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A Right Without a Remedy: Time Runs Out Before the Right to File Accrues for Successive Habeas Corpus Petitioners

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A RIGHT WITHOUT A REMEDY: TIME RUNS OUT BEFORE THE RIGHT TO FILE ACCRUES FOR SUCCESSIVE HABEAS CORPUS PETITIONERS

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I. INTRODUCTION: FAIRNESS IN HABEAS CORPUS RELIEF

"An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"[1] The importance that finality of convictions has on our society comes only second to ensuring that those who were convicted and sentenced were treated fairly.[2] The availability of post-conviction relief to prisoners is a vital function of our criminal justice system, not as a means of "loopholes" criminals can use to be set free, but to ensure that all of our citizens are treated justly and within the bounds of our Constitution.[3]

"[W]hen is it fair to give defendants whose cases were settled long ago the benefit of a new Supreme Court decision, versus when is it fair . . . to leave old cases 'final' even when the law changes later on constitutional grounds?"[4] This Comment discusses the conflicting policies that surround

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1. Brady v. Maryland, 373 U.S. 83, 87 (1963).

2. *See* Spencer v. United States, 773 F.3d 1132, 1164 (11th Cir. 2014) (Jordan, J., dissenting) ("[F]inality is not 'the central concern of the writ of habeas corpus'—'fundamental fairness is.'" (quoting Strickland v. Washington, 466 U.S. 668, 697 (1984))).

3. *See* 1-2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2, LEXIS (2017) [hereinafter 1-2 FEDERAL HABEAS CORPUS § 2.2] ("'[T]he very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected' and that preclusive doctrines and formalities 'yield to the imperative of correcting . . . fundamentally unjust incarceration.'" (first quoting Harris v. Nelson, 394 U.S. 286, 291 (1969); and then quoting Engle v. Isaac, 456 U.S. 107, 135 (1982))).

4. Rory Little, *Opinion analysis: A lopsided majority for full retroactivity*, SCOTUSBLOG (Apr. 19, 2016, 11:56 AM), http://www.scotusblog.com/2016/04/opinion-analysis-a-lopsided-majority-for-full-retroactivity/.

the availability of habeas corpus relief to federal prisoners. First, this Comment will provide a brief background of habeas corpus, its governing statute of limitations, and the retroactivity requirement as interpreted by the Supreme Court.[5] Second, this Comment will explain that this interpretation of the retroactivity requirement created a right without a remedy to successive habeas corpus petitioners.[6] Next, this Comment will briefly outline and then dismiss the main policy arguments that favor finality of convictions over their fairness.[7] And lastly, this Comment will propose a solution to the retroactivity problem by calling upon Congress to amend the statute in a way that will provide the relief it intended, or, in the alternative, by asking the Supreme Court to allow successive habeas corpus petitions to be equitably tolled until the Supreme Court expressly decides whether each new rule of law is applicable retroactively to cases on collateral review.[8]

II. BACKGROUND: HABEAS CORPUS, §2255, AND TIMELINESS

A. QUICK OVERVIEW OF THE HABEAS CORPUS PROCEDURE

The writ of habeas corpus, from the Latin meaning "that you have the body"[9] and known as the Great Writ of Liberty,[10] is a longstanding practice ratified by Congress into a federal statute by which the legal authority under which a person was imprisoned, convicted, or sentenced can be challenged.[11] Once a federal defendant is convicted and sentenced, he or she can then use this writ to file a petition requesting the court to review the circumstances surrounding his or her incarceration to ensure that neither the conviction nor sentence violate his or her constitutional rights.[12] This

5. *See infra* Part II.

6. *See infra* Part III, Section A.

7. *See infra* Part III, Sections B-C.

8. *See infra* Part IV.

9. *Habeas corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter *Habeas corpus*] ("In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review of (1) the regularity of the extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence.").

10. 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, 78 (2005).

11. *Habeas corpus*, *supra* note 9 ("A writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal.").

12. William F. Harvey, *28 U.S.C. 2255: From Habeas Corpus to Coram Nobis*, 1 WASHBURN L.J. 381, 382 (1961) ("Under statutory and decisional authority, a prisoner was allowed to challenge his detention, and United States courts had jurisdiction to entertain the challenge, upon the ground that his liberty was being deprived in violation of constitutional

type of post-conviction appellate[13] procedure is an essential right recognized by the United States Constitution[14] to give prisoners relief from serving illegal sentences.[15] Although appellate in nature, the "writ of habeas corpus is not a proceeding in the original criminal prosecution, but an independent civil suit"[16] that "does not afford 'direct'[17] appellate, but only 'collateral,'[18] review of the legality of criminal judgments."[19] These procedural actions do not substantively challenge a person's guilt or innocence.[20] Determination of guilt is not the focus of habeas petitions because "constitutional rights of criminal defendants are granted to the innocent and the guilty alike."[21]

Habeas corpus procedure for federal[22] criminal defendants is codified in 28 U.S.C. § 2255, which offers defendants a mechanism to collaterally

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rights.").

13. *See* 1-2 FEDERAL HABEAS CORPUS § 2.2, *supra* note 3 (citing Ex parte Siebold, 100 U.S. 371, 374 (1879)). *But see* Keeney v. Tamayo-Reyes, 504 U.S. 1, 14 (1992) ("Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court."). The Supreme Court has recognized the habeas corpus petition's appellate character since the 19th century. *See* 1-2 FEDERAL HABEAS CORPUS § 2.2, *supra* note 3.

14. *See* U.S. CONST. art. I, § 9, cl. 2. ("The Privilege of the Writ of Habeas Corpus shall not be suspended . . . .").

15. *See* 1-2 FEDERAL HABEAS CORPUS § 2.2, *supra* note 3.

16. Riddle v. Dyche, 262 U.S. 333, 336 (1923).

17. *See Direct appeal*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An appeal from a trial court's decision directly to the jurisdiction's highest court, thus bypassing review by an intermediate appellate court.").

18. *See Collateral attack*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Typically a collateral attack is made against a point of procedure or another matter not necessarily apparent in the record, as opposed to a direct attack on merits exclusively.").

19. *See* 1-2 FEDERAL HABEAS CORPUS § 2.2, *supra* note 3.

20. *See* United States v. Kastenbaum, 613 F.2d 86, 89 (5th Cir. 1980) ("The guilt or innocence of the defendant is not in issue on a § 2255 proceeding, but rather the validity and the fairness of the proceedings against him." (quoting C. WRIGHT, 2 FEDERAL PRACTICE AND PROCEDURE § 593, at 592 (1969))); Thomas H. Gabay, Note, *Using* Johnson v. United States *to Reframe Retroactivity for Second or Successive Collateral Challenges*, 84 FORDHAM L. REV. 1611, 1621 (2016) ("Habeas corpus is a 'collateral' way for a prisoner to challenge a sentence—meaning without directly challenging substantive guilt of the offense charge.").

21. Kimmelman v. Morrison, 477 U.S. 365, 380 (1986) (noting that habeas corpus relief is available to both guilty and innocent prisoners); *see* 1-2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.5, LEXIS (2017) [hereinafter 1-2 FEDERAL HABEAS CORPUS § 2.5] ("[E]xcept to the limited extent that actual or possible innocence forms an element of the underlying constitutional right itself—in which case the innocence-focused element would apply equally on direct and habeas corpus review—a claim's bearing on innocence is irrelevant in determining the claim's cognizability in habeas corpus.").

22. *See* United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003) ("The court of appeals must examine the [collateral review] application to determine whether it contains any claim that satisfies § 2244(b)(2) (for state prisoners) or § 2255 ¶ 8 (for federal prisoners)."). State prisoners file their habeas corpus petitions under § 2244, while federal prisoners file under § 2255. *Id.*

challenge their unconstitutional convictions or sentences through a motion to "vacate, set aside or correct"[23] a conviction or sentence.[24] A federal defendant who wants to challenge his or her sentence post-conviction must file a habeas corpus petition under § 2255, but, as this is a last resort procedure, he or she must first exhaust all direct appellate remedies.[25] A direct appeal is the first step in challenging a conviction and offers the most avenues for relief.[26] A defendant must file his or her direct appeal within fourteen days of the final judgment of conviction.[27]

B. EXHAUSTION OF APPELLATE REMEDIES BEFORE FILING

Generally, a defendant should not file a § 2255 petition until after he or she has exhausted all appellate remedies.[28] As a § 2255 petition and a direct appeal brought by the same defendant should not be pending at the same time, district courts will often dismiss without prejudice[29] any § 2255 motion filed while a direct appeal is ongoing.[30] Disposition of the direct

23. 28 U.S.C. § 2255(a) (2016).

> 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 court was without jurisdiction to impose such sentence, 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.

Id.

24. *See* Ex parte Nielsen, 131 U.S. 176, 182 (1889) ("[I]f the court which renders a judgment has no[] jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*.").

25. 28 U.S.C. § 2254(b)(1)(A) (2016) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.").

26. Paul D. Borman, *Hidden Right to Direct Appeal from a Federal Plea Conviction*, 64 CORNELL L. REV. 319, 374 (1979) (discussing the advantages of direct appeals in challenging federal sentences or convictions).

27. FED. R. APP P. 4(b)(1)(A) ("In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal.").

28. Masters v. Eide, 353 F.2d 517, 518 (8th Cir. 1965) ("Ordinarily resort cannot be had to 28 U.S.C. § 2255 or habeas corpus while an appeal from conviction is pending."); United States v. Prows, 448 F.3d 1223, 1228 (10th Cir. 2006) ("[T]here is no jurisdictional barrier to a district court entertaining a § 2255 motion while a direct appeal is pending, though it should only do so in extraordinary circumstances given the potential for conflict with the direct appeal.").

29. *Dismissal without prejudice*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitation period."). A petitioner, like a plaintiff, may refile a previously dismissed § 2255 petition if the dismissal was without prejudice and if he or she refiles within the one-year limitation period. *Id.*

30. *See Prows*, 448 F.3d at 1228; *see also* Capaldi v. Pontesso, 135 F.3d 1122, 1124 (6th

appeal could render the § 2255 petition moot; therefore, dismissal avoids potential conflict and furthers judicial efficiency.[31]

C. TIMELINESS OF §2255 HABEAS CORPUS PETITIONS FOR UNCONSTITUTIONAL SENTENCES

A court may deny or dismiss a § 2255 petition for various reasons notwithstanding the merits of the claim, including the petitioner's failure to file the claim within the one-year statute of limitations, which runs from the latest of four determining dates.[32] Section 2255(f)(3) states, in relevant part, that a "[one]-year period of limitation . . . shall run 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."[33] For the first habeas petition, three other triggering dates for filing a claim are available,[34] but a second or successive petition must satisfy a more burdensome threshold.[35] Availability of relief for second or successive petitions is limited because the only other existing remedy is substantive in

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Cir. 1998) ("[I]n the absence of extraordinary circumstances, a district court is precluded from considering a § 2255 application for relief during the pendency of the applicant's direct appeal.").

31. *See* Womack v. United States, 395 F.2d 630, 631 (1968) ("A motion under Section 2255 is an extraordinary remedy and not a substitute for a direct appeal. Moreover, determination of the direct appeal may render collateral attack unnecessary."); *see also Prows*, 448 F.3d at 1228 (explaining that the court's main concern is not jurisdiction, but rather judicial economy).

32. *See* 28 U.S.C. § 2255(f)(2017).

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) 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; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

33. § 2255(f)(3).

34. *See* §§ 2255(f)(1)-(4).

35. § 2255(h)(2) ("A second or successive motion must be certified . . . 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."); *see* Harvey, *supra* note 12, at 397 ("Even though res judicata does not prevent the filing or asserting of a second motion, quite obviously, if a prisoner is to prevail he must, in that motion, demonstrate new facts—facts which were not and could not be raised on appeal and facts not raised in a previous motion.").

nature and requires the federal defendant to introduce new evidence that will prove his or her actual innocence.[36]

A successive petitioner's ability to invoke § 2255(f)(3) as his or her basis for relief hangs on two separate, but equally important, conditions: (1) the right must be newly recognized by the Supreme Court, *and* (2) the new rights must be made retroactively applicable to cases on collateral review.[37] Although a newly recognized constitutional right starts a new limitation period for second or successive petitioners,[38] the Supreme Court, not lower courts, must hold that this right applies retroactively to cases on collateral review before they can seek relief.[39] Further, this one-year limitation period runs from the date on which the Supreme Court initially recognized the right, not from the date on which that right was subsequently made retroactively applicable to cases on collateral review.[40]

D. §2255(F)(3) TIME LIMITATION AND RETROACTIVITY EXEMPLIFIED IN *JOHNSON V. UNITED STATES* AND *WELCH V. UNITED STATES*

This two-condition requirement can be first illustrated through the recent ruling in *Johnson v. United States*.[41] On June 26, 2015, the Supreme Court held that the residual clause[42] of the Armed Career Criminal Act

36. § 2255(h)(1) ("[N]ewly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.").

37. *See* Dodd v. United States, 545 U.S. 353, 358–59 (2005) (finding that the language in § 2255(f)(3) limits the right to relief by requiring compliance with the two statutorily imposed conditions).

38. *See* §§ 2255(f)(3), (h)(2). The language of section (h)(2) is unambiguous in its requirement that a court of appeals cannot certify a successive petition if the new rule the petition invokes has not yet been made retroactive by the Supreme Court. *See* § 2255(h)(2). A first petition, however, does not have to be certified by a court of appeals; thus, those petitioners are the ones whose claims will serve as the basis for the determination of retroactivity. *See* § 2255(f)(3).

39. *See* Ashley v. United States, 266 F.3d 671, 672 (7th Cir. 2001) ("[U]ntil the Supreme Court itself declares that a new decision applies retroactively on collateral review, subparagraph (3) [of § 2255(f)] does not open a new filing window for prisoners."); Nichols v. United States, 285 F.3d 445, 447 (6th Cir. 2002) (reading § 2255(f)(3) to require a new rule to be recognized and made retroactive by the Supreme Court before a petitioner can invoke it).

40. *See Dodd*, 545 U.S. at 356–57 (explaining that the statute of limitations in the federal habeas statute runs from "the date on which the right asserted was initially recognized by the Supreme Court," even if the right has not yet been "made retroactively applicable to cases on collateral review").

41. *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) ("[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

42. *See* 18 U.S.C. § 924(e)(2)(B) (2017). The "residual clause" refers to the second part of §924(e)(2)(B)(ii)—"or otherwise involves conduct that presents a serious potential risk of

("ACCA"),[43] which provides for enhanced sentences to repeat criminal offenders upon being convicted in federal court of possession of a firearm,[44] was unconstitutionally vague.[45] Any person previously sentenced under this clause of the ACCA could now seek resentencing or release[46] by filing a § 2255 petition because *Johnson* created a newly recognized constitutional right that was previously unavailable.[47] However, the Supreme Court in *Johnson* did not expressly hold whether this rule was applicable retroactively.[48] Lower courts struggled with *Johnson*'s retroactive application to cases on collateral review resulting in a major circuit split, with some courts granting successive habeas petitions and others denying them.[49]

As a result, on April 18, 2016, the Supreme Court issued a decision in *Welch v. United States*, which expressly held *Johnson*'s rule retroactively

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physical injury to another." § 924(e)(2)(B)(ii). This clause acts as a "catch-all" for offenses that do not fall squarely into either the "elements clause," which requires as an element "the use, attempted use, or threatened use of physical force against the person of another," or the "enumerated clause," which lists offenses such as "burglary, arson, or extortion" that are statutorily defined violent felonies. § 924(e)(2)(B)(i)–(ii).

43. *See* § 924(e). The Armed Career Criminal Act provides for enhanced sentencing for repeat offenders who have three or more prior convictions for either a "serious drug offence," a "violent felony," or a combination of both. *See id.* These terms are defined in §924(e)(2)(A) and (B), respectively. *See id.*

44. *See* § 924(g). This section governs the sentencing of offenders who, while traveling from one state or foreign country to another, use, transfer, or acquire a firearm in furtherance of a crime of violence or in violation of a controlled substance law. *See id.*

45. *See Johnson*, 135 S. Ct. at 2574; *see also* Welch v. United States, 136 S. Ct. 1257, 1261 (2016) (explaining that, under the Armed Career Criminal Act, "a person who possesses a firearm after three or more convictions for a 'serious drug offense' or a 'violent felony' is subject to a minimum sentence of 15 years and a maximum sentence of life in prison").

46. *See* 28 U.S.C. § 2255(a) (2017) ("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 . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.").

47. § 2255(f)(3) ("[T]he 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." (emphasis added)).

48. *See Welch*, 136 S. Ct. at 1260–61 ("*Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. §924(e)(2)(B)(ii). The Court held that provision void for vagueness. The present case asks whether *Johnson* is a substantive decision that is retroactive in cases on collateral review.").

49. *See* Leah Litman, *The (In)Significance Of Orders Authorizing Successive Petitions*, CASETEXT (Jan. 6, 2016), https://casetext.com/posts/the-insignificance-of-orders-authorizing-successive-petitions ("Several courts of appeals—the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits—have granted prisoners authorization to file successive petitions based on *Johnson*. Three courts of appeals—the Fifth, Tenth, and Eleventh—have denied prisoners authorization to file successive petitions." (citations omitted)).

applicable to cases on collateral review.[50] The Supreme Court made this determination based on a finding that the rule in *Johnson* is substantive[51] in nature, thus falling outside of the general bar to retroactivity.[52]

Based on the combined decisions in *Johnson* and *Welch*, the two conditions imposed by § 2255(f)(3) were met.[53] Courts use the date of the *Johnson* decision, not the *Welch* decision, to calculate the time from which the statute of limitations under § 2255(f)(3) begins to run.[54] At this point, federal criminal defendants sentenced under the now unconstitutional residual clause of the ACCA had two more months to confidently file their § 2255 petitions seeking release or resentencing under *Johnson* without being time-barred.[55]

E. DEVELOPMENT OF § 2255(F)(3)'S RETROACTIVITY REQUIREMENT

Petitioners have to file their claims within one year from the date on which the Supreme Court announces a new rule, changes an existing rule,

50. *Welch*, 136 S. Ct. at 1265 ("*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied. *Johnson* is thus a substantive decision and so has retroactive effect under *Teague* in cases on collateral review.").

51. *Substantive law*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The part of the law that creates, defines, and regulates the rights, duties, and power of parties."); *see Welch*, 136 S. Ct. at 1265 ("[T]he rule announced in *Johnson* is substantive.").

52. *Welch*, 136 S. Ct. at 1264 (holding that new substantive rules, like the *Johnson* rule, as well as "watershed rules of criminal procedure" are not subject to the general non-retroactivity rule).

53. *See* 28 U.S.C. § 2255(f)(3) (2017) ("[I]f that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . ."). The decision in *Johnson* created a newly recognized right, and the decision in *Welch* made this right retroactively applicable to cases on collateral review. *See id.*

54. *See* § 2255 (f)(3) ("[T]he *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 . . . ." (emphasis added)); *see also, e.g.*, Westrich v. United States, 2016 U.S. Dist. LEXIS 120785, at *11 (S.D. Fla. Sep. 2, 2016) ("Movant had one year from June 26, 2015, the date *Johnson* was decided, to seek relief . . . ."); Ford v. United States, 2016 U.S. Dist. LEXIS 110837, at *4 (W.D.N.C. Aug. 19, 2016) ("*Johnson* was issued on June 26, 2015. As such, to be timely under § 2255(f)(3), the Petitioner must have filed his motion on or before June 26, 2016."); Mubin v. United States, 2016 U.S. Dist. LEXIS 108601, at *11 (E.D. Va. Aug. 16, 2016) ("Because *Johnson* had been decided on June 26, 2015, petitioners had until June 26, 2016, to file a § 2255 motion to vacate, set aside, or correct a sentence imposed under the residual clause of the ACCA.").

55. *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015); *Welch*, 136 S. Ct. at 1268. *Johnson* was decided on June 26, 2015, and *Welch* held that *Johnson* was retroactive on April 18, 2016, which was almost ten months later. *See Johnson,* 135 S. Ct. at 2551; *Welch*, 136 S. Ct. at 1257, 1268. The statute of limitations is one year, thus leaving petitioners with just over two months to file their § 2255 habeas corpus petitions. *See Johnson,* 135 S. Ct. at 2551; *Welch*, 136 S. Ct. at 1257.

or voids a rule on the grounds that it is unconstitutional.[56] However, successive § 2255(f)(3) petitions will fail unless the rule under which the petitioners seek relief is also one that can be applied retroactively to their cases.[57] Generally, new rules of law are not available to those whose cases concluded before the rule is recognized.[58] But some rules are subject to a finding of retroactivity, which, if found, allows a habeas corpus petitioner to invoke the new rule to challenge the legality of his or her sentence or conviction.[59] A court of appeals is tasked with answering the question of whether a new rule has already been "made retroactive to cases on collateral review by the Supreme Court" as a prerequisite for authorizing a successive petition under § 2255.[60]

The Supreme Court can choose which cases to hear at its discretion; therefore, not every defendant's question about a new rule's retroactivity will end in a Supreme Court ruling as required by § 2255's conditions for successive petitioners.[61] In the absence of a Supreme Court decision with respect to a new rule's retroactivity, appellate courts must make the determination for themselves in deciding whether to grant or deny motions to file successive habeas corpus petitions.[62] As the test for retroactivity is

56. *See* § 2255(f) ("A 1-year period of limitation shall apply to a motion under this section.").

57. *See* § 2255(f)(3) ("[T]he 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* . . . ." (emphasis added)).

58. *See* Butterworth v. United States, 775 F.3d 459, 463 (1st Cir. 2015) (noting that if every rule was retroactive, then "every change could unsettle hundreds or thousands of closed cases, and courts might even hesitate to adopt new rules for fear of unsettling too many final convictions and settled expectations").

59. *See* §§ 2255(f)(3), (h)(2).

60. § 2255(h)(2).

61. FRANCIS HILLIARD, LAW OF NEW TRIALS, AND OTHER REHEARINGS; INCLUDING WRITS OF ERROR, APPEALS ETC. 1806–1878, 689 (2d ed., rev. 1872) (ebook) ("The petition for this writ is addressed to the judicial discretion of the court, and the writ will not be granted if substantial justice has been done, though the record may show the proceedings to have been defective and informal.").

62. *See* Leah Litman, *Circuit Splits & Original Writs*, CASETEXT (Dec. 17, 2015), https://casetext.com/posts/circuit-splits-original-writs (pointing out that circuit courts came to different decisions regarding the retroactivity of the new rule announced in *Johnson* because the Supreme Court had not yet ruled on this issue).

complex,[63] appellate courts often come to different conclusions.[64] Unless it is the defendant's first petition, he may be prevented from appealing the decision or petitioning the Supreme Court for a writ of certiorari.[65]

F. STATUTORY INTERPRETATION OF § 2255(F)(3)'S RETROACTIVITY REQUIREMENT

When a statute's meaning is ambiguous, a court is tasked with interpreting it based on legislative intent and text used.[66] "The court "interpret[s] the words 'in their context and with a view to their place in the overall statutory scheme.'"[67] "[T]he 'new law' provision [subsection (f)(3)] of the statute of limitations employs a linguistic formulation that does not conjoin—and, indeed, noticeably separates—the phrase 'Supreme Court' from the phrase 'made retroactively applicable.'"[68] "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts

63. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) ("Such [substantive] rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." (quoting Bousley v. United States, 523 U.S. 614, 620 (1998))); Sawyer v. Smith, 497 U.S. 227, 233 (1990) ("[A] rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus unless the rule falls within one of two narrow exceptions."); *see also* 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, 166 (2005).

64. *See* Litman, *supra* note 62 (discussing the circuit split on the retroactivity of the recent decision in *Johnson*, which made the residual clause of the Armed Career Criminal Act void for vagueness, and, thus, unconstitutional); *see also* Gabay, *supra* note 20, at 1635–43 (explaining that the circuit split on the issue of retroactivity is largely due to the doctrine's intricate application).

65. *See* 28 U.S.C. § 2244(b)(3)(E) (2017) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."); *Certiorari*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver record in the case for review . . . . The U.S. Supreme Court uses certiorari to review most of the cases it decides to hear.").

66. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (noting a cannon of statutory construction: "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *see also* KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 46–59 (Oxford Univ. Press 2013) (ebook) (explaining the significance of congressional intent and text of the statute in interpreting its meaning).

67. Tyler v. Cain, 533 U.S. 656, 662 (2001) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).

68. 1-5 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, LEXIS § 5.2, at n.60 (2017) [hereinafter 1-5 FEDERAL HABEAS CORPUS § 5.2] (citations omitted).

intentionally."[69] "The fact that Congress chose to employ such different wording in [each part of subsection (f)(3) of] the statute of limitations suggests that it intended that the retroactivity rule need *not* be made by the Supreme Court in the statute of limitations context" for a first petition.[70]

But Congress used different language in subsection (h)(2) where it increased the requirements for successive petitions.[71] There, the language "made retroactive" is followed, without separation, by the language "by the Supreme Court," which suggests congressional intent that the new rule must specifically be made retroactive by a Supreme Court decision for successive § 2255 petitions.[72]

The Supreme Court interpreted the word "made"[73] in the statutory language of § 2255[74] to mean that the Supreme Court must expressly "hold" that the new rule is retroactive.[75] Even though the statute's text does not use the word "hold," Congress is not required to use specific language and is free to use synonyms.[76] The Supreme Court must decide a new rule's retroactivity in a separate holding,[77] rather than in dicta of the prior

69. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 544 (2012) (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

70. 1-5 FEDERAL HABEAS CORPUS § 5.2, *supra* note 68.

71. *See* 28 U.S.C. §§ 2255(f)(3), (h)(2) (2017).

72. *See* § 2255(f)(3) ("[T]he 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 . . . ."); § 2255(h)(2) ("[A] new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."). The language in both sections, although very similar at first glance, is actually quite different because section (h)(2) intentionally imposes stricter requirements for successive petitioners. *See* §§ 2255(f)(3), (h)(2)

73. Ellen F. Carey, Comment, *Constitutional Law - Closing the Door on Successive Habeas Petitions: Supreme Court Must Expressly Hold That New Rule Is Retroactively Available for Collateral Review Under the AEDPA* - Tyler v. Cain, *121 S. Ct. 2478 (2001)*, 36 SUFFOLK U. L. REV. 273, 279 (2002) ("The Court's narrow interpretation of the word 'made' eases the burden on lower federal courts to determine questions of retroactivity because an explicit-holding requirement eliminates difficult de novo analysis, which normally accompanies questions of retroactivity.").

74. § 2255(h)(2) ("[A] new rule of constitutional law, *made* retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." (emphasis added)).

75. *See* Tyler v. Cain, 533 U.S. 656, 663 (2001) ("[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive."); *see also* Carey, *supra* note 73, at 278.

76. *See Tyler*, 533 U.S. at 664 ("Congress, needless to say, is permitted to use synonyms in a statute. And just as 'determined' and 'held' are synonyms in the context of § 2254(d)(1), 'made' and 'held' are synonyms in the context of § 2244(b)(2)(A)."). The language "made retroactive to cases on collateral review" in § 2244(d)(1)(C) is the same exact language as is used in § 2255(f)(3). *Compare* 28 U.S.C. § 2244(d)(1)(C) (2017), *with* § 2255(f)(3).

77. *Holding*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision.").

case which announced the new rule, because dicta does not bind the court.[78] This results in a "two-holdings" or "two-cases" method[79] of determining the retroactive application of new law.[80]

G. *TYLER V. CAIN*'S "TWO-HOLDINGS" REQUIREMENT FOR RETROACTIVITY IN § 2255

The defendant in *Tyler v. Cain* argued that the rule he invoked in his habeas corpus petition was already made retroactive because, in a prior case, the Supreme Court found a particular jury instruction violated the Due Process Clause.[81] However, the Supreme Court made clear that lower courts cannot infer a rule's retroactivity from dicta.[82] The Court further clarified that, for purposes of successive habeas petitions, no combination of lower court holdings can *make* a rule retroactive; the Supreme Court is the only one with the power to do so.[83] The Supreme Court noted that when it held that the jury instruction violated the Due Process Clause, it did not expressly hold that the rule was retroactively applicable to cases on collateral review; thus, the rule was not *made* retroactive by the Supreme Court as required by the statute.[84]

The *Tyler* defendant alternatively argued that if the rule he invoked was not previously made retroactive, the Court should make it retroactive in this decision.[85] The Supreme Court refused to do so, explaining that any statement on the rule's retroactivity would be dictum because it does not help this defendant's case.[86] In his dissent, Justice Breyer criticized the

78. *Dictum*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A statement of opinion or belief considered authoritative because of the dignity of the person making it."). Dicta is plural of dictum. *See id.* It is an authoritative comment or statement made by the court, but because it is not part of the legal basis for judgment, it is not binding on the court. *See id.*

79. *See Tyler*, 533 U.S. at 666 ("Multiple cases can render a new rule retroactive only if the *holdings* in those cases necessarily dictate retroactivity of the new rule." (emphasis added)).

80. *See id.* at 664 (noting that the words "held" and "made" are synonyms that have the same effect).

81. *See id.* at 664–65 (referring to the holding in *Sullivan*); *see also* Sullivan v. Louisiana, 508 U.S. 275, 282 (1993) (Rehnquist, J., concurring) ("The Court holds today that the reasonable-doubt instruction given at Sullivan's trial . . . violates due process . . . .").

82. *See Tyler*, 533 U.S. at 662–63.

83. *See id.* at 657 (explaining that courts of appeals, in their determination of whether to grant or deny a successive habeas petition, "do not have to engage in the difficult legal analysis that can be required to determine questions of retroactivity in the first instance, but need only rely on Supreme Court retroactivity holdings").

84. *See id.* at 666.

85. *See id.* at 667.

86. *See id.* at 667–68.

majority's approach as overly complex and unfair.[87] He suggested a better way to make a rule retroactive is "to hold that a set of circumstances [which] falls within a particular legal category is simultaneously to hold that, other things being equal, the normal legal characteristics of members of that category apply to those circumstances."[88] Put more simply, "[i]f Case One holds that all men are mortal and Case Two holds that Socrates is a man, we do not need Case Three to hold that Socrates is mortal."[89] The majority rejected this proposition based on the plain meaning of the statutory text, allowing a decision on retroactivity "only if the holding . . . necessarily dictate[s] retroactivity of the new rule."[90]

H. TIME LIMITATION NOT AFFECTED BY § 2255 (F)(3)'S RETROACTIVITY CONDITION

As briefly discussed above, the one-year limitation period is triggered on the date of the decision in which the Supreme Court initially recognized the new right, rather than on the date of the subsequent decision in which the Supreme Court made this right retroactive.[91] A defendant may file a *first* § 2255 petition within one year from the date on which the Supreme Court recognized a new right, anticipating that the district or circuit court will make a favorable finding that the rule invoked applies retroactively to his or her case.[92] In contrast, a *second* or *successive* petitioner must wait to file until after the Supreme Court makes the retroactivity decision because the court of appeals cannot approve the petition until then.[93] Yet a

87. *See id.* at 677 (Breyer, J. dissenting) ("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.").

88. *Tyler*, 533 U.S. at 673. Justice Breyer criticized the majority's lack of logic on the subject. *Id.*

89. *Id.* at 672–73.

90. *Id.* at 666 (majority opinion) ("The only holding in *Sullivan* is that a *Cage* error is structural error. There is no second case that held that all structural-error rules apply retroactively or that all structural-error rules fit within the second *Teague* exception."). The majority alluded that the Supreme Court would have to make a broad ruling on the retroactivity of an entire class of cases in order for Justice Breyer's method to work. *Id.* at 666–67.

91. *See* Dodd v. United States, 545 U.S. 353, 357 (2005) (explaining that the statute of limitations in the federal habeas statute runs from "the date on which the right asserted was initially recognized by the Supreme Court" even if the right has not yet been "made retroactively applicable to cases on collateral review").

92. *See, e.g.*, Butterworth v. United States, 775 F.3d 459, 464 (1st Cir. 2015) ("[W]e join our sister circuits in concluding that [for purposes of section 2255(f)(3)] '[d]istrict and appellate courts, no less than the Supreme Court, may issue opinions' on initial petitions for collateral review holding in the first instance that a new rule is retroactive in the absence of a specific finding to that effect by the Supreme Court."); United States v. Lopez, 248 F.3d 427, 432–33 (5th Cir. 2001); Ashley v. United States, 266 F.3d 671, 673–75 (7th Cir. 2001).

93. *See* 28 U.S.C. § 2255(h)(2) (2017); *see also, e.g.*, United States v. Holt, 417 F.3d 1172,

petitioner cannot wait too long because a motion to file a second or successive § 2255 petition will not be granted unless it is timely filed, "even if time runs out before a given avenue of attack on the conviction becomes legally and factually tenable."[94]

In *Dodd v. United States*, a defendant convicted of "knowingly and intentionally engaging in a continuing criminal enterprise" filed a § 2255(f)(3) petition, invoking a new right created by *Richardson v. United States*.[95] The defendant in *Dodd* argued that his petition was timely because he filed it within one year of the decision in *Ross v. United States*, which made the new rule announced in *Richardson* retroactive.[96] The Supreme Court rejected his argument, interpreting the statutory text of § 2255(f)(3) as identifying only one date from which the start of the time limitation is measured.[97] The Court explained that the language in the second clause of § 2255(f)(3)—"if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"—is merely a condition and has no impact on the time limitation.[98]

In his dissent, Justice Stevens correctly pointed out that the Supreme Court rarely holds that a new rule is retroactive within one year of its original decision, which, in many cases, results in the statute of limitations

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1175 (11th Cir. 2005) (per curiam) (requiring that second or successive § 2255 petitions must have appellate permission before a district court can consider them); *In re* Turner, 267 F.3d 225, 227 (3d Cir. 2001) (noting that to obtain circuit court approval to file a second or successive § 2255 petition, the petitioner must make only a superficial showing that his or her motion has merit); United States v. Evans, 224 F.3d 670, 672 (7th Cir. 2000) (explaining that second or successive § 2255 motions require appellate approval).

94. Escamilla v. Jungwirth, 426 F.3d 868, 871–872 (7th Cir. 2005), *abrogated on other grounds by* McQuiggin v. Perkins, 133 S. Ct. 1924 (2013)).

95. *Dodd*, 545 U.S. at 353 (discussing its prior decision in *Richardson* as the rule invoked by the petitioner); *see also* Richardson v. United States, 526 U.S. 813, 815 (1999) (holding that a jury must agree unanimously that a defendant is guilty of each of the specific violations that together constitute the continuing criminal enterprise).

96. *See Dodd*, 545 U.S. at 356; *see also* Ross v. United States, 289 F.3d 677 (11th Cir. 2002); *Richardson*, 526 U.S. at 815. *Richardson* was initially decided on June 1, 1999. *See Richardson*, 526 U.S. at 813. *Ross*, making *Richardson* retroactive, was decided on April 19, 2002. *See Ross*, 289 F.3d at 677. The petitioner in *Dodd* filed his habeas corpus motion on April 4, 2001, over one year after the *Richardson* decision and over one year before the *Ross* retroactivity decision. *See Dodd*, 545 U.S. at 353.

97. *See Dodd*, 545 U.S. at 357 ("We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there.' . . . What Congress has said . . . is clear: An applicant has one year from the date on which the right he asserts was initially recognized by this Court." (citations omitted)).

98. *Id.* at 358 (quoting 28 U.S.C. § 2255(f)(3) (2017)) (relying on Webster's definition of "if" meaning "in the event that" or "on condition that" to find that the second clause only imposes conditions).

expiring before the right to file the claim ever accrues.[99] Justice Stevens suggested that Congress construed the language of the statute in such a way because it assumed the Supreme Court would recognize a new rule and make it retroactive in the same case, rather than in the "two-holdings" approach the Court adopted.[100] The majority rejected his argument, refusing to rewrite a statute that Congress enacted, even though its results are harsh.[101]

I. EQUITABLE TOLLING ONLY IN EXTRAORDINARY CIRCUMSTANCES

The only remedy a petitioner *may* have to this harsh time restriction is through the doctrine of equitable tolling, which extends the limitation period beyond the statutory deadline at the court's discretion.[102] All circuits have uniformly held that the one-year limitation period under § 2255 is not a jurisdictional bar, but rather a statute of limitations that is subject to equitable tolling.[103] However, equitable tolling is an exception that is rarely attainable and only in appropriate circumstances.[104]

A petitioner is entitled to the benefit of equitable tolling of the statute of limitations "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way'

99. *See id.* at 367–68 (Stevens, J., dissenting) ("Even for those prisoners who are incarcerated in a jurisdiction in which the new rule is quickly held to be retroactive, at least part of the 1-year period in which to file a claim taking advantage of the retroactive rule will run before the petition raising the claim can be filed.").

100. *See id.* at 364–65 ("[I]t seems nonsensical to assume that Congress deliberately enacted a statute that recognizes a cause of action, but wrote the limitations period in a way that precludes an individual from ever taking advantage of the cause of action."). In essence, such a reading of the statute creates a right without a remedy. *See id.*

101. *See id.* at 359 (majority opinion) ("The disposition required by the text here, though strict, is not absurd. It is for Congress, not this Court, to amend the statute . . . .").

102. *Equitable tolling*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A court's discretionary extension of a legal deadline as a result of extraordinary circumstances that prevented one from complying despite reasonable diligence throughout the period before the deadline passed.").

103. *See, e.g.*, Sandvik v. United States, 177 F.3d 1269, 1270 (11th Cir. 1999) (per curiam) (holding that the one-year limitation period under § 2255 is subject to equitable tolling); Moore v. United States, 173 F.3d 1131, 1134 (8th Cir. 1999) (same); United States v. Pollard, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005) (citing cases that have held that the one-year limitation period under § 2244 or § 2255 is subject to equitable tolling).

104. *See* Socha v. Boughton, 763 F.3d 674, 684 (7th Cir. 2014) ("[T]olling is rare; it is 'reserved for extraordinary circumstances far beyond the litigant's control that prevented timely filing.'" (quoting Nolan v. United States, 358 F.3d 480, 484 (7th Cir. 2004))); *see also* Whiteside v. United States, 775 F.3d 180, 184 (4th Cir. 2014) ("[E]quitable tolling is appropriate in those 'rare circumstances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.'" (quoting Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003))).

and prevented timely filing."[105] The burden of proof is on the petitioner to show that the two elements were satisfied.[106] "A petitioner must establish not only the existence of an extraordinary circumstance but also that the extraordinary circumstance was, in fact, the cause of the untimely filing of the federal habeas petition."[107] A petitioner must be diligent in pursuing his rights; thus, the cause for his untimeliness must be external.[108]

Due to its equitable nature, tolling is not a bright line rule, but rather a totality of circumstances test.[109] Although there are various reasons for allowing the application of equitable tolling, the frequently delayed determination of a new rule's retroactive application to cases on collateral review as required by § 2255(f)(3) has never specifically been considered.[110]

III. DISCUSSION: RIGHT WITHOUT A REMEDY CLOAKED UNDER A GUISE OF INTERESTS FOR FINALITY

A. STATUTE OF LIMITATIONS EXPIRES BEFORE NEW RULES ARE MADE RETROACTIVE

As Justice Stevens pointed out in his dissent in *Dodd*, "the most natural reading of the statutory text [of § 2255(f)(3) and (h)(2)] would make it possible for the limitations period to expire before the cause of action accrues."[111] It is hard to imagine that Congress intended to impose

105. Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)) (remanding the case for a determination of whether the attorney's conduct rose to a level of "extraordinary circumstances" that would allow equitable tolling).

106. *See* Lawrence v. Florida, 549 U.S. 327, 336 (2007) (observing that petitioner is the one who must prove that both requirements were satisfied in order to avail himself of the benefits of the equitable tolling doctrine).

107. *See* Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); *see also* Bryant v. Ariz. Attorney' Gen., 499 F.3d 1056, 1061 (9th Cir. 2007) (requiring the petitioner to show that the extraordinary circumstances he claims were the actual cause of his untimeliness).

108. *See Bryant*, 499 F.3d at 1061 ("A petitioner must show that his untimeliness was caused by an external impediment and not by his own lack of diligence.").

109. *See* Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 25 (2004) ("[E]quitable tolling is applied when legal principles require it, or in order to prevent a miscarriage of justice.").

110. *See* 28 MOORE'S FEDERAL PRACTICE—*Criminal Procedure* § 671.02, LEXIS (2017) [hereinafter MOORE'S FEDERAL PRACTICE § 671.02] ("Equitable relief is not warranted when the petitioner has inexplicably delayed the attempt to file until the end of the limitations period. Errors of counsel amounting at worst to negligence are not an extraordinary circumstance justifying equitable tolling, although active misconduct by counsel may justify tolling.").

111. Dodd v. United States, 545 U.S. 353, 361 (2005) (Stevens, J., dissenting) ("Whether the source of this possible result is merely the use of careless wording or an incorrect assumption by Congress concerning the timing of two relevant events, I am convinced that Congress did not

restrictions that make the right the statute provides a superficial one.[112] When writing the statute, Congress likely assumed that the Supreme Court would decide whether or not the new rule is retroactive in the same decision in which it recognized that new rule.[113] That assumption was incorrect, however, because the Supreme Court has interpreted the language of the statute to require retroactivity of the rule to be decided in a separate case.[114]

Second or successive petitioners have to meet a very strict requirement because their petitions must be certified by a court of appeals and will be denied unless the Supreme Court has already made a retroactivity ruling.[115]

> As the Supreme Court rarely discusses the retroactive effect of a decision within one year of that initial decision, in most cases when the petitioner has previously filed a [habeas corpus] petition, the new one-year limitations period will expire before the right to seek permission [from the court of appeals] to file [a second or successive] claim . . . accrues.[116]

Even though those who file their first § 2255 petition need not wait for the Supreme Court to make a rule retroactive,[117] it is likely that the circuit court in their jurisdiction will not make a retroactivity determination within the one-year time limitations either.[118] Even if a circuit court makes a new rule retroactive quickly, and within the one-year time limitation, a portion of the year will have passed and petitioners will have been denied the benefit of the full year as granted to them by § 2255(f)(3).[119] As

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intend to authorize such a perverse result in either case.").

112. *See id.*

113. *See id.* at 364–65 ("In my judgment, the probable explanation for statutory text that creates this risk is Congress' apparent assumption that our recognition of the new right and our decision to apply it retroactively would be made at the same time. Otherwise it seems nonsensical to assume that Congress deliberately enacted a statute that recognizes a cause of action, but wrote the limitations period in a way that precludes an individual from ever taking advantage of the cause of action.").

114. *See supra* Part II, Section G.

115. 28 U.S.C. § 2255(h)(2) (2017) ("A second or successive motion must be certified . . . 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.").

116. *See* MOORE'S FEDERAL PRACTICE § 671.02, *supra* note 110.

117. *See* 1-5 FEDERAL HABEAS CORPUS § 5.2, *supra* note 68; *supra* Part II, Section F.

118. *See Dodd*, 545 U.S. at 367 (Stevens, J., dissenting). The petitioner in *Dodd* relied on a rule that was not made retroactive by the Eleventh Circuit Court of Appeals until nearly fourteen months after it was recognized. *Id.* Justice Stevens explained that even first petitioners who are not relying purely on the Supreme Court can often be time-barred from seeking relief because the circuit courts are not any faster in deciding retroactivity. *Id.* at 367 n.7.

119. *See id.* at 368 ("Even for those prisoners who are incarcerated in a jurisdiction in which

illustrated in *Johnson* and *Welch* above, successive petitioners had only two months to file their § 2255(f)(3) petitions, which flooded the district courts as petitioners all filed quickly in an effort to meet the now shortened deadline.[120]

Out of concern for finality of convictions, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended § 2255 by adding a previously non-existent one year limitation period.[121] By doing so, however, Congress surely did not intend to entirely prevent successive habeas corpus petitioners from taking advantage of the new rights that the Supreme Court deems to be applicable retroactively on collateral review.[122] Such restraint would render this newly added section a nullity, and Congress would not have made the change.[123]

B. ARGUMENTS IN FAVOR OF FINALITY OF CONVICTIONS AND SENTENCES

The primary argument for new laws generally not being applicable retroactively is rooted in the principle of finality of convictions.[124] Those who favor finality claim that it serves our society by deterring and rehabilitating offenders, preserving judicial resources, and boosting confidence in our judicial system, among others.[125] Justice Harlan, a

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the new rule is quickly held to be retroactive, at least part of the 1-year period in which to file a claim taking advantage of the retroactive rule will run before the petition raising the claim can be filed.").

120. *See* Daniel Horowitz, *Supreme Court could let thousands of career criminals go free*, CONSERVATIVE REVIEW (Aug. 3, 2016) https://www.conservativereview.com/commentary/2016/08/thousands-of-career-criminals-could-go-free ("The district courts have been crushed with such petitions . . . since April. According to federal data, roughly 16,900 criminals filed petitions to vacate their sentences from April-June.").

121. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214. This Act amended § 2255, among others, to add the one-year time limitations provisions. *See id.* Prior to this amendment, petitioners could file their § 2255 motions without any time restriction. *See id.*

122. *See Dodd*, 545 U.S. at 369 (Stevens, J., dissenting).

123. *See id.* at 371 ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001))).

124. *See* Mackey v. United States, 401 U.S. 667, 690 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation . . . ."). The argument is that if new laws are applicable retroactively, then prisoners can indefinitely challenge their sentences and convictions. *Id.*

125. *See* Kirby J. Sabra, *Miscarriage of Justice: Post-Booker Collateral Review of Erroneous Career Offender Sentence Enhancements*, 96 B.U. L. REV. 261, 286–87.

> [A]rguments favoring finality claim that it (1) "respects notions of comity and federalism"; (2) "avoids problems that result from staleness of evidence"; (3)

longtime proponent of finality, rationalized that "it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final."[126]

These arguments, however, fall flat. "Making people serve unjust sentences is unlikely to promote their respect for the law" because "people are better deterred by a system that they view as just and legitimate[,]" and lengthy sentences are counter-productive to rehabilitation because prisoners have a harder time adjusting back to society after a long period of incarceration.[127] Shortening sentences and overturning convictions actually saves tremendous amounts of resources because the government does not have to bear the expensive costs associated with incarceration.[128] Additionally, society has confidence in our judicial system when that system is just and treats all of its members fairly, even those who are already incarcerated.[129]

C. ARGUMENTS IN FAVOR OF JUSTICE AND FAIRNESS

"In the real world, every system has to decide how much leeway to give convicts to relitigate their convictions, and how much injustice to tolerate in its courts."[130] "Admittedly, finality is often the easier value to quantify, as it is viewed in terms of efficiency. "Justice, given its focus on

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> "protects victims from the harm that may come from the repeated revisiting of the case by the courts"; (4) "furthers the criminal law's goal of deterrence and rehabilitation of offenders"; (5) "preserves resources and avoids delay in other court cases"; and (6) "provides psychological benefits by allowing society to move on and feel confident in the judicial system."

Id. (quoting Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C.L. REV. 79, 154–55 (2012)).

126. *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in the judgments in part and dissenting in part).

127. Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C.L. REV. 79, 154–55 (2012).

128. *See id.* at 150. ("It costs approximately $28,000 per year for the federal government to incarcerate someone.").

129. *See id.* at 161.

> Convicted people should feel that their sentences have been determined through fair procedures and that the results are just . . . . [T]he broader society is undoubtedly harmed by leaving major injustices uncorrected . . . . Allowing people to continue to serve years of extra prison time despite a plain error in their sentence undermines the legitimacy of the criminal justice system . . . .

Id.

130. Garrett Epps, *What Happens to Old Sentences When the Law Changes*, THE ATLANTIC (Oct. 14, 2015) http://www.theatlantic.com/politics/archive/2015/10/what-happens-to-old-sentences-when-the-law-changes/410455/.

notions of fairness, is usually perceived as more difficult to define. That does not mean, however, that we should prefer the former over the latter . . . ."[131] "[W]ithout justice, finality is nothing more than a bureaucratic achievement . . . . Finality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliable judicial determination of his claim."[132] Such opportunity will never arise, however, when a successive petitioner is prevented from filing his or her claim because the time limitation expired before the right to file even accrued.[133] It is illogical for Congress to afford successive petitioners a right to seek relief but limit it in such a way that they can never get the opportunity to obtain that relief.[134]

IV. SOLUTION: MAKING THE WAY BACK TO CONGRESSIONAL INTENT

A. AMENDMENT TO THE TIME LIMITATIONS SECTION OF § 2255(F)(3) TO REFLECT CONGRESSIONAL INTENT

The Supreme Court will not rewrite statutes that Congress enacted except in situations where the disposition required by the language of the statute would be absurd.[135] Whether a statutorily required disposition is absurd or simply harsh is quite subjective, as one court may find the requirements to be strict but not absurd, and another may find them to be wholly irrational.[136] It has long been established that "a statute of limitations begins to run when the cause of action 'accrues', that is, when the [claimant] can file suit and obtain relief."[137] When drafting the language of § 2255(f)(3), Congress likely intended that a petitioner's cause of action will accrue when both conditions are met as a result one holding

131. Spencer v. United States, 773 F.3d 1132, 1164 (11th Cir. 2014) (Jordan, J., dissenting).

132. Gilbert v. United States, 640 F.3d 1293, 1337 (11th Cir. 2011) (Hill, J., dissenting).

133. *See* Dodd v. United States, 545 U.S. 353, 364–65 (2005) (Stevens, J., dissenting) ("[I]t seems nonsensical to assume that Congress deliberately enacted a statute that recognizes a cause of action, but wrote the limitation period in a way that precludes an individual from ever taking advantage of the cause of action."); *see also supra* Part III, Section A.

134. *See supra* Part III, Section A.

135. *See Dodd*, 545 U.S. at 359 ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted.").

136. *See id.* ("The disposition required by the text here, though strict, is not absurd."). *But see id.* at 364–65 ([I]t seems nonsensical to assume that Congress deliberately enacted a statute that recognizes a cause of action, but wrote the limitation period in a way that precludes an individual from ever taking advantage of the cause of action.").

137. *See* Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604, 610 (2013) (quoting Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)).

made by the Supreme Court, that is, when a new rule is recognized and made retroactive at the same time.[138]

In light of the Supreme Court's "two-holdings" approach to retroactivity, Congress should amend § 2255(f)(3) to make clear that the statute of limitations starts to run only when both conditions are met: (1) a new right is announced by the Supreme Court, *and* (2) that right has been made retroactively applicable to cases on collateral review by the Supreme Court, and thus, the claim is ripe.[139] This Comment proposes that the language of § 2255(f)(3) should be as follows: "the date on which the right asserted, which was previously newly recognized by the Supreme Court, has been made retroactively applicable to cases on collateral review."

As a result of the proposed statutory amendment, *Johnson* petitioners would have been able to file their petitions until April 18, 2017, one full year from the date of the *Welch* decision, as likely intended by Congress.[140] Such language would prevent saturation of district courts with unmeritorious claims filed immediately prior to the deadline in anticipation of a favorable Supreme Court decision to prevent the claim from being time-barred.[141] Rather than being overwhelmed with 16,900 habeas corpus petitions filed within two months like in *Johnson*, district courts would receive the petitions over the course of an entire year allowing judicial resources to be used more efficiently.[142]

This Comment recognizes that statutory amendments are uncommon and when Congress does make them, such overrides come at the high cost of otherwise designated congressional time and resources.[143] In an effort to reach fairness and justice more quickly, the doctrine of equitable tolling should be extended to successive § 2255(f)(3) petitions until such

138. *See supra* Part III, Section A.

139. *See Dodd*, 545 U.S. at 357–59 (finding that the language in § 2255(f)(3) is limited by satisfaction of the two statutorily imposed conditions).

140. *See* Johnson v. United States, 135 S. Ct. 2551 (2015); Welch v. United States, 136 S. Ct. 1257 (2016). *Johnson* announced a new rule on June 26, 2015, and *Welch* held that *Johnson* was retroactive on April 18, 2016, which was almost ten months later. *See Johnson*, 135 S. Ct. at 2551; *Welch*, 136 S. Ct. at 1257. If this Comment's solution is implemented, the amended statute of limitations would give petitioners one full year to file their § 2255 claims, as intended by Congress. *See Johnson*, 135 S. Ct. at 2551; *Welch*, 136 S. Ct. at 1257.

141. *See supra* Part II, Section H.

142. *See supra* Part III, Section A.

143. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 564–65 (2009) (explaining that Congressional overrides "take time away from other legislation that Congress might otherwise address [and] . . . that Congress is far less willing to pass overrides, even when it disagreed with judicial interpretations").

amendment can be made.[144]

144. *See supra* Part IV, Section B.

B. SUCCESSIVE § 2255 PETITIONS TOLLED UNTIL THE ISSUE OF RETROACTIVITY IS RESOLVED BY THE SUPREME COURT

Although equitable tolling is a rarely used remedy, the dichotomy created by the combination of the Supreme Court's "two-holdings" retroactivity method and its interpretation of § 2255(f)(3)'s "two-conditions" requirement should qualify as an extraordinary circumstance that prevents petitioners from timely filing their claims.[145] The doctrine of equitable tolling requires that the extraordinary circumstances be external and not the result of the petitioner's inaction.[146] The Supreme Court's determination of a new right's retroactivity lies entirely outside of the petitioner's control.[147] No amount of diligence on the part of the petitioner will affect how and when the Supreme Court will decide the retroactive applicability of a new rule.[148]

Had district courts allowed successive *Johnson* petitions to be equitably tolled until the Supreme Court decided *Welch*, the effect would have been the same as under the proposed amendment of the language of § 2255(f)(3).[149] Both of these proposed solutions promote fairness in the criminal justice system without diminishing the interest for finality of convictions because the extension of time is relatively short and supports congressional intent that successive petitioners will enjoy the benefit of one full year before their claim will be time-barred.[150]

V. CONCLUSION: DETERIORATION OF THE GREAT WRIT OF LIBERTY

Congress restricted the once extensive Writ of Habeas Corpus through the AEDPA by imposing a statute of limitations "with a complexity that ensured most defendants would not be able to comply with the limit . . . . The law also made it nearly impossible to qualify for filing a second or subsequent petition for a writ."[151] Critics of the AEDPA and its

145. *See supra* Part II, Section I.

146. *See* Bryant v. Ariz. Att'y Gen., 499 F.3d 1056, 1061 (9th Cir. 2007) ("A petitioner must show that his untimeliness was caused by an external impediment and not by his own lack of diligence."); *see also* Roy v. Lampert, 465 F.3d 964, 973 (9th Cir. 2006) ("[I]f the petitioners can allege facts showing that extraordinary circumstances—and not a lack of diligence—caused the failure to file, there is no need to require specific dates before holding an evidentiary hearing.").

147. *See* HILLIARD, *supra* note 61.

148. *See supra* Part II, Section E.

149. *See supra* note 140.

150. *See supra* Part III, Section B.

151. Lincoln Caplan, *The Withered Writ*, THE AMERICAN PROSPECT (July 15, 2013), http://prospect.org/article/withered-writ.

restrictions bring light to the "illogical chasm" it created.[152] The intent behind the act was to give defendants a fair chance to challenge their unconstitutional convictions and sentences collaterally, while creating a finality of convictions once the statute of limitations passed.[153] In reality, however, this intent was lost. "AEDPA and the Supreme Court all but hide this chasm—and the injustice it regularly leads to— behind byzantine rules and rulings, making it exceedingly hard for our legal system to keep the Constitution's promise that habeas will be available to prevent the most serious deprivations of liberty."[154]

152. *Id.*
153. *See id.*
154. *Id.*