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.

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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 court\(^7\) 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

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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).


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).


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. Had Abe been incarcerated within the same jurisdiction as Ben, he too would have obtained relief. Since the Supreme Court’s 2015 decision in Johnson v. United States, such disparate treatment of inmates across jurisdictions has become commonplace. In Johnson, the Court held that a portion of the Armed Career Criminal Act (ACCA), known as the “residual clause,” was unconstitutionally vague. 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).

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.” Johnson held that “[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.”

The Johnson decision has already had significant implications for various areas of the law. 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

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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.
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.
22. Id. § 924(e)(2)(B)(ii).
23. Johnson, 135 S. Ct. at 2560.
a basis for resentencing or release. 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 appeal or as the basis of an initial petition under § 2255. By contrast, inmates petitioning under § 2255 for at least a second time 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.

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." 25

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: Reevaluating Implications of Johnson’s Potential Ruling on ACCA’s Constitutionality, 115 COLUM. L. REV. SIDE BAR 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).


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. § 2254(c)(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 term—a fortunate appeals must make for a successive motion under § 2255 to be authorized. See id. § 2244(b)(2)(A); infra Part I.C.


\(^{33}\) 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.*


\(^{38}\) 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 expiration—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.

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.” Part III also proposes a modified framework that the Supreme Court might consider adopting to determine whether a new rule has been made retroactive. 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 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].


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.\textsuperscript{43} Finally, Part III concludes by discussing the policy benefits that would result were the Court to hold that Johnson has been made retroactive.\textsuperscript{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)\textsuperscript{45} and (2) has been convicted three times for prior violent felonies or serious drug offenses.\textsuperscript{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.\textsuperscript{47} Congress intended that only prior crimes indicating that a felon is especially dangerous when in possession of a firearm should qualify.\textsuperscript{48} In defining “violent felony,” the statute includes both an enumerated list of violent felonies and a catchall provision.\textsuperscript{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

\textsuperscript{43} See infra Part III.B.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{46} See 18 U.S.C. § 924(e)(1).


\textsuperscript{48} See Montgomery, supra note 36, at 717.

\textsuperscript{49} See id. at 717–18.
conduct that presents a serious potential risk of physical injury to another.\textsuperscript{50}

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

\section*{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).\textsuperscript{52} In light of Johnson’s extensive criminal record, the Government requested an enhanced sentence under the ACCA,\textsuperscript{53} arguing that “three of Johnson’s previous offenses—including unlawful possession of a short-barreled shotgun . . . qualified as violent felonies.”\textsuperscript{54} The district court agreed with the Government and sentenced Johnson under the ACCA to the mandatory minimum fifteen years in prison.\textsuperscript{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.\textsuperscript{56} After Johnson unsuccessfu lly appealed his sentence to the Eighth Circuit,\textsuperscript{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 ACCA\textsuperscript{58} and later requested reargument addressing the residual clause’s compatibility with the “Constitution’s prohibition of vague criminal laws.”\textsuperscript{59}

\textsuperscript{50} 18 U.S.C. § 924(e)(2)(B) (emphasis added).
\textsuperscript{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.
\textsuperscript{52} See Johnson, 135 S. Ct. at 2556.
\textsuperscript{53} See id.
\textsuperscript{54} Id.
\textsuperscript{55} See id.
\textsuperscript{56} See id.
\textsuperscript{57} See United States v. Johnson, 526 F. App’x 708 (8th Cir. 2013) (per curiam).
\textsuperscript{58} See Johnson, 135 S. Ct. at 2556.
\textsuperscript{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.\textsuperscript{60} Recognizing that the residual clause had “created numerous splits among the lower federal courts,” where it has proved “nearly impossible to apply consistently,”\textsuperscript{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.\textsuperscript{62} The Court reasoned that two facets of the clause created “a black hole of confusion and uncertainty”\textsuperscript{63} and rendered it unconstitutionally vague.\textsuperscript{64} First, the residual clause fostered uncertainty about how to evaluate the risk a crime carried.\textsuperscript{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.”\textsuperscript{66} Accordingly, the Court was unable to articulate a viable method for assessing which kind of conduct the “ordinary case” of a crime entailed.\textsuperscript{67} Second, the residual clause presented uncertainty as to how much risk the ordinary case had to pose to be considered a violent felony.\textsuperscript{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.”\textsuperscript{69} The Court ultimately granted Johnson relief and remanded the case for further proceedings.\textsuperscript{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.


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

\begin{footnotesize}
\begin{enumerate}
\item[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.
\item[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.
\item[62.] See id. at 2563.
\item[63.] Id. at 2562 (quoting United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)).
\item[64.] See id. at 2557.
\item[65.] See id.
\item[66.] Id.
\item[67.] Id.
\item[68.] Id. at 2558.
\item[69.] Id.
\item[70.] See id. at 2563.
\end{enumerate}
\end{footnotesize}
appeal is the procedural path to judicial relief, whether release or a new trial. Inmates who have already lost on direct appeal may instead seek postconviction relief by petitioning for a writ of habeas corpus ad subjiciendum.

Habeas corpus, Latin for “that you have the body” and known as the Great Writ, is a centuries-old means for contesting the lawfulness of detention. Habeas corpus is a “collateral” way for a prisoner to challenge a sentence—meaning without directly challenging substantive guilt of the offense charge. Although of common law origin, the writ of habeas corpus is presently codified in several places in the U.S. Code. 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. For prisoners convicted of federal crimes, the more typically utilized § 2255 allows federal prisoners to collaterally challenge a sentence in federal court.
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.


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 ID (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; Entzeroth, 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 Entzeroth, 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.”).

These austere retroactivity provisions significantly limit the availability of collateral relief even on a colorable claim of a new rule, especially on a successive collateral challenge. 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. 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. The retroactivity doctrine—along with AEDPA—is consequently a substantial barrier to federal habeas petitions.

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.


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.

1. The Early Retroactivity Doctrine

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

The Warren Court’s doctrinal solution was articulated in *Linkletter v. Walker*. The specific question in *Linkletter* was whether the new exclusionary rule derived from *Mapp v. Ohio* should apply to state criminal cases on federal collateral review. 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. 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. The functional result of the *Linkletter* standard, however, was disparate treatment of similarly situated individuals and arbitrary retroactive application of new rules. Consequently, many

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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.


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.”).


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


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


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 Linkletter114 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).


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. 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,” or (2) if the new rule “requires the observance of ‘those procedures that . . . are “implicit in the concept of ordered liberty.”’

The Supreme Court has on several occasions elaborated on Teague’s first exception to nonretroactivity. The first such elaboration came in Penry v. Lynaugh, 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. 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.” While the Court ultimately ruled that executing the mentally handicapped was not unconstitutional (at the time), its discussion of Teague’s first exception remains good law.

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

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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.
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.”).
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
The 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. 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. 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." The Court then asserted that much like the Teague exceptions, including "decisions placing conduct ‘beyond the . . . law-making authority to proscribe,'" decisions holding that a federal criminal statute does not reach certain conduct are also retroactive. 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.'" The Court therefore determined that "the doctrinal underpinnings of habeas review" supported the retroactive application of Bailey to the petitioner's claim. In short, Bousley provides that a substantive change in law is retroactive.

“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 Entzeroth, 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_, 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_ rendered his sentence unlawful. The Court found that _Ring_ was not entitled to retroactive effect because it was not substantive and did not meet the _Teague_ exceptions. 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. 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.”

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_. The Court reemphasized that _Teague_’s first exception stands for the proposition that substantive rules are entitled to retroactive effect. The Court also stated that _Teague requires_ the retroactive application of new substantive rules 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.”).  

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 & Miliken, supra_ note 95, at 952–64. 
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." 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."  

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. For first § 2255 motions, 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. Hence, Courts assess both whether the rule is new and whether it is retroactive under *Teague*. 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." 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*.

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146. Id. at *7 (emphasis added).
147. Id. at *10.
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.
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).
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 was entitled to retroactive effect on a successive collateral challenge. 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. 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. 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. 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. 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

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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 Bentel, 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. 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.

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. 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.

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.” 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.” Since the Tyler decision, courts have come to follow Justice O’Connor’s approach in determining whether a rule is made retroactive.

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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.”)


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

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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.”).
178. Because the Tyler reading of § 2255(b)(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 impossibly 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 . . . we 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. 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. The ruling in Johnson, however, has supplanted those cases as the basis for habeas relief from sentences imposed under the residual clause. 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 requirement serves as a major impediment to petitioners in certain jurisdictions. 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. On the other hand, the
Fifth, Tenth, and Eleventh Circuits have denied authorizations on the ground that Johnson has not been made retroactive by the Supreme Court. 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.

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, Price was convicted in 2006 of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Price had three prior convictions that qualified him for the ACCA’s sentencing enhancement, and the court sentenced him to twenty years and ten months imprisonment, a term exceeding the fifteen-year mandatory minimum sentence under the ACCA. Price’s sentence was affirmed on direct appeal and his subsequent § 2255 motion was denied.

After the Supreme Court decided Johnson, Price petitioned the Seventh Circuit to authorize the district court to entertain a successive § 2255 motion; 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.
motion\textsuperscript{196} on the basis that his prior sentence, invoked under the unconstitutional residual clause, was unlawful.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{201}

In finally determining that Johnson was “made retroactive to cases on collateral review by the Supreme Court,”\textsuperscript{202} the court reasoned that the Supreme Court need not expressly hold Johnson retroactive.\textsuperscript{203} The court relied on Justice O’Connor’s concurrence in Tyler,\textsuperscript{204} which stated that the Court can make a rule retroactive “through multiple holdings that logically dictate the retroactivity of the new rule.”\textsuperscript{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,\textsuperscript{206} the Price court recognized that “it necessarily follows that [the Supreme Court] has ‘made’” the new substantive Johnson rule retroactive.\textsuperscript{207} The Price court, in essence, used the Bousley and Summerlin expansions of Teague’s first exception\textsuperscript{208} 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.\textsuperscript{209}

\textsuperscript{196} See id.; supra notes 90–93 and accompanying text.
\textsuperscript{197} See Price, 795 F.3d at 732.
\textsuperscript{198} Id.
\textsuperscript{199} See id. at 732–33.
\textsuperscript{202} 28 U.S.C. § 2255(h)(2) (2012); see Price, 795 F.3d at 734.
\textsuperscript{203} See Price, 795 F.3d at 734.
\textsuperscript{204} Tyler v. Cain, 533 U.S. 656 (2001).
\textsuperscript{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.
\textsuperscript{206} See Price, 795 F.3d at 733 (quoting Tyler, 533 U.S. at 669 (O’Connor, J., concurring)).
\textsuperscript{207} Id. at 734 (quoting Tyler, 533 U.S. at 669 (O’Connor, J., concurring)).
\textsuperscript{208} See supra Part I.D.2.
\textsuperscript{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 Government’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.”\(^{221}\)


\(^{211}\) 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.

\(^{218}\) 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. 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, the petitioner was found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). 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.

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.” 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

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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. 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 carry[es] 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.” 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.” 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. 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. The court reiterated that it cannot “do more than simply rely on Supreme Court holdings on retroactivity.” Without a holding on Johnson retroactivity specifically, the court declined to grant the petitioner authorization to file a successive § 2255 motion.

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, declined to grant a petitioner’s request to file a successive § 2255 motion. 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. The court began by stating that Johnson announced a new rule of constitutional law. But the court then asserted that Johnson does not fall within Teague’s watershed rule exception nor is it substantive. The court concluded that Johnson does not forbid a certain category of punishment because, after Johnson,
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 States256 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.


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.

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. First, Johnson announced a new rule, as it was not dictated by prior precedent nor was it previously available. 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. Furthermore, the Johnson rule is exempt from nonretroactivity because it is substantive per Teague’s first exception. 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.”

But has Johnson been made retroactive? While the Court in Tyler established that the word “made” is equivalent to “held,” the majority stated—and Justice O’Connor’s concurrence and the dissent emphasized—that a new rule can be been made retroactive through a series of holdings that logically dictate that result. 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. 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.”).
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.\textsuperscript{272} Simply stated, under the multiple holdings framework\textsuperscript{273} recognized by the \textit{Tyler} majority, emphasized by the \textit{Tyler} dissent, and endorsed by Justice O’Connor’s \textit{Tyler} concurrence, the Court has made \textit{Johnson} retroactive to cases on collateral review.\textsuperscript{274}

\textbf{B. Justice O’Connor’s Easy Example}

In deciding whether \textit{Johnson} was made retroactive, the Supreme Court might also consider recasting the entire \textit{Tyler} approach to § 2255(h)(2). It could do so by invoking in its analysis the doctrinal underpinnings of habeas corpus\textsuperscript{275} in conjunction with Justice O’Connor’s easy example of when a rule has logically been made retroactive.\textsuperscript{276} Crucially, the language

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\item \textsuperscript{272} See \textit{Johnson} v. United States, 135 S. Ct. 2551, 2563 (2015); Litman, supra note 29, at 47. The \textit{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 \textit{Bousley} and \textit{Johnson}. See \textit{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 after a defendant’s eligibility for a 15-year term of imprisonment.”).
\item \textsuperscript{273} While this section emphasizes that \textit{Bousley} logically dictates that \textit{Johnson} was made retroactive, it is also feasible that the Court’s recent \textit{Montgomery} decision, see supra notes 143–47 and accompanying text, which states that \textit{Teague} and the Constitution require the retroactive application of substantive rules, also dictates that the Court has made the substantive \textit{Johnson} rule retroactive, see \textit{Montgomery}, 2016 WL 280758, at *6, *7.
\item \textsuperscript{274} Cf. supra notes 233, 237 (describing the \textit{Rivero} dissent’s argument that \textit{Bousley} logically dictates that \textit{Johnson} was made retroactive). The \textit{Rivero} and \textit{Williams} courts’ rejection of this approach is flawed because both courts declined to analyze the \textit{Bousley} rule as articulated in \textit{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 \textit{Schriro} v. \textit{Summerlin}, 542 U.S. 348, 352 (2004); see also supra Parts I.D.2, II. Furthermore, the \textit{Rivero} court’s argument that \textit{Bousley} cannot logically dictate \textit{Johnson}’s retroactivity, because \textit{Bousley} did not announce a new rule of constitutional law, is also misplaced. See \textit{In re Rivero}, 797 F.3d 986, 992 (11th Cir. 2015). The court understood \textit{Summerlin} to require that a decision interpreting a statute also announce a constitutional rule and therefore concluded that because the \textit{Bousley} rule is not constitutional, it cannot dictate the retroactivity of the constitutional \textit{Johnson} rule. See id. But the \textit{Summerlin} Court did not hold as such, and the \textit{Tyler} court did not suggest that the multiple holdings approach requires all holdings involved to be constitutional in nature. See \textit{generally Summerlin}, 542 U.S. 348; \textit{Tyler}, 533 U.S. 656; supra note 237. The \textit{Gieswein} court’s conservative approach—framed by plain meaning statutory interpretation and a close reading of \textit{Tyler}—also falls short. See \textit{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 \textit{Tyler} endorsed to varying degrees of warmth. See supra Part I.D.3. Finally, the \textit{Williams} court’s analysis is flawed because \textit{Johnson} is not a procedural rule that is barred from retroactive application under \textit{Teague}—it falls precisely within the \textit{Bousley} and \textit{Summerlin} definitions of substantive rules. See \textit{Williams}, 806 F.3d at 325–26; supra Part I.D.2; cf. \textit{Montgomery}, 2016 WL 280758, at *14 (stating that the argument that \textit{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 \textit{Summerlin}, 542 U.S. at 353 (alteration in original))).
\item \textsuperscript{275} See supra notes 77, 134, 201 and accompanying text.
\item \textsuperscript{276} See \textit{Tyler}, 533 U.S. at 669 (O’Connor, J., concurring); supra note 165 and accompanying text.
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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 corpus\(^{284}\)—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.\(^{286}\)

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\(^{277}\) See *Tyler*, 533 U.S. at 669.


\(^{279}\) 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). Adopting this approach would limit the impact of the Tyler decision and soften the strict statutory reading given to § 2255(h)(2). It would also reinvigorate the Teague analysis in the successive habeas context. 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. 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.

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.

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.


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 imply 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. The number of petitioners with Johnson claims is relatively few, and petitioners who will inevitably seek to rely on other new rules as the basis of successive claims will still face several gatekeeping provisions and substantial procedural hurdles. 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. Determining whether a rule is prima facie substantive under Teague within thirty days is not overly burdensome and is thus not an unreasonable expectation.

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.