2016

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Recommended Citation

Litman, Leah and Luke C. Beasley. "Jurisdiction and Resentencing: How Prosecutorial Waiver Can Offer Remedies Congress Has Denied." *Cornell Law Review* 101 (2016): 91-113.

JURISDICTION AND RESENTENCING: HOW PROSECUTORIAL WAIVER CAN OFFER REMEDIES CONGRESS HAS DENIED

Leah M. Litman & Luke C. Beasley†

INTRODUCTION

This Essay is about what prosecutors can do to ensure that prisoners with meritorious legal claims have a remedy. The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes draconian conditions on when prisoners may file successive petitions for post-conviction review (that is, more than one petition for post-conviction review).[1] AEDPA's restrictions on post-conviction review are so severe that they routinely prevent prisoners with meritorious claims from vindicating those claims.

Take, for example, the recent litigation about whether prisoners with "*Johnson*" claims may be resentenced. *Johnson v. United States* held that the "residual clause" of the Armed Career Criminal Act (ACCA) is unconstitutionally

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1 *See, e.g.*, 28 U.S.C. § 2255(h) ("A second or successive motion must be certified . . . to contain—(1) newly 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; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.").

vague.[2] ACCA imposed a mandatory fifteen-year term of imprisonment on prisoners; but without ACCA, the statutory maximum term of imprisonment for these prisoners is ten years.[3] *Johnson* therefore means these prisoners could lawfully be sentenced to no more than ten years in prison.[4] Prisoners whose ACCA sentences depended on the residual clause are now seeking to have their 15-year sentences reduced to the lawful 10 years.[5] But three courts of appeal held that AEDPA bars prisoners with *Johnson* claims from obtaining relief if they have already filed one petition for post-conviction review, because the prisoners do not satisfy AEDPA's conditions for filing a successive petition for post-conviction review.[6]

The United States attempted to avoid this result.[7] The United States urged courts to grant prisoners permission to file successive petitions: It waived the argument that prisoners who were sentenced under ACCA's residual clause have not satisfied the conditions to file successive petitions for post-conviction review.[8] But some courts still denied prisoners permission to file the petitions.[9] The reason is that while litigants generally may "waive"—affirmatively forego making—arguments on which they might prevail,

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2 135 S. Ct. 2551, 2555 (2015).

3 *Id.*

4 18 U.S.C. § 924(a)(2) (2012).

5 *See* 18 U.S.C. § 924(a)(2) (2012); 18 U.S.C. § 924(e) (2012); *see generally* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 61–62 (2015) [hereinafter *Residual Impact*] ("A decision finding the residual clause invalid would mean that defendants subjected to the enhancement received 'a punishment the law c[ould] not impose on' them—a term of years exceeding the statutory maximum for the offense they were convicted of.").

6 *In re* Williams, 806 F.3d 322 (5th Cir. 2015); *In re* Gieswein, 802 F.3d 1143 (10th Cir. 2015); *In re* Rivero, 797 F.3d 986 (11th Cir. 2015).

7 The Supreme Court may attempt to avoid this result as well, given that it granted a petition for certiorari that raises the question whether *Johnson* is retroactive. *See* Welch v. United States, 136 S. Ct. 790 (2016).

8 Joint Emergency Motion for an Order Authorizing District Court to Consider a Successive Motion Under 28 U.S.C. §2255, *United States v. Striet*, No. 15-72506, at 10–11 (9th Cir. Aug. 25, 2015); Joint Emergency Motion for an Order Authorizing District Court to Reconsider a Successive Motion Under 28 U.S.C. 2255, *Reliford v. United States*, No. 15-3224, at 10 (8th Cir. Oct. 6, 2015); Woods v. United States, 805 F.3d 1152, 1154 (8th Cir. 2015) ("[W]e have previously accepted the government's concession of retroactivity of a new Supreme Court rule as a sufficient prima facie showing to allow a second or successive § 2255 petition.").

9 *In re* Williams, No 15-30731, Letter Brief of the United States Sept. 24, 2015, at 6 ("The government does not object to the defendant's motion for leave to file a successive § 2255 motion."); *In re* Williams, 806 F.3d at 325–27.

litigants cannot waive arguments that go to the federal courts' jurisdiction—the courts' power and authority to hear a case. And some courts have held that AEDPA's restrictions on post-conviction review are jurisdictional. The U.S. Court of Appeals for the Eleventh Circuit has held that they are.[10] So too has the U.S. Court of Appeals for the Fourth Circuit,[11] although it is set to take another look at this question as a full *en banc* court this spring.[12]

This Essay takes up the question of whether the threshold requirements for obtaining authorization to file a successive petition for post-conviction review are jurisdictional. The *Johnson* litigation is not the first, nor will it be the last, time AEDPA's restrictions on post-conviction review bar prisoners with meritorious claims from obtaining relief. AEDPA's restrictions are severe, and the United States has, outside of the *Johnson* litigation, previously attempted to "waive" the argument that AEDPA's restrictions are not satisfied.[13] Whether AEDPA's restrictions are jurisdictional dictates whether there is a safety valve—prosecutorial waiver—that could serve as a mechanism to allow prisoners with meritorious claims to obtain relief on those claims when AEDPA's restrictions do not.

Part I describes AEDPA's restrictions on post-conviction petitions that are preventing prisoners with meritorious claims from obtaining relief, and how the United States is attempting to bypass those restrictions by waiving the argument that AEDPA's restrictions are not satisfied. Part II argues that AEDPA's restrictions on filing successive petitions for post-conviction review are not jurisdictional, and that courts may therefore accept the government's waiver and allow prisoners to obtain relief on their claims even if prisoners do not satisfy AEDPA's preconditions for

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10 *See, e.g.*, Williams v. Warden, 713 F.3d 1332, 1339 (11th Cir. 2013) ("This bar on second or successive motions is jurisdictional."); *id.* at 1336–37 ("Whether a prisoner may bring a . . . petition under the savings clause of § 2255(e) . . . is a threshold jurisdictional issue.").

11 United States v. Surratt, 797 F.3d 240, 246 (4th Cir. 2015) ("[I]n AEDPA, Congress limited the jurisdiction of federal courts to hear second or successive requests . . . . [C]ourts may hear second or successive petitions only if" they satisfy the requirements of § 2255(h).); Rice v. Rivera, 617 F.3d 802, 807–08 (4th Cir. 2010).

12 Order, United States v. Surratt, No. 14-6851 (4th Cir. Dec. 2, 2015).

13 *See, e.g.*, Surratt, 797 F.3d at 246 ("The Government did not oppose Surratt's . . . request."); Williams, 713 F.3d at 1336 ("The government initially conceded . . . that the savings clause applied to the kind of claim Williams sought to bring.").

filing successive petitions for post-conviction review.

I
STATUTORY RESTRICTIONS ON SECOND OR SUCCESSIVE PETITIONS

This Part describes AEDPA's restrictions on successive petitions for post-conviction review. It then describes the rules of litigation that generally allow parties to waive arguments on which they might prevail.

A. Restrictions

AEDPA severely limits prisoners' ability to file "second or successive" petitions for post-conviction review—review that occurs after a defendant's conviction has become final. If a prisoner has already filed one petition for post-conviction review, the prisoner may file another petition only if he obtains authorization from the court of appeals.[14] And AEDPA provides that a court of appeals may grant authorization to file a successive petition in only extremely limited circumstances—if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"[15]; or "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and"[16] "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense."[17]

AEDPA's restrictions on post-conviction review pose a substantial barrier to litigants seeking to file a successive petition for post-conviction review. The Supreme Court rarely "makes" new rules retroactive to cases on post-conviction review. In the last fifteen years, the Supreme Court has held that two rules are retroactive.[18] Nor is it easy to show by "clear and convincing evidence" that "no reasonable factfinder would have found [the prisoner]

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14 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.").

15 28 U.S.C. § 2244(b)(2)(A)

16 28 U.S.C. § 2244(b)(2)(B)(i)

17 28 U.S.C. § 2244(b)(2)(B)(ii).

18 Montgomery v. Louisiana, 136 S. Ct. 718, 732-36 (2016); Welch v. United States, 136 S. Ct. 1257, 1265-68 (2016).

guilty."[19] The Court has described the clear-and-convincing standard as "stringent."[20] At least one case illustrates the kind of showing that might satisfy the clear-and-convincing gatekeeping requirement. In *House v. Bell*, the Court found that it was "more likely than not" that no reasonable factfinder could have found the defendant guilty of the offense.[21] Because the question in that case concerned the defendant's procedural default—the failure to raise a claim earlier—as opposed to his ability to file a successive petition, the defendant had to show only that it was "more likely than not" that no factfinder would have found him guilty in order to present his otherwise procedurally defaulted claim. The Court concluded the following evidence made it "more likely than not" that no reasonable jury would have found the defendant guilty: Subsequent testing revealed the purported DNA match was incorrect—the DNA at the crime scene came from someone other than the defendant; the blood stains on the defendant's clothes came from blood from the crime lab, rather than from the crime scene; and several individuals testified that someone other than the defendant had confessed to the crime.[22]

All this is to say that it is hard—and sometimes prohibitively so—for a prisoner to meet the threshold requirements for obtaining authorization to file a second or successive petition in the court of appeals. Take the recent litigation over who can be resentenced in light of *Johnson v. United States*. *Johnson* held that ACCA's "residual clause" was unconstitutionally vague.[23] Defendants sentenced under the residual clause were subject to a mandatory minimum term of imprisonment of fifteen years.[24] Without the ACCA mandatory minimum, however, the statutory *maximum* term of imprisonment for their offense of conviction was ten years.[25] Many federal prisoners are therefore seeking post-conviction relief in order to have their

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19 28 U.S.C. § 2255(h)(1); 28 U.S.C. § 2244(b)(2).

20 Schlup v. Delo, 513 U.S. 298, 326–27 (1995).

21 *See* House v. Bell, 547 U.S. 518 (2006). *House* also held the petitioner had not made the more "persuasive showing" of actual innocence that might be required to maintain a freestanding claim of actual innocence. Whether that more persuasive showing is higher than clear and convincing evidence is not clear. *Id.* at 554–55; *see, e.g.*, Herrera v. Collins, 506 U.S. 390 (1993).

22 *House*, 547 U.S. at 540–53.

23 135 S. Ct. 2551 (2015).

24 18 U.S.C. § 924(e) (2012).

25 18 U.S.C. § 924(a)(2) (2012); *see generally* Litman, *Residual Impact*, *supra* note 5, at 61–62.

sentences reduced to their lawful terms.

Prisoners who were sentenced under ACCA's residual clause have *Johnson* claims—they were sentenced under an unconstitutional sentencing enhancement and received a term of imprisonment at least five years longer than the statutory maximum term of imprisonment. Moreover, *Johnson* is the kind of rule that is clearly retroactive and applies to convictions that have already become final.[26] "New" constitutional rules generally do not apply to criminal cases that have already become final, but a new constitutional rule applies retroactively—to convictions that have already become final—if the new rule is "substantive."[27] The Supreme Court has said that "any fact that increases the mandatory minimum" sentence is an "element" of a criminal offense: "[A] fact triggering [a] mandatory minimum . . . constitute[s] a new, aggravated crime."[28] It has also said that a decision that "modifies the elements of an offense is normally substantive rather than procedural."[29] By changing who is eligible for a mandatory minimum sentence, *Johnson* modified the elements of a criminal offense. The Court has also said that substantive rules are rules that create "a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him."[30] And *Johnson* means that defendants sentenced under ACCA's residual clause received "a punishment the law c[ould] not impose on" them—a term of years exceeding the statutory maximum for their offense of conviction.[31] Moreover, without the ACCA enhancement, the statutory maximum term of imprisonment for a conviction under § 924(a)(2) is ten years, whereas with the enhancement, the statutory mandatory minimum term of imprisonment is

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26 One of us has explained this argument more in depth elsewhere. *See, e.g.*, Litman, *Residual Impact*, *supra* note 5, at 61–63 (2015); Leah M. Litman, *Resentencing in the Shadow of* Johnson v. United States, 28 FED. SEN'G REP. 45, 47 (2015) [hereinafter *Resentencing in the Shadow*].

27 Teague v. Lane, 489 U.S. 288, 307 (1989) ("[A] new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"); Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004) ("[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.").

28 Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158, 2160–61 (2013).

29 *Schriro*, 542 U.S. at 354.

30 *Id.* at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

31 *See id.*

fifteen years.

But there is a difference between *Johnson* being retroactive and the Supreme Court "making" it retroactive. To prevail on a first petition for post-conviction review, a prisoner has to show only that *Johnson* is retroactive. But to obtain authorization to file a successive petition for post-conviction review, a prisoner must show that *Johnson* has been *made retroactive by the Supreme Court*.[32] *Tyler v. Cain* held that the Court can "make" a rule retroactive only through "holdings" rather than dicta. To establish that a rule has been "made retroactive . . . by the Supreme Court," *Tyler* explained, a prisoner generally must show that "the Supreme Court h[eld] it to be retroactive."[33] *Tyler* then came close to suggesting that the Supreme Court can "make" a rule retroactive only by issuing a decision holding that rule retroactive or applying that rule to a case on collateral review.[34] And prior to April 18, 2016, the Supreme Court had not yet done so for the rule in *Johnson*. No matter what it means to "make" or "hold" a rule retroactive, however, the important point here is that there is some conceptual space between a rule being retroactive and the Supreme Court making it so.

There is also a narrow window in which the Supreme Court must "make" a new rule retroactive: The Court must make a new rule retroactive within one year of announcing the new rule in order for a prisoner's successive petition not to be time-barred. Prisoners have one year to file a successive petition from "the date on which the constitutional right [the prisoner] assert[ed] was initially recognized by the Supreme Court."[35] *Dodd v. United States* held that the statute of limitations period begins when the Court recognizes the new right, not when it makes the right retroactive, even though prisoners must also show the Supreme Court has made a right retroactive in order to receive authorization to file a successive petition.[36] "[A]n applicant who files a second or successive motion seeking to take advantage of a new rule of constitutional law will be time barred except in the rare case in which this Court announces a new rule of constitutional law and makes it

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32 28 U.S.C. § 2255(h); *see* Tyler v. Cain, 533 U.S. 656, 662 (2001) (interpreting identically worded provision in § 2244).

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

34 *See id.*; Litman, *Resentencing in the Shadow*, *supra* note 26, at 48–49.

35 28 U.S.C. § 2244(d)(1)(C) (2012); *see also* 28 U.S.C. § 2255(f)(3) (2012).

36 545 U.S. 353, 357–59 (2005).

retroactive within one year."[37]

Relying on *Tyler*, some courts of appeals held that, because the Supreme Court had not "made" *Johnson* retroactive, prisoners were not permitted to file a successive petition for post-conviction review based on *Johnson* if they have already filed one petition for post-conviction review.[38] The U.S. Court of Appeals for the Tenth Circuit denied authorization to file second or successive petitions.[39] So too did U.S. Court of Appeals for the Fifth Circuit[40] and the U.S. Court of Appeals for the Eleventh Circuit.[41] The law in these circuits, therefore, did not permit prisoners who have already filed one petition for post-conviction review to have their sentences reduced to the lawful ten years.[42] Rather, these prisoners may have had to serve the entirety of their fifteen-year term.

B. The Possibility of Waiver

The government tried to avoid this result. The United States urged courts to grant prisoners authorization to file successive petitions for post-conviction review. That is, the government attempted to waive the argument that the Supreme Court has not "made" *Johnson* retroactive so that courts may grant prisoners permission to file successive petitions and be resentenced to lawful ten-year terms of imprisonment.[43]

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37 *Id.*

38 *Tyler*, 553 U.S. at 666.

39 *In re* Gieswein, 802 F.3d 1143 (10th Cir. 2015).

40 *In re* Williams, 806 F.3d 322 (5th Cir. 2015).

41 *In re* Rivero, 797 F.3d 986 (11th Cir. 2015).

42 Two decisions denying authorization to file second or successive petitions—one from the Fifth Circuit and one from the Eleventh Circuit—suggested that *Johnson* might not be retroactive at all. The Fifth Circuit in *In re Williams* stated that "*Johnson* is not available . . . on collateral review" because it was not a substantive rule. 806 F.3d at 326. And the Eleventh Circuit in *In re Rivero* maintained that "the rule announced in *Johnson* does not meet the criteria the Supreme Court uses to determine whether the retroactivity exception for new substantive rules applies." 797 F.3d at 989. However, no court of appeals has held *Johnson* is not retroactive in a case that does not involve an application for a second or successive petition for post-conviction review. One district court in the Fifth Circuit did. *See* Harrimon v. United States, No. 15-cv-00152, D.E. No. 9 (N.D. Tex. Nov. 19, 2015).

43 Joint Emergency Motion for an Order Authorizing District Court to Consider a Successive Motion Under 28 U.S.C. § 2255, *United States v. Striet*, No. 15-72506, at 10–11 (9th Cir. Aug. 25, 2015); Joint Emergency Motion for an Order Authorizing District Court to Reconsider a Successive Motion Under 28 U.S.C. 2255, *Reliford v. United States*, No. 15-3224, at 10 (8th Cir. Oct. 6, 2015); Woods v. United States, 805 F.3d 1152, 1154 (8th Cir. 2015) ("[W]e

In some respects, this is unremarkable. Litigants are not required to make every possible argument on which they might prevail; litigants "waive" and "forfeit" arguments all the time. A litigant "forfeits" an argument by failing to raise the argument, or failing to raise it at the correct time in the litigation.[44] And under the well-established doctrine of "forfeiture," courts can decline to consider forfeited arguments, or they may consider them under a more demanding legal standard.[45] But courts will rarely, if ever, raise or consider arguments that litigants have "waived." A litigant "waives" an argument by affirmatively declining to make it, or affirmatively indicating the argument lacks merit.[46] And courts will not consider arguments that have been waived because these are arguments that litigants have deliberately and voluntarily refused to pursue.[47] Thus, even if an argument is right, a litigant might not prevail on the argument if she has failed to raise it, or has affirmatively declined to make it. Forfeiture and waiver are routinely invoked in criminal cases, often against defendants and to affirm convictions.[48] But waiver and forfeiture are also invoked against the government, resulting in a conviction or sentence being vacated.[49]

Indeed, one reason why prisoners are obtaining relief in their first petitions for post-conviction review is because the government is waiving objections to resentencing. That is, the government agrees that prisoners who were sentenced

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have previously accepted the government's concession of retroactivity of a new Supreme Court rule as a sufficient prima facie showing to allow a second or successive § 2255 petition."); Leah M. Litman, *The Extraordinary Circumstances Of* Johnson v. United States, 114 MICH. L. REV. FIRST IMPRESSIONS 81, 87–89 (2016) [hereinafter *The Extraordinary Circumstances*].

44 *E.g.*, Guyan Int'l, Inc. v. Prof'l Benefits Adm'rs, Inc., 689 F.3d 793, 799 (6th Cir. 2012); Miller v. Admin. Office of Courts, 448 F.3d 889, 893 (6th Cir. 2006).

45 *E.g.*, Usman v. Holder, 566 F.3d 262, 268 (1st Cir. 2009); United States v. Moore, 376 F.3d 570 (6th Cir. 2004).

46 *E.g.*, *Usman*, 566 F.3d at 268; *Moore*, 376 F.3d 570.

47 *See* Wood v. Milyard, 132. S. Ct. 1826, 1830 (2012) ("A court is not at liberty, we have cautioned, to bypass, override, or excuse a State's deliberate waiver of a limitations defense."); *see also* United States v. Clements, 590 F.App'x 446, 449 (Oct. 22, 2014) ("While a party who waives evidentiary objections may not seek review of them at all, a party who fails to object to the introduction of evidence may seek plain-error review of the forfeited objection."); United States v. Walker, 615 F.3d 728, 733 (6th Cir. 2010) ("But Walker did not just forfeit this argument; he waived it.").

48 *See* sources cited *supra* notes 43 and 44.

49 United States v. Noble, 762 F.3d 509, 527 (6th Cir. 2014) ("[T]he government, like other litigants, therefore, can forfeit or waive an argument.").

under ACCA's residual clause should be resentenced to their lawful ten-year terms of imprisonment.[50] It was conceding that *Johnson* is retroactive and waiving that objection to resentencing.[51] And many courts that are ordering defendants to be resentenced are doing so specifically on the ground that the government is waiving all objections to post-conviction relief.[52]

But there is a big exception to the general rules about waiver and forfeiture: "Jurisdictional" rules may not be waived or forfeited.[53] A rule is jurisdictional if it affects the court's power and authority to hear a case.[54] And courts must raise jurisdictional arguments on their own; parties cannot consent, waive, or forfeit their way into federal court.[55] A court's "[s]ubject-matter jurisdiction can never be waived or forfeited"; "objections [to jurisdiction] may be resurrected at any point in the litigation"; and courts must consider *sua sponte* requirements that "go[] to subject-matter jurisdiction."[56]

II
JURISDICTIONAL OR NOT?

The government attempted to waive the argument that the Supreme Court has not "made" *Johnson* retroactive so that courts may grant prisoners permission to file successive petitions and be resentenced to lawful ten-year terms of

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50 *See* sources cited *supra* notes 43.

51 *See, e.g.*, Woods v. United States, 805 F.3d 805 F.3d 1152, 1154 (8th Cir. 2015) ("Here, the United States concedes that Johnson is retroactive."); Tooley v. United States, No. 05-00211-01-CR-W-FG, 2015 WL 7758973, at *1 (W.D. Mo. Dec. 1, 2015) ("The Court further finds, again without objection from the parties, that Johnson constitutes a new substantive rule of constitutional law that should be applied retroactively to defendants previously sentenced under the ACCA."); United States v. Nagy, No. 5:13-CR-138, 2015 WL 6870120, at *4 (N.D. Ohio Nov. 6, 2015); Brief of United States in United States v. Imm, No. 14-4809, at 5 (3d Cir. Aug. 6, 2015) ("The government further waives any objection based on procedural default."); United States v. Schultz, No. CR 13-214, 2015 WL 5853117, at *1 (D. Minn. Oct. 7, 2015) ("The United States of America (the "Government") does not oppose the motion."); Godley v. United States, No. 4:05-CR-17-FL-1, 2015 WL 5155967, at *2 (E.D.N.C. Sept. 2, 2015); United States v. Hamilton, No. 06CR200-01, 2015 WL 5011450, at *1 (D.D.C. Aug. 24, 2015).

52 *See* sources cited *supra* note 51.

53 Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006).

54 *E.g.*, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160–61 (2010).

55 *Arbaugh*, 546 U.S. at 514; *see also* Henderson v. Shinseki, 562 U.S. 428, 435 (2011) ("[A] party may raise . . . a [jurisdictional] objection even if the party had previously acknowledged the trial court's jurisdiction.").

56 Gonzalez v. Thaler, 132 S. Ct. 641, 647–48 (2012).

imprisonment.[57] But some courts did not accept these concessions.[58] And they may have refused to do so in part because some precedent suggests that the threshold requirements for obtaining permission to file a successive petition for post-conviction review are jurisdictional.

This Part suggests that view is mistaken. Over the last three decades, the Supreme Court has established and consistently applied a very demanding clear statement rule to determine whether a statutory requirement is jurisdictional. Section II.A outlines those precedents, and Section II.B surveys the reasons to think that the gatekeeping requirements for obtaining a successive petition for post-conviction review are not jurisdictional.

A. Arbaugh's Clear Statement Rule

Arbaugh v. Y & H Corp. established an "administrable bright line" rule for when a statutory requirement is jurisdictional: Unless the "Legislature clearly states that a threshold limitation . . . shall count as jurisdictional," courts "should treat the restriction as nonjurisdictional in character."[59] "[T]he term 'jurisdictional,'" the Court has explained, "properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating [the court's] adjudicatory authority."[60]

In the last two decades, the Court has relied on *Arbaugh*'s clear-statement rule to hold many statutory requirements not jurisdictional.[61] The Supreme Court has

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57 *See* sources cited *supra* note 6.

58 *See* sources cited *supra* note 8.

59 *Arbaugh*, 546 U.S. at 515–16.

60 Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

61 *See, e.g.*, United States. v. Kwai Fun Wong, 135 S. Ct. 1625, 1633 (2015) (statute of limitations is not jurisdictional and does not "in any way cabin [a court's] usual equitable powers"); Henderson v. Shinseki, 562 U.S. 428, 429 (2011) (120-day deadline for filing notice of appeal with Veterans Court was not jurisdictional); Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817, 818 (2013) (180-day period to file Medicare appeal not jurisdictional). The two exceptions are *Bowles v. Russell*, 551 U.S. 205 (2007), and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). *Bowles* held the time to file an appeal under 28 U.S.C. § 2017(a) is jurisdictional, noting the fact that "this Court has long held that the taking of an appeal within the prescribed amount of time is 'mandatory and jurisdictional.'" 551 U.S. at 209–10. *John R. Sand* held that courts were required, on their own, to determine whether parties had complied with the statute of limitations governing suits against the United States in the Court of Federal Claims. 552 U.S. at 133–34. *John R. Sand*, however, was more a question of statutory stare decisis, given that the Court suggested the petitioner could "succeed only

"pressed a stricter distinction between *truly* jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not."[62] In applying *Arbaugh*'s clear-statement principle, the Court has repeatedly recited the practical considerations that counsel against finding a statutory requirement jurisdictional: Once a limit is jurisdictional, "waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory";[63] "tardy jurisdictional objections" waste public and private resources and "disturbingly disarm litigants."[64]

The reasoning in *Reed Elsevier v. Muchnick* is illustrative. *Reed* held that 17 U.S.C. § 411(a)'s requirement that no copyright infringement suit "shall be instituted until preregistration or registration of the copyright claim has been made" was a nonjurisdictional precondition to filing suit.[65] *Reed* reasoned that the phrase "no civil action . . . shall be instituted until preregistration" "[did] not speak in jurisdictional terms."[66] *Reed* also noted that the registration requirement appeared in a "provision 'separate' from those granting federal courts subject-matter jurisdiction"; that the statute allows courts to adjudicate some civil actions where there was no preregistration; and that the "legal character" of the registration requirement was not jurisdictional.[67]

The Court decided *Gonzalez v. Thaler* against this backdrop. In *Gonzalez*, the Court examined whether 28 U.S.C. § 2253(c), the AEDPA provision outlining the requirements for appealing a district court's ruling on a § 2255 petition, was jurisdictional. Section 2253(c)(1) reads: "Unless a circuit justice or judge issues a certificate of appealability [COA], an appeal may not be taken to the court of appeals . . . ."[68] The Court held that this provision was jurisdictional; that is, without a certificate of appealability, the court of appeals does not have subject-matter

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by convincing us that this Court has overturned, or that it should now overturn, its earlier precedent." *Id.* at 136.

62 Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012).

63 *Bowles*, 551 U.S. at 216–17 (2007).

64 *Sebelius*, 133 S. Ct. at 824.

65 559 U.S. 154, 163 (2010).

66 *Id.* at 173 (quoting Zipes v. Trans World Airlines, Inc., 455 U. S. 385, 394 (1982)).

67 *Id.* at 164–66.

68 28 U.S.C. § 2253(c)(1); Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012).

jurisdiction over the appeal.[69] But it held that both sections 2253(c)(2) and 2253(c)(3), which state "threshold condition[s] for the issuance of a COA," were nonjurisdictional.[70] Section 2253(c)(2) provides that, "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right"; section 2253(c)(3) states that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."[71] The Court summarized the significance of the provisions as follows: "[T]he failure to obtain a COA is jurisdictional, while a COA's failure to indicate an issue is not. A defective COA is not equivalent to the lack of any COA."[72]

B. Second or Successive Petitions

The same is true for orders granting authorization to file successive petitions and the conditions for issuing those orders. The threshold conditions for granting authorization to file a successive petition for post-conviction relief—in sections 2255(h)(1) and 2255(h)(2)—are not jurisdictional, even if the issuance of the order authorizing the successive petition is jurisdictional. This Section examines the two provisions—section 2244(b) and section 2255(h)—that are most relevant to when successive petitions may be granted.

1. *Section 2244*

Numerous courts—including the Supreme Court—have suggested that the failure "to receive authorization from the Court of Appeals before filing" a successive petition deprives a district court of "jurisdiction to entertain" the successive petition.[73] Several courts have suggested that section 2244 is what makes an order authorizing a successive petition jurisdictional.[74] And section 2255(h) incorporates section

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69 *Gonzalez*, 132 S. Ct. at 649.

70 *Id.*

71 28 U.S.C. § 2253(c)(2),(3); *Gonzalez*, 132 S. Ct. at 648.

72 *Gonzalez*, 132 S. Ct. at 649.

73 Burton v. Stewart, 549 U.S. 147, 153 (2007).

74 *E.g.*, Stewart v. Martinez-Villareal, 523 U.S. 637, 637 (1998) (second or successive motion must comply with § 2244(b)(3)(A) to grant jurisdiction); Burton v. Stewart, 549 U.S. 147, 149 (2007) (failure of second or successive motion to comply with § 2244(b) "deprived the District Court of jurisdiction"); Schwartz v. Neal, 228 F. App'x 814, 815 (10th Cir. 2007) (per curiam) ("He failed to obtain this authorization. *See* 28 U.S.C. 2244(b)(3)(A). Therefore, the district court lacked subject matter jurisdiction."); United States v. Key, 205 F.3d 773, 774 (5th Cir. 2000) ("[Section] 2244(b)(3)(A) acts as a jurisdictional

2244 by reference: It provides that a successive motion must be "certified as provided in section 2244."[75] And section 2244 provides that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."[76]

Assuming that section 2244(b)(3)(A) makes the issuance of an order authorizing a successive petition jurisdictional,[77] it does not follow that the threshold requirements for the issuance of the order are jurisdictional. Indeed, there are several reasons to think they are not.

First, the text and statutory structure of section 2255(h) and 2244(b)(3)(C) suggest that the provisions are not jurisdictional. Section 2255(h) and 2244(b)(3)(C) "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."[78] Rather, section 2255(h) provides that a successive motion "must be certified as provided in section 2244 . . . to contain" either a new rule of constitutional law or newly discovered evidence.[79] And section 2244(b)(3)(C) provides only that a court of appeals "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection."[80] These provisions thus speak to when an order authorizing a successive petition may be granted, rather than to the district court's authority to hear such a petition.[81]

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bar."); United States v. Howard, No. CR 6:02-38-DCR, 2015 WL 5612001, at *1 (E.D. Ky. Sept. 22, 2015); Simpson v. Cross, No. 15-CV-817-DRJ-CJP, 2015 WL 5585809 (S.D. Ill. Sept. 21, 2015).

75 28 U.S.C. § 2255(h)

76 28 U.S.C. § 2244(b)(3)(A).

77 *E.g.*, El-Amin v. United States, 172 F. App'x 942, 946 (11th Cir. 2006) ("[W]ithout authorization, the district court lacks jurisdiction to consider a second or successive motion." (citing United States v. Farris, 333 F3d 1211, 1216 (11th Cir. 2003)).

78 Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006).

79 28 U.S.C. § 2255(h).

80 The "requirements of this subsection" likely refers to § 2244(b)(2), which lays out the two grounds on which a second or successive motion can be certified. *See* Burton v. Stewart, 549 U.S. 147, 153 (2007).

81 Congress also specifically allowed courts to entertain successive petitions in some circumstances—where the remedy provided by section 2255 is inadequate or ineffective. 28 U.S.C. § 2255(e); *see* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 165 (2010) ("Nor does any other factor suggest that . . . [the] registration requirement can be read to 'speak in jurisdictional terms . . .' First, and most significantly, [the statute] expressly *allows* courts to

The requirements for issuing the authorization order also appear in a different subsection, and use different language, from the jurisdictional provision in section 2244(b)(3)(A). Section 2244(b)(3)(A) speaks to what must happen for "the district court" to be "authorize[d]" to hear a successive petition.[82] The language referring to the district court's authority is absent from both sections 2255(h) and 2244(b)(3)(C). Section 2255(h) speaks only of what the "successive motion must be certified . . . to contain." And section 2244(b)(3)(C) speaks to what a court of appeals must determine before "authoriz[ing] the filing of . . . a successive application." The absence of similar jurisdictional language in sections 2255(h) and 2244(b)(3)(C)—and their placement in subsections separate from the jurisdictional provision in subsection 2244(b)(3)(A)—suggests that sections 2255(h) and 2244(b)(3)(C) are not jurisdictional.[83]

An analogy to *Gonzalez* helps to clarify why section 2244(b)(3)(C) in particular is not jurisdictional. *Gonzalez* held that while section 2253(c)(1)'s requirement of a COA was jurisdictional, section 2253(c)(2)'s requirements for when a COA may issue were not. Section 2253(c)(1) provides that "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken," and section 2253(c)(2) provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." Section 2253(c)(2), *Gonzalez* reasoned,

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adjudicate infringement claims involving unregistered works in three circumstances.").

82 28 U.S.C. § 2244(b)(3)(A).

83 The provisions are also separated from section 2255(e). Section 2255(e) states that a petition for habeas corpus under 2241 "shall not be entertained" unless the remedy provided in section 2255 is inadequate or ineffective. 28 U.S.C. § 2255(e). Some courts have held that section 2255(e) is jurisdictional. *See, e.g.*, United States v. Surratt, 797 F.3d 240, 246 (4th Cir. 2015); Williams v. Warden, 713 F.3d 1332, 1339 (11th Cir. 2013); Abernathy v. Wandes, 713 F.3d 538, 557 (10th Cir. 2013). Moreover, in cases predating *Arbaugh*, the Court suggested an identically worded provision governing post-conviction remedies for prisoners convicted in D.C. courts deprived federal courts of jurisdiction to hear petitions for post-conviction review filed by such prisoners. *See, e.g.*, Swain v. Pressley, 430 U.S. 372, 376 (1977) (referring to D.C. Code § 23-110(g) as "statutory curtailment of the District Court's jurisdiction"); Williams v. Martinez, 586 F.3d 995 (D.C. Cir. 2009) ("Section 23-110(g)'s plain language makes clear that it . . . divests federal courts of jurisdiction to hear habeas petitions."); D.C. Code § 23-110(g) ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained . . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.").

"speaks only to *when* a COA may issue" and "does not contain § 2253(c)(1)'s jurisdictional terms."[84]

The similarities between sections 2244 and 2253 are telling. Both section 2253(c)(1) and section 2244(b)(3)(A) make particular orders jurisdictional—an order authorizing an appeal (section 2253), and an order authorizing the district court to consider a successive petition (section 2244). Both sections also have neighboring subsections that speak to when the relevant orders may be issued. In fact, both neighboring subsections—sections 2253(c)(2) and 2244(b)(3)(C)—provide that an order "*may issue . . . only if*" certain conditions are met. But "[s]ubstantive shortcomings" with a petition for post-conviction review "do not affect subject matter jurisdiction."[85] And while the language in sections 2255 and 2244 is mandatory, "most" statutory requirements are, and the Court "ha[s] consistently found it of no consequence."[86]

Gonzalez rejected the argument that section 2253(c)(3) is jurisdictional because it refers to a jurisdictional provision (section 2253(c)(1)), and speaks to when a jurisdiction-conferring order can be granted. The Court found it significant that Congress "set off the requirements in distinct paragraphs and, rather than mirroring their terms, excluded the jurisdictional terms in one from the other."[87] Congress did the same thing here. While section 2244(b)(3)(A) states that an applicant must apply for a COA before he or she even files a second or successive motion in district court, section 2244(b)(3)(C) says nothing about when an applicant may file a second or successive motion. All that provision does is, like the nonjurisdictional section 2253(c)(2), specify *when* a court of appeals should grant an order authorizing a successive petition.[88]

While one subsection of 2244(b)(3) may be jurisdictional—2244(b)(3)(A)—that does not mean other subsections like 2244(b)(3)(C) are as well. "A requirement [the Court] would otherwise classify as nonjurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional

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84 Gonzalez v. Thayer, 132 S. Ct. 641, 649 (2012) (emphasis added).

85 Harris v. Warden, 425 F.3d 386, 388 (7th Cir 2005).

86 United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015). Mandatory requirements also do not become jurisdiction when they are "important (most are)." *Id.*

87 *Gonzalez*, 132 S. Ct at 651.

88 *See* 28 U.S.C. § 2244(b)(3)(C).

provisions."[89] And *Gonzalez* found that one subsection—section 2253(c)(2)—was not jurisdictional, even though another subsection—section 2253(c)(1)—was. *Gonzalez* reasoned, "Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle."[90] In fact, *Gonzalez* suggested that a subsection's proximity to what is clearly a jurisdictional subsection highlights the distinction between the two.[91]

Second, statutory context reinforces that the requirements in sections 2255(h) and 2244(b)(3)(C) are not jurisdictional. Section 2244(b)(4) directs district courts to "dismiss any claim presented in a . . . successive application . . . unless the applicant shows that the claim satisfies the requirements of this section."[92] If the "requirements of" section 2244—the preconditions for granting authorization to file a successive petition—were jurisdictional, section 2244(b)(4) would be superfluous. District courts and courts of appeal always must assess their own jurisdiction: If the preconditions for issuing a successive petition were jurisdictional, courts would need to assure themselves that the preconditions were satisfied whether or not section 2244(b)(4) directed them to do so.[93] And courts generally do not "treat statutory terms as surplusage" where an alternative interpretation is plausible.[94]

Third, the "legal character" of the requirements contained in sections 2255(h) and 2244(b)(3)(C) does not suggest they are jurisdictional.[95] *Jones v. Bock* held that the exhaustion requirement contained in the Prison Litigation Reform Act was *not* jurisdictional because although the requirement was framed in mandatory terms—"no action . . . shall be brought . . . until . . . administrative remedies . . . are exhausted"[96]—exhaustion is "typically regard[ed] . . . as an affirmative defense."[97] The Supreme Court has described AEDPA's "restrictions on successive petitions" as a "modified

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89 Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 825 (2013).

90 *Gonzalez*, 132 S. Ct. at 651.

91 *Id.*

92 28 U.S.C. § 2244(b)(4).

93 *See* sources cited *supra* notes 49, 51.

94 Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 698 (1995).

95 Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010).

96 42 U.S.C. § 1997e(a).

97 549 U.S. 199, 211, 212 (2007).

res judicata rule."[98] And traditional "principles rank res judicata as an affirmative defense ordinarily lost if not timely raised," not as a jurisdictional requirement.[99] The rules governing section 2254 and 2255 proceedings further suggest that the conditions on successive petitions are affirmative defenses, rather than jurisdictional limitations. Rule 5(b), for example, directs the United States in a section 2255 proceeding to state whether the moving party has brought a previous post-conviction motion.[100] But if the preconditions for a successive post-conviction motion were jurisdictional, courts would need to ascertain this for themselves.

The legal character of the conditions themselves also suggest the conditions do not affect the court's jurisdiction. Take the requirement that a successive petition contain a "new rule, made retroactive to cases on collateral review by the Supreme Court."[101] Whether a rule is retroactive does not affect the habeas court's jurisdiction; litigants are free to waive the argument that a new rule is not retroactive.[102]

The preconditions for successive petitions are also too bound up with merits or remedial determinations to be jurisdictional. *Gonzalez* reasoned that "it would be passing strange if, after a COA has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing" of whether a petition had a substantial claim because "[t]hat inquiry would be largely duplicative of the merits."[103] So too with respect to retroactivity. The parties are likely to litigate whether any new rule that a prisoner relies on applies retroactively to cases that have already become final, and courts, in the course of adjudicating the petitions, will determine whether a new rule applies retroactively. It would be odd if "each court . . . adjudicating" the petition "were dutybound to revisit the

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98 Felker v. Turpin, 518 U.S. 651, 664 (2001).

99 Arizona v. California, 530 U.S. 392, 410 (2000); *see also* Fed. R. Civ. P. 8(c) (listing res judicata as an affirmative defense).

100 Habeas Rule 5(b). Rule 5(b) directs the State in a section 2255 proceeding to state whether the petition is barred by non-retroactivity, a condition listed in section 2244(b)(3)(C).

101 28 U.S.C. § 2255(h)(2).

102 Schiro v. Farley, 510 U.S. 222, 229 (1994) ("[A] State can waive the Teague bar by not raising it . . . ."). The habeas rules also place retroactivity "on a par with" other affirmative defenses, such as the statute of limitations, failure to exhaust state remedies, or other procedural bars. *See* Day v. McDonough, 547 U.S. 198, 209 (2006).

103 Gonzalez v. Thaler, 132 S. Ct. 641, 649 (2012).

threshold showing" of retroactivity, which would be partially "duplicative of the . . . question before the court"—namely, whether principles of retroactivity entitled a prisoner to relief on a new rule of constitutional law.[104]

Fourth, turning the preconditions for successive petitions into jurisdictional requirements would make post-conviction litigation more unwieldy, not less. *Gonzalez* declared that Congress's "intent in AEDPA [was] 'to eliminate delays in the federal habeas review process.'"[105] But finding sections 2244(b)(3)(C) and 2255(h)(2) jurisdictional would undermine that goal: Doing so would allow the government to raise preconditions as reasons to deny petitions that courts have already adjudicated. Finding sections 2244(b)(3)(C) and 2255(h)(2) jurisdictional would also add to the number of determinations that courts would have to make at every stage in the litigation.[106]

Fifth, the Court has invoked an arguably stronger version of *Arbaugh*'s clear statement rule in cases governing post-conviction review. *Holland v. Florida* held that AEDPA's statute of limitations was subject to equitable tolling and not

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104 *Id.* The same is true for the condition that a prisoner show that "newly discovered evidence . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1). Each court would be effectively dutybound to determine whether a petitioner established he or she was prejudiced by the constitutional violation—a question courts decide in the course of adjudicating a petition on the merits. *See* Fed. R. Crim. P. 52.

105 *Gonzalez*, 132 S. Ct. at 650 (quoting Holland v. Florida, 560 U.S. 631, 638 (2010)).

106 In AEDPA, these limitations were added in a section labeled "limits on second or successive applications." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 106, 110 Stat. 1220 (1996). Other sections of the Act, however, were explicitly labeled as jurisdictional. *E.g.*, § 221, 110 Stat. at 1241 ("Jurisdiction for lawsuits against terrorist states."). Additionally, "Congress roundly rejected an amendment to the bill eventually adopted that directly invoked the text of the jurisdictional grant." Williams v. Taylor, 529 U.S. 362, 378, 379 n.10 (Stevens, J. concurring). A proposed amendment would have provided that: "Notwithstanding any other provision of law, an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment or order of a State court *shall not be entertained* by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." 141 Cong. Rec. S7829 (daily ed. June 7, 1995) (amendment of Sen. Kyl) (emphasis added). Criticizing the amendment, Senator Specter explained that when "dealing with the question of jurisdiction of the Federal courts to entertain questions on Federal issues, on constitutional issues, *I believe it is necessary that the Federal courts retain that jurisdiction as a constitutional matter*." *Id.* at S7834 (emphasis added). The amendment failed to pass, with sixty-one senators voting against it. *Id.* at 7849.

jurisdictional.[107] *Holland* reasoned: "[E[quitable principles have traditionally governed the substantive law of habeas corpus," and courts should not "construe a statute to displace courts' traditional equitable authority absent the clearest command."[108] Thus, while AEDPA sought to eliminate delays in federal post-conviction review, it sought "to do so without undermining basic habeas corpus principles . . . . [I]t did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights."[109]

Sixth, interpreting the preconditions for successive petitions as jurisdictional would foreclose a potentially viable way for prosecutorial discretion to curb the severe statutory restrictions on post-conviction review. If the preconditions are jurisdictional, state and federal prosecutors could never choose to exercise their discretion and allow prisoners to file successive petitions even if the prisoners do not satisfy the preconditions for doing so. That is precisely what is happening in the *Johnson* litigation. Scholars have argued that the executive's "monopoly on enforcement of the laws allows the president to use prosecutorial discretion to protect . . . vulnerable population[s]" and "advance libertarian and egalitarian values."[110] Prosecutorial discretion has many downsides, but in this case, it may be a potential upside: Discretion allows federal and state prosecutors to elect not to enforce the stringent statutory restrictions on successive petitions for post-conviction review that prevent prisoners with meritorious claims from obtaining relief.

Seventh, the restrictions on post-conviction petitions—including those on successive petitions—are separate from the general grants of jurisdiction to district courts.[111] Describing AEDPA's restrictions on post-conviction petitions, the Court wrote in *Williams v. Taylor* that while "the federal habeas corpus statute has been repeatedly amended, . . . the

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107 560 U.S. 631 (2010).

108 *Id.* at 646 (internal quotation marks omitted).

109 *Id.* at 648–49 (internal quotation marks omitted).

110 *E.g.*, Roderick M. Hills, Arizona v. United States: *The Unitary Executive's Enforcement Discretion As A Limit On Federalism*, 11-2 CATO SUP. CT. REV. 189, 191–92 (1992)

111 *See, e.g.*, United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1633 (2015) ("This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." (citing cases)).

scope of that jurisdictional grant remains the same."[112] *Williams* referred to section 2241 as the jurisdictional grant.[113] Section 2241 provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions[,]"[114] a separate section from the restrictions on successive petitions, which are contained in sections 2255(h) and 2244. Section 2255(a) also generally allows for prisoners in custody to file a motion "to vacate, set aside or correct the sentence."[115] Judge Easterbrook in *Webster v. Caraway* identified several other potential sources of subject-matter jurisdiction for second or successive petitions, including section 1331, the statute providing district courts with jurisdiction over cases arising under federal law; section 1343(a)(4), on the theory that habeas petitions are, in some ways, civil rights claims; and section 3231 because the motions are part of, or at least related to, criminal prosecutions.[116]

Nor does section 2244(a) generally circumscribe this jurisdiction with respect to second or successive petitions. Section 2244(a) provides that "[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus . . . if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255."[117] But that does not make every restriction on successive petitions jurisdictional, for all of the reasons discussed in this section. Rather, section 2244(a) substitutes the remedy provided by section 2255 for the more general writ of habeas corpus.[118]

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112 529 U.S. 362, 375 (2002).

113 *Id.* at 375, n.7.

114 28 U.S.C. § 2241(a).

115 28 U.S.C. § 2255(a).

116 Webster v. Caraway, 761 F.3d 764, 768–69 (7th Cir. 2014) *reh'g en banc granted, opinion vacated*, 769 F.3d 1194 (7th Cir. 2014) *on reh'g en banc sub nom.* Webster v. Daniels, 784 F.3d 1123 (7th Cir. 2015); *see also* Harris v. Warden, 425 F.3d 386, 388 (7th Cir. 2005) (Judge Easterbrook noting the possible jurisdictional grants).

117 28 U.S.C. § 2244(a).

118 *E.g.*, *In re* Davenport, 147 F.3d 605, 607 (7th Cir. 1998) ("The principal question we must decide is when if ever a federal prisoner can use the habeas corpus statute, 28 U.S.C. §§ 2241–2254, to get around the bar that the Antiterrorism Act places athwart successive motions under 28 U.S.C. § 2255, the federal prisoner's habeas corpus substitute."); Morales v. Bezy, 499 F.3d 668, 670 (7th Cir. 2007) ("The remedy created by section 2255 is a substitute for habeas corpus for federal prisoners; section 2241 backs it up."); United

So where does this leave us? Section 2244 does not make the preconditions for obtaining authorization for a successive petition under section 2255(h) jurisdictional. *Gonzalez* makes clear that only a prisoner's failure to seek or obtain authorization from a court of appeals deprives a district court of jurisdiction over a successive petition. Once the prisoner has filed for and obtained authorization, he has cleared the lone jurisdictional hurdle.[119] Any requirements for obtaining authorization are just that—threshold conditions for when authorization may be granted. Thus, if the government waives an argument regarding whether a prisoner's request to file a successive application meets the requirements of section 2255(h)(2), the court of appeals does not need to determine for itself whether the requirements are satisfied.

2. *Section 2255*

This still leaves, however, the possibility that section 2255(h) itself is jurisdictional. It's helpful here to view 2255(h) in its entirety:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly 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; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[120]

This language—particularly the requirement that a "second or successive motion must be certified . . . to contain"—does not satisfy *Arbaugh*'s "readily administrable bright line" rule for when a requirement is jurisdictional. Congress has not "clearly state[d] that [this] threshold limitation . . . count[s] as jurisdictional."[121] The provision "does not speak in

States v. Surratt, 797 F.3d 240, 264 (4th Cir. 2005) ("§ 2255 itself serves as the relevant substitute." (internal quotation marks omitted)).

119 Gonzalez v. Thaler, 132 S. Ct. 641, 650 (2012) ("Once a judge has made the determination that a COA is warranted and resources are deployed in briefing and argument, however, the COA has fulfilled that gatekeeping function.").

120 28 U.S.C. § 2255(h).

121 Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006).

jurisdictional terms."[122]

The closest section 2255(h) comes to imposing a jurisdictional requirement is when it states that a motion "must be certified." But the Supreme Court has repeatedly held that mandatory language without more is not jurisdictional.[123] Compared to other provisions in section 2255, section 2255(h) uses less jurisdictional language: Section 2255(h) says a motion "must be certified to contain," whereas section 2255(e) provides that a habeas petition "shall not be entertained." Many of the reasons why section 2255(h)(1) and (2) should not be viewed as jurisdictional, such as their legal character, also counsel against reading section 2255(h) as a jurisdictional bar.

If a court disagrees, however, and believes that the "must be certified" language in section 2255(h) is jurisdictional, it still might be able to treat subsections 2255(h)(1) and (2) as nonjurisdictional preconditions by relying on *Gonzalez*. To be sure, there are some structural differences between section 2255 and section 2253, which was at issue in *Gonzalez*. Here, parts (1) and (2) are disjunctive subparts of (h), whereas in *Gonzalez*, the nonjurisdictional (c)(2) and (c)(3) were not subparts of (c)(1), although they did refer to and incorporate that provision. But section 2255(h)(2) is still functionally analogous to section 2253(c)(2); they both stipulate conditions that must be fulfilled in order to obtain an order from the court of appeals. Saying that the petition must be certified to contain an element (as in section 2255(h)) is nearly equivalent to saying that certification is only permissible where a certain element can be shown (as in section 2253(c)).

CONCLUSION

We've attempted to show that the preconditions for obtaining authorization to file a successive petition are not jurisdictional. Our argument also has implications for the circuit split on whether other requirements on successive post-conviction petitions in section 2255 are jurisdictional. For example, it is hard to imagine that the statute of

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122 *Id.* (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

123 *See, e.g.*, Henderson v. Shinseki, 562 U.S. 428, 439 (2011) ("It is true that § 7266 is cast in mandatory language, but we have rejected the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'").

limitations, for example, is jurisdictional.[124] Other courts have held that section 2255(e), which bars prisoners from bringing petitions for habeas corpus under section 2241 unless section 2255's provisions for successive petitions are inadequate, is jurisdictional.[125] Some of our arguments for why the conditions on successive petitions are not jurisdictional suggest that section 2255(e)'s is also not jurisdictional.

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124 United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015) ("[W]e have made plain that most time bars are nonjurisdictional . . . . Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.").

125 *See* sources *supra* cited note 11.