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Possible Reliance: Protecting Legally Innocent *Johnson* Claimants

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NOTE

POSSIBLE RELIANCE: PROTECTING LEGALLY INNOCENT *JOHNSON* CLAIMANTS

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The writ of habeas corpus presents the last chance for innocent defendants to obtain relief from invalid convictions and sentences. The writ constitutes a limited exception to the finality of judgments. Given the role finality plays in conserving judicial resources and deterring criminal conduct, exceptions created by habeas must be principally circumscribed. Since the Supreme Court's invalidation of the Armed Career Criminal Act's residual clause in Johnson v. United States*, the federal courts of appeals have attempted to develop a test that protects the writ from abuse by* Johnson *claimants.*

This Note first contributes a new understanding of the resulting circuit split. Currently, circuits construe the split to be about a Johnson *petitioner's burden of proof at the jurisdictional stage. However, circuits actually disagree on the standard a petitioner must meet to establish the court's subject-matter jurisdiction. This Note identifies two standards. The sole-reliance standard requires petitioners to show that the sentencing court relied solely on the residual clause, while the possible-reliance standard requires petitioners to show that the court may have relied on the residual clause. Both standards must be shown by a preponderance of the evidence. This Note then deploys this reconceptualization of the circuit split to advance new arguments in favor of imposing the possible-reliance standard at the jurisdictional stage. The possible-reliance standard protects the innocent, preserves the finality of judgments, and conforms with Supreme Court habeas jurisprudence and congressional intent expressed in the Antiterrorism and Effective Death Penalty Act.*

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INTRODUCTION

The writ of habeas corpus is the last chance for those convicted to establish their innocence. As such, determining whether a petitioner can access courts on the writ is a high-stakes inquiry. Granting habeas relief undermines confidence in the justice system to some degree, as it entails recognizing injustice done by institutional actors at previous stages of the proceedings.[1] At the same time, however, the potential for habeas relief stands as a testament to the justice system's commitment to integrity. It provides petitioners an opportunity to recover from injustice that occurs despite the system's best efforts.[2]

The Supreme Court's decision in *Johnson v. United States* has significant implications for habeas jurisprudence.[3] Samuel Johnson—the habeas claimant—was sentenced pursuant to the Armed Career Criminal Act (ACCA), which allows enhanced sentences for defendants who "ship, possess, [or] receive firearms" if they also have three or more earlier convictions for violent felonies.[4] Three clauses in the ACCA define "violent felonies," but only one,

1. *See* William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961).

2. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980).

3. 135 S. Ct. 2551 (2015).

4. 18 U.S.C. § 922(g); *id.* § 924(e)(1); *Johnson*, 135 S. Ct. at 2555–56.

the residual cause, was at issue in *Johnson*.[5] The residual clause is a catchall: it identifies crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" as crimes of violence.[6]

In *Johnson*, the Court determined that the residual clause was unconstitutionally vague in violation of the Fifth Amendment.[7] The clause failed to provide courts adequate direction in assessing when a past crime presented a substantial enough "risk of physical injury to another" to warrant an enhanced sentence.[8] Consequently, enhanced sentences of thousands of prisoners charged under the ACCA's residual clause have been called into question.[9]

Before a court may decide a habeas petition on the merits, the claimant must show that the reviewing court has proper subject-matter jurisdiction to review that petition at all. This Note addresses a circuit split regarding the showing that *Johnson* claimants must make to establish a court's subject-matter jurisdiction over their habeas claims.[10] So far, eight circuits have weighed in on the issue.[11] Some courts characterize the split as a disagreement about whether habeas petitioners' burden of proof is preponderance or nonpreponderance.[12]

This Note rejects that conceptualization of the split. Instead, it argues that the split is better conceptualized as a disagreement as to the evidentiary standard to which petitioners should be held. This understanding reflects the fact that all circuits require petitioners to establish the reviewing court's subject-matter jurisdiction by a preponderance of the evidence. Some circuits require petitioners to show that the sentencing court relied *solely* on the residual clause in assigning an enhanced sentence (the "sole-reliance" standard).[13] Others require a showing that the sentence *may* have relied on the

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5. Section 924(e)(2)(B)(i) contains the elements clause, which defines crimes of violence as those that have "as an element the use, attempted use, or threatened use of physical force" against another. In addition to the residual clause, § 924(e)(2)(B)(ii) includes the enumerated-offenses clause, which singles out burglary, arson, and extortion and crimes that "involve[the] use of explosives."

6. 18 U.S.C. § 924(e)(2)(B)(ii).

7. 135 S. Ct. 2551.

8. 18 U.S.C. § 924(e)(2)(B)(ii); *Johnson*, 135 S. Ct. at 2557.

9. *See* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 59 (2015).

10. At the jurisdictional stage, "a court adjudicates preliminary procedural issues going to whether the dispute over real-world facts and obligations can be resolved in this particular court between these particular parties at this particular time." Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 649 (2005). A court has subject-matter jurisdiction when it has the constitutional or statutory power to resolve the petitioner's case. *Id.* at 650. At the merits stage, the court determines whether there are any factual disputes to be resolved at trial. *Id.* at 652–55.

11. *See infra* Part II.

12. *See, e.g.*, Dimott v. United States, 881 F.3d 232, 234, 241–42 (1st Cir. 2018); Potter v. United States, 887 F.3d 785, 788 (6th Cir. 2018); *see also infra* Section II.B.

13. *See, e.g.*, *Dimott*, 881 F.3d at 234, 241–42; *Potter*, 887 F.3d at 787.

residual clause (the "possible-reliance" standard).[14] Courts in the latter camp use the sole-reliance standard when they are conducting review on the merits.

This circuit split implicates themes prevalent in the broader conversation about sentencing reform. On the one hand, the split presents an opportunity to mitigate the effect long sentences have on mass incarceration.[15] Reformers argue that because the likelihood of criminality declines as an individual gets older, sentences can be shortened without putting people in danger.[16] On the other hand, antireformers point to the low success rate of habeas claims, suggesting that resources spent reviewing meritless habeas claims could be better used elsewhere.[17] Antireformers also worry that broader habeas review will inhibit the law's ability to incapacitate and deter violent criminals.[18] In light of this debate, a viable solution to this circuit split must balance innocence against the advantages traditionally attributed to finality: deterrence, incapacitation, and the conservation of judicial resources.

This Note argues that courts should ask whether a petitioner's sentence *may* have relied on the residual clause at the jurisdictional stage and reserve the question of whether her sentence *solely* relied on the residual clause for the merits stage. This allows the writ of habeas corpus to free the innocent without undermining finality. Part I provides background on habeas relief, the ACCA, and the Court's recent decisions in *Johnson v. United States*[19] and

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14. *See, e.g.*, United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017); United States v. Geozos, 870 F.3d 890, 895 (9th Cir. 2017); United States v. Snyder, 871 F.3d 1122, 1129 (10th Cir. 2017); Beeman v. United States, 871 F.3d 1215, 1224 (11th Cir. 2017). In *Beeman*, the court considered the merits of Beeman's claim as an alternative grounds of affirming the lower court's dismissal, which suggests it somewhat equivocally followed the possible-reliance standard. Had the court stringently applied the sole-reliance standard, it would have dismissed the claim as untimely without reviewing the merits. This Note focuses primarily on the proper inquiry at the jurisdictional stage.

15. *See New Report: Rise of Extreme Sentences Drives Mass Incarceration in Washington*, ACLU (Feb. 25, 2020), https://www.aclu.org/press-releases/new-report-rise-extreme-sentences-drives-mass-incarceration-washington [https://perma.cc/JS7Z-9NR9].

16. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 122 (2018).

17. John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 284 (2006) (finding that 1 percent of state habeas claimants were successful); *see also* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) (noting the possibility of a predisposition against habeas petitions given the small proportion that are meritorious).

18. 142 CONG. REC. 7798 (1996) (statement of Sen. Specter) ("[V]iolent crime has been one of the worst problems faced by the people of our country for several years."). *But see* John Gramlich, *5 Facts About Crime in the U.S.*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/ [https://perma.cc/BU9Q-Y53E] (indicating that, contrary to the public perception that violent crime is high, the violent crime rate has been dropping steadily since the early nineties).

19. 135 S. Ct. 2551 (2015) (finding that the residual clause of the ACCA is unconstitutionally vague).

Welch v. United States.[20] Part II reconceptualizes the existing circuit split as a disagreement concerning different evidentiary standards rather than different evidentiary burdens. Part III identifies shortcomings of the sole-reliance standard and argues instead for adopting the possible-reliance standard. Enforcing possible reliance at the jurisdictional stage strikes the best balance between finality and innocence.

I. HABEAS CORPUS, THE AEDPA, AND THE ACCA

Prisoners' access to habeas corpus relief has fluctuated throughout American history.[21] Section I.A locates the Antiterrorism and Effective Death Penalty Act (AEDPA), a statute that limits the availability of habeas relief, within the broader history of the writ of habeas corpus and describes its effect on the writ.[22] Section I.B discusses the ACCA and the Supreme Court's holding in *Johnson v. United States*, flagging the particular difficulties *Johnson* claimants face.[23]

A. *The Great Writ of Liberty*

Habeas is the "great writ of liberty."[24] It plays a crucial role in protecting people from arbitrary or wrongful imprisonment by providing them a means of collaterally challenging their convictions and sentences. A habeas petitioner may challenge her sentence on the grounds that her conviction (1) violates the Constitution, (2) was imposed by a court lacking jurisdiction, (3) exceeded the maximum sentence outlined by the laws, or (4) is otherwise subject to collateral attack.[25] On the merits, a petitioner generally must make one of the four aforementioned showings by a preponderance of the evidence.[26]

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20. 136 S. Ct. 1257 (2016) (granting prisoners the right to collaterally attack sentences founded upon the residual clause).

21. *See* DUKER, *supra* note 2, at 3–8 (providing a history of habeas corpus relief and analyzing the impact political struggles had on the writ).

22. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

23. 135 S. Ct. at 2563.

24. DUKER, *supra* note 2, at 3. The writ has been a central feature of the U.S. criminal justice system since the Founding era. The Judiciary Act of 1789 made habeas review in federal courts available to federal prisoners. Judiciary Act of 1789, ch. 20, 1 Stat. 73. In the Force Bill of 1833, Congress made the writ available to prisoners in state custody as well. The Force Bill, ch. 57, 4 Stat. 632 (1833). Now, state prisoners often bring their habeas claims in the federal district court in the district in which they are in custody pursuant to 28 U.S.C. § 2241(d). *E.g.*, Dickey v. Davis, 231 F. Supp. 3d 634, 652, 659 (E.D. Cal. 2017).

25. 28 U.S.C. § 2255(a).

26. Parke v. Raley, 506 U.S. 20, 34 (1992). One exception to the preponderance standard occurs when a habeas claim is based on an unreasonable factual determination. In such cases, courts require a higher showing—that the sentencing court's decision was made according to an "unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d); *e.g.*, Noguera v. Davis, 290 F. Supp. 3d 974, 1003 (C.D. Cal. 2017).

Challenges to a prisoner's sentence are best understood as requests for collateral, rather than direct, review.[27] Direct review of a criminal conviction entails "review [conducted] in the 'same proceeding'" before the judgment becomes final.[28] Collateral review, as traditionally understood, constitutes a separate proceeding investigating aspects of the initial proceeding and can begin only after direct review is complete.[29] Of late, the Supreme Court and Congress have limited the availability of habeas as a vehicle for direct review, reserving it for prisoners collaterally attacking their sentences.[30] This Note focuses on *Johnson* as a means of collaterally attacking a sentence.

The scope of the writ has fluctuated throughout history.[31] The past few decades have seen the writ judicially[32] and legislatively narrowed.[33] In part, this narrowing occurred in response to growing worries that guilty prisoners were using habeas corpus to escape their sentences.[34] As the federal prison

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27. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 940 (7th ed. 2016) ("[F]ederal court consideration of the habeas corpus petition is not considered a direct review of the state court decision; rather, the petition constitutes a separate civil suit filed in federal court and is termed 'collateral relief.'"). Habeas petitioners may challenge the legality of a court's application of federal or state laws. *See supra* note 24. Additionally, habeas can be used to challenge both convictions and sentences. *See* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 436–37 (2018). However, this Note focuses on the writ as a means of attacking sentences specifically because that is how *Johnson* claimants employ the writ.

28. Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 470 (2006).

29. *Id.* at 471.

30. *See id.* at 470. One of the ways Congress limited habeas to direct review is to require that petitioners either exhaust state remedies or show that the state's corrective process is nonexistent or ineffective. 28 U.S.C. § 2254(b).

31. The writ reached its height under the Warren Court after a period of gradual expansion throughout the early twentieth century. *See* Neil D. McFeeley, *The Supreme Court and the Federal System: Federalism from Warren to Burger*, PUBLIUS J. FEDERALISM, Fall 1978, at 5, 13; *see also* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the right against self-incrimination requires certain warnings to be given upon arrest); Frank v. Mangum, 237 U.S. 309, 327 (1915) (seeking to ensure the adequacy of the appeals process provided to the defendant).

32. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 296 (1989) (limiting the applicability of cases decided after the defendant's conviction to two exceptional circumstances). Cases decided after a petitioner's conviction can only be considered if "(1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Whorton v. Bockting, 549 U.S. 406, 416 (2007) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

33. *See, e.g.*, AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

34. This concern has received significant attention in the past decades. *See, e.g.*, 142 CONG. REC. 7791 (1996) (statement of Sen. Warner); Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2090–91 (2014). This increased attention is in part due to the creation of new federal crimes throughout the 1980s and '90s and the subsequent increase in the federal prison population. *See* Brian W. Walsh, *Doing Violence to the Law: The Over-Federalization of Crime*, HERITAGE FOUND. (June 9, 2011), https://www.heritage.org/crime-and-justice/commentary/doing-violence-the-law-the-over-federalization-crime [https://perma.cc/M69G-DLB8].

population increased during the late twentieth century, so did prison litigation; much of that litigation was filed by prisoners seeking a writ of habeas corpus.[35] In 1996, Congress reacted by passing the AEDPA to eliminate nonmeritorious suits early and often.[36] However, Congress's overzealous approach risks keeping too many meritorious claims out of court.[37]

The AEDPA aims to weed out nonmeritorious suits by erecting various procedural hurdles. Two provisions in particular present substantial obstacles to petitioners. The statute bars petitioners from both applying for relief multiple times and bringing claims more than one year after their judgment becomes final.[38] While these bars have exceptions, their allowances are narrow. The bar on successive petitions applies to claims "presented in a prior application" with two narrow exceptions: (1) claims based on a new retroactive rule of constitutional law and (2) claims based on facts that could not have been discovered previously through due diligence.[39] Petitioners bringing successive petitions can only file in a district court if a three-judge panel of the court of appeals determines that they have made a prima facie showing that their petition fits within one of those two exceptions.[40]

To obtain an exception to the time bar, a petitioner bringing her claim more than a year after her judgment became final must show either that (1) newly discovered evidence clearly establishes her innocence and the evidence could not have been discovered earlier through the exercise of due diligence; or (2) her claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[41] Accordingly the statutory bar is still enforced, but it begins to run on the date that a new constitu-

35. *Criminal Justice Facts*, SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/6XZA-NUUM]; Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 28 CORR. L. REP. 69, 72 (2017).

36. *See* Blume, *supra* note 17, at 270–71. In the same year it passed the AEDPA, Congress also restricted prisoners' ability to bring civil claims with the Prison Litigation Reform Act of 1995 (PLRA). Pub. L. No. 104-134, § 803(d), 110 Stat. 1321, 1321-71 to -73 (1996) (codified as amended at 42 U.S.C. § 1997e). The PLRA makes it both harder to file and harder to win civil claims by requiring administrative exhaustion, allowing the court to dismiss frivolous and malicious claims sua sponte, limiting the amount of attorneys' fees that are recoverable, and restricting prisoners' ability to bring claims for mental or emotional injury. 42 U.S.C. § 1997e; *see also* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015); *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, ACLU, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [https://perma.cc/PJB3-2XT7] ("[The PLRA] makes it harder for prisoners to file lawsuits in federal court.").

37. Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 2 (2016); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 140 (2008).

38. 28 U.S.C. § 2244(a), (d)(1).

39. *Id.* § 2244(b)(1)–(2).

40. *Id.* § 2244(b)(3).

41. *Id.* § 2244(b)(2); *see also id.* § 2255(h).

tional rule was made retroactive by the Supreme Court rather than on the date that the petitioner's conviction became final. The time bar and its exceptions apply to both initial petitions and properly brought successive petitions.[42] The AEDPA applies these additional procedural restrictions to "provide justice for victims"[43] and ensure a greater degree of finality.[44] Congress intended the AEDPA's constraints on habeas claimants to apply only to the extent that they would not overburden innocent petitioners seeking relief.[45]

B. Johnson *Claims and the ACCA*

While the federal habeas statutes, revised by the AEDPA, provide a procedural vehicle for prisoners' relief, the Supreme Court's invalidation of the ACCA's residual clause in *Johnson v. United States* provides the substantive grounds. Originally passed in 1984, the ACCA seeks to incapacitate dangerous repeat offenders more effectively by providing enhanced sentences on the basis of previous convictions.[46] Therefore, sentencing enhancement under the ACCA requires three prior convictions, each of which must be a crime of violence punishable by more than one year to make the defendant eligible for a sentencing enhancement.[47] Three provisions define crimes of violence: (1) the elements clause, which requires that the prior offenses have "as an element the use, attempted use, or threatened use of physical force" against another;[48] (2) the enumerated-offenses clause, which singles out burglary, arson, extortion, and crimes that "involve [the] use of explosives";[49] and (3) the residual clause, which encompasses all crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[50]

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42. *See id.* § 2244(d)(1).

43. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, 1214 (1996).

44. Johnson v. United States, 340 F.3d 1219, 1224 (11th Cir. 2003).

45. *See* H.R. REP. NO. 79-2646, at A170 (1946).

46. *See The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Crim. L. of the S. Comm. on the Judiciary*, 99th Cong. 6–7 (1986) (statement of Rep. Wyden). The ACCA has been amended three times since 1984: the first two amendments occurred in 1986, first to adjust the statute's definition of burglary and then, more importantly, to broaden the prior offenses eligible for sentence enhancement under the ACCA so as to incapacitate even more repeat offenders. 132 CONG. REC. 7697 (1986) (statement of Sen. Specter); Kayleigh E. McGlynn, *Incapacitating Dangerous Repeat Offenders (or Not): Evidentiary Restrictions on Armed Career Criminal Act Sentencing in* United States v. King, 59 B.C. L. REV. 348, 352–53 (2018).

47. 18 U.S.C. § 924(e). This provision also applies to those with three previous convictions for a serious drug offense. *Id.*

48. *Id.* § 924(e)(2)(B)(i). The elements clause is also referred to as "the force clause."

49. *Id.* § 924(e)(2)(B)(ii).

50. *Id.*

In *Johnson v. United States*, the Supreme Court held that the residual clause was unconstitutionally vague in violation of the Fifth Amendment.[51] Samuel Johnson, the petitioner, pled guilty to a felony possession charge after showing firearms to undercover agents.[52] The government pursued an enhanced sentence under the ACCA, arguing that Johnson's previous conviction for unlawful possession of a short-barreled shotgun constituted a violent crime under the residual clause.[53]

According to the Court, the residual clause was unconstitutionally vague for two reasons.[54] First, the clause left "grave uncertainty about how to estimate the risk posed by a crime."[55] Prior to *Johnson*, a court applying the residual clause would begin its analysis by imagining an abstract "ordinary case" of the crime for which the defendant was convicted.[56] The court would then decide whether this "ordinary case" constituted a crime of violence that should trigger the ACCA's sentence enhancements. Without considering the particular facts of the defendant's conviction, however, the court would struggle to define the "ordinary case" of any given crime.[57] The *Johnson* Court explained that the residual clause offered "no reliable way to choose between . . . competing accounts of what [conduct the] 'ordinary'" crime involved.[58]

Second, even once the court defined the ordinary case, the residual clause left too much uncertainty regarding the amount of risk a crime must create to constitute a violent felony.[59] When the "serious potential risk" inquiry was applied to the judicially imagined "ordinary case," the statute gave insufficient guidance to courts and failed to provide adequate notice of what conduct it punished.[60] Less than a year after *Johnson*, the Court held in *Welch v. United States* that *Johnson* applied retroactively to cases on collateral review.[61] As a result, those convicted under the residual clause could challenge their sentences through habeas, provided they brought their *Johnson* claim within one year of the Court's decision in *Welch*.

A more fine-grained understanding of innocence is necessary to understand the precise nature of the circuit split advanced in the next Section. Innocence comes in two varieties: factual innocence and legal innocence.

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51. 135 S. Ct. 2551, 2557 (2015).

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

53. *Id.*

54. *Id.* at 2557.

55. *Id.* at 2557–58.

56. *Id.* Notably this imagined "ordinary case" is completely divorced from the facts of the defendant's case.

57. *See id.* at 2557–58.

58. *Id.* at 2558.

59. *Id.*

60. The Court suggested this standard might be workable if it were applied to real-world facts. *See id.* at 2557–58.

61. 136 S. Ct. 1257, 1265 (2016).

Petitioners assert factual innocence when they provide new evidence that reveals they did not commit the act of which they were convicted.[62] When petitioners assert legal innocence, however, they admit to committing the act of which they are accused, but they dispute that the act was itself a crime. Those claiming legal innocence argue they were convicted under an invalid statute.[63] Thus, all claims based on the Supreme Court's invalidation of the residual clause in *Johnson* are legal innocence claims.[64] Importantly, courts recognize both varieties of innocence as grounds for collateral relief.[65]

II. THE CIRCUIT SPLIT: THE PROBLEMS WITH PREPONDERANCE

The debate about the appropriate standard for *Johnson* claims is a recent installment in a longer historical conversation about balancing the interest in finality against the competing interest in fundamental fairness.[66] On the one hand, *Johnson* claims might test courts' ability to prevent people with criminal convictions from manipulating the writ to avoid their enhanced sentence through a technicality, despite being factually guilty of a crime.[67] On the other hand, the habeas statutes as revised by the AEDPA might be ill-suited to provide a remedy to legally innocent petitioners under *Johnson*.[68]

Section II.A begins by explaining how the courts understand the circuit split and identifying problems this conceptualization creates. Currently, the circuits describe their disagreement as one about the evidentiary burden that a *Johnson* petitioner must satisfy at the jurisdictional stage (whether petitioners prevail on a showing by the preponderance of the evidence or something less). Next, Section II.B argues that the split is better understood as a disagreement on what evidentiary standard *Johnson* petitioners should be held to at the jurisdictional stage (whether petitioners must show that the

62. Litman, *supra* note 27, at 419.

63. *Id.*

64. *Id.* at 445.

65. *See Welch*, 136 S. Ct. at 1268; *Johnson*, 135 S. Ct. at 2563; *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/7P9F-VLU8] (providing fast facts about DNA exonerations, which are cases of factual innocence, in the United States).

66. For instance, the Warren Court gave fundamental fairness primacy, as evidenced by its establishment of procedural protections as grounds for subsequent habeas relief. *See, e.g.*, United States v. Wade, 388 U.S. 218, 236–37 (1967) (holding that people have a right to counsel at lineups); Miranda v. Arizona, 384 U.S. 436, 476 (1966) (indicating that the right against self-incrimination requires certain warnings to be given upon arrest). Conversely, the Burger, Roberts, and Rehnquist Courts focused on finality in narrowing habeas relief. CHEMERINSKY, *supra* note 27, at 951–52.

67. *See* 142 CONG. REC. 7791–92 (1996) (statement of Sen. Warner) (declaring that under the AEDPA "habeas corpus appeals will be reformed: death row inmates will no longer be allowed to drag out their appeals for several decades").

68. *See* 142 CONG. REC. 7784 (1996) (statement of Sen. Kennedy) (arguing that the AEDPA achieves the reprehensible goal of "den[ying] meaningful habeas corpus review to State death row inmates").

sentencing court *solely* relied on the residual clause or, instead, that the sentencing court *may* have relied on the residual clause). Importantly, this Note argues that regardless of whether circuits endorse the sole-reliance or possible-reliance standard, they all require the petitioner to make her showing by a preponderance of the evidence.

A. *The Circuits' Understanding of the Split: Preponderance v. Nonpreponderance*

After *Welch* made *Johnson* available as a basis for habeas relief, a circuit split emerged regarding what standards to impose on *Johnson* claimants at the jurisdictional and merits stages.[69] Some circuits understand the split as a debate about whether to enforce the preponderance burden at the jurisdictional stage.[70] Under this conception, courts on one side of the split enforce the preponderance standard while courts on the other side of the split adopt a burden of proof on defendants that is lower than a preponderance.[71]

Dimott v. United States provides a paradigmatic example of a court's implementation of the preponderance/nonpreponderance distinction followed by the First, Sixth, and Eighth Circuits.[72] In *Dimott*, Charles Casey, one of the petitioners, argued that the court had subject-matter jurisdiction over his *Johnson* claim because he had filed within a year of the date *Johnson* became retroactively applicable.[73] He supported the assertion that he relied on *Johnson* by showing that the sentencing record was silent with respect to

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69. Circuits also disagree on what it means for movants to rely on *Johnson* and whether movants may rely on post-sentencing case law in their *Johnson* claims. *Compare In re* Hires, 825 F.3d 1297, 1302–04 (11th Cir. 2016) (prohibiting defendants from relying on post-sentencing case law to prove a *Johnson* claim), *with* United States v. Peppers, 899 F.3d 211, 227 (3d Cir. 2018) (permitting a *Johnson* petitioner to rely on post-sentencing case law).

70. *See, e.g.*, Dimott v. United States, 881 F.3d 232, 240–42 (1st Cir. 2018).

71. *Id.* at 241–242.

72. *Id.*; Golinveaux v. United States, 915 F.3d 564, 567 (8th Cir. 2019) ("This court rejected the Fourth and Ninth circuits' approaches that require showing only that a sentencing court 'may have' relied on the residual clause."); Raines v. United States, 898 F.3d 680, 684–85 (6th Cir. 2018) (per curiam); Potter v. United States, 887 F.3d 785, 788 (6th Cir. 2018) (dismissing the petition at the jurisdictional stage because "[n]either the presentence report nor the sentencing transcript shows that the district court relied on the residual clause or, to be more precise, relied only on the residual clause"). *But see* Williams v. United States, 927 F.3d 427, 439 n.7 (6th Cir. 2019) (limiting enforcement of the preponderance standard to cases where there is "affirmative evidence that the sentencing court sentenced the movant under a clause other than the residual clause" suggesting that the Sixth Circuit might impose a standard below the preponderance standard if there is no such affirmative evidence).

73. *Dimott*, 881 F.3d at 238–40. Recall that the time bar destroys federal courts' subject-matter jurisdiction over claims brought more than a year after the initial sentence or a year after the date the new rule of constitutional law was made retroactively applicable. 28 U.S.C. § 2244(d). Casey filed more than a year after his conviction became final, so the only way he could establish the court's subject-matter jurisdiction was to show he was entitled to an exception to the time bar.

which of the three ACCA clauses supported his enhanced sentence.[74] The First Circuit rejected Casey's argument and found that it lacked subject-matter jurisdiction because he had not shown by a preponderance of the evidence that the sentencing court had relied on the residual clause.[75] The court "[p]lac[ed] the burden of proof and production on habeas petitioners," which it suggested accorded with First Circuit precedent and the goals of the AEDPA.[76] On this reasoning, the mistake made by nonpreponderance circuits is that they "shift[] the burden of proof onto the Government," and thereby "irreparably undermine[]" the presumption of finality.[77] The next Section identifies the shortcomings of this conceptualization and provides a clearer characterization of the circuit split.

B. *A Neater Distinction: Possible Reliance v. Sole Reliance*

Before proceeding, some clarifications about the possible-reliance standard are in order.[78] The First Circuit's use of the preponderance/nonpreponderance distinction provides a good example of the distinction's shortcomings.[79] In *Dimott*, the petitioner claimed that he was entitled to habeas relief under *Johnson* because the sentencing court's record did not specify which of the three ACCA provisions supported his enhanced sentence.[80] The First Circuit held that the petitioner's claim did not properly rely on *Johnson* because he could not show that "it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause."[81] Accordingly, the court concluded that it had no subject-matter jurisdiction over the petitioner's habeas claim. But the court failed to realize that the petitioner was not arguing for a lighter burden of proof. Instead, he was arguing that the correct standard is possible reliance and that, by showing that the sentencing record was silent, he had shown by a preponderance of the evidence that the sentencing court may have relied on the residual clause.

The approach that the *Dimott* court characterizes as nonpreponderance is better understood as the possible-reliance standard. The Third, Fourth, Ninth, Tenth, and Eleventh Circuits find that the petitioner has established the court's subject-matter jurisdiction if she shows by a preponderance of the evidence that her sentence "may have been predicated" on the residual

74. *Dimott*, 881 F.3d at 240.

75. *Id.* at 240, 243.

76. *Id.* at 242.

77. *See id.* at 241–43.

78. *See* Ryan Baker, Note, Dimott v. United States*: Requiring Petitioners Prove that Sentence Enhancement More Likely than Not Resulted from the Armed Career Criminal Act's Residual Clause*, 52 CREIGHTON L. REV. 191, 193 (2019) (criticizing the Fourth and Ninth Circuit approaches for not enforcing preponderance, without recognizing that these circuits enforce preponderance at the jurisdictional stage).

79. *See, e.g.*, *Dimott*, 881 F.3d at 241.

80. *Id.* at 238.

81. *Id.* at 243.

clause.[82] The Ninth Circuit's implementation of the possible-reliance standard in *United States v. Geozos* is exemplary.[83] Like the sentencing record in *Dimott*, David Geozos's sentencing record failed to indicate "whether [the court] found any or all of [his] convictions to qualify as a conviction for a violent felony under the residual clause of ACCA."[84] In light of his ambiguous sentencing record, Geozos argued that the court had subject-matter jurisdiction under *Johnson*.[85] Rather than construe Geozos's argument as a request for a lesser burden of proof, the Ninth Circuit realized that Geozos was arguing for the possible-reliance standard.[86] The court found Geozos had established its subject-matter jurisdiction because he had shown that it was unclear whether the sentencing court had relied on the residual clause—in other words, that the court may have relied on the residual clause.[87]

The use of "preponderance" and "nonpreponderance" causes significant confusion. Instead, this Note argues that the possible-reliance/sole-reliance distinction better captures the circuits' disagreement. It highlights the relevant similarities between the circuits' approaches and more precisely locates the differences. Both standards identify what showing habeas petitioners must make at the jurisdictional stage to prove that her claim relies on *Johnson*.[88] Both standards require petitioners to show they are more likely than not entitled to relief. Recall that under the possible-reliance standard, courts only have subject-matter jurisdiction if the petitioner shows that her sentence more likely than not possibly relied on the residual clause.[89] Accordingly, possible reliance still requires petitioners to show they are entitled to relief by a preponderance of the evidence. The circuits disagree on what standard should be enforced at the jurisdictional stage—not whether the burden of proof on petitioners is preponderance.[90] The dispute is about pos-

82. United States v. Peppers, 899 F.3d 211, 223 (3d Cir. 2018); Beeman v. United States, 871 F.3d 1215, 1221 (11th Cir. 2017) (resolving the petitioner's claim at the merits stage because he failed to meet the sole-reliance standard); United States v. Snyder, 871 F.3d 1122, 1126–28 (10th Cir. 2017); United States v. Geozos, 870 F.3d 890, 895 (9th Cir. 2017); United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017).

83. 870 F.3d 890.

84. *Geozos*, 870 F.3d at 893.

85. *See id.* at 894.

86. *See id.* at 896.

87. *Id.* at 897.

88. *See supra* notes 12–14 and accompanying text.

89. *See supra* notes 12–14 and accompanying text.

90. *Compare* Dimott v. United States, 881 F.3d 232, 243 (1st Cir. 2018) (holding that the petition is time-barred unless the petitioner establishes "that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause"), *with* United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017) (explaining that a petitioner's claim relies on *Johnson* when her "sentence may have been predicated on application of the now-void residual clause"), *and Geozos*, 870 F.3d at 896–97 ("We therefore hold that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson II*.").

sible or sole reliance, rather than whether or not a preponderance of the evidence is the applicable burden of proof, so the First Circuit's argument that its approach better promotes finality is premised on a false assumption.[91]

It is a little more difficult to determine whether circuits disagree about the standard at the merits stage, when the courts determine whether the sentencing court's error actually prejudiced the defendant.[92] The circuits also seem to be divided on what standard to apply at the merits stage. Some courts appear to require the petitioner to prove that the sentencing court more likely than not relied solely on the residual clause.[93] Other courts appear to shift the burden of proof to the government once the petitioner makes the jurisdictional showing.[94] The government must then identify an alternative ACCA provision that could support the petitioner's sentence by a preponderance of the evidence. The confusion arises in part from the nature of *Johnson* claims: because there is no new trial—reviewing courts only consider sentencing court documents—it is not always clear which party must shoulder the burden of proof.[95] Moreover, courts thus far seem to be able to fully resolve *Johnson* claims on the merits without articulating that they have relied on a presumption tie-breaker.[96] In other words, the case law that courts rely on in adjudicating the merits almost always clearly determines whether the enhanced sentence could be upheld under a different, valid clause of the ACCA. Accordingly, courts do not need to resort to burden shifting to adjudicate *Johnson* cases. This Note does not seek to resolve this area of disagreement among the circuits.

III. POSSIBLE RELIANCE BALANCES INNOCENCE AND FINALITY

This Part argues that the sole-reliance standard overemphasizes rigid adherence to the AEDPA's procedural bars and shifts the focus away from a substantive inquiry to the petitioner's innocence.[97] The AEDPA's procedural bars are only justified insofar as they can distinguish between meritorious

91. *See infra* Section III.B.

92. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

93. *E.g.*, Beeman v. United States, 871 F.3d 1215, 1221 (11th Cir. 2017).

94. *See infra* note 99 and accompanying text.

95. *See Geozos*, 870 F.3d at 901 (holding that the "[d]efendant is entitled to relief" without indicating whether the defendant carries his burden, or the state failed to carry its burden).

96. *Compare* United States v. Snyder, 871 F.3d 1122 (10th Cir. 2017) (affirming defendant's sentence), *with* Raines v. United States, 898 F.3d 680 (6th Cir. 2018) (reversing defendant's sentence).

97. *See* Paul G. Cassell, *Can We Protect the Innocent Without Freeing the Guilty? Thoughts on Innocence Reforms that Avoid Harmful Trade-Offs*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 264 (Daniel S. Medwed ed., 2017).

and nonmeritorious claims—they are simply not justifiable when the petitioner's guilt has been sufficiently called into question.[98]

Section III.A begins by identifying the arguments in favor of the sole-reliance standard. Next, Section III.B illustrates the shortcomings of the sole-reliance standard. Finally, Section III.C argues in support of applying the possible-reliance standard at the jurisdictional stage for *Johnson* claims by showing that it conforms with congressional intent and Supreme Court precedent.[99] Under the approach advocated by this Note, the petitioner should only have to demonstrate that the sentencing record is *unclear* as to whether the court relied on the residual clause to proceed to the merits. Then, in reviewing the merits, the court can consider a broader range of evidence to decide if the defendant was actually sentenced under the residual clause.

A. *Sole Reliance and Its Justification*

Circuits using the sole-reliance standard emphasize finality of judgment as a dominant concern when reviewing habeas petitions and argue that sole reliance best promotes this concern.[100] These circuits suggest that the key advantage of the sole-reliance standard is that it reinforces finality by pre-

98. In sorting out nonmeritorious claims, the procedural requirements also encourage the defense to bring all available arguments before the court when the evidence is still fresh and leave more decisions to state, rather than federal, courts. That said, the *Welch* Court reasoned that, in *Johnson* cases, these benefits could be foregone in the interest of ensuring the validity of sentences imposed pursuant to the residual clause. *See* Welch v. United States, 136 S. Ct. 1257 (2016).

99. Some circuits appear to go even further than this, shifting the burden to the state at the merits stage once petitioners have shown by a preponderance of the evidence that the sentencing court may have relied on the residual clause. The Fourth and Ninth Circuits appear to require the state to show by a preponderance of the evidence that the sentence could be supported by the enumerated-offense clause or elements clause at the merits stage. *See* United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017); United States v. Geozos, 870 F.3d 890, 895 (9th Cir. 2017). This burden-shifting approach is not unheard of in habeas claims. For instance, once a petitioner challenging jury corruption by outside influence establishes that a jury was contacted by an outsider, a heavy burden is placed on the state to show that this contact did not prejudice the petitioner. Rodriguez v. Duckworth, 565 F. Supp. 989, 992 (N.D. Ind. 1983), *aff'd*, 746 F.2d 1482 (7th Cir. 1984) (unpublished table decision). Additionally, in cases where a petitioner challenges his acquiescence to surrendering his right to counsel, the state initially carries the burden and is required to show that he was advised of and legitimately waived his right. United States *ex rel.* Jefferson v. Fay, 364 F.2d 15, 17 (2d Cir. 1966). While there is some reason to think the burden-shifting approach is justified, it poses a substantially higher risk to finality and deterrence than the approach defended in this Note. Accordingly, more work needs to be done to assess whether burden shifting conforms with congressional intent and balances the competing values at stake in habeas corpus petitions. The viability of the burden-shifting approach is reserved for another project.

100. *See, e.g.*, Dimott v. United States, 881 F.3d 232, 240 (1st Cir. 2018) (suggesting that allowing petitioners to prevail on any lower a standard would undercut the "animating principle of AEDPA: the presumption of finality").

serving the distinction between direct and collateral review.[101] Fortifying finality promotes deterrence and incapacitation[102] and conserves judicial resources.[103]

To understand how the sole-reliance standard is supposed to promote finality, it is essential to highlight the difference between direct and collateral review. A final decision ends the period of direct review. A prisoner's conviction becomes final when the Supreme Court either denies certiorari or grants certiorari and affirms the conviction on the merits or when the limitation period for filing for certiorari runs out.[104] Generally, the state is presumed at this point to have sufficiently shown that the defendant was guilty beyond a reasonable doubt.[105] This means all evidence and reasonable inferences are drawn in favor of the state and the defendant "must undertake the burden of overturning them."[106] It also means that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment," because the grounds for overturning a sentence on collateral review are narrower than those available on direct review.[107] Challenges to sentences after the judgment becomes final are collateral, separate proceedings that allege an error in the original trial and appeals process.

Maintaining the traditional distinction between collateral and direct review helps promote finality by making it more difficult for petitioners to obtain relief on collateral review because judgments are presumed to be legally valid once they become final (i.e., susceptible only to collateral, not direct, review).[108] This distinction encourages petitioners to be proactive during their direct appeals and helps preserve scarce judicial resources by establishing an end point for litigation.[109] The grounds for relief are narrower on collateral review, and facts and reasonable inferences are drawn against the petitioner, so they have a substantial incentive to be diligent during the direct-appeals process. The sole-reliance standard aims to promote finality af-

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101. *See, e.g.*, *id.* at 241–42; *see also* Baker, *supra* note 78, at 198 (relying on the important ends promoted by separating direct review from collateral attack). See *supra* notes 28–30 and accompanying text for more on the differences between direct and collateral review.

102. *Dimott*, 881 F.3d at 240 (quoting Teague v. Lane, 489 U.S. 288, 309 (1989)); *see also* 142 CONG. REC. 7803 (1996) (statement of Sen. Hatch) ("I have been fighting, along with crime victims across our Nation, for the enactment of this legislation for nearly 20 years. Finally, heinous criminals will no longer be able to thwart justice and avoid just punishment by filing frivolous appeals for years on end.").

103. *See* Baker, *supra* note 78, at 212.

104. Clay v. United States, 537 U.S. 522, 527, 532 (2003); *see also* Jimenez v. Quarterman, 555 U.S. 113, 119 (2009) (holding that direct review concludes only when the availability of direct appeal to state or federal courts has been exhausted).

105. United States v. Frady, 456 U.S. 152, 164, 170 (1982).

106. 39 AM. JUR. 2D *Habeas Corpus* § 153, Westlaw (database updated Aug. 2020).

107. United States v. Addonizio, 442 U.S. 178, 184 (1979); *see also supra* notes 24–26 and accompanying text.

108. Teague v. Lane, 489 U.S. 288, 308–09 (1989).

109. *See* Baker, *supra* note 78, at 200.

ter the exhaustion of direct review by requiring a more substantial showing from habeas petitioners. In comparison to the possible-reliance standard, it is more difficult to show that a sentence *did* rely on the residual clause than it is to show that it *may* have. This is illustrated by petitioners like Geozos and Casey: a silent or ambiguous record satisfies possible reliance, but not sole reliance.[110] Proponents of the sole-reliance standard argue this makes it consistent with the rest of habeas jurisprudence insofar as it makes collateral relief sufficiently hard to obtain.[111]

Critics of the possible-reliance standard argue that, by allowing collateral challenges on a showing that the underlying conviction may have been tainted by the alleged error, the standard blurs the distinction between collateral and direct review.[112] On this view, possible reliance construes ambiguity regarding whether an error has occurred in favor of the petitioner—which is more akin to direct review than collateral, where inferences are supposed to be drawn against the petitioner.[113] Finality is furthered only by a distinction that makes relief significantly more difficult to obtain on collateral review than on direct.

By better protecting finality, the sole-reliance standard promotes deterrence and incapacitation.[114] Many argue that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[115] They assert that an increase in the amount of successful habeas claims will decrease the disincentives of incarceration by making it less likely that people with criminal convictions will have to serve their entire sentence.[116] Arguments relying on the value of deterrence also draw on broader congressional intent in passing the AEDPA. For instance, when considering the law, one senator voiced concerns that "[a]buse of the writ of habeas corpus has led to the death penalty being not an effective deterrent, but a mockery."[117]

The sole-reliance standard also furthers the criminal justice system's interest in incapacitating dangerous criminals. A lower burden supposedly increases the risk that meritless petitions will be granted, allowing dangerous criminals to reenter society earlier by shortening their sentence. A higher burden and additional procedural bars purportedly mitigate these worries.[118]

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110. *See supra* Section II.B.

111. *See* Baker, *supra* note 78, at 209–10.

112. *Id.* at 211.

113. *Id.* at 214.

114. Dimott v. United States, 881 F.3d 232, 240 (1st Cir. 2018); Beeman v. United States, 871 F.3d 1215, 1223 (11th Cir. 2017).

115. Teague v. Lane, 489 U.S. 288, 309 (1989); *see also Beeman*, 871 F.3d at 1223 (quoting *Teague*); *Dimott*, 881 F.3d at 240 (same).

116. *See Beeman*, 871 F.3d at 1223 (positing that a lower standard "would go a long way toward creating a presumption of non-finality and undermine the important interests that finality protects").

117. 142 CONG. REC. 7798 (1996) (statement of Sen. Specter).

118. *See* 142 CONG. REC. 7785 (1996) (statement of Sen. Hatch) ("Capital punishment reform, death penalty reform, something that has been needed for years, decades. It is being

Moreover, the importance of incapacitation is often more salient in cases of legal innocence, where "no valid criminal statute prohibited the defendant's conduct," rather than factual innocence, where petitioners argue that they did not carry out the wrongful act for which they were convicted.[119] The goal of incapacitation is defeated where a petitioner prevails under a theory of legal innocence and has her sentence vacated, despite having committed an act that society has deemed immoral.[120]

Finally, those endorsing the sole-reliance standard suggest it conserves scarce judicial resources.[121] Some commentators go so far as to argue that the flood of meritless habeas claims is the most egregious issue with collateral attack.[122] Limiting collateral claims allows courts' resources to be diverted to potentially meritorious claims.[123] In passing the AEDPA, Congress was clear that it was motivated by a desire to preserve judicial resources.[124] Indeed, judges are concerned that they are becoming predisposed toward dismissal because of the high volume of meritless habeas claims they review.[125]

That said, judges are beginning to recognize that the AEDPA may have overcorrected.[126] The AEDPA's stringent limitations on who receives habeas review make the possibility of erroneously rejecting a meritorious petition all

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abused all over the country. There are better than 3,000 people who have been living on death row for years with the sentences never carried out, the victims going through the pain every time they turn around.").

119. Litman, *supra* note 27, at 419, 451. Litman uses a hypothetical to support the claim that legal innocence cases have different moral valence than factual innocence cases:

> Imagine, for example, a legally innocent defendant who robbed a bank, but carried with him a fake gun rather than a real one, such that the crime didn't amount to armed robbery under the relevant statute. By contrast, the most common example of a factually innocent defendant would be a defendant who was at home watching a movie instead of robbing a bank.

Id. at 451.

120. *Id.* at 451.

121. *See* Baker, *supra* note 78, at 210–12.

122. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970).

123. *See* 142 CONG. REC. 7792 (1996) (statement of Sen. Warner) (voicing the concern that habeas reform ought to both preserve fair review for meritorious petitioners and curb abuse of the mechanism).

124. *See* 142 CONG. REC. 7798 (1996) (statement of Sen. Specter) ("Unfortunately, the Federal courts have gone too far in habeas corpus cases. These cases drag on for years, and there is no end to them, as inmates, especially those on death row with nothing to lose, file endless rounds of petitions."). Later, after identifying a few examples of lengthy habeas review, Senator Specter laments the fact that there are "over 4,550 petitions for Supreme Court review" in 1986. *Id.*

125. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

126. *See, e.g.*, *In re* Jones, 830 F.3d 1295, 1301 (11th Cir. 2016) (Rosenbaum & J. Pryor, JJ., concurring).

too likely.[127] There would be good reason to adopt the possible-reliance standard at the jurisdictional stage if it successfully ferreted out meritless petitions without withholding relief from innocent persons.

B. *The Shortcomings of Sole Reliance*

This Section argues first that the sole-reliance standard is too high a bar to impose on innocent petitioners at the jurisdictional stage because it promotes finality at the expense of protecting the innocent. Next, this Section argues that the sole-reliance standard does not do as much to further finality as its proponents suggest. Accordingly, to the extent that possible reliance prioritizes innocence over finality, it does so with nominal costs to the presumption of finality.[128]

First, the sole-reliance standard affords too much weight to the importance of finality. One of the hallmarks of collateral review is that the petitioner, at least initially, bears the burden of showing either that she is innocent or that the final judgment entered in her case was otherwise erroneous.[129] That said, the evidentiary standard to which habeas petitioners are held should reflect the difficulties inherent in making a showing of the particular claim they advance. The higher the likelihood of innocence, the weaker the interest in finality. In the context of *Johnson* claims, sentencing judges are not required to, and often do not, make it clear which ACCA provision they used to justify enhancing the petitioner's sentence.[130] This makes the petitioner's success more difficult—if not impossible—for reasons beyond the petitioner's control and makes a petitioner's ability to satisfy sole reliance a poor indicator of her legal innocence. The petitioner's initial burden should be reduced to address these concerns.

Moreover, *Johnson* claims center on the sentencing court's judicial construction of a statute. In these cases, which hinge on a court's understanding of the law rather than on the petitioner's conduct, the Supreme Court has weakened the presumption of finality by allowing lower courts to consider cases decided after the petitioner's sentencing to determine the statute's proper construction and the resulting outcome of the petitioner's claim.[131] Courts permit the consideration of post-sentencing case law because the invalidation of criminal statutes "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make crimi-

127. *Id.* (indicating that the possibility of error is exacerbated by the fact that circuit judges "have little to go on and are instructed to perform a very limited function in the request-for-authorization stage").

128. *Cf.* Baker, *supra* note 78 (relying exclusively on the interest in finality in advocating for the preponderance standard).

129. *See* 28 U.S.C. §§ 2244–2255.

130. United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017).

131. *See* Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004); Bousley v. United States, 523 U.S. 614, 618–21 (1998).

nal.'"[132] Subsequent case law helps reviewing courts clarify what exactly the law made criminal. This practice shows that the strength of finality varies depending on the context. The ambiguous sentencing record in many *Johnson* claims supports a more permissive standard at the jurisdictional stage, even if it weakens the presumption of finality.

Second, it is not clear that the sole-reliance standard does a better job preserving the presumption of finality than the possible-reliance standard. Finality is made stronger, and the distinction between collateral and direct review clearer, when habeas petitioners bear a heavier burden at the jurisdictional stage. However, a less precise distinction between direct review and collateral attack might still sufficiently promote finality. The Supreme Court has been clear about when the presumption of finality attaches to a petitioner's sentence, but the Court's willingness to hear and resolve collateral attacks is less clear.[133] In contrast to criticisms by sole-reliance courts, the possible-reliance standard does recognize the importance of finality in judgment. The disagreement among the circuits is best understood as reflecting different views on the strength of the presumption of finality—not as some circuits rejecting the importance of finality in judgment.[134]

The criminal justice system's goals of promoting deterrence and incapacitation also provide only weak support for the sole-reliance standard. Deterrence and incapacitation can only legitimize the punishment of those who have committed wrongs validly identified by the law.[135] The circumstances of innocent *Johnson* claimants are complicated by the fact that they have committed wrongs validly identified by the law—the prior underlying offenses—whereas the legally innocent defendant has not committed an act that the law has validly identified as deserving of an enhanced sentence.[136] To recognize why deterrence and incapacitation cannot be legitimately advanced, it helps to recognize that "a defendant can be innocent of a noncapital sentence" just as they can be innocent of an offense.[137] While the existence of an enhanced punishment deters and incapacitates for the underlying offense, the question presented by *Johnson* claims is whether the additional deterrence and incapacitation effect is created legitimately. A central tenet of our justice system is that deterrence and incapacitation cannot be legitimately advanced unless there is adequate notice.[138] For *Johnson* claimants, while there was adequate notice for the underlying offense, there was inadequate notice for the enhanced sentence when it was predicated on the residual clause.[139] Accordingly, the deterrent effect and term of incapacita-

132. *Bousley*, 523 U.S. at 620 (quoting Davis v. United States, 417 U.S. 333, 346 (1974)).

133. Teague v. Lane, 489 U.S. 288, 305, 308 (1989); *see* Litman, *supra* note 27, at 433–35.

134. *See supra* Section II.B.

135. Litman, *supra* note 27, at 450.

136. U.S. CONST. amend. V; Litman, *supra* note 27, at 452.

137. Litman, *supra* note 27, at 440 (citing Welch v. United States, 136 S. Ct. 1257 (2016)).

138. Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015).

139. *See, e.g.*, *id.* at 2557–58.

tion assigned on the grounds of the underlying sentence are legitimate, but any additional deterrent effect owing to the longer sentence is unjustified if the enhanced sentence is grounded in the residual clause. Thus, the sole-reliance standard cannot legitimately serve those goals when it withholds relief from those with legitimate legal innocence claims under *Johnson*.[140] Requiring a petitioner to show that the sentencing judge relied solely on the residual clause risks the continued incarceration of legally innocent individuals, and this cannot be justified on the basis that it furthers deterrence and incapacitation.

Additionally, *Johnson* claims exert a minimal draw on judicial resources, especially in comparison to other habeas claims.[141] There is no possibility of retrial in *Johnson* claims as the Ex Post Facto Clause of the Constitution prohibits retrying successful *Johnson* petitioners under any laws that have been invalidated in the wake of *Johnson* or that were passed since their conviction.[142] In practice, courts manage to process a substantial number of *Johnson* claims, contrary to contentions that they clog the courts.[143] Moreover, courts need only consider a fairly narrow range of evidence when deciding *Johnson* claims.[144] Indeed, even in the circuits that consider post-sentencing case law in examining alternative bases for the enhanced sentence, courts are limited to the factual materials that were available to the sentencing judge and subsequent case law.[145] Courts are permitted—not required—to consider post-sentencing case law.

Admittedly, some judicial resources are required for resentencing, as reviewing judges must determine the state of the law and analyze the petitioner's claim accordingly. Still, the limited resources required to adjudicate a *Johnson* claim limit the extent to which concerns about the conservation of judicial resources can justify the sole-reliance standard.[146] Moreover, the defendant is still only entitled to resentencing if she can prove that the error actually prejudiced her.[147]

The sole-reliance standard is not necessary to preserve the traditional distinction between collateral and direct review. The standard also makes it

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140. *See supra* Section I.B.

141. *See* Litman, *supra* note 27, at 460–62.

142. *Id.* at 422; *see also* U.S. CONST. art. I, §§ 9–10.

143. *In re* Jones, 830 F.3d 1295, 1301 (11th Cir. 2016) (Rosenbaum & J. Pryor, JJ., concurring) (indicating that the Eleventh Circuit processed 1,800 *Johnson*-based claims in 2016). Some might suggest this shows that habeas is already a huge burden on courts. Part III addresses this argument and suggests this cost is worth tolerating because it is necessary to respect the importance of innocence.

144. *See* Litman, *supra* note 27, at 456–57.

145. *E.g.*, United States v. Geozos, 870 F.3d 890, 892, 897–98 (9th Cir. 2017); United States v. Winston, 850 F.3d 677, 683 (4th Cir. 2017).

146. Litman, *supra* note 27, at 456.

147. *Geozos*, 870 F.3d at 897. A defendant is actually prejudiced if the error had a "substantial and injurious effect or influence" on her sentence or conviction. Kotteakos v. United States, 328 U.S. 750, 776 (1946).

more likely that courts will fail to remedy constitutional violations by keeping legally innocent petitioners in prison. Finally, it does not substantially decrease the draw on judicial resources. Thus, the justifications for the sole-reliance standard are weaker than advocates of the standard suggest.

C. The Possible-Reliance Standard Protects Innocent Johnson *Claimants*

Courts, academics, and practitioners have long maintained that the petitioner's innocence, legal or factual, is a vital consideration in determining the availability of collateral relief.[148] The AEDPA and Supreme Court jurisprudence establish a particular balance between innocence and finality. Unlike the sole-reliance standard, the possible-reliance standard strikes this balance, adequately protecting innocence and preserving finality.

While other scholars have advocated for similarly innocence-centered reforms to the writ of habeas corpus in contexts beyond just *Johnson* claims,[149] Professor Eve Brensike Primus's work on equitable gateways plays a particularly key role in this Section's analysis.[150] Specifically, Primus argues that there is a consistent equitable practice in federal habeas jurisprudence of allowing petitioners to bypass the procedural obstacles imposed by the AEDPA when "a state prisoner has not had a full and fair opportunity to present his or her claims and have them fairly considered."[151] Primus calls these procedural concessions "equitable gateways" and argues that these equitable gateways should be broadened if federal habeas is to serve as an adequate check against fundamental unfairness.[152]

This Section argues that the possible-reliance standard is consistent with AEDPA's language and then draws an analogy between one of the equitable gateways Primus defends and the unique circumstances of *Johnson* claimants with ambiguous or silent sentencing records. When a petitioner is entitled to

148. *E.g.*, Kaufman v. United States, 394 U.S. 217, 235–36 (1969) (Black, J., dissenting); Friendly, *supra* note 122, at 148 (proposing limiting habeas claims to only those with a colorable claim of innocence).

149. *See, e.g.*, Cassell, *supra* note 97, at 272. Many scholars provide additional arguments in favor of expanding habeas by relaxing or eliminating procedural barriers to federal claimants who have shown a reasonable probability of innocence. *See, e.g.*, Stephanie Roberts Hartung, *Post-Conviction Procedure: The Next Frontier in Innocence Reform*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT, *supra* note 97, at 247 (outlining an "innocence track" on which a prisoner who establishes innocence by a preponderance of the evidence would be entitled to a blanket exemption from procedural bars); Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009 (2011) (proposing an approach where defendants who submit to and prevail in an investigative trial benefit from greater freedom to raise habeas claims); *see also* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990).

150. Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 ARIZ. L. REV. 291, 296–97 (2019).

151. *Id.* at 304.

152. *Id.* at 297.

an equitable gateway through a procedural bar, the remedy is to develop the evidentiary record. Courts should give *Johnson* claimants an analogous remedy by hearing the petitioner's claim on the merits. This Section concludes by showing that the possible-reliance standard does not allow too many petitioners to obtain merits review.

1. Possible Reliance is Justified by Congressional Intent

Petitioners bringing *Johnson* claims are legally innocent if the sentencing judge relied on the unconstitutionally vague residual clause of the ACCA.[153] If the sentencing record is ambiguous, petitioners that actually had their sentence enhanced under the residual clause will struggle to meet the sole-reliance standard at the jurisdictional stage, and thus, the sole-reliance standard increases the risk of incarcerating innocent petitioners. The central importance of a petitioner's innocence in habeas proceedings makes this a strong reason for a more permissive standard at the jurisdictional stage.

While there are some differences between a legally and factually innocent defendant, each is entitled to habeas relief because neither acted in violation of a valid criminal statute.[154] As such, the high costs associated with imposing criminal sanctions on a legally innocent defendant cannot be justified any more than imposing sanctions on factually innocent defendants.[155] Federal courts have demonstrated sensitivity to these high costs by structuring habeas relief in a way to mitigate the cost of punishing the innocent. For instance, judge-made law allows courts to hear procedurally defaulted claims in cases where someone who is probably innocent has been convicted.[156] Regarding the AEDPA's time bar, the Supreme Court allows the one-year limitation period to be tolled for equitable reasons[157] and the excuse of petitioners who make "a convincing showing of actual innocence" from compliance with the time bar.[158]

In the AEDPA, Congress established a threshold showing of innocence that would exempt petitioners from the act's time bar and bar on successive petitions.[159] Accordingly, it is critical to determine whether possible reliance lets petitioners who have not shown a sufficiently high likelihood of inno-

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

154. Litman, *supra* note 27, at 448–49.

155. *See* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1112, 1121–22 (2015) (arguing that the dynamic consequences of Blackstone's principle—it is better that ten guilty persons escape than that one innocent suffer—"makes some innocent *defendants* worse off," as society understands conviction as a stronger indicator of guilt).

156. Murray v. Carrier, 477 U.S. 478, 496 (1986).

157. Holland v. Florida, 560 U.S. 631, 645 (2010).

158. McQuiggin v. Perkins, 569 U.S. 383, 386–87 (2013).

159. 28 U.S.C. §§ 2244, 2254.

cence bring meritless habeas proceedings.[160] Congressional intent is fairly clear on the policy issues implicated by this issue. For one, Congress has indicated that the discovery of a new constitutional right would provide good grounds for weakening the presumption of finality.[161] The AEDPA contains exceptions to the procedural bars for petitioners whose claims are based on retroactive rules of constitutional law or facts that could not have been discovered previously through due diligence.[162] These exceptions suggest that the Act was meant to strengthen finality to the extent consistent with preserving innocent petitioners' ability to recover—not to strengthen finality at any cost.[163] Had Congress intended finality to be conclusive, it would have required petitioners to make more than a "substantial showing of the denial of a federal right" in appealing a final order in a habeas proceeding.[164] Thus, implementing possible reliance at the jurisdictional stage is consistent with Congress' intent as expressed in the AEDPA.

The Court's interpretation of the AEDPA in *Welch* shows that *Johnson* claimants are entitled to an equitable gateway through the otherwise strict procedural bar on successive or untimely habeas motions.[165] An analogy between jurisprudence on equitable gateways and the possible-reliance standard supports the claim that possible reliance achieves the appropriate balance between innocence and finality. Jurisprudence on equitable gateways shows courts exempt habeas petitioners who show a high enough possibility of innocence from procedural bars.[166] In some cases the petitioners have provided new positive evidence that was not uncovered despite their due diligence at trial.[167] In others, petitioners show that they did not have a fair opportunity to litigate their federal claims on the merits at the state level.[168] In both instances, equitable gateways are justified using the emphasis the criminal justice system places on innocence. Procedural requirements in habeas review aim to conserve judicial resources without increasing the likelihood of wrongful conviction, but the particularly stringent procedural limits in

160. 142 CONG. REC. 7792 (1996) (statement of Sen. Warner) (suggesting the AEDPA successfully ensured "defendants retain very reasonable access to Federal courts to prove their innocence").

161. *See, e.g.*, 28 U.S.C. § 2255(f)(3).

162. *See, e.g.*, *id.* § 2244(b)(2).

163. *See, e.g.*, *id.* § 2255(f) (relaxing the one-year procedural filing requirement when unconstitutional government action impeding the petitioner's motion is removed and facts supporting innocence have been discovered after direct review despite the petitioner's due diligence).

164. H.R. REP. NO. 104-23, at 9 (1995).

165. *Id.*

166. *See* Primus, *supra* note 150.

167. *Id.* at 299.

168. Holland v. Florida, 560 U.S. 631 (2010); Primus, *supra* note 150, at 312.

habeas are predicated on the assumption that the initial trial and direct review process were executed fairly.[169]

2. Possible Reliance Comports with Supreme Court Jurisprudence

Beyond comporting with congressional intent expressed in the AEDPA, the possible-reliance standard is consistent with Supreme Court jurisprudence on due process and equitable gateways. For instance, requiring habeas petitioners to adhere to the sole-reliance standard treats similarly situated people differently.[170] Two petitioners who committed the same criminal act and had the same previous criminal conviction might receive different results on habeas review solely because one petitioner's sentencing judge made it more clear that she relied solely on the residual clause.[171] As judges are not required to clearly identify which provision of the ACCA grounds the enhanced sentence, the difference between these petitioners is arbitrary.

The Ninth Circuit extends the *Stromberg* principle to resolve this issue.[172] Under the *Stromberg* principle, a general verdict in a multiclaim suit that contains an erroneously submitted claim cannot be upheld because it violates the claimant's right to due process.[173] In *Stromberg v. California*, the defendant was convicted for displaying a red flag in a public space in violation of a Red Scare-era California statute.[174] The trial court instructed the jury to convict Stromberg if they found that she displayed the flag as an "emblem of opposition to organized government . . . an invitation or stimulus to anarchistic action, or . . . in aid to propaganda that is of a seditious character."[175] On appeal, the Supreme Court found that the "opposition to organized government" clause was unconstitutionally vague on its face.[176] Because the jury returned a general verdict after being instructed to convict if the defendant violated any of the three clauses, the Court set aside Stromberg's conviction.[177]

As the Ninth Circuit indicated in *Geozos*, the issues in *Stromberg* are analogous to those presented by *Johnson* petitioners.[178] In *Stromberg*, the jury verdict was ambiguous with respect to which clause provided the basis for the petitioner's conviction.[179] Similarly, for *Johnson* claimants, the sentenc-

169. Williams v. Taylor, 529 U.S. 420, 436–37 (2000); Engle v. Isaac, 456 U.S. 107, 126 (1982).

170. *E.g.*, United States v. Geozos, 870 F.3d 890, 895–96 (9th Cir. 2017).

171. *E.g.*, *id.*

172. *Id.* at 896.

173. Stromberg v. California, 283 U.S. 359, 361 (1931).

174. *Id.* at 361–62.

175. *Id.* at 363.

176. *Id.* at 369–70.

177. *Id.* at 359, 370.

178. United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017).

179. *Id.*

ing record is ambiguous as to whether the enumerated-offense clause, the elements clause, or the residual clause supported the enhanced sentence. One petitioner may easily prevail under the more difficult showing required by the sole-reliance standard because her sentencing judge made clear that the residual clause provided the sole ground for her enhanced sentence. Another may fail to satisfy the same standard because the sentencing judge failed to unambiguously specify the grounds for sentencing enhancement. It was not feasible to determine which of the three clauses the jury in *Stromberg* relied on, so the solution in *Stromberg* was to vacate the judgment. However, sentencing decisions in *Johnson* cases rest largely on legal conclusions. Accordingly, *Johnson* cases should be resolved by requiring judges to adjudicate the merits of the petitioner's claim.[180]

Allowing *Johnson* claimants who have demonstrated that the grounds for their enhanced sentence are ambiguous to proceed with their claims ensures due process because courts are better positioned to ensure that different outcomes for *Johnson* claimants turn on legally relevant differences—i.e., the existence of alternative, legitimate grounds for an enhanced sentence—by conducting a review on the merits. Advocates of the sole-reliance standard suggest it is necessary to ensure finality. However, the finality-related benefits cited by the standard's proponents are less valuable in the context of *Johnson* claims. Accordingly, the strong countervailing interest in protecting innocence and the right to due process defeats these justifications and militates in favor of a lower standard.

Furthermore, Professor Primus identifies equitable gateways in habeas corpus jurisprudence and suggests that courts are often willing to depart from procedural and substantive restrictions on habeas petitions.[181] While Primus primarily contemplates cases where failures in state courts have unfairly inhibited the petitioner's access to habeas relief,[182] such cases are analogous to the omissions made by federal sentencing judges in *Johnson* claims. Primus discusses cases in which the Supreme Court decided that, because a petitioner's due diligence at trial was thwarted, the reviewing court should grant a new evidentiary hearing.[183] For instance, in *Williams v. Taylor*, the Supreme Court found that a petitioner was entitled to an evidentiary hearing because evidence providing the factual basis for the petitioner's claims was not "reasonably available to petitioner's counsel during state habeas proceedings."[184] Despite the petitioner's diligence, he was not put on notice about the possibility of prosecutorial misconduct and therefore could not develop an evidentiary record for this defense.[185] When the remedy for an equitable

180. *See id.*

181. Primus, *supra* note 150, at 291.

182. *Id.* at 293.

183. Williams v. Taylor, 529 U.S. 420, 444 (2000).

184. *Id.* at 442.

185. *Id.*

gateway is a new trial, the state must prove the defendant's guilt beyond a reasonable doubt at the retrial.

Like petitioners in circumstances described in *Williams*, *Johnson* claimants were unable to develop their sentencing record because of "the conduct of another or by happenstance."[186] In the case of *Johnson* claimants, the sentencing "court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony" is out of their control.[187] Further, a defendant certainly has no control over the constitutionality of the provision under which she was sentenced. The appropriate remedy, according to equitable-gateway jurisprudence, is to allow for the development of the evidentiary record. This requires hearing their claim on the merits, as *Johnson* claimants are no more in control of the evidentiary record when making the jurisdictional showing that their claim relies on *Johnson* than they were at the time of their sentencing. [188] Reviewing courts should conduct the analysis the sentencing court would have had to complete had they known the residual clause was unconstitutional—namely, whether the elements or enumerated-offense clause could support an enhanced sentence. Adopting the sole-reliance standard would be equivalent to withholding an evidentiary hearing in cases, like *Williams*, where the defendant could not have discovered the trial error, despite his diligent efforts to develop the evidentiary record.[189] The Supreme Court has deemed cases like *Williams* well worth the judicial resources spent holding an entirely new trial. If *Williams* cases are worth the resources, resentencing in *Johnson* cases should be, too. After all, *Johnson* claims can be resolved with a closed-record review that expends far fewer judicial resources.

Finally, adjudicating *Johnson* claims uses up less of the court's resources than most examples in the equitable-gateway context, supporting the possible-reliance standard. In most equitable-gateways cases, the burden is increased by the need for a new trial and is completely shifted back onto the state.[190] In contrast, as only legal issues need to be resolved, judges are likely to be both more comfortable and more efficient when reviewing the merits of *Johnson* claims.[191]

This Note suggests that enforcing the possible-reliance standard at the jurisdictional stage comports with the practice of reserving equitable gateways for those that advance a colorable claim of innocence.[192] Executing merits review for petitioners who satisfy the possible-reliance standard at the jurisdictional stage prevents a judge's arbitrary decision about whether to

186. *Id.* at 432.

187. United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017).

188. *Williams*, 529 U.S. at 442.

189. *Id.* at 442–43.

190. *See supra* notes 181–185 and accompanying text.

191. Litman, *supra* note 27, at 453–54.

192. *See* Primus, *supra* note 150, at 293.

specify which ACCA clause supported the sentence from determining whether a *Johnson* claimant will be freed.

3. Possible Reliance Does Not Let Too Many Petitioners Proceed to Merits Review

The key arguments against the possible-reliance standard assert that it disregards legislative intent expressed in the AEDPA by eroding finality. But again, the importance of finality must not be overstated, as the AEDPA recognizes actual innocence as a key countervailing concern.[193] Proponents of the sole-reliance standard overvalue finality.[194] They suggest that allowing a showing of possible reliance "to establish subject matter jurisdiction for petitioners' collateral claims subjects the courts to entertaining petitions for collateral relief that would not survive a full examination of their merits."[195] One issue with this claim is that it conflates the jurisdictional and merits stages. If only those claims that could "survive a full examination of their merits" made it past the jurisdictional stage, there would be no purpose for the merits stage, as only actually meritorious claims would be considered on their merits.[196] This approach risks dismissing meritorious claims at the jurisdictional stage in favor of ensuring that only those that will prevail advance to the merits, and it is unrealistic about courts' ability to identify meritorious claims this early in the proceedings.

Additionally, proponents of sole reliance claim that the AEDPA seeks to preserve judicial resources and that adopting possible reliance at the jurisdictional stage would contravene Congress's intent.[197] This counterargument carries weight only if (1) the possible-reliance standard lets nonmeritorious petitions through to the merits stage; (2) these petitions would be dismissed at the jurisdictional stage if we enforced a higher standard; and (3) this higher standard would not deny relief to actually innocent petitioners. In the past, the Supreme Court has treated the risk of punishing the actually innocent as sufficient justification for equitable concessions.[198] As the possible-reliance standard requires proof by the preponderance of the evidence, the burden is high enough to disincentivize nonmeritorious claims.

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193. *Supra* Section III.C.1.

194. *See, e.g.*, Dimott v. United States, 881 F.3d 232, 239 (1st Cir. 2018); *see also* Baker, *supra* note 78, at 210.

195. *See* Baker, *supra* note 78, at 210. Baker mischaracterizes possible reliance as something "less than a preponderance." *Id.*

196. *Cf.* United States v. Peppers, 899 F.3d 211, 235 n.21 (3d Cir. 2018).

197. *Dimott*, 881 F.3d at 242.

198. *See* Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); United States v. U.S. Coin & Currency, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing."); *supra* Section III.C.2.

Still, another potential shortcoming of the possible-reliance standard must be considered: Does possible-reliance permit too many meritless claims to proceed to the merits stage? The main reason for different standards at different stages is to cut down on the number of nonmeritorious claims that make it past the jurisdiction gate, and then to distinguish apparently meritorious claims from actually meritorious claims with more searching review on the merits. Congressional intent and Supreme Court jurisprudence militate in favor of a more permissive standard at the jurisdictional stage because, even post-AEDPA, the federal habeas statutes seek to protect innocent petitioners. This is illustrated by the AEDPA's exceptions to the one-year time bar and the bar on successive motions.[199] Requiring a showing of sole reliance at the jurisdictional stage risks closing these equitable gateways by setting a standard that many legally innocent petitioners cannot satisfy.[200]

Subsequent jurisprudence suggests petitioners that can satisfy the possible-reliance standard have established a sufficiently robust claim of innocence to warrant merits review. The court's decision in *Welch* made *Johnson* claims retroactively applicable on review and therefore eligible for this statutorily established equitable gateway.[201] In *Welch*, the Court found that *Johnson* created a new substantive constitutional right insofar as its invalidation "alter[ed] the range of conduct or the class of persons" that were punished under the ACCA sentencing enhancement provisions.[202] It adopted a fairly permissive view of the kinds of arguments worth considering on the merits by recognizing that "the parties continue to dispute whether Welch's strong-arm robbery conviction qualifies as a violent felony under the elements clause of the Act."[203] So while the case's resolution on the merits remained an open question, Welch's claim of legal innocence was sufficiently strong to warrant review on the merits—despite the fact that on remand the Court of Appeals might have "determine[d] on other grounds that the District Court was correct to deny Welch's motion to amend his sentence."[204] That said, the Court was unequivocal in its statement that Welch passed the jurisdictional bar.[205] Accordingly, *Welch* clearly indicates that the interest in finality is defeated if the petitioner makes a sufficient showing of innocence (i.e., she properly relies on *Johnson*).

199. 28 U.S.C. §§ 2244(b), 2255(f).

200. *See* United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017).

201. Welch v. United States, 136 S. Ct. 1257 (2016).

202. *Id.* at 1264–65 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).

203. *Id.* at 1268.

204. While the court stated that "reasonable jurists at least could debate whether Welch is entitled to relief," because there was no debate about whether *Welch* relied on *Johnson*, the area for reasonable debate can only be properly focused on the merits of his claim. *Id.* The alternative grounds referred to here are the elements and force clauses.

205. *Id.* ("*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review.").

CONCLUSION

The possible-reliance/sole-reliance distinction put forth in this Note more accurately captures the circuits' disagreement than the preponderance/nonpreponderance distinction. Furthermore, implementing the possible-reliance standard at the jurisdictional stage and the sole-reliance standard at the merits stage achieves the balance between innocence and finality contemplated by Congress and enshrined in Supreme Court jurisprudence regarding equitable gateways. The minimal burden placed on the courts by enforcing a lower standard—thereby permitting more petitioners to have their claims heard on the merits—is a reasonable price to pay for adequately protecting innocence. Despite the general trend toward restricting the availability of habeas relief through procedural bars, this Note joins the robust countermovement in courts and the academic discourse toward a greater respect for legal innocence. Should the Supreme Court address the circuit split, endorsing the approach advanced by this Note would be an unequivocal statement that the great writ of liberty is still available to the innocent.