JUSTICE BY LUCK: HOW UNCLEAR RECORDS FORCE SOME UNLUCKY PRISONERS TO SERVE UNCONSTITUTIONAL SENTENCES IN THE WAKE OF *JOHNSON V. UNITED STATES*

INTRODUCTION

The Armed Career Criminal Act (ACCA) imposes mandatory minimum sentences on individuals convicted of being a felon in possession of a firearm who have at least three prior convictions for "violent felon[ies]."[1] "Violent felon[ies]" include those crimes contemplated by the ACCA's "residual clause,"[2] which sweeps in any crime that "involves conduct that presents a serious potential risk of physical injury to another."[3] The Supreme Court ruled that the residual clause was unconstitutional in *Johnson v. United States* in 2015.[4] As the decision in *Johnson* was retroactive,[5] individuals whose sentences were enhanced on the basis of the residual clause may seek relief under *Johnson*.[6]

In affording such relief, however, the circuits disagree as to what standard of proof should apply to the question of whether a sentence enhancement was in fact based on the residual clause.[7] Some circuits have held that a movant[8] must show only that his sentence enhancement "may have" been based on the residual clause in order to have the sentence vacated.[9] Other circuits, however, have held that a movant must meet the higher preponderance-of-the-evidence standard by showing that the judge more than likely relied on the residual clause in handing down the

1. 18 U.S.C. § 924(e) (2018).
2. Welch v. United States, 136 S. Ct. 1257, 1261 (2016) (referring to the final clause of § 924(e)(2)(B)(ii) as the "residual clause").
3. § 924(e)(2)(B)(ii), *invalidated by* Johnson v. United States, 135 S. Ct. 2551 (2015).
4. *Johnson*, 135 S. Ct. at 2563.
5. *Welch*, 136 S. Ct. at 1265.
6. *See, e.g.*, United States v. Muna, No. 3:13-CR-0100-SLG, 2017 WL 357304, at *4 (D. Alaska Jan. 24, 2017) (vacating sentence enhancement imposed on the basis of the ACCA's residual clause), *aff'd*, 740 F. App'x 539 (9th Cir. 2018).
7. *See* Walker v. United States, 900 F.3d 1012, 1014 (8th Cir. 2018) (noting circuit split over standard of proof required to obtain relief under *Johnson*).
8. Prisoners seeking relief under *Johnson* who have exhausted their direct appeals must file a motion pursuant to 28 U.S.C. § 2255. *See infra* note 38. Accordingly, this Note refers to prisoners seeking relief under *Johnson* as "movants."
9. United States v. Peppers, 899 F.3d 211, 236 (3d Cir. 2018); United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017); United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017). This lower standard of proof is referred to as the "may-have" standard throughout this Note.

sentence.[10] In 2019, the Fifth Circuit in *United States v. Clay* chose sides in the circuit split by adopting the harsher preponderance-of-the-evidence standard.[11] This Note uses the Fifth Circuit's decision in *Clay* as a springboard for analyzing the consequences of the preponderance-of-the-evidence standard.[12]

Part I of this Note contains an overview of the ACCA and its history, the law governing collateral review of federal criminal sentences, and the reactions of other courts of appeals immediately following *Johnson*, as well as an analysis of the Fifth Circuit's decision in *Clay*.[13] Part II of this Note makes two main arguments for why *Clay* was wrongly decided.[14] The first is that the preponderance-of-the-evidence standard announced in *Clay* is grounded in a misunderstanding of the presumption of finality in collateral review, as claims for relief under *Johnson* represent precisely the type of scenario in which the presumption of finality should give way.[15] The second argument is that the preponderance-of-the-evidence standard is unfair because it leads to inconsistent results in which some unlucky movants who were sentenced under the residual clause must remain in prison to serve out unconstitutional sentences due to unclear sentencing records, a problem exacerbated by the Supreme Court's decisions prior to *Johnson*.[16]

To remedy the problems presented by the preponderance-of-the-evidence standard, this Note proposes a two-part solution in Part III.[17] First, the Supreme Court should weigh in on this issue in order to resolve the split among the circuits and clarify that the correct standard of proof on collateral review under *Johnson* is the lower may-have standard.[18] Second, in order to prevent similar injustices in the future, the Supreme Court should extend the

10. *Walker*, 900 F.3d at 1015; United States v. Washington, 890 F.3d 891, 896 (10th Cir. 2018); Dimott v. United States, 881 F.3d 232, 243 (1st Cir. 2018); Beeman v. United States, 871 F.3d 1215, 1221–22 (11th Cir. 2017). Courts appear to use the terms "preponderance of the evidence" and "more likely than not" interchangeably in this context. *See, e.g.*, *Washington*, 890 F.3d at 896 ("[W]e hold the burden is on the defendant to show by a preponderance of the evidence—*i.e.*, that it is more likely than not—his claim relies on *Johnson*."). For the sake of consistency, this Note refers to this higher standard as the "preponderance-of-the-evidence" standard.

11. United States v. Clay, 921 F.3d 550, 558–59 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 866 (2020) (mem.).

12. Most of the same criticisms are applicable to every decision in which a court of appeals has adopted the preponderance-of-the-evidence standard. This Note focuses on the decision in *Clay*, however, because the Fifth Circuit's ambivalence and hesitance to choose a standard in the years preceding *Clay* exacerbated the problem and illustrates the need for clarity from the Supreme Court on this and similar issues. *See infra* text accompanying notes 55–60.

13. *See infra* Part I.

14. *See infra* Part II.

15. *See infra* Section II.A.

16. *See infra* Section II.B.

17. *See infra* Part III.

18. *See infra* Part III.

principle first elucidated in *Stromberg v. California*[19] to situations such as the one presented in *Clay*.[20]

I. BACKGROUND

A. The Armed Career Criminal Act

Under federal law, it is a crime for a person who has been convicted of a felony[21] to possess a firearm.[22] The ACCA imposes mandatory fifteen-year minimum sentences upon felons convicted of possessing a firearm who have three or more prior convictions for "a violent felony or a serious drug offense, or both."[23] The meaning of "violent felony"—both as defined in the statute and as interpreted by the courts—has undergone numerous revisions since the ACCA was first enacted in 1984.[24]

Under the law's current formulation, there are three ways in which a conviction can qualify as a "violent felony" (or, in the language of the courts, a "predicate offense"[25]) under the ACCA.[26] First, under

19. Stromberg v. California, 283 U.S. 359, 368 (1931). The *Stromberg* principle holds that, when a jury convicts on a general verdict with multiple possible legal bases, at least one of which is later determined to be unconstitutional, that conviction must be vacated if the basis for the jury's verdict cannot be determined with certainty. *Id.* This Note argues that this principle should be extended to apply not just to jury verdicts but to any criminal conviction or sentence. For a longer discussion of the *Stromberg* principle, *see infra* note 139 and accompanying text.

20. *See infra* Part III.

21. By its explicit terms, § 922(g) applies to persons who have been convicted of "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1) (2018). This threshold coincides with the definition of a felony under the federal criminal law. 18 U.S.C. § 3559(a) (2018).

22. § 922(g). Violation of § 922(g) has the additional element of a nexus with interstate commerce, but this jurisdictional requirement is a low bar. *See* Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019) (describing purpose of § 922(g)'s interstate commerce element as "simply [to] ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct"); Scarborough v. United States, 431 U.S. 563, 575 (1977) (holding that similarly worded jurisdictional element in predecessor to § 922(g) required only "the minimal nexus that the firearm have been, at some time, in interstate commerce").

23. § 924(e). In addition to a minimum duration of fifteen years, sentences under the ACCA may not be suspended or probationary. *Id.* The ordinary maximum sentence for conviction of being a felon in possession of a firearm is ten years. § 924(a)(2). As such, the immediate practical effect of a sentence enhancement under the ACCA is to add at least five years to a sentence's duration.

24. *See, e.g.*, Taylor v. United States, 495 U.S. 575 (1990) (discussing changes to the definition of "violent felony" under the ACCA); Jondavid S. DeLong, Annotation, *What Constitutes "Violent Felony" for Purpose of Sentence Enhancement Under Armed Career Criminal Act (18 U.S.C.A. § 924(e)(1))*, 119 A.L.R. Fed. 319 (1994). The meaning of "serious drug offense" has also undergone numerous revisions and is likewise ripe for discussion. *See* United States v. Rodriquez, 553 U.S. 377 (2008) (discussing history of changes to the definition of "serious drug offense" under the ACCA). However, only the meaning of "violent felony" under the ACCA is relevant for the purposes of this Note.

25. *See, e.g.*, Shepard v. United States, 544 U.S. 13, 21 (2005).

26. § 924(e)(2)(B). The statute defines "violent felony" as follows:

§ 924(e)(2)(B)(i) (the "elements clause"[27]), crimes that have the use of force as an element (whether actual, threatened or attempted) are predicate offenses.[28] Second, subsection (ii) names specific crimes that are predicate offenses.[29] These enumerated offenses are burglary, arson, extortion, and any crime that "involves use of explosives."[30] Third, and finally, subsection (ii) also contains the ACCA's residual clause, which makes any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another" a predicate offense.[31]

When determining whether a given crime is a predicate offense, courts use a "categorical approach," meaning that courts do not consider the facts of the particular instance of the crime giving rise to the conviction; instead, courts consider only the elements of the offense in the abstract.[32] Thus, whether a felony was actually accomplished in a violent manner is irrelevant to residual clause analysis.[33] What matters instead is whether an "idealized

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> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Id. It is worth noting that, although the ACCA is itself a federal crime, state crimes can also qualify as predicate offenses. *See, e.g.*, Stokeling v. United States, 139 S. Ct. 544, 555 (2019) (holding that Florida robbery statute is an ACCA predicate offense). Indeed, as this Note will explain, the courts' struggles to square the ACCA with the diverse criminal law schemes of the fifty states and other territories is precisely what has given rise to the controversy that is the focus of this Note. *See infra* Section II.B.2.

27. Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

28. § 924(e)(2)(B)(i).

29. § 924(e)(2)(B)(ii).

30. *Id.*

31. 18 U.S.C. § 924(e)(2)(B)(ii).

32. Taylor v. United States, 495 U.S. 575, 600 (1990). This categorical approach is necessary due, in part, to Sixth Amendment concerns. *See* Mathis v. United States, 136 S. Ct. 2243, 2252 (2016) ("Second, a construction of ACCA allowing a sentencing judge to go any further [than the elements of the offense] would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000))). If judges were to consider whether the particular facts giving rise to a prior conviction constitute a predicate offense, it would encroach upon the constitutionally mandated purview of the jury. *Id.* The categorical approach is designed to solve this problem by having judges consider whether a conviction counts as a predicate offense as a matter of law, but some (including Justice Thomas) have suggested that having judges find even the fact of conviction runs afoul of the Sixth Amendment. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1253–54 (2018) (Thomas, J., dissenting) ("The categorical approach . . . created the same Sixth Amendment problem that it tried to avoid. . . . In my view, if the Government wants to enhance a defendant's sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt.").

33. In *Taylor*, the Supreme Court discussed how the categorical approach decouples ACCA sentence enhancements from actual violence by referring to the ACCA's legislative history:

ordinary case" of the crime, as determined by analyzing the text of the statute in a vacuum,[34] "involves conduct that presents a serious potential risk of physical injury to another."[35] Due to uncertainty created by a reliance upon this "judicially imagined 'ordinary case'" of a crime, as well as a lack of a satisfying standard for how risky a crime must be to qualify as a "violent crime," in 2015 the Supreme Court struck down the ACCA's residual clause as unconstitutionally vague in *Johnson v. United States*.[36]

B. Collateral Attacks in Federal Criminal Cases

While all of the Supreme Court's decisions creating new rules apply automatically to criminal cases that are still pending on direct appeal, only some decisions—namely, substantive rules of law and certain "watershed" procedural rules—apply retroactively to cases in which judgements are final.[37] Under 28 U.S.C. § 2255—the modern codification of the writ of habeas corpus for federal prisoners[38]—a federal prisoner may file a motion to have his sentence vacated, set aside, or corrected if it was "imposed in violation of the Constitution or laws of the United States."[39] As such, a Supreme Court decision announcing a new rule of law can afford retroactive

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"[Congressional] concern [regarding career offenders] was not limited to offenders who had actually been convicted of crimes of violence against persons. (Only H.R. 4768, rejected by the House Subcommittee, would have restricted the predicate offenses to crimes actually involving violence against persons.)" *Taylor*, 495 U.S. at 588.

34. Johnson v. United States, 135 S. Ct. 2551, 2561 (2015).

35. 18 U.S.C. § 924(e)(2)(B)(ii).

36. *Johnson*, 135 S. Ct. at 2557–58. The Court cited two fatal flaws in the residual clause. *Id.* at 2557. First, the requirement that judges employ the categorical approach in determining the risk an "ordinary case" of a given offense leads to "grave uncertainty." *Id.* Second, even if judges could determine with certainty the risk posed by a given offense, there is no clear standard for what level of risk is required for an offense to qualify as a predicate offense. *Id.* at 2558.

37. Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004). The Court in *Schriro* wrote:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.

Id. (internal citations omitted).

38. *See* Boumediene v. Bush, 553 U.S. 723, 774–75 (2008) (noting that § 2255 "replaced traditional habeas corpus for federal prisoners . . . with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was" imposed unconstitutionally). Strictly speaking, a § 2255 motion is not a petition for a writ of habeas corpus. *See* United States v. Hayman, 342 U.S. 205, 220 (1952) (noting that a hearing pursuant to § 2255 "is not a habeas corpus proceeding"). Nonetheless, courts commonly refer to § 2255 motions as "habeas" motions, and this Note follows this convention where appropriate for clarity's sake. *See, e.g.*, United States v. Gonzales, 95 F.3d 54, 54 (5th Cir. 1996) (referring to a § 2255 motion as a "federal habeas motion").

39. 28 U.S.C. § 2255(a) (2018).

relief even in a case that is already final, as long as the new rule of law is deemed to be substantive or, if procedural, a "watershed" decision.[40]

While § 2255 creates a path to collateral relief, that path is beset by judicial and legislative hurdles. The law governing collateral relief is undergirded by a "presumption of finality and legality" that attaches to a criminal conviction once direct appeals have been completed, and, as such, movants face a high burden on collateral attack.[41] This presumption was further strengthened by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[42] AEDPA, for example, imposes a "strict statute of limitations" that time-bars movants' claims for relief, which courts may invoke *sua sponte* even when the government has failed to raise the timeliness issue.[43] The presumption of finality, especially in light of AEDPA, animates much of the law of collateral review today.[44]

*C. Post-*Johnson *Collateral Attacks on Sentences Based upon the Residual Clause*

While the Court's decision in *Johnson* striking down the residual clause of the ACCA as unconstitutional applied automatically to cases that were still pending on direct appeal, it was unclear whether the ruling would apply retroactively as a substantive rule of law.[45] A year after its decision in *Johnson*, the Court resolved the question in *Welch v. United States*, holding that the decision in *Johnson* created a substantive rule of law that applied retroactively on collateral attack.[46] Accordingly, individuals who received

40. *Schriro*, 542 U.S. at 351–52.

41. Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)); *see also Barefoot*, 463 U.S. at 887 ("The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.").

42. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. *See also* Williams v. Taylor, 529 U.S. 420, 436 (2000) (noting it is "AEDPA's purpose to further the principle[] of . . . finality").

43. Dimott v. United States, 881 F.3d 232, 238 (1st Cir. 2018) (citing Wood v. Milyard, 566 U.S. 463, 473 (2012); Day v. McDonough, 547 U.S. 198, 209 (2006)); 28 U.S.C. § 2255(f). Other burdens AEDPA places on movants include the inability to appeal the denial of a § 2255 motion unless movant first procures a "certificate of appealability" from the denying district court. § 2253(c). As this Note is concerned with the standard of proof for a § 2255, AEDPA requirements such as these are beyond the scope of this Note, except for the extent to which such requirements are emblematic of the general harshness of AEDPA.

44. *See Dimott*, 881 F.3d at 241 ("We think the focus must be on the fact that we are applying clear limits established by Congress for when federal post-conviction petitions may be entertained by the federal courts . . . .").

45. *Compare In re* Watkins, 810 F.3d 375, 383–84 (6th Cir. 2015) (holding that *Johnson* created a new substantive rule of law that applies retroactively on collateral review), *with In re* Williams, 806 F.3d 322, 325–26 (5th Cir. 2015) (holding that *Johnson* did not create a new substantive rule of law that applies retroactively on collateral review).

46. Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

enhanced sentences because of the ACCA's residual clause are entitled to relief under *Johnson*, even if they have exhausted their direct appeals.[47]

When movants began bringing *Johnson* challenges to ACCA sentence enhancements, courts disagreed as to the standard of proof a movant must meet in asserting that his sentence was enhanced on the basis of the now-unconstitutional residual clause.[48] Some circuits, namely the Third, Fourth, and Ninth, have held that a movant is entitled to relief if he can demonstrate that the sentencing court "may have" relied on the residual clause.[49] These circuits rested their holdings on appeals to fairness and equal application of the law, reasoning that movants who may have been sentenced unconstitutionally should be entitled to review of whether they were in fact sentenced unconstitutionally.[50]

Other circuits, including the First, Fifth, Eighth, Tenth, and Eleventh, have required instead that movants demonstrate by a preponderance of the evidence that the sentencing court relied upon the residual clause in handing down the ACCA sentence enhancement.[51] These circuits justified this higher standard of proof by invoking movants' high burden in habeas proceedings and by referencing the general principle of finality, as manifested in the harshness of AEDPA.[52] The Supreme Court has refused to address the split,[53] and as such, different circuits are deciding cases seeking post-*Johnson* relief under both the may-have and the preponderance-of-the-evidence standards.[54]

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47. *See, e.g.*, United States v. Teeples, No. 02-45-M-DWM, 2016 WL 4147139, at *2 (D. Mont. Aug. 3, 2016). In *Teeples*, the movant's conviction became final on May 15, 2006, more than nine years before *Johnson* was decided. *Id.* The court nonetheless granted relief under *Johnson* and *Welch*, *id.* at *4, because "[n]ew substantive constitutional rules and new watershed procedural constitutional rules apply to all cases, even if they are already final at the time the new rule is announced," *id.* at *2.

48. *Compare* Walker v. United States, 900 F.3d 1012, 1015 (8th Cir. 2018) (adopting preponderance-of-the-evidence standard), *with* United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017) (adopting may-have standard).

49. United States v. Peppers, 899 F.3d 211, 223 (3d Cir. 2018); United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017); *Geozos*, 870 F.3d at 896.

50. *See, e.g.*, *Winston*, 850 F.3d at 682 (finding that "imposing the burden on movants urged by the government in the present case would result in selective application of the new rule of constitutional law announced in [*Johnson*], violating the principle of treating similarly situated defendants the same" (internal quotation marks omitted) (quoting In re Chance, 831 F.3d 1335, 1341 (11th Cir. 2016))).

51. *Walker*, 900 F.3d at 1015; United States v. Washington, 890 F.3d 891, 896 (10th Cir. 2018); Dimott v. United States, 881 F.3d 232, 241–42 (1st Cir. 2018); Beeman v. United States, 871 F.3d 1215, 1221–22 (11th Cir. 2017).

52. *See supra* note 43 and accompanying text.

53. *See, e.g.*, Clay v. United States, 140 S. Ct. 866, 866 (2020) (mem.) (denying petition for writ of certiorari).

54. *Compare* Morrison v. United States, No. 16-CV-1517 DMS, 2019 WL 2472520, at *6 (S.D. Cal. June 12, 2019) (applying may-have standard), *with* Einfeldt v. United States, No. C16-2051-LRR, 2018 WL 10124648, at *3 (N.D. Iowa Sept. 10, 2018) (applying preponderance-of-the-evidence standard).

D. The Fifth Circuit's Decision in United States v. Clay

Prior to April 2019, the Fifth Circuit had equivocated with respect to choosing a standard of proof on post-*Johnson* claims.[55] In *United States v. Taylor*, decided in 2017, the Fifth Circuit described the competing arguments at length before concluding that it need not choose a standard because the movant's claims had satisfied both.[56] In the next relevant case to come before the Fifth Circuit, *United States v. Wiese*, the court again declined to choose a standard, but this time for the opposite reason: the movant's claims in that case would have failed under either standard.[57] The decision in *Wiese* did advance the Fifth Circuit's caselaw in at least one respect, though, as the court adopted a precedent from the Tenth Circuit recognizing that courts, in addition to looking at "the sentencing record for direct evidence of a sentence," may also look to "the relevant background legal environment that existed at the time of [the defendant's] sentencing."[58] Thus, even if the record is silent, courts may nevertheless attempt to divine the basis on which the sentencing judge applied the ACCA sentence enhancement.[59] It was on this basis—as opposed to on the basis of the record, which was silent as to the clause under which movant's sentence was enhanced—that the Fifth Circuit dismissed movant's § 2255 motion.[60]

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55. United States v. Clay, 921 F.3d 550, 555 (5th Cir. 2019), *cert. denied*, 140 S. Ct. at 866 ("[W]e have yet to 'conclusively decide' which standard of proof applies." (quoting United States v. Wiese, 896 F.3d 720, 724–25 (5th Cir. 2018)). Not all circuits have yet picked a side. *See* Acosta v. United States, No. 1:03-CR-00011-MAT, 2019 WL 4140943, at *7 n.7 (W.D.N.Y. Sept. 2, 2019) ("The Second Circuit has not addressed the petitioner's burden . . . ."); Sotelo v. United States, 922 F.3d 848, 855 (7th Cir. 2019) (declining to consider the question because movant "could not satisfy even [*Peppers*'s and *Geozos*'s] liberal standard of demonstrating that he *might* have been sentenced under the residual clause"). The Sixth Circuit seemed initially to adopt the preponderance-of-the-evidence standard, but an intra-circuit split has since splintered that court's caselaw in a manner that is beyond the scope of this Note. *See* Raines v. United States, 898 F.3d 680, 685–86 (6th Cir. 2018) (limiting the holding of an earlier decision in which the Sixth Circuit adopted the preponderance-of-the-evidence standard).

56. United States v. Taylor, 873 F.3d 476, 481 (5th Cir. 2017).

57. *Wiese*, 896 F.3d at 724–25. While the Fifth Circuit did not choose a side in *Wiese*, it did express a preference for the higher standard in dicta, writing: "We note that the 'more likely than not' standard appears to be the more appropriate standard since it comports with the general civil standard for review and with the stringent and limited approach of AEDPA to successive habeas applications." *Id.* at 724.

58. *Id.* at 725 (alteration in original) (internal quotations omitted) (quoting United States v. Washington, 890 F.3d 891, 896 (10th Cir. 2018)).

59. The Ninth Circuit gave the following illustration of the "background legal environment" concept:

> If, for instance, binding circuit precedent at the time of sentencing was that crime *Z* qualified as a violent felony under the force clause, then a court's failure to invoke the force clause expressly at sentencing, when there were three predicate convictions for crime *Z*, would not render unclear the ground on which the court's ACCA determination rested.

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

60. *Wiese*, 896 F.3d at 725–26.

In *United States v. Clay*, decided in April of 2019, the Fifth Circuit chose a side, joining those circuits that had adopted the preponderance-of-the-evidence standard.[61] The movant in that case, Glen B. Clay, was convicted of being a felon in possession of a firearm.[62] The charging document and the presentence report at trial both indicated that Clay was subject to sentence enhancement under the ACCA, and Clay's lawyer conceded that Clay had at least three prior convictions for predicate offenses, which ordinarily would trigger a sentence enhancement under the ACCA.[63] While the fact of Clay's prior convictions was not contested, the record at trial contained no documentation indicating which of Clay's numerous prior state-law convictions were the predicate offenses for his sentence enhancement.[64] In the words of the Fifth Circuit, "[B]ecause Clay's counsel conceded at his hearing that the ACCA applied, there was no occasion for the sentencing court to clarify how the requisite 'violent felonies' were tabulated."[65] The trial court applied the ACCA enhancement, sentencing Clay to prison for 235 months—more than nineteen years.[66] Clay filed direct appeals and an initial § 2255 motion on other grounds, but he did not succeed in having his conviction overturned or his sentence reduced.[67]

Following the Supreme Court's decisions in *Johnson* and *Welch*, however, Clay filed a successive[68] § 2255 motion, in which Clay also requested that the district court obtain documents that would shed light on the predicate offenses that formed the basis of his sentence enhancement.[69] Without obtaining such documents, the district court denied Clay's motion

61. United States v. Clay, 921 F.3d 550 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 866, 866 (2020) (mem.).

62. *Id.* at 553.

63. *Id.*

64. *Id.* at 555–56.

65. *Id.* at 556.

66. *Id.* at 553.

67. *Id.*

68. Under AEDPA, successive (i.e. subsequent) § 2255 motions are treated differently than initial § 2255 motions. 28 U.S.C. §§ 2244(b), 2255(h) (2018); *see also* United States v. Driscoll, 892 F.3d 1127, 1135 n.5 (10th Cir. 2018) ("In the context of a second or successive § 2255 motion, there are procedural hurdles not present when filing a first § 2255 motion."). This is a reflection of the general principle that AEDPA gives movants "one bite at the post-conviction apple" on collateral attack. Trenkler v. United States, 536 F.3d 85, 100 (1st Cir. 2008) (quoting United States v. Barrett, 178 F.3d 34, 57 (1st Cir. 1999)). In this context, however, the distinction is largely without a difference, as many courts that have confronted the issue have determined that the same standard of proof for determining whether a sentencing judge relied upon the residual clause should apply on initial and successive § 2255 petitions. *See, e.g.*, *Driscoll*, 892 F.3d at 1135 n.5 (10th Cir. 2018) (adopting a uniform standard for initial and subsequent § 2255 motions). *But see* Raines v. United States, 898 F.3d 680, 685 (6th Cir. 2018) (distinguishing earlier Sixth Circuit precedent endorsing preponderance-of-the-evidence on the basis that it involved a successive, rather than initial, § 2255 motion). Thus, while courts have framed the question differently in different contexts—in terms of § 2244(b) on successive motions and in terms of § 2255(b) on initial motions—the question in either case is whether the movant "relies on" *Johnson*.

69. *See Clay*, 921 F.3d at 553.

on the basis that he had not demonstrated that his sentence had been enhanced in reliance upon the residual clause and because, even if Clay had made such a demonstration, his prior convictions nonetheless qualified as predicate offenses under the enumerated offenses clause.[70] Clay sought—and was denied—a certificate of appealability from the district court.[71] Clay then sought—and was granted—a certificate of appealability from the Fifth Circuit Court of Appeals on two issues, one of which was "whether a prisoner seeking the district court's authorization to file a successive § 2255 motion raising a *Johnson* claim must establish that he was sentenced under the residual clause to show that the claim relies on *Johnson*."[72]

The court in *Clay* acknowledged the circuit split as well as its previous decisions on the issue of the standard of proof in *Wiese* and *Taylor*.[73] Clay argued that he was entitled to relief because the sentencing judge had necessarily deemed his prior convictions to be predicate offenses under the residual clause.[74] In the alternative, Clay argued that, where the prior convictions could have been deemed to be predicate offenses under more than one theory and the record is unclear as to which theory the sentencing judge actually employed, the "court should apply the rule of lenity and give him the benefit of the doubt."[75] While the court rejected the argument that Clay must have been sentenced under the unconstitutional residual clause, the court acknowledged the alternative argument that Clay may have been convicted on that basis:

> Without conviction records, this court cannot conclusively determine which statute(s) Clay was convicted of violating—and, accordingly, whether his prior convictions for "house burglary" qualified as "violent felonies" under the ACCA's enumerated offenses clause. Therefore, this court cannot rule out the possibility that the sentencing court relied solely on the residual clause to impose Clay's ACCA-enhanced sentence.[76]

Accordingly, the court explicitly acknowledged that, unlike *Taylor* (in which the Fifth Circuit held the movant would win under either standard)[77] and *Wiese* (in which the Fifth Circuit held the movant would lose under

70. *Id.* at 553–54.
71. *Id.* at 554.
72. *Id.*
73. *Id.* at 554–55.
74. *Id.* at 555.
75. *Id.* This argument is, in essence, an argument to extend the "*Stromberg* principle" beyond the context of general jury verdicts. *See infra* note 139 and accompanying text.
76. *Clay*, 921 F.3d at 558.
77. United States v. Taylor, 873 F.3d 476, 481 (5th Cir. 2017).

either standard),[78] Clay's case was "a situation where the standard of proof makes a difference to the outcome."[79]

With the issue of the standard of proof squarely before it, the Fifth Circuit sided with those circuits that had adopted the preponderance-of-the-evidence standard.[80] In support of its decision, the Fifth Circuit cited the preponderance-of-the-evidence standard's consistency with the "general civil standard for review" as well as the "stringent and limited approach of" AEDPA.[81] Consequently, Clay lost his appeal, and the district court's dismissal of his § 2255 post-*Johnson* motion was affirmed.[82] On January 13, 2020, the United States Supreme Court denied Clay's petition for a writ of certiorari, ending Clay's chances for relief under *Johnson* and leaving unresolved the circuit split regarding the standard of proof courts should use in evaluating claims for relief under *Johnson.*[83]

II. WHY *CLAY* WAS WRONGLY DECIDED

The Fifth Circuit's decision in *Clay* was incorrect for two main reasons. First, the *Clay* decision is inconsistent with the current state of the law as expressed in statute and Supreme Court precedent regarding the ACCA's residual clause. Second, the preponderance-of-the-evidence standard adopted by the Fifth Circuit in *Clay* leads to inconsistent and unjust results.

A. Clay *Is Inconsistent with the Law Governing Collateral Relief for Federal Prisoners*

1. The Presumption of Finality Is Not Absolute

The Fifth Circuit's decision in *Clay*, along with the decisions of its sister circuits adopting the preponderance-of-the-evidence standard for *Johnson* relief, is incorrect in its application of the current state of the law regarding collateral relief for federal prisoners. In short, the *Clay* decision was

78. United States v. Wiese, 896 F.3d 720, 724–25 (5th Cir. 2018).

79. *Clay*, 921 F.3d at 558. The Fifth Circuit explained:

> On the record before this court, Clay has shown that the sentencing court "may have" relied on the residual clause to enhance his sentence. Therefore, if this court adopts the standard articulated by the Fourth, and Ninth Circuits, Clay will have sustained his burden of proof . . . . However, Clay has not shown that the sentencing court "more likely than not" relied on the residual clause . . . . Therefore, if this court adopts the standard articulated by the First, Third, Sixth, Eighth, Tenth, and Eleventh Circuits, Clay will have failed to prove that his successive § 2255 petition relies on *Johnson* . . . .

Id.

80. *Id.* at 558–59.

81. *Id.* at 559 (quoting *Wiese*, 896 F.3d at 724).

82. *Clay*, 921 F.3d at 559.

83. Clay v. United States, 140 S. Ct. 866, 866 (2020) (mem.).

grounded largely upon AEDPA's "stringent and limited approach,"[84] which is to say it was grounded largely upon respect for the presumption of finality,[85] but an analysis of the court's opinion reveals that the Fifth Circuit has conflated a *presumption* of finality with the notion that criminal judgments should be virtually impervious to attack.[86] As Congress has made clear in statutes and the Supreme Court has made clear in its decisions, however, the presumption of finality is merely that: a presumption.[87] And like all presumptions, the presumption of finality can be overcome.[88] Congress and the Supreme Court have likewise indicated by their actions in analogous situations that collateral attacks in response to a change in substantive law like the one announced in *Johnson* is a circumstance in which the presumption of finality should be defeated and relief should be afforded.[89]

While the inclusion of the word "presumption" should be enough to indicate that finality is not absolute, Congress's statutory scheme also indicates that certain criminal judgments should be subject to collateral attack.[90] The Fifth Circuit in *Clay* cited AEDPA's "stringent and limited approach" as a justification for adopting the harsher preponderance-of-the-evidence standard in *Johnson* collateral review.[91] While there is no denying AEDPA is harsh in some respects[92] and that its purpose is to make collateral attacks more burdensome for movants in certain circumstances,[93] AEDPA

84. One of the two justifications the *Clay* court cited in favor of adopting the preponderance-of-the-evidence standard was "the stringent and limited approach of [AEDPA]." *Clay*, 921 F.3d at 559 (quoting *Wiese*, 896 F.3d at 724). The other justification was that the standard "comports with the general civil standard for review." *Id.* However, this is not a normative argument for what the standard of proof in this context should be as much as an (unsupported) observation about what the most common or "default" civil standard of proof is. In any case, preponderance-of-the-evidence certainly is not the only civil standard of proof, nor is it even the only civil standard of proof in the context of § 2255. *See* 28 U.S.C. § 2255(h)(1) (2012) (requiring "clear and convincing" standard for successive motions based on newly discovered evidence).

85. Courts have recognized that the presumption of finality is "an animating principle of AEDPA." Dimott v. United States, 881 F.3d 232, 240 (1st Cir. 2018); *see also* Williams v. Taylor, 529 U.S. 420, 436 (2000) (noting that "finality" is one of AEDPA's purposes).

86. *Cf.* Engle v. Isaac, 456 U.S. 107, 135 (1982) (noting that principle of finality "must yield to the imperative of correcting a fundamentally unjust incarceration" in certain circumstances).

87. 28 U.S.C. § 2255 (allowing for post-conviction relief in certain circumstances); Henderson v. Kibbe, 431 U.S. 145, 154 n.13 (1977) (noting that the presumption of finality must be overcome before post-conviction relief may be granted).

88. *See* Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (holding that "final and presumptively correct convictions" may be overturned if habeas petitioner can satisfy the *Kotteakos* harmless-error standard).

89. 28 U.S.C. § 2255(a) (2018); *see also infra* note 135 and accompanying text.

90. 28 U.S.C. § 2255(a).

91. United States v. Clay, 921 F.3d 550, 559 (5th Cir. 2019).

92. *See supra* note 43 and accompanying text.

93. *See, e.g.*, Holland v. Florida, 560 U.S. 631, 648 (2010) (noting that "AEDPA seeks to eliminate delays in the federal habeas review process"); United States v. Brooks, 230 F.3d 643, 648 (3d

was not designed to make collateral attack impossible.[94] On the contrary, AEDPA reenacted § 2255, which explicitly requires courts to grant collateral relief "[i]f . . . the sentence imposed was not authorized by law."[95] Thus, while AEDPA no doubt contains procedural hurdles, it also creates pathways to collateral relief, and so the hurdles should not be construed so broadly as to swallow up § 2255 and deprive it of effect entirely.

The Supreme Court has recognized the limits of the presumption of finality in its decisions as well.[96] In *Welch* itself, the Court recognized that the retroactivity of a new rule of constitutional law depends on "a balance between, first, the need for finality in criminal cases, and second, the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law."[97] Thus, a court deciding an issue on collateral review should not reflexively deny relief to the movant on the basis of the presumption of finality. Instead, the presumption of finality is merely one side of a balancing test, the other side of which is the "imperative" that unconstitutional sentences be corrected.[98] In the words of Justice Harlan, "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[99] Thus, when a judgment has been rendered contrary to law, the presumption of finality is at its weakest.[100] In those circumstances, the quantum of evidence necessary to tip the balance in the favor of the movant should not be unduly high.

2. Johnson *Represents One of the Circumstances in Which the Presumption of Finality Should Be Overcome*

Given that the presumption of finality must give way in at least some circumstances, the question becomes, "In which circumstances?" The answer is found in an analysis of the statutory scheme and caselaw surrounding collateral attacks. When there has been a change in substantive

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Cir. 2000) (noting that AEDPA increased burdens for movants on second or successive habeas motions), *on reh'g*, 245 F.3d 291 (3d Cir. 2001); Duncan v. Walker, 533 U.S. 167, 178 (2001) (noting that AEDPA "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments").

94. *See, e.g.*, *Holland*, 560 U.S. at 649 ("When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" (quoting Slack v. McDaniel, 529 U.S. 473, 483 (2000))). Thus, while one of the goals of AEDPA was, for example, to reduce delays in federal habeas proceedings, "[i]t did not seek to end every possible delay at all costs." *Id.*

95. 28 U.S.C. § 2255(b).

96. Welch v. United States, 136 S. Ct. 1257, 1266 (2016).

97. *Id.*

98. *Id.*

99. *Id.* (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part)).

100. *Id.*

law that renders previous judgments unconstitutional (such as the change announced in *Johnson*),[101] the status quo of the wrongfully sentenced prisoners is one of those points where, in Justice Harlan's words, the criminal process "ought properly never to repose."[102] This is evident both from the text of § 2255[103] itself and the Supreme Court's decades-long struggles with the ACCA's residual clause.[104]

AEDPA itself, for all its harshness, provides for scenarios in which the presumption of finality should give way. For example, one of the stringent procedural hurdles imposed on habeas movants by AEDPA is a one-year statute of limitations.[105] Ordinarily, the statute of limitations runs from "the date on which the judgment of conviction becomes final."[106] However, the statute of limitations is pushed back in certain circumstances, including when the right asserted "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[107] This exception, which allows for the habeas petitions of *Johnson* movants who were sentenced more than a year before *Johnson* was announced,[108] reveals that Congress has decided that a *Johnson*-type scenario (that is, one in which a new, retroactive substantive rule of law is announced)[109] should trigger more equitable exceptions to AEDPA's ordinarily harsh rules. The presumption of finality, in other words, gives way in certain circumstances,

101. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015); *Welch*, 136 S. Ct. at 1265.

102. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part).

103. 28 U.S.C. § 2255(a) (2012).

104. *See Johnson*, 135 S. Ct. at 2559 (noting *Johnson* was the Court's "fifth [case] about the meaning of the residual clause"); *see also infra* notes 112–115 and accompanying text.

105. 28 U.S.C. § 2255(f) reads:

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

While AEDPA retained much of the language from previous versions of § 2255, the statute of limitations was a new addition in AEDPA. Flanagan v. Johnson, 154 F.3d 196, 198 (5th Cir. 1998) ("Prior to AEDPA, there was no specific period of limitation governing federal habeas corpus petitions . . . .").

106. 28 U.S.C. § 2255(f)(1).

107. 28 U.S.C. § 2255(f)(3)–(4). The other circumstances are when the movant is prevented from making a motion by illegal governmental action and when the facts supporting the claim were not initially known or discoverable through the exercise of due diligence. *Id.*

108. *See, e.g.*, Cross v. United States, 892 F.3d 288, 293–94 (7th Cir. 2018) (noting that movants' post-*Johnson* motions were timely under 28 U.S.C. § 2255(f)(3)).

109. Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

and Congress through § 2255(f)(3) has singled out a *Johnson*-type scenario as one of those situations.[110]

The Supreme Court's decades-long effort to salvage the residual clause (which ultimately proved to be in vain) also indicates that the decision in *Johnson* was meant to have substantial consequences.[111] In its decisions involving the ACCA's residual clause prior to *Johnson*, the Court refined its interpretation of the statute four times in order to save the clause from unconstitutionality.[112] In *Johnson*, Justice Scalia wrote that "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy."[113] In recognition of this unworkability, the Court acknowledged explicitly that it had to go against the weight of stare decisis in order to render its decision striking down the residual clause.[114] In a vehement dissent, Justice Alito agreed that to overrule precedent that had been so frequently and so recently reaffirmed time and time again was extraordinary.[115] Related to the principle of stare decisis is the principle of constitutional avoidance, under which courts are supposed to decide cases on non-constitutional grounds if at all possible.[116] What these principles of constitutional lawmaking have in common is that they are undergirded by an understanding that new rules of constitutional law have a disruptive effect on the legal system and a society

110. 28 U.S.C. § 2255(f)(3).

111. In addition to suggesting that striking down the residual clause was understood and intended to have significant consequences, the Supreme Court's repeated attempts to salvage the residual clause exacerbated the problem of unclear records on collateral attack. *See infra* Section II.B.2.

112. *See* Chambers v. United States, 555 U.S. 122 (2009), *abrogated by* Johnson v. United States, 135 S. Ct. 2551 (2015); Begay v. United States, 553 U.S. 137 (2008), *abrogated by Johnson*, 135 S. Ct. 2551; James v. United States, 550 U.S. 192 (2007), *overruled by Johnson*, 135 S. Ct. 2551. In a dissenting opinion in *Sykes v. United States*, Justice Scalia wrote:

> [T]his case is "another in a series" . . . . More specifically, it is an attempt to clarify, for the fourth time since 2007, what distinguishes "violent felonies" under the residual clause of the [ACCA] from other crimes. . . .
>
> As was perhaps predictable, instead of producing a clarification of the Delphic residual clause, today's opinion produces a fourth ad hoc judgment that will sow further confusion.

Sykes v. United States, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting) (internal citations omitted), *overruled by Johnson*, 135 S. Ct. 2551.

113. *Johnson*, 135 S. Ct. at 2558. *See also id.* at 2573 (Thomas, J., concurring in the judgment) ("Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one.").

114. *Id.* at 2563 (majority opinion).

115. *Id.* at 2575 (Alito, J., dissenting). The justices' agreement on this point is particularly compelling given that Justice Alito's dissent is in disagreement with the majority opinion on virtually every other issue. *Id.* at 2573.

116. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

that make decisions in reliance on the consistency of the law.[117] The desire to avoid such disruption may be one argument against making new rules of constitutional law, but once a new rule of constitutional law has been announced, disruption is to be expected.[118]

In light of the Court's long struggle with the residual clause and the weight of bedrock principles of constitutional interpretation favoring its continued validity, the Court's decision in *Johnson* should be seen as a reasoned and knowing departure from well-established law. As such, it should not be surprising that *Johnson* might disrupt the status quo of finality in collateral attacks.[119] Indeed, Justice Alito likened the potential fallout from *Johnson* to "a nuclear explosion."[120] That is not to say that the effect of *Johnson* should be to upend the law of collateral attacks or entirely overwhelm legitimate concerns about the federal docket's caseload.[121] What the Supreme Court's trepidation in rendering the *Johnson* decision should demonstrate, though, is that the abrogation of the residual clause was meant to have consequences, even disruptive ones. And in fact the Supreme Court has extended its holding in *Johnson* to other federal statutes that include residual clauses whose language resembles that of the ACCA, proving the contention that *Johnson* was meant to substantially alter the law.[122] As such, the notion that it would be disruptive to give effect to *Johnson* by reconsidering sentence enhancements that were possibly decided on the basis of the residual clause, while perhaps an accurate observation, is not a compelling argument for imposing a high burden on movants. The Court in *Johnson* acknowledged[123] Justice Alito's dissent predicting disarray as a result of the abrupt abandonment of such firmly established precedent,[124]

117. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (citing Vasquez v. Hillery, 474 U.S. 254, 265–266 (1986))); *Ashwander*, 297 U.S. at 345 (acknowledging "great gravity and delicacy" of decisions concerning constitutionality of Congressional acts).

118. *See, e.g.*, Cross v. United States, 892 F.3d 288, 296 (7th Cir. 2018) ("[W]hen the Supreme Court reverses course, the change generally indicates an abrupt shift in law.").

119. *Id.*

120. *Johnson*, 135 S. Ct. at 2577 (Alito, J., dissenting).

121. Indeed, available figures suggest that federal courts' caseloads in the wake of *Johnson* spiked substantially. United States v. St. Hubert, 918 F.3d 1174, 1179 (11th Cir. 2019) (Tjoflat, J., concurring in the denial of rehearing en banc) (indicating a ten-fold increase in successive § 2255 motions in the year following *Johnson*).

122. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1210–11 (2018) (citing *Johnson* and holding unconstitutional the Immigration and Nationality Act's definition of "crime of violence," which contains a residual clause virtually identical to the one in the ACCA); United States v. Davis, 139 S. Ct. 2319 (2019) (citing *Johnson* and holding unconstitutional the residual clause in 18 U.S.C. § 924(c), which concerns the use of a firearm in connection with certain crimes).

123. *See, e.g.*, *Johnson*, 135 S. Ct. at 2558, 2560, 2562 (responding to Justice Alito's dissenting opinion).

124. *Id.* at 2557 (Alito, J., dissenting).

but the Court struck down the ACCA's residual clause nonetheless.[125] In short, lower courts should not attempt to blunt the effect of *Johnson* due to concerns over disruption because the Supreme Court knew—and perhaps even intended—that *Johnson* would be disruptive.[126]

3. *Post*-Johnson *Movants Should Get the Benefit of the Doubt When the Record Is Unclear*

The Supreme Court's decisions involving another aspect of the ACCA—the modified categorical approach[127]—provide an example of lenity in the face of uncertainty that should be followed in determining the standard of proof required after *Johnson*. Prior to 1986, the only predicate offenses under the ACCA were "robbery or burglary," each of which was defined more specifically in the statute.[128] When the ACCA acquired its current form in 1986 (in which the definitions of the enumerated clauses were eliminated and the residual clause was added, among other changes),[129] the Supreme Court was faced with the question of how to determine whether a given conviction qualified as an ACCA predicate offense.[130]

In *Taylor v. United States*, the Supreme Court adopted the categorical approach, which requires courts to consider not the facts of the particular instance of the crime on which conviction was based but rather the elements of the offense in the abstract.[131] When a statute provides for multiple means by which a crime may be committed, a conviction under that statute may qualify as a predicate offense if the crime was accomplished by one means but not if it was accomplished by another means.[132] In these situations, the

125. *Id.* at 2563 (majority opinion).

126. *See* Cross v. United States, 892 F.3d 288, 296 (7th Cir. 2018) ("[W]hen the Supreme Court reverses course, the change generally indicates an abrupt shift in law.").

127. Taylor v. United States, 495 U.S. 575, 602 (1990) (describing the modified categorical approach); Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (citing *Taylor* and referring to this approach as the "modified categorical approach").

128. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1803(2), 98 Stat. 2185; *Taylor*, 495 U.S. at 581.

129. Career Criminals Amendment Act of 1986, Pub. L. 99-570, 100 Stat. 3207–39; *Taylor*, 495 U.S. at 582.

130. *Taylor*, 495 U.S. at 580 ("On the face of the federal enhancement provision, it is not readily apparent whether Congress intended 'burglary' to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a § 924(e) enhancement.").

131. *Id.* at 600; *see also supra* note 32 and accompanying text.

132. Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) ("This case concerns a . . . law . . . that enumerates various factual means of committing a single element."). In *Mathis*, the Supreme Court considered whether a conviction under an Iowa statute, which defined a type of burglary that could be accomplished by multiple means, could count as a predicate offense under the ACCA. *Id.* at 2249–50. This type of analysis, however, requires reference to another legal invention that leads to even more wrinkles in ACCA caselaw: the "generic" version of crimes. *Id.* "Generic burglary," for example, is

Court has approved use of a "modified categorical approach," under which courts look beyond the mere fact of conviction "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of."[133] When those documents do not prove with certainty the set of elements under which the defendant was convicted, however, it is impossible to say whether the prior conviction qualifies as a predicate offense.[134] Since *Taylor*, the Supreme Court has clarified the effect of unclear records in the context of determining whether a given state statute qualifies as an ACCA predicate offense, holding that "*Taylor*'s demand for certainty" will not support a sentence enhancement on the basis of an unclear record.[135] By contrast, the preponderance-of-the-evidence standard permits an ACCA sentence enhancement to stand when the record is unclear as to whether it was imposed unconstitutionally on the basis of the residual clause.[136] As such, the standard adopted by the Fifth Circuit in *Clay* seems to fly in the face of the Supreme Court's ACCA jurisprudence by allowing sentence enhancements to stand when the record is unclear.[137]

The reasoning behind *Taylor*'s "demand for certainty"[138] also underlies the analogous principle from *Stromberg v. California*.[139] The *Stromberg* principle holds that when a jury delivers a general verdict that could have rested on more than one ground, one of which is later deemed to be

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defined as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." United States v. Mathis, 786 F.3d 1068, 1072 (8th Cir. 2015) (quoting *Taylor*, 495 U.S. at 599), *rev'd*, 136 S. Ct. 2243 (2016).

133. Mathis v. United States, 136 S. Ct. at 2249.

134. *See, e.g.*, *Taylor*, 495 U.S. at 602 (overturning ACCA sentence enhancement because "it is not apparent to us from the sparse record before us which of [various burglary] statutes were the bases for [petitioner's] prior convictions").

135. Mathis v. United States, 136 S. Ct. at 2257 ("Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense." (quoting Shepard v. United States, 544 U.S. 13, 21 (2005)).

136. United States v. Clay, 921 F.3d 550, 558–59 (5th Cir. 2019).

137. In other words, had the charging documents, sentencing colloquy, etc. relating to Clay's prior convictions been ambiguous as to whether Clay's prior convictions had been for valid predicate offenses, *Taylor* would require Clay's sentence enhancement to be vacated. *Shepard*, 544 U.S. at 21. By contrast, under the Fifth Circuit's decision in *Clay*, ambiguity in those same documents as to which clause of the ACCA formed the basis of the sentence enhancement does not require the sentence to be vacated. *Clay*, 921 F.3d at 558–59; *see also supra* note 65 and accompanying text.

138. *Shepard*, 544 U.S. at 21.

139. In *Stromberg v. California*, 283 U.S. 359 (1931), the Supreme Court reviewed the decision of a California court in which the defendant was convicted for violating a statute that criminalized displaying flags or banners in any of several manners. The defendant was convicted on a general verdict that "did not specify the ground upon which it rested." *Id.* at 367–68. On appeal, the statute was partially struck down as unconstitutional, but the appellate court upheld the conviction as having been based on other, constitutional provisions of the statute. *Id.* The Supreme Court reversed and remanded, holding that the conviction could not stand because one of the provisions was unconstitutional, and it was impossible to determine on which provision the jury's verdict had been based. *Id.* at 369–70.

unconstitutional, and it is not clear on which ground the verdict rested, that verdict cannot stand.[140] In *United States v. Geozos*, the Ninth Circuit analogized to the *Stromberg* principle in adopting the may-have standard for relief under *Johnson*.[141] The Ninth Circuit reasoned that if a jury verdict that was possibly unconstitutional cannot stand, neither should a sentence enhancement that was possibly unconstitutional.[142] Applying this reasoning to a *Johnson* claim, the *Geozos* court held that an ACCA sentence enhancement could not stand when the record was unclear as to which clause of the ACCA the movant's sentence enhancement was based upon.[143] Instead, where either positive evidence or a lack of a clear record raises the possibility that the unconstitutionally vague residual clause was the basis for enhancement, the sentence must be vacated.[144] The *Stromberg* principle and the Supreme Court's decision in *Taylor* thus stand for the proposition that, when an unclear record gives rise to the possibility that a criminal conviction or sentence was imposed unconstitutionally, courts should err on the side of lenity.[145]

B. The Preponderance-of-the-Evidence Standard Announced in Clay *Is Unfair*

In addition to being incongruous with the law governing federal habeas proceedings as contained in relevant statutes, Supreme Court precedent, and principles from analogous areas of law, the preponderance-of-the-evidence standard the Fifth Circuit adopted in *Clay* is unfair and unjust. The standard leads to inconsistent results based on little more than happenstance.[146] While inconsistency is in and of itself undesirable in the law,[147] especially within

140. United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017) ("[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." (quoting Griffin v. United States, 502 U.S. 46, 53 (1991))).

141. *Id.*

142. *Id.* ("[I]t does not follow that, when a judge makes a finding that a defendant qualifies for an enhanced sentence, and that finding may rest on an unconstitutional ground, the finding should be treated any differently than a finding made by a jury for the purpose of conviction.").

143. *Id.* ("We are persuaded that a rule analogous to the *Stromberg* principle should apply in the sentencing context.").

144. *Id.*

145. *Id.* ("Indeed, treating [*Stromberg* situations and *Johnson* situations] differently because one involves sentencing and the other involves conviction would be contrary to the principle that any 'fact increasing either end of [a sentencing] range produces a new penalty and constitutes an ingredient of the offense.'" (second alteration in original) (quoting Alleyne v. United States, 570 U.S. 99 (2013))).

146. *See infra* Section II.B.1.

147. *Cf.* Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("[A] traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law . . . .").

the context of the criminal law,[148] inconsistency is especially unwelcome in the context of habeas relief under the ACCA. This is because § 2255 motions challenging ACCA enhancements necessarily involve sentences of at least fifteen years in prison, and such sentences demand fairness and equitable administration.[149] The preponderance-of-the-evidence standard does not meet this demand because it will require some movants to spend years in prison serving out unconstitutional sentences for no reason other than the bad luck of having a sentencing judge who was inexplicit at the time of sentencing.[150] These problems are exacerbated by the Supreme Court's having repeatedly and consistently upheld the constitutionality of the ACCA and its residual clause.[151] Because sentencing judges had been continually reassured by way of successive Supreme Court opinions that the residual clause was constitutional, judges had no reason to believe there was constitutional significance in *which* clause of the ACCA the sentence enhancement was based.[152] As such, judges would have had little reason to memorialize their thought process at the time of sentencing, potentially leading to a greater quantity of unclear records on collateral review.[153]

1. The Preponderance-of-the-Evidence Standard Leads to Inconsistent Results

What is at stake in the debate between higher and lower standards for *Johnson* relief was explained best by the Eleventh Circuit in *In re Chance*.[154] The court referenced an example "involving two defendants, sentenced on the same day, for the same offense, by the same judge, with the same ACCA predicates."[155] If the judge sentenced both defendants under the residual clause but only made that basis explicit in one of the cases, then only one of the defendants would get relief under the preponderance-of-the-evidence standard.[156] Such disparate outcomes offend basic notions of fairness

148. Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (citing "principle of treating similarly situated defendants the same").

149. *See* Johnson v. United States, 135 S. Ct. 2551, 2560 (2015) ("Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.").

150. *See, e.g.*, *In re* Chance, 831 F.3d 1335, 1340–41 (11th Cir. 2016).

151. *See infra* Section II.B.2.

152. United States v. Bennerman, 785 F. App'x 958, 961 (4th Cir. 2019).

153. *In re Chance*, 831 F.3d at 1340 ("Nothing in the law requires a judge to specify which clause of § 924(c)—residual or elements clause—it relied upon in imposing a sentence.").

154. *Id.* at 1340–41.

155. Beeman v. United States, 871 F.3d 1215, 1228–29 (11th Cir. 2017) (Williams, J., dissenting) (citing *In re Chance*, 831 F.3d at 1341).

156. *In re Chance*, 831 F.3d at 1340–41.

because "selective application of new rules violates the principle of treating similarly situated defendants the same."[157]

Accordingly, inconsistent results, on their own, are undesirable because they reflect arbitrariness in the law—the very thing the decision in *Johnson* itself was designed to eliminate by striking down the ACCA's residual clause as unconstitutionally vague.[158] The circumstances of the inconsistency at issue here, however, mean that not only will winners and losers be determined arbitrarily, but the United States will detain the losers in federal prison for years longer than the constitution would permit, if not for a judge's brevity at sentencing.[159] This is unacceptable.[160] As the court wrote in Johnson, "Invoking so shapeless a provision [as the ACCA's residual clause] to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process."[161] Determining whether someone must serve out such a sentence on the basis of "whether the district court used the words 'residual clause' at his potentially decades-old sentencing"[162] is equally offensive to due process. This possibility that a movant's remaining in prison might depend on what the sentencing judge decided to commit to the record is not a remote possibility trotted out in a parade of horribles; in *Clay* itself, the record on collateral review was unclear in part because defense counsel saw no occasion to ensure that the record reflected which clause of the ACCA the sentence enhancement was based on.[163] The Fifth Circuit acknowledged that it could not "rule out the possibility that the sentencing court relied solely on the residual clause to impose Clay's ACCA-enhanced sentence."[164] This means, in no uncertain

157. Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (citing Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting)).

158. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015) (holding the residual clause unconstitutionally vague because it "both denies fair notice to defendants and invites arbitrary enforcement by judges").

159. *See* United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017) (suggesting that denying *Johnson* relief due to an unclear record "penalize[s] a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony").

160. The seemingly obvious proposition that whether someone spends additional years in prison should depend on more than sheer luck is, apparently, controversial. In *Beeman v. United States*, the Eleventh Circuit wrote:

> Nor are we persuaded by Beeman's argument that requiring a § 2255 movant raising a *Johnson* claim to carry his burden of proof and persuasion would make the outcome depend on the "fluke" of a district court having expressly stated which clause it was relying on. If true, that would be equally true whichever side bears the burden. It is no more arbitrary to have the movant lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one.

871 F.3d at 1223–24.

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

162. *In re* Chance, 831 F.3d 1335, 1340 (11th Cir. 2016).

163. United States v. Clay, 921 F.3d 550, 556 (5th Cir. 2019); *see also supra* note 65 and accompanying text.

164. *Clay*, 921 F.3d at 558.

terms, that the Fifth Circuit recognized that Glen B. Clay's sentence very well could have been unconstitutional, but the court decided to err on the side of imprisonment in the face of a silent record.[165]

2. *The Problem Is Compounded by the Supreme Court's Failure to Recognize the Unconstitutionality of the Residual Clause Prior to* Johnson

The Supreme Court's delay in striking down the residual clause is regrettable for the simple reason that it permitted the imposition of unconstitutional sentence enhancements under the residual clause for nearly three decades.[166] However, the Court's meandering path toward finally striking down the residual clause in *Johnson* was damaging for the additional reason that it exacerbated the problem of unclear records on collateral review.[167] Without the Supreme Court's insistence that the residual clause was firmly established as constitutional, judges and defendants might have had more reason to insist that the record be more explicit due to the possibility that the basis for enhancement would have constitutional significance.[168] Instead, the Supreme Court repeatedly upheld the residual clause's constitutionality,[169] and so "courts had little reason to think the choice [of which clause formed the basis of the sentence enhancement] would matter."[170] Since judges and defense counsel believed it made no difference whether a sentence enhancement was based on the residual clause as opposed to, say, the elements clause,[171] sentencing records reflected this indifference through their silence on the matter.[172] It is a cruel irony that some movants may be forced to serve out unconstitutional prison

165. *Id.* at 558–59. In the words of the Fourth Circuit, courts adopting the preponderance-of-the-evidence standard have essentially decided to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017).

166. *See In re* PSLJ, Inc., 904 F.2d 701, 701 (4th Cir. 1990) (per curiam) ("It is a time-honored statement that 'justice delayed is justice denied . . . .'").

167. United States v. Bennerman, 785 F. App'x 958, 961 (4th Cir. 2019).

168. Ironically, the "relevant background legal environment" concept is turned on its head when seen in this light. *See supra* notes 58–59 and accompanying text. Courts like the Ninth Circuit have cited the "relevant background legal environment" as a ground for upholding a sentence enhancement despite an unclear record. United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017). However, given the residual clause's pedigree of constitutionality prior to *Johnson*, the "background legal environment" would seem to indicate that a judge would have thought herself on firm constitutional ground in relying on the residual clause. *See* Cross v. United States, 892 F.3d 288, 296 (7th Cir. 2018).

169. Johnson v. United States, 135 S. Ct. 2551, 2573 (2015) (Alito, J., dissenting) (criticizing the majority for striking down the residual clause "even though we have twice rejected that very argument within the last eight years"); *Cross*, 892 F.3d at 296 ("Until *Johnson*, the Supreme Court had been engaged in a painful effort to make sense of the residual clause.").

170. *Bennerman*, 785 F. App'x at 961.

171. *See supra* note 27 and accompanying text.

172. *Bennerman*, 785 F. App'x at 961.

sentences because the Supreme Court was so adamant about the residual clause's constitutionality before "the Court made a U-turn and tossed out the ACCA residual clause as unconstitutionally vague."[173]

An illustration of this point can be seen in an analogy to the concept of non-mutual offensive collateral estoppel (NMOCE).[174] NMOCE refers to a situation in which a defendant is sued by two different plaintiffs over the same issue. If the defendant loses the first case, should that judgment be used against the defendant in the second case to estop him from relitigating an issue on which he has already lost? The Supreme Court has permitted NMOCE in certain circumstances, but it has also noted the potential of NMOCE to be "unfair" to defendants: "If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable."[175] In light of this and other potential sources of unfairness, a plaintiff attempting to assert NMOCE must satisfy certain criteria, including that "there was a full and fair opportunity to litigate the identical issue in the prior action."[176] Due also to these concerns, NMOCE is considerably more limited in the criminal context than the civil context.[177]

The same concerns about incentives are present in the context of post-*Johnson* relief.[178] Because the Supreme Court had reiterated the constitutionality of the residual clause time and time again,[179] "future suits" regarding which clause of the ACCA supported the sentence enhancement were "not foreseeable" at the time of sentencing.[180] As such, the "defendant in the first action" would have had "little incentive" to litigate the issue of which clause applied.[181] For the same reasons the use of NMOCE against criminal defendants is disfavored, the potential for detrimental reliance upon the Supreme Court's repeated affirmations of the residual clause's

173. *Cross*, 892 F.3d at 296.

174. "Collateral estoppel" is sometimes referred to as "issue preclusion." Yeager v. United States, 557 U.S. 110, 119 n.4 (2009).

175. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) (citing The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944)).

176. Syverson v. Int'l Bus. Machs. Corp., 472 F.3d 1072, 1078 (9th Cir. 2007).

177. *See* Standefer v. United States, 447 U.S. 10, 25 (1980) (noting that "'[t]he public interest in the accuracy and justice of criminal results' . . . outweigh[s] the economy concerns that undergird the estoppel doctrine" in the civil context (quoting United States v. Standefer, 610 F.2d 1076, 1093 (3d Cir. 1980))). Nonetheless, the Supreme Court has not banned the use of NMOCE against criminal defendants entirely, and some courts continue to allow it. *See* State v. Huffine, 422 P.3d 102, 109–11 (Mont. 2018) (collecting cases and noting that only one federal circuit allows for NMOCE against criminal defendants).

178. *See Cross*, 892 F.3d at 296.

179. *See supra* notes 112–115 and accompanying text.

180. *Parklane*, 439 U.S. at 330.

181. *Id.*

constitutionality should militate against upholding ACCA sentence enhancements on the basis of an incomplete record.

At least one court has recognized (in a slightly different context) the possibility that defendants and their counsel could have relied to their detriment on the Supreme Court's repeated confirmations of the validity of the residual clause.[182] In *Cross v. United States*, the Seventh Circuit considered the § 2255 motions of two prisoners who challenged their sentences under a provision of the U.S. Sentencing Guidelines that was virtually identical to the ACCA's residual clause.[183] The government argued the movants' claims should be denied for failure to challenge the constitutionality of the residual clause at trial.[184] Noting that prior to *Johnson*, the Supreme Court "took the position that the validity of the residual clause was so clear that it could summarily reject" arguments to the contrary, the Seventh Circuit "excus[ed] . . . the petitioners' failure to challenge the residual clause prior to *Johnson*."[185] In the same way that supposed certainty over the constitutionality of the residual clause would have kept defendants from raising the issue at trial, supposed certainty over the constitutionality of the residual clause would have also kept judges from memorializing the basis for the sentence enhancement in the record. Thus, for the same reasons the Seventh Circuit excused the movants in *Cross*, courts like the Fifth Circuit should not make post-*Johnson* movants pay the price for the Supreme Court's misplaced confidence in the constitutionality of the residual clause in the years before *Johnson*.

III. PROPOSAL

In order to address the inconsistencies and inequities perpetuated by the circuit split over what standard of proof should apply to § 2255 habeas motions seeking relief under *Johnson*, the Supreme Court should take two actions. First, the Court should grant certiorari to one of the many petitioners whose claims have been denied due to an inability to meet the preponderance-of-the-evidence standard.[186] Doing so will resolve the split

182. *Cross*, 892 F.3d 288.
183. *Id.*
184. *Id.* at 294.
185. *Id.* at 296.
186. The Supreme Court has repeatedly denied petitions for certiorari in cases involving the denial of post-*Johnson* § 2255 motions decided under the preponderance-of-the-evidence standard. *See* Dimott v. United States, 881 F.3d 232 (1st Cir.), *cert. denied*, 138 S. Ct. 2678 (2018) (mem.); Walker v. United States, 900 F.3d 1012 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2715 (2019) (mem.); United States v. Washington, 890 F.3d 891 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 789 (2019) (mem.); Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019) (mem.).

among the circuits and clarify what the correct standard of proof is.[187] The need for lenity and consistency in the context of post-*Johnson* relief is especially strong when considered in light of the many ways in which ACCA sentence enhancements are already on potentially precarious constitutional footing.[188] Importantly, these same factors are among those considered most critical to the Supreme Court's decision whether to grant certiorari in a given case.[189]

Moreover, adopting the may-have standard will be unlikely to lead to the "nuclear explosion" Justice Alito feared when he opposed the decision in *Johnson* in the first place.[190] Indeed, there are a number of considerations that would soften the effect of an adoption of the may-have standard. As an initial matter, it is important to emphasize that satisfaction of the standard of proof that is the subject of this Note does not lead to the movant's immediate release from prison or even his sentence being overturned; instead, a movant who shows that he "relies" on *Johnson* is simply entitled to have his sentence corrected.[191] Of course, correction of a sentence may result in the release of a movant if there is no legal basis for his continued imprisonment,[192] a result that can hardly be opposed. In other cases, though, the remedy may be more subtle due to the fact that harmless error review applies in the merits phase of a § 2255 motion.[193] Thus, if a movant's underlying convictions qualify as predicate offenses under another clause of the ACCA (such as the enumerated offenses clause), the sentence enhancement will stand.[194]

The second component of this proposal is that, in order to prevent similar problems in the future, the Supreme Court should extend the applicability

187. *Cf.* Mohamad v. Palestinian Auth., 566 U.S. 449, 452 (2012) (deciding a case in order "to resolve a split among the Circuits").

188. For example, due to the categorical approach, someone convicted of a "violent felony" need not actually have acted violently. *See supra* note 33 and accompanying text. As the Supreme Court has noted, there are potential Sixth Amendment concerns regarding the ACCA. *See supra* note 32 and accompanying text. Some circuits permit judges to rely on their apprehension of the "relevant legal background environment" at the time of sentencing instead of looking to the record. *See supra* notes 58–59. Moreover, the risk of error is compounded by the fact that habeas challenges to ACCA sentence enhancements necessarily involve multiple proceedings, possibly in different jurisdictions and spread over decades. Given the risk for error—and the grave consequences inherent in a fifteen-year mandatory sentence—a just and uniform standard is badly needed.

189. *See* SUP. CT. R. 10; BUREAU OF NAT'L AFFAIRS, *Chapter 4. Factors Motivating the Exercise of the Court's Certiorari and Appellate Jurisdiction*, in SUPREME COURT PRACTICE (2019) (ebook).

190. Johnson v. United States, 135 S. Ct. 2551, 2577 (2015) (Alito, J., dissenting).

191. 28 U.S.C. § 2255(b) (2018).

192. *See, e.g.*, United States v. Geozos, 870 F.3d 890, 901 (9th Cir. 2017) (remanding with instructions that "Defendant be released from custody immediately").

193. United States v. Driscoll, 892 F.3d 1127, 1132 (10th Cir. 2018).

194. *See, e.g.*, United States v. Duran, 754 F. App'x 739, 747 (10th Cir. 2018) (affirming denial of *Johnson* § 2255 motion because any reliance on residual clause was harmless since prior convictions qualified as predicate offenses under elements clause and enumerated offenses clause).

of the *Stromberg* principle[195] to all situations in the criminal law in which a conviction or sentence rests on one of several possible grounds, at least one of which is unconstitutional. Announcing such a broad rule may lead to administrative difficulties in the short term, but it will serve to incentivize explicitness in records in criminal proceedings, which should prevent problems such as the post-*Johnson* confusion from recurring. It is imperative that the Supreme Court announce an extension of the *Stromberg* principle instead of hoping that lower courts will apply it on a case-by-case basis, as the Ninth Circuit did in *Geozos*.[196] Otherwise, the result will simply be more circuit splits in which justice is distributed unequally on the basis of happenstance.[197]

CONCLUSION

In *Johnson*, the Supreme Court reaffirmed that an unconstitutionally vague provision may not serve as the basis for a fifteen-year prison sentence, and in *Welch*, the Court underscored the importance of its decision in *Johnson* by announcing that it must apply retroactively. The gravity of these decisions demands that they be given effect and not stymied by procedural barriers. The presumption of finality must give way in certain circumstances, and review of an ACCA sentence enhancement imposed on the basis of the residual clause is one of them. The may-have standard is the only standard that is capable of adequately securing justice in these circumstances, and so the Supreme Court should take action to make sure its decision in *Johnson* and future rulings of constitutional law are given full effect.

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195. *See supra* note 139 and accompanying text.
196. *See supra* note 141 and accompanying text.
197. *See supra* Section II.B.1.