Using the Supreme Court's Original Habeas Jurisdiction to "Ma[k]e" New Rules Retroactive

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Ever since the Supreme Court's 1989 decision in *Teague v. Lane*,[1] state and federal prisoners alike have struggled to take advantage of "new rules" of constitutional law that are articulated by the Court after their direct appeals have gone final. Whether through a state prisoner's federal habeas petition or a federal prisoner's motion for post-conviction relief under 28 U.S.C. § 2255, only two kinds of "new rules" are retroactively enforceable under *Teague*: "watershed" rules of criminal procedure (of which there have been precisely none since *Teague*), or decisions "that narrow the scope of a criminal statute by interpreting its terms" or involve "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish," which the Court has described as "substantive" rules that are always retroactively enforceable.[2]

And for prisoners who have already filed one claim for federal post-conviction relief, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) adds an additional trio of "gatekeeping" roadblocks: First, under AEDPA, a prisoner seeking to file a second-or-successive claim must obtain the advance permission of the Court of Appeals, and such permission will only be granted for claims based upon new rules when the cited rule has been "made retroactive to cases on collateral review by the Supreme Court."[3] In other words, it is not enough that the Supreme Court has, in fact, articulated a new rule that, based upon its nature, should be retroactively enforceable; the Court must also have separately "made" the rule retroactive.

Second, if the Court of Appeals denies permission for any (or even no) reason, that denial cannot be appealed to the Supreme Court through a petition for a writ of certiorari.[4] Finally, petitioners have only one year from the date of the Supreme Court decision articulating the new rule—and not a subsequent decision in which the new rule is made retroactive—to file a second-or-successive claim seeking to take advantage of the change in the law.[5] Taken together, these roadblocks make it exceedingly difficult even for a prisoner with a patently meritorious claim for post-conviction relief based upon a new rule of constitutional law (including a claim that might require his immediate release) to obtain such relief through a second-or-successive petition.

This short essay uses the aftermath of the Supreme Court's June 2015 decision in *Johnson v. United States*,[6] in which the Court invalidated the so-called "residual clause" of the Armed Career Criminals Act (ACCA),[7] to illuminate three different potential mechanisms for avoiding the trap AEDPA otherwise creates for second-or-successive petitioners seeking to take advantage of Supreme Court decisions articulating new rules of constitutional law.[8] Part I focuses on AEDPA's "made retroactive" language, and considers whether lower courts could simply decide for themselves that it is sufficiently clear under prior Supreme Court decisions that a new rule (like *Johnson*) is retroactive. As Part I explains, although this process could work in theory, in practice, as *Johnson*'s aftermath illustrates, lower courts will not always agree on how clear it is that a new rule has already been "made retroactive," and so there will be a non-zero set of cases requiring a subsequent Supreme Court decision in which the new rule is so "made."

Although second-or-successive petitioners cannot seek certiorari when the Court of Appeals declines to certify their claim, first petitioners don't face that same roadblock. And so a second approach, as Part II documents, is simply to wait for a prisoner bringing his first claim for federal post-conviction relief to lose in the lower federal courts, and then bring his case to the Supreme Court via certiorari—at which point the Court can unquestionably "ma[k]e" the new rule retroactive.

This approach, however, faces two separate hurdles: First, as *Johnson* illustrates, it is possible that lower courts may agree that a new rule is retroactively enforceable even if they do not believe that the rule has been "made retroactive" by the Supreme Court (for example, by agreeing that a new rule is "substantive," but not clearly so). In other words, it is at least conceivable that no prisoner will lose a first post-conviction claim based upon a holding of non-retroactivity, since demonstrating that a new rule is retroactively enforceable under *Teague* is significantly easier than demonstrating that it has been "made retroactive" by the Supreme Court under AEDPA.

Second, even if a prisoner eventually loses such a case, there is no guarantee that his appeal will reach the Supreme Court in time to help second-or-successive petitioners, who must bring their claims based upon new rules within one year of the new rule being articulated—not within a year of it being "made retroactive."

The upshot of Parts I and II is that there will inevitably be cases that fall through the cracks, where second-or-successive petitioners have no immediately obvious (and

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timely) means of taking advantage of new rules of constitutional law that are—or at least ought to be—retroactive under *Teague*. In those circumstances, as Part III demonstrates, the only avenue that may be left is to invoke the obscure jurisdiction of the Supreme Court to issue an "original" writ of habeas corpus—an exceedingly rare remedy that the Justices haven't provided since 1925.[9] In a number of ways, as Part III concludes, original habeas may actually be the cleanest vehicle through which the Justices can "ma[k]e" a new rule retroactive, since it does not require either the creative statutory interpretation or the fortuitous circumstances necessary to the other two avenues for review. Instead, the real problem with original habeas, as *Johnson*'s aftermath underscores, is the Justices' reluctance to utilize it—a reluctance that not only puts that much more pressure on the other two avenues for "ma[king]" new rules retroactive, but that provokes serious constitutional questions about AEDPA, as well. Thus, as this essay concludes, if the Justices take AEDPA's retroactivity trap seriously, they can (and should) rely upon their original habeas jurisdiction to "ma[k]e retroactive" those new rules of constitutional law that can't otherwise be enforced by second-or-successive post-conviction claimants.

I. Relying Upon Prior Supreme Court Decisions

The difficulties posed by AEDPA's "made retroactive" language were first considered by the Supreme Court in *Tyler v. Cain*,[10] involving whether the Court had "made retroactive" its prior decision in *Cage v. Louisiana*—which had held that jury instructions are unconstitutional if there is a reasonable likelihood that they allow convictions without proof beyond a reasonable doubt.[11] Writing for a 5-4 majority in *Tyler*, Justice Thomas emphasized that the key consideration was whether the Supreme Court had itself held that the new rule was retroactive, concluding that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive."[12] But whereas *Tyler* thereby seemed to suggest that the Court must always issue an express retroactivity holding at T_1 after articulating a new rule at T_0, Justice O'Connor's controlling concurrence outlined a more pragmatic approach:

> a single case that expressly holds a rule to be retroactive is not a sine qua non for the satisfaction of this statutory provision. This Court instead may "ma[k]e" a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule. . . . [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review.[13]

In other words, per Justice O'Connor, the sequencing of the new rule and the decision in which it is "made retroactive" is irrelevant; all that matters is that "the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively."[14] Thus, after *Tyler*, lower courts have generally agreed that, if a new rule is unambiguously retroactive based upon prior Supreme Court precedents (say, for example, because it is clearly "substantive" under *Teague*), then there need not be a subsequent Supreme Court decision in which the new rule is "made retroactive"; it was already "made retroactive" by dint of the prior holdings that all "substantive" new rules are retroactively enforceable.

So it was that, after *Johnson*, six different circuits certified second-or-successive motions for post-conviction relief under 28 U.S.C. § 2255(h)(2), even though neither *Johnson* itself nor a subsequent Supreme Court decision had expressly "made" *Johnson* retroactive.[15] As the Seventh Circuit explained in *Price v. United States*, because, in its view, "*Johnson* . . . announced a new substantive rule[,]. . . . [t]here is no escaping the logical conclusion that the Court itself has made *Johnson* categorically retroactive to cases on collateral review."[16] In *Pakala v. United States*, the First Circuit adopted the same reasoning, albeit largely because the government didn't oppose it.[17]

But two different problems arose with this approach: First, not every circuit agreed that it was so clear that *Johnson* was "substantive," and, thus, retroactively enforceable under *Teague*. For example, the Fifth Circuit held in *In re Williams* that "*Johnson* merely mandates that Congress require such punishment with greater clarity—fair notice to persons it engages,"[18] and so it was not "substantive" under *Teague* and its progeny. Divided panels of the Eleventh Circuit reached the same conclusion.[19] Second, the Tenth Circuit concluded that, even though *Johnson* may have been substantive, it had not yet been "made retroactive" by the Supreme Court because, reading *Tyler* narrowly, the Supreme Court had not itself decreed *Johnson* to be substantive.[20] Thus, in the Fifth and Eleventh Circuits, *Johnson* could not be retroactively enforced at all; in the Tenth Circuit, *Johnson* could only be retroactively enforced in a first § 2255 motion; and in the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits, *Johnson* could be retroactively enforced in both first and second-or-successive petitions.

Normally, such a circuit split could easily be resolved by the Supreme Court through a petition for certiorari. Recall, though, that denials of applications to file second-or-successive petitions under AEDPA cannot be appealed via certiorari. And even though the government may appeal if and when it loses a second-or-successive petition on the merits, the federal government took the view that *Johnson* was both substantive and retroactively enforceable, and so saw no need to appeal decisions with which it did not disagree. (This will presumably be less likely in cases involving new rules as applied to state prisoners, since there's more of a chance that at least one state government would oppose retroactivity on the merits, as in *Montgomery v. Louisiana*,[21] for example.)

An alternative possibility for resolving the circuit split would have been for one of the courts of appeals to "certify" the question of *Johnson*'s retroactivity to the Supreme Court, per the terms of 28 U.S.C. § 1254(2).[22] Insofar as the courts of appeals have jurisdiction to determine their jurisdiction, that would presumably extend to certifying a question the answer to which would be dispositive of their power to authorize a second-or-successive claim for post-conviction relief. But the Supreme Court has not accepted a certified question since 1981,[23] has rejected several high-profile attempts to obtain a certificate in recent years,[24] and has made clear that the certificate process is only appropriate "in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business."[25] In other words, certification is not a mechanism simply for invoking the Court's jurisdiction when other avenues are formally or practically unavailable; it is a specific remedy for courts of appeals to ask the Justices to clarify the applicability of a case pending before the Supreme Court to cases pending below. It's hard to see how questions over the retroactive effect of a recent Supreme Court decision fit into that understanding.

Thus, disagreement over whether *Johnson* had in fact been "made retroactive" (whether because it wasn't clearly substantive or because the Supreme Court hadn't clearly said it was) seemed effectively unreviewable by the Supreme Court, at least in cases out of the First, Second, Sixth, Seventh, Eighth, Ninth, or Tenth Circuits. Given the different readings of *Tyler* adopted by the lower courts in *Johnson*, it is not difficult to imagine how a similar split could recur after a future "new rule" that is also not as unambiguously "substantive."

II. Waiting for a Traditional Cert. Petition

To be sure, the Fifth and Eleventh Circuit's curious conclusions that *Johnson*'s new rule was not substantive at all cracked open the door to more traditional Supreme Court review; unlike second-or-successive post-conviction petitions, denials of initial § 2255 motions can be appealed to the Supreme Court via certiorari. Thus, a prisoner who seeks to take advantage of *Johnson* in a first § 2255 motion in the Fifth or Eleventh Circuit will surely lose in light of *Williams* or *Franks*, but can then promptly seek certiorari (perhaps even before judgment, given the timing concerns) from the Supreme Court.

Although this approach may seem like it requires the least heavy lifting, it also depends upon fortuities of timing and judicial decisionmaking. Taking the timing first, recall from above that AEDPA requires second-or-successive petitioners to file within one year of the Supreme Court decision articulating the "new rule," not the decision in which that rule is "made retroactive." The Fifth Circuit's decision in *Williams* (which could not itself be appealed since it came in the context of a second-or-successive application) came nearly five months into that one-year period, and the Eleventh Circuit's decision in *Franks* came even later.

It is certainly possible that seven months is enough time for a new prisoner to (1) have an initial § 2255 motion denied by the district court under *Williams*; (2) appeal to the Fifth Circuit; (3) have the Fifth Circuit reject the appeal; (4) appeal to the Supreme Court; and (5) have the Supreme Court grant certiorari, set the case for briefing and argument, hear argument, and render a decision—indeed, that appears to be the fluky denouement of the *Johnson* aftermath.[26] But in the ordinary case, it is not likely. Thus, even in circumstances in which, after a new rule is handed down, lower courts divide over whether the rule is retroactively enforceable under *Teague* in the first place, waiting for the conventional certiorari process may be inadequate for second-or-successive petitioners.

Another possibility is that, in an appropriate case, the Supreme Court might extend the "fundamental miscarriage of justice" exception, recently reiterated in *McQuiggin v. Perkins*,[27] to claims based upon new rules that would otherwise be time-barred by AEDPA's one-year statute of limitations. But given *McQuiggin*'s emphasis that "[t]he miscarriage of justice exception . . . applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner],'"[28] this seems even less likely than a case reaching the Supreme Court within AEDPA's one-year time limit.

Nor is there any guarantee that lower courts will divide over whether a new rule is retroactively enforceable under *Teague*, as opposed to the distinct—and narrower—question of whether it has been "made retroactive" by the Supreme Court for purposes of AEDPA. Imagine if the Fifth Circuit in *Williams* or the Eleventh Circuit in *Franks* had reached the same result by instead following the Tenth Circuit, and had held that, whether or not *Johnson* is "substantive," it had not yet been "made retroactive" by the Supreme Court. Waiting for conventional certiorari review wouldn't even be a possibility in that circumstance, since prisoners would presumably have no trouble enforcing *Johnson* in first § 2255 motions (and the government wouldn't appeal).

Thus, traditional certiorari review will not provide a vehicle for the Court to "ma[k]e" a new rule of constitutional law retroactive in all (and perhaps even many) cases—and almost certainly not in the short window AEDPA provides for second-or-successive petitions.

III. "Original" Habeas as a Solution

To be sure, these concerns about AEDPA are not new. In the very first case that the Supreme Court heard concerning the 1996 statute, it considered constitutional challenges to the statute's "gatekeeping" provisions for second-or-successive claims.[29] But the reason why the Court in *Felker v. Turpin* held that AEDPA did not violate either the Suspension Clause (by taking away access to habeas corpus) or the Exceptions Clause (by taking away the Supreme Court's

appellate jurisdiction) was because of the Court's untouched jurisdiction to issue "original" writs of habeas corpus under 28 U.S.C. § 2241(a). In Justice Souter's words, such a claim is "commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction,"[30] since "[t]he decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature."[31]

Although the Court's "original" habeas jurisdiction was obscure, the fact that it was theoretically available to provide the review that AEDPA otherwise foreclosed was central to the Court's constitutional defense of AEDPA. As Chief Justice Rehnquist wrote for the majority, "since [AEDPA] does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."[32] Whereas the Court ultimately concluded that Felker's petition was meritless (and so rejected Felker's original habeas petition), it reasserted its power to issue an original writ of habeas corpus if that was the only means of providing relief to which he was otherwise entitled.

In his concurrence, Justice Souter went one step further, emphasizing not just that original writs of habeas corpus from the Supreme Court were theoretically available, but that, to avoid the constitutional questions AEDPA would otherwise raise, they would need to be available in practice, as well. As he put it, "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."[33] And, perhaps presciently, he concluded, that "The question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard,"[34]—i.e., exactly what happened after *Johnson*.

Felker thereby appeared to represent a commitment from the Justices to use their power to issue original writs of habeas corpus to sidestep AEDPA's gatekeeping provisions in appropriate cases—where, under the Court's Rule 20.4, the applicant can show "exceptional circumstances warranting the exercise of the Court's discretionary powers" and "that adequate relief cannot be obtained in any other form or from any other court."[35] The question *Felker* raised, but did not answer, was what such "exceptional circumstances" would look like. And in the twenty years since *Felker* was decided, the Court has provided no elaboration—with five different Justices alluding to the Court's power to issue original writs of habeas corpus,[36] but with the Court never actually exercising it.

One reason for the Court's reluctance may be found in *Felker* itself. As Chief Justice Rehnquist explained, even if AEDPA did not affect the Supreme Court's jurisdiction to issue original writs of habeas corpus, it did affect the standards the Court would apply in such cases, especially where the underlying claim went to error by the original trial court.[37] Thus, the Justices may be especially skeptical of issuing such relief in cases in which their review, per AEDPA, would not be de novo.

But where the only question presented to the Justices is whether a prior decision articulated a "new rule" that ought to be retroactively enforceable through petitions for collateral post-conviction relief, those concerns disappear. Not only would such review in all cases be de novo, but AEDPA itself expressly contemplates that the Justices play such a role, since the gatekeeping provisions assume that it is the Supreme Court itself that will "ma[k]e" new rules retroactive. Moreover, although the Court's own rules stress that "[t]his writ is rarely granted,"[38] situations in which lower courts divide over whether a new rule of constitutional law has been "made retroactive" by the Justices have proven relatively few and far between. In other words, using original writs of habeas corpus to "ma[k]e" new rules retroactive would neither "usurp th[e] power" of criminal trial courts, as the Court feared in *Felker*,[39] nor open the floodgates to a rash of original habeas petitions. In addition, the availability of original habeas (and the potential correctness of the relevant lower-court decisions) cuts against using other forms of extraordinary relief, such as mandamus.

So it was that, on eerily similar facts (a division among the lower courts about whether a prior decision had been "made retroactive"), the Solicitor General urged the Supreme Court in 1999 to set an original habeas petition for plenary review: "The rare exercise of this Court's habeas jurisdiction in a case like this, . . . far from interfering with the accomplishment of Congress's objectives in the AEDPA, would assist in effectuating in a sensible fashion the system of collateral review Congress created."[40] The Court (over three dissents) disagreed,[41] perhaps because, so soon after AEDPA, it hoped that cases presenting such circumstances would be rare (and perhaps because the "new rule" at issue turned out to not be retroactive).[42]

If that turns out to be incorrect, though, then the Court's original habeas jurisdiction may be the way to cut AEDPA's Gordian knot—and provide the Justices with an expedient way to "ma[k]e" new rules retroactive. As importantly, issuing original writs of habeas corpus in such circumstances would go a long way toward ameliorating Justice Souter's charge in *Felker*, that "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open." Both to avoid serious constitutional questions about AEDPA and to timely settle retroactivity disagreements in the lower court, then, the Supreme Court's original habeas jurisdiction may be the simplest, cleanest, and most efficient vehicle for answering the retroactivity question raised by new rules like *Johnson*. And for those prisoners who, but for their difficulty in enforcing a new rule, would be at liberty, original habeas might also

be the only way to vindicate their rights under the Suspension Clause.

IV. Conclusion

In his dissenting opinion in *Tyler*, Justice Breyer warned of the adverse consequences that could be produced by the exact chain of events that took place after *Johnson*. As he wrote,

> After today's opinion, the only way in which this Court can make a rule such as *Cage*'s retroactive is to repeat its [retroactivity] reasoning in a case triggered by a prisoner's filing a first habeas petition (a "second or successive" petition itself being barred by the provision here at issue) or in some other case that presents the issue in a posture that allows such language to have the status of a "holding." Then, after the Court takes the case and says that it meant what it previously said, prisoners could file "second or successive" petitions to take advantage of the now-clearly-made-applicable new rule. We will be required to restate the obvious, case by case, even when we have explicitly said, but not "held," that a new rule is retroactive.
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> Even this complex route will remain open only if the relevant statute of limitations is interpreted to permit its 1-year filing period to run from the time that this Court has "made" a new rule retroactive, not from the time it initially recognized that new right. Otherwise, the Court's approach will generate not only complexity, along with its attendant risk of confusion, but also serious additional unfairness.[43]

As described above, the only way to ensure that such additional unfairness (and potential constitutional infirmities) can be avoided is through petitions for "original" writs of habeas corpus from the Supreme Court, because there will be circumstances in which that is the only way for the Justices to "ma[k]e retroactive" a "new rule" of constitutional law that ought to be retroactively enforceable in time for second-or-successive petitioners to take advantage of it. Thanks to the strange way in which the Eleventh Circuit handled the *Welch* appeal,[44] the Court appears to have been spared from having to reach this issue in the aftermath of *Johnson*. But sooner or later, so long as AEDPA remains on the books, an original writ of habeas corpus will provide the only way out of its retroactivity trap.

Notes

* (This paper derives from a series of posts on "PrawfsBlawg," along with amicus briefs I co-authored and signed in *In re Butler*, 136 S. Ct. 698 (2015) (mem.); *In re* Sharp, No. 15-646, 2016 WL 101050 (U.S. Jan. 11, 2016) (mem.); and *In re* Williams, No. 15-759, 2016 WL 101016 (U.S. Jan. 11, 2016) (mem.). Needless to say, the views expressed herein are mine alone. My thanks to Leah Litman and to participants in a faculty workshop at the University of Kansas School of Law (especially Corey Yung), for helpful comments and feedback.

1 *Teague*, 489 U.S. 288 (1989).

2 *See* Schiro v. Summerlin, 542 U.S. 348, 349–50 (2004).

3 AEDPA, 28 U.S.C. §§ 2244(b)(2)(A) (state prisoners), 2255(h)(2) (federal prisoners) (emphasis added).

4 *Id*. § 2244(b)(3)(E).

5 *Id*. §§ 2244(d)(1)(C) (state prisoners); 2255(f)(3) (federal prisoners).

6 *Johnson*, 135 S. Ct. 2551 (2015).

7 ACCA, 18 U.S.C. § 924(e)(2)(B).

8 For another (excellent) look at the retroactive enforcement problems raised by *Johnson*, see Leah Litman, *The Exceptional Circumstances of* Johnson v. United States, 114 Mich. L. Rev. First Impressions 81 (2016).

9 *See Ex parte* Grossman, 267 U.S. 87 (1925).

10 *Tyler*, 533 U.S. 656 (2001).

11 *Cage*, 498 U.S. 39 (1990) (per curiam).

12 *Tyler*, 533 U.S. at 663.

13 *Id*. at 668–69 (O'Connor, J., concurring) (citations omitted).

14 *Id*. at 669.

15 *See* Pakala v. United States, 804 F.3d 139 (1st Cir. 2015) (per curiam); Rivera v. United States, No. 13-4654 (2d Cir. Oct. 5, 2015) (mem.); *In re* Watkins, No. 15-5038, 2015 WL 9241176 (6th Cir. Dec. 17, 2015); Price v. United States, 795 F.3d 731 (7th Cir. 2015); Reliford v. United States, No. 15-3224 (8th Cir. Oct. 16, 2015) (mem.); United States v. Striet, No. 15-72506 (9th Cir. Aug. 25, 2015) (mem.).

16 *Price*, 795 F.3d at 734.

17 *Pakala*, 804 F.3d at 139; *see also* Woods v. United States, 805 F.3d 1152 (8th Cir. 2015) (per curiam) (relying upon the government's concession to certify a second-or-successive § 2255(h)(2) claim under *Johnson*).

18 *In re* Williams, 806 F.3d 322, 326 (5th Cir. 2015).

19 *See In re* Franks, No. 15-15456, 2016 WL 80551 (11th Cir. Jan. 6, 2016); *In re* Rivero, 797 F.3d 986 (11th Cir. 2015).

20 *See In re* Gieswein, 802 F.3d 1143, 1146–49 (10th Cir. 2015) (per curiam).

21 *Montgomery*, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016) (holding that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), is retroactive).

22 28 U.S.C. § 1254(2) ("Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired. . . .").

23 *See* Iran Nat'l Airlines v. Marschalk Co., 453 U.S. 919 (1981) (mem.); *see also* United States v. Seale, 558 U.S. 985, 986 (2009) (Stevens, J., respecting dismissal of the certified question) ("The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification.").

24 *See, e.g. Seale*, 558 U.S. 985; United States v. Penaranda, 543 U.S. 1117 (2005) (en banc) (mem.); *In re* Slagle, 504 U.S. 952 (1992).

25 Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

26 On January 8, 2016, the Supreme Court granted certiorari in *Welch* v. *United States*, a petition for certiorari from the Eleventh Circuit's affirmance of the district court's denial of an initial § 2255 motion. *See* Welch v. United States, No. 15-6418, 2016 WL 90594 (U.S. Jan. 8, 2016) (mem.). What makes *Welch* fluky is that the Eleventh Circuit's rejection of his § 2255 appeal came *before* the Supreme Court decided *Johnson*—and so his initial § 2255 appeal was already in the pipeline when AEDPA's one-year clock started. Suffice it to say, there is no guarantee there will be similarly fortuitous trailer-cases in the future (or that, as arguably should have happened in the Eleventh Circuit, the appellant won't be able to prevail on a motion for reconsideration).

27 *McQuiggin*, 133 S. Ct. 1924 (2013).

28 *Id*. at 1933 (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)) (emphasis in original).

29 *See* Felker v. Turpin, 518 U.S. 651 (1996).

[30] *Id*. at 667 n.1 (Souter, J., concurring) (citing Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153).

[31] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.).

[32] *Felker*, 518 U.S. at 661–62.

[33] *Id*. at 667 (Souter, J., concurring).

[34] *Id*.

[35] Sup. Ct. R. 20.4(a).

[36] *See, e.g. In re* Davis, 557 U.S. 952, 953 (2009) (Stevens, J., concurring); Padilla v. Hanft, 547 U.S. 1062, 1064 (2006) (Kennedy, J., concurring).

[37] *Felker*, 518 U.S. at 662–63.

[38] Sup. Ct. R. 20.4(a).

[39] *Felker*, 518 U.S. at 663 (quoting *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 194 (1830) (internal quotation marks omitted)).

[40] Brief for the United States as Amicus Curiae at 11–12, *In re* Smith, 526 U.S. 1157 (1999) (mem.) (No. 98-5804), http://perma.cc/7V8J-833X.

[41] *Smith*, 526 U.S. 1157.

[42] *See, e.g.* Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004).

[43] Tyler v. Cain, 533 U.S. 656, 677 (2001) (Breyer, J., dissenting) (citations omitted).

[44] *See supra* note 26.