomery*, the Constitution requires the retroactive application of substantive rules in state collateral review courts because it is

The additional functional result of this approach would be that *Teague* would once again govern the inquiry for assessing the retroactivity of new rules for successive collateral challenges. This is so because a court would need only to determine whether a new rule is substantive under *Teague* in deciding whether it qualifies for retroactive effect on successive challenges.²⁸⁷ In fact, this result is consistent with the Court's own retroactivity practice. From a pragmatic perspective, it would be counterintuitive for the Court to hold that a substantive rule has not been made retroactive unless the rule was not retroactive under *Teague* to begin with. Consider *Tyler*: while there the Court found that *Cage* was not made retroactive and declined to address the question of whether the rule was retroactive generally under *Teague*, it appears that the Court would not have found *Cage* retroactive under *Teague* if presented with the question.²⁸⁸ Perhaps the Court was manifesting the view that if a rule falls within the *Teague* exceptions, the Court has made it retroactive, while if a rule does not fall within the *Teague* exceptions, the Court has not made it retroactive.²⁸⁹

*C. The Policy Implications of Finding
That Johnson Was Made Retroactive*

Finding that *Johnson* has been made retroactive under the multiple holdings approach will immediately benefit those with viable *Johnson* claims. But finding further that *Johnson* falls within Justice O'Connor's easy example—which the Court can do this Term in *Welch*—will set a precedent ensuring that future meritorious claims founded on new constitutional rules can be afforded due consideration on successive collateral review without being barred by an overly restrictive interpretation of § 2255(h)(2).²⁹⁰

unconstitutional to detain individuals for conduct that is beyond the law making authority to proscribe, it necessarily follows that substantive rules must be given retroactive effect in federal collateral review courts, regardless of whether a petition is initial or successive. *See Montgomery*, 2016 WL 280758, at *7 (“[T]he Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.”). Thus, by considering new substantive rules to be made retroactive, a result the Court could effect by liberally interpreting Justice O'Connor's easy example of the multiple holdings principle, the Court would avoid constitutional issues that might otherwise occur if substantive claims on successive § 2255 motions are denied under the current regime.

287. *See supra* Part I.D.2 (discussing the development of the substantive rule exception).

288. *See supra* note 158.

289. Although perhaps *post hoc ergo propter hoc* logic, this proposition finds support in the fact that on another occasion, the Court declined to decide whether a prior rule was made retroactive. *See In re Smith*, 526 U.S. 1157 (1999) (denying a petition for an original writ of habeas corpus). Professor Stephen Vladeck suggests that the Court denied the writ and the opportunity to decide whether the rule at issue had been made retroactive “perhaps because, so soon after AEDPA, it hoped that cases presenting such circumstances would be rare (and perhaps because the ‘new rule’ at issue turned out to *not* be retroactive).” *See Vladeck, supra* note 37, at 8.

290. *See supra* Part I.D.4 (discussing the drawbacks of the strict *Tyler* interpretation of the successive collateral challenge bar).

Accordingly, the Court should adopt Justice O'Connor's easy example as the test for surmounting the retroactivity requirements of § 2255(h)(2),²⁹¹ to both reduce disparity among similarly situated individuals and to protect the core purposes of habeas corpus review²⁹² and § 2255(h)(2).²⁹³ Adopting this approach would limit the impact of the *Tyler* decision and soften the strict statutory reading given to § 2255(h)(2).²⁹⁴ It would also reinvigorate the *Teague* analysis in the successive habeas context.²⁹⁵ Additionally, such a method would not result in an unreasonable interpretation of § 2255(h)(2) because the Court already interprets § 2255(f)(3)'s "made retroactive" language to mean retroactive in accordance with *Teague*.²⁹⁶ Finally, this approach would solve the inefficiency problem of waiting for a Supreme Court holding on the retroactivity of a new rule, which on a practical level is neither an expedient nor guaranteed event.²⁹⁷

Proponents of the status quo—those that might maintain a rigid bar on successive habeas petitions—might not agree that *Johnson* has been made retroactive under *Tyler* and would certainly not call for a broader reading of *Tyler* and § 2255(h)(2). Still, while these proponents may cite finality interests, this Note's approach does not significantly undermine such interests; finality concerns are lessened in the sentencing context.²⁹⁸

291. Moreover, Justice O'Connor's *Tyler* concurrence is already frequently looked to in assessing retroactivity for successive collateral challenges. See *supra* note 166 and accompanying text.

292. See *supra* notes 77, 134 and accompanying text.

293. See *supra* notes 168–71 and accompanying text; see also *Tyler v. Cain*, 533 U.S. 656, 676–77 (2001) (Breyer, J., dissenting) (arguing that AEDPA's purpose is to prevent successive petitions when lower courts determine the existence of new rules and their retroactive applicability). Justice Breyer thus asserts that the legislation was not intended to bar the lower courts from applying *Teague* principles to determine the retroactivity of new rules announced by the Supreme Court. See *id.*

294. See *supra* Part I.D.3–4.

295. Using Justice O'Connor's *Tyler* concurrence to collapse *Tyler* into its *Teague* foundations seems appropriate, as Justice O'Connor also authored the *Teague* plurality. See *Teague v. Lane*, 489 U.S. 288, 292 (1989); see also *supra* note 176 and accompanying text (discussing the argument that the *Tyler* majority approach abrogates *Teague*).

296. See *supra* notes 150, 151 and accompanying text. While the Court in *Tyler* looked to § 2254(d) in determining that "made" meant "held," see *supra* note 157 and accompanying text, abandoning that approach would bring the Court's approach to § 2255(h)(2) in better accord with its approach to § 2255(f)(3), see *supra* notes 150–51 and accompanying text (discussing the Court's approach to retroactivity for initial § 2255 motions). This is not unreasonable, as the language of § 2255(h)(2) is more similar to the language of § 2255(f)(3) than it is to § 2254(d)(1). See *supra* notes 87, 90, 157 and accompanying text. See generally *supra* Part I.D. The Court could justify this approach by relying on its power to equitably construe habeas statutes—the Court has previously equitably construed habeas statutes to afford relief that would otherwise be denied had the statute been given a strict textualist reading. See, e.g., *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998); see also *Stevenson*, *supra* note 44, at 776 ("[T]he Court has shown a willingness to construe some AEDPA provisions narrowly so as to preserve the vitality of the writ.").

297. See *supra* note 181 and accompanying text.

298. See *supra* note 117; see also *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *11 (U.S. Jan. 25, 2016) ("[T]he retroactive application of substantive rules does not implicate a State's weighty interests in . . . finality of convictions and sentences. . . . This concern [of wasting resources] has no application in the realm of

Furthermore, should the Court choose to adopt this approach, there would be little to no floodgate risk.²⁹⁹ The number of petitioners with *Johnson* claims is relatively few,³⁰⁰ and petitioners who will inevitably seek to rely on other new rules as the basis of successive claims³⁰¹ will still face several gatekeeping provisions and substantial procedural hurdles.³⁰² Finally, while expecting the circuit courts to use the *Teague* analysis to determine whether a new rule has been made retroactive may appear unrealistic in light of the thirty-day time limit they are afforded to review such petitions, the inquiry has always been a prima facie one.³⁰³ Determining whether a rule is prima facie substantive under *Teague* within thirty days is not overly burdensome and is thus not an unreasonable expectation.³⁰⁴

CONCLUSION

The circuit split on *Johnson* retroactivity for successive collateral challenges is currently resulting in the disparate treatment of similarly situated individuals. As explained herein, the *Johnson* rule—which is substantive because it invalidates a sentencing statute on constitutional grounds—should be given retroactive effect in all instances so as to preserve the core functions of habeas review. Through *Welch*, the Supreme Court will hopefully resolve the split so that prisoners wrongly sentenced above the statutory maximum for their offenses can uniformly seek relief.

But while the Supreme Court could resolve the split by holding that *Johnson* is retroactive under *Teague*, it should also consider clarifying the problematic *Tyler* majority reading of § 2255(h)(2) by finding further that *Johnson* has been made retroactive as described by Justice O'Connor in her *Tyler* concurrence. Such a holding would reframe the approach of retroactivity to successive habeas petitions, resulting in the notion that rules encompassed by *Teague*'s first exception, and the application of which serve the core underpinnings of habeas corpus, have necessarily been made retroactive. This approach would soften *Tyler*'s control and allow lower courts to apply *Teague* in determining the retroactivity of new rules to successive motions without waiting for a Supreme Court ruling on the issue. In conclusion, the method this Note proposes would reduce the inequitable administration of the law, put an end to a part of the overly restrictive AEDPA, and give those with otherwise meritorious successive

substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose." (citing *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

299. See *supra* note 117 (discussing floodgate risks).

300. See Russell, *supra* note 79, at 135; *supra* note 25.

301. These include both state and federal inmates, as the "made retroactive by the Supreme Court" language applies to both state and federal inmates seeking to file successive habeas motions. See *supra* Part I.C.

302. See *supra* Part I.C.

303. See *supra* note 92 and accompanying text.

304. See *In re Lott*, 366 F.3d 431, 432–33 (6th Cir. 2004).

claims a chance at liberty—liberty to which they are equitably and legally entitled.