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## Back to the Future: Permitting Habeas Petitions Based on Intervening Retroactive Case Law to Alter Convictions and Sentences

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## NOTES

### **BACK TO THE FUTURE: PERMITTING HABEAS PETITIONS BASED ON INTERVENING RETROACTIVE CASE LAW TO ALTER CONVICTIONS AND SENTENCES**

*Lauren Casale\**

*In 1948, Congress enacted 28 U.S.C. § 2255, which authorizes a motion for federal prisoners to “vacate, set aside or correct” their sentences, with the goal of improving judicial efficiency in collateral review. Section 2255(e), known as the “savings clause,” allows federal inmates to challenge the validity of their imprisonments with writs of habeas corpus if § 2255 motions are “inadequate or ineffective to test the legality of [their] detention[s].” Due to the U.S. Supreme Court’s and Congress’s silence regarding what suffices as “inadequate or ineffective,” the circuit courts have adopted varied standards.*

*The Sixth and Seventh Circuits hold that prisoners can use the savings clause to challenge their convictions or sentences based on new retroactive case law. On the other hand, the Tenth and Eleventh Circuits prejudice prisoners by prohibiting them from challenging their convictions or sentences based on new case law. Recently, the Fourth Circuit expanded the circuit split by agreeing with the Sixth and Seventh Circuits in *United States v. Wheeler*. A petition for a writ of certiorari in *Wheeler* is currently pending before the Supreme Court. This Note examines the circuits’ different standards and contends that the circuits that foreclose savings clause challenges impermissibly curtail prisoners’ rights. Further, this Note argues that the Supreme Court must define the scope of the savings clause to permit prisoners to challenge their convictions and sentences under the provision.*

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#### INTRODUCTION

Over the last two decades, Charles “Gary” Bruce and Robert Bruce’s interactions with the criminal justice system appeared virtually identical.<sup>1</sup> The Bruce brothers have more in common than their genes; they also share the same criminal convictions stemming from the crimes they jointly committed.<sup>2</sup> In the 1990s, the Western District of Tennessee imposed indistinguishable sentences on Robert and Gary.<sup>3</sup> Nevertheless, their criminal fates finally diverged in 2016 and 2017 due to conflicting interpretations of 28 U.S.C. § 2255(e).<sup>4</sup>

Overall, 28 U.S.C. § 2255 empowers federal prisoners to file motions “to vacate, set aside, or correct” their sentences.<sup>5</sup> Section 2255(e), known as the “savings clause,” creates a pathway for prisoners to challenge their incarcerations.<sup>6</sup> If inmates show that a § 2255 motion is “inadequate or ineffective to test the legality of [their] detention[s],” the savings clause allows them to bring a § 2241 petition for a writ of habeas corpus.<sup>7</sup> Congress originally enacted this provision to promote judicial efficiency.<sup>8</sup> However, a clash among the circuits regarding what qualifies as “inadequate or ineffective” has transformed this statute into a prisoners’ rights dilemma.<sup>9</sup> This Note focuses on the circuit split’s ramifications for inmates, who may be denied a chance to challenge their detentions solely because of the inopportune location of their prisons.<sup>10</sup> Comparing the Bruce brothers highlights this conflict’s arbitrariness.

In January 1991, Gary and Robert Bruce, along with another brother and a friend, killed two people and burned the victims’ bodies and home.<sup>11</sup> A

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1. See Reply Brief for the Petitioner at 3, *McCarthy v. Collins*, 138 S. Ct. 502 (2017) (No. 17-85), 2017 WL 5508928, at \*3.

2. *Id.*

3. Compare *Bruce v. Warden*, 868 F.3d 170, 176 (3d Cir. 2017) (noting that the Western District of Tennessee sentenced Gary to life without parole plus ten years), with *Bruce v. Warden*, 658 F. App’x 935, 937 (11th Cir. 2016) (per curiam) (noting that the Western District of Tennessee sentenced Robert to life in prison and ten years), *cert. denied*, 137 S. Ct. 683 (2017).

4. See *Bruce*, 868 F.3d at 180.

5. 28 U.S.C. § 2255 (2012).

6. See *Bruce*, 868 F.3d at 174.

7. 28 U.S.C. § 2255(e); see *Boumediene v. Bush*, 553 U.S. 723, 774 (2008).

8. See *infra* notes 225–27 and accompanying text.

9. See *infra* Part III.A.

10. See *infra* note 77 and accompanying text.

11. *Bruce*, 868 F.3d at 175. Gary and Robert Bruce plotted to rob Danny Vine, the operator of a nearby mussel shell camp, along with their brother, Jerry Bruce, and a friend, David Riales. After restraining Vine and his fiancée, Della Thornton, Gary and Jerry Bruce shot them. Once they completed the murders and arson, they fled the scene with stolen

grand jury indicted each of the four men involved on eight counts,<sup>12</sup> one of which was witness-tampering murder.<sup>13</sup> In 1995, Robert Bruce, his other brother Jerry Bruce, and friend David Riales were tried in the Western District of Tennessee.<sup>14</sup> Gary Bruce, however, escaped from jail in July 1994 and remained on the run for fourteen months.<sup>15</sup> Thus, Gary's 1998 trial was severed from that of his coconspirators.<sup>16</sup> Nevertheless, Robert and Gary Bruce were each convicted on all counts and each received a life sentence with an additional ten-year term.<sup>17</sup>

After being convicted, Gary and Robert Bruce attempted to obtain postconviction relief multiple times.<sup>18</sup> Their efforts were unsuccessful until they sought to invoke a 2011 U.S. Supreme Court decision,<sup>19</sup> *Fowler v. United States*.<sup>20</sup> The *Fowler* decision clarified the government's burden of proof for federal witness-tampering murder,<sup>21</sup> of which both Gary and Robert had been convicted.<sup>22</sup> Relying on the savings clause, the Bruce brothers filed petitions for writs of habeas corpus under 28 U.S.C. § 2241 to challenge their detentions.<sup>23</sup> They argued that their habeas petitions were appropriate because the intervening *Fowler* decision rendered other forms of relief under § 2255 "inadequate or ineffective."<sup>24</sup> The Bruces claimed that they were

mussels. Days later, local police discovered the burned corpses of Vine, Thornton, and their dog. *Id.*

12. *Id.* at 176. Ultimately, investigators connected them with the crime after learning that Gary's wife and brothers sold questionable mussel shells. *Id.* at 175.

13. A person has committed witness-tampering murder if he or she "kills or attempts to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. § 1512(a)(1)(C) (2012); *see also Bruce*, 868 F.3d at 181.

14. *United States v. Bruce*, Nos. 95-6046 to 95-6049, 1996 WL 640468, at \*1 (6th Cir. Nov. 5, 1996). Robert and Jerry Bruce, as well as Riales, were convicted on all the charges. *Bruce*, 868 F.3d at 176.

15. *Bruce*, 868 F.3d at 176.

16. *See id.*

17. *Id.* at 176; *Bruce v. Warden*, 658 F. App'x 935, 937 (11th Cir. 2016) (per curiam) (noting that Robert's sentence was life in prison and ten years), *cert. denied*, 137 S. Ct. 683 (2017). Despite Gary Bruce's additional jailbreak offense, he received the same sentence. *See Bruce*, 868 F.3d at 176.

18. *See Bruce*, 868 F.3d at 176 (noting that Gary Bruce previously filed a § 2255 motion in 2011 and tried to obtain permission to file two additional § 2255 motions in 2012 and 2013, which were denied); *Bruce*, 658 F. App'x at 937 (stating that Robert Bruce previously filed a § 2255 motion, which a Tennessee district court denied in 1998, and attempted to file additional § 2255 motions in 2003 and 2005, which were also denied).

19. *See Bruce*, 868 F.3d at 183; *Bruce*, 658 F. App'x at 937–38.

20. 563 U.S. 668 (2011).

21. *Bruce*, 658 F. App'x at 937–38 (quoting *Fowler*, 563 U.S. at 677–78) (explaining that *Fowler* requires the government to show that a person killed another with "intent to prevent communications with federal law enforcement officers," which is satisfied "only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer").

22. *Bruce*, 868 F.3d at 176.

23. *Id.* at 177; *Bruce*, 658 F. App'x at 937.

24. *See Bruce*, 868 F.3d at 176–77; *Bruce*, 658 F. App'x at 937–38 (describing that the crux of the Bruces' petitions was the court's jury instructions at trial, which did not include a

innocent of witness-tampering murder because the conduct for which they were convicted did not meet the requisite burden of proof under *Fowler*.<sup>25</sup> Because Robert and Gary were imprisoned in different circuits, they were forced to file their habeas petitions in different courts.<sup>26</sup> This difference subjected the petitions to markedly different judicial treatment, simply due to the circuits' contradictory readings of the savings clause.<sup>27</sup>

The Eleventh Circuit, where Robert Bruce was incarcerated, rejected his claim.<sup>28</sup> That court found that Robert was not foreclosed from raising a *Fowler*-esque argument on direct appeal or in his first § 2255 motion.<sup>29</sup> Accordingly, Robert Bruce did not satisfy the savings clause and lacked jurisdiction to file his petition.<sup>30</sup> Conversely, the Third Circuit reached the opposite conclusion by relying on its prior holding that prisoners may use the savings clause whenever a new, intervening, and substantive law may make them innocent.<sup>31</sup> Thus, the Third Circuit allowed Gary's claim to proceed and considered the merits of his actual-innocence argument.<sup>32</sup>

Juxtaposing the Bruce brothers' disparate treatment highlights the inequity that the savings clause circuit split poses for inmates based simply on a prison's location.<sup>33</sup> Although Gary Bruce did not ultimately prevail on his petition, the key difference is that he received an opportunity that his brother was denied.<sup>34</sup> If the Third Circuit had found that Gary demonstrated that he was actually innocent of witness-tampering murder, he would have obtained full habeas relief.<sup>35</sup> In this scenario, Gary would have successfully shown that he was unlawfully imprisoned for witness-tampering murder, and the court would have thrown out his conviction on that charge.<sup>36</sup> In contrast, Robert Bruce's conviction for witness-tampering murder would have

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reasonable likeness standard nor specify that *federal* law enforcement officers must be implicated).

25. *Bruce*, 868 F.3d at 174; *Bruce*, 658 F. App'x at 937–38.

26. See *infra* notes 66, 215–18 and accompanying text for an explanation of the Bureau of Prisons's authority to determine where an inmate is incarcerated and the jurisdictional requirement that prisoners file habeas petitions in the district where they are imprisoned.

27. See *Bruce*, 868 F.3d at 180.

28. *Bruce*, 658 F. App'x at 940.

29. *Id.* (determining that, earlier, Robert Bruce had a “genuine opportunity” to challenge his conviction).

30. *Id.*

31. *Bruce*, 868 F.3d at 180–81.

32. *Id.* at 181.

33. See *id.* at 181–82.

34. See *id.* at 183, 188–89 (finding that Gary Bruce's habeas petition was unsuccessful because he did not meet the standard of showing that “any reasonable juror faced with ‘all the evidence,’ . . . would conclude that, had [the victims] survived, the likelihood that they would have communicated with a federal officer was more than remote, outlandish, or simply hypothetical,” and that “[i]t therefore follows that any reasonable juror would convict Bruce of witness tampering murder”).

35. See *id.* at 184.

36. See *id.* at 182–84 (stating that courts have “no authority to leave in place a conviction or sentence that violates a substantive rule”).

remained, and he would still be incarcerated on all charges.<sup>37</sup> Both Gary and Robert Bruce acted in conjunction to commit the same crimes and received equal punishments.<sup>38</sup> Yet, only Gary, who arguably was even more culpable because he escaped from prison, could challenge his incarceration.<sup>39</sup>

Critically, the circuit split on the savings clause's scope is not limited to the tests espoused by the Third and Eleventh Circuits.<sup>40</sup> Besides disagreeing over the availability of savings clause petitions to dispute an underlying conviction, other circuits also allow savings clause relief for sentencing defects.<sup>41</sup> Though questions regarding the savings clause's reach are not new,<sup>42</sup> this dilemma came to the forefront once again with a March 2018 decision that widened the circuit split, *United States v. Wheeler*.<sup>43</sup> In *Wheeler*, the Fourth Circuit expanded its interpretation of the savings clause to allow prisoners to dispute their sentences, in addition to their convictions.<sup>44</sup> Characterized as an "entrenched conflict" in the government's October 2018 petition for a writ of certiorari,<sup>45</sup> the savings clause controversy highlights the particularly grave implications of this unsettled legal question.<sup>46</sup>

Part I of this Note provides background information about the writ of habeas corpus and the savings clause, 28 U.S.C. § 2255(e). Next, Part II describes the conflicting interpretations of the savings clause. Part III then asserts that the Supreme Court must conclusively define the savings clause to lessen arbitrariness, improve judicial and legal efficiency, and address this recurring and fundamental prisoners' rights issue. Finally, Part IV proposes that the Supreme Court should permit savings clause relief for inmates relying on intervening retroactive case law to challenge their convictions or sentences.

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37. See *id.* at 180 (observing that the Eleventh Circuit did not believe that Robert Bruce was entitled to invoke the savings clause to challenge his witness-tampering murder conviction under § 2241).

38. See *supra* notes 1–3, 17–19 and accompanying text.

39. See *supra* notes 28–32 and accompanying text.

40. See Petition for a Writ of Certiorari at 23–24, *United States v. Wheeler*, No. 18-420 (U.S. Oct. 3, 2018) (stating that "[t]he courts of appeal are divided" and noting that even those circuits permitting some savings clause relief "have offered varying rationales and have adopted somewhat different formulations").

41. See, e.g., *United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018); *Hill v. Masters*, 836 F.3d 591, 595 (6th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013).

42. Petition for a Writ of Certiorari at 13, *McCarthan v. Collins*, 138 S. Ct. 502 (2017) (No. 17-85), 2017 WL 3034223, at \*13 (stating that this issue "cries out for the Court's intervention" and that "[t]he arguments on both sides of the conflict are well developed, with the benefit of numerous opinions across nearly every regional circuit over the last two decades").

43. 886 F.3d 415 (4th Cir. 2018), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018).

44. See *id.* at 428–29.

45. Petition for a Writ of Certiorari, *supra* note 40, at 23.

46. See *United States v. Wheeler*, 734 F. App'x 892, 893–94 (4th Cir. 2018) (mem.) (Agee, J., statement respecting denial of petition for rehearing en banc).

## I. THE DEVELOPMENT OF HABEAS CORPUS AS A FORM OF COLLATERAL REVIEW

This Part explores the development of the writ of habeas corpus, which affords inmates an additional opportunity for judicial relief beyond the direct appeals process. Part I.A briefly describes the origins of habeas corpus and its early application in the American criminal justice system. Part I.B provides an overview of current habeas law in the United States, including the current statutory framework for this form of collateral review.

### *A. The Greatness of the “Great Writ”: A Brief History of Habeas Corpus as a Crucial Safeguard for Prisoners*

Collateral review is a way for courts to indirectly examine a decision apart from a direct appeal.<sup>47</sup> Examples of collateral proceedings include writs of habeas corpus<sup>48</sup> and motions to vacate, set aside, or correct a sentence.<sup>49</sup> Habeas corpus, which means “that you have the body” in Latin,<sup>50</sup> is a procedural tool that allows courts to evaluate whether a prisoner’s detention is legally authorized.<sup>51</sup> This legal recourse dates back to English common law, where it was termed the “Great Writ.”<sup>52</sup> Some have opined that the availability of habeas corpus is the most fundamental human right.<sup>53</sup>

The American Founding Fathers similarly deemed habeas corpus to be the “ultimate weapon” in the citizenry’s arsenal to guard their individual rights against intrusion by the federal government.<sup>54</sup> Consequently, the Suspension Clause of the U.S. Constitution explicitly protects habeas corpus during times of peace.<sup>55</sup> When the states ratified the Constitution, the Suspension Clause was understood to confer an affirmative right on all federal detainees to have

47. *Wall v. Kholi*, 562 U.S. 545, 551–53 (2011) (defining collateral review as “a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process”).

48. *Id.*

49. *United States v. Robinson*, 361 U.S. 220, 230 n.14 (1960) (remarking that “there are a number of collateral remedies available to redress denial of basic rights”).

50. *Habeas Corpus*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also Jeffrey Toobin, *Killing Habeas Corpus*, NEW YORKER (Dec. 4, 2006), <https://www.newyorker.com/magazine/2006/12/04/killing-habeas-corpus> [<https://perma.cc/7XLY-HF8M>].

51. See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 1 (2001); NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 4 (2011); LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS* 85 (2d ed. 2010).

52. See KING & HOFFMANN, *supra* note 51, at vii, 2–3.

53. DAVID CLARK & GERARD MCCOY, *THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH* 3–4 (2000) (observing that incarcerated individuals’ “ability to exercise all other human rights is either severely restricted or virtually non-existent”).

54. THE FEDERALIST NO. 84, at 432 (Alexander Hamilton) (Ian Shapiro ed., 2009) (commenting that the writ of habeas corpus, along with the constitutional ban on ex post facto laws and noble titles, may be the greatest constitutional “securities to liberty and republicanism”); KING & HOFFMANN, *supra* note 51, at 3.

55. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); see also KING & HOFFMANN, *supra* note 51, at 3.



a court scrutinize the legality of their confinements.<sup>56</sup> Habeas relief is so crucial that Congress cannot suspend it except when necessary to protect the country's safety.<sup>57</sup> After the Civil War, Congress enacted the Habeas Corpus Act of 1867, which allowed federal courts to also evaluate the validity of state prisoners' detentions.<sup>58</sup>

### B. Modern Habeas Relief

Federal prisoners may seek habeas relief through two avenues<sup>59</sup>: a traditional habeas corpus petition under 28 U.S.C. § 2241<sup>60</sup> or a motion under 28 U.S.C. § 2255.<sup>61</sup> This section discusses the modern statutory framework for habeas corpus, analyzes more recent changes to habeas relief, and considers the savings clause, which links § 2241 and § 2255.

#### 1. Two Bodies of Review: § 2241 and § 2255 Frameworks

Prisoners challenging their sentences may seek collateral relief through 28 U.S.C. § 2241 or 28 U.S.C. § 2255.<sup>62</sup> Congress initially enacted both statutes in 1948<sup>63</sup> as responses to difficulties with the Habeas Corpus Act of 1867, which allowed more prisoners to file petitions.<sup>64</sup>

Federal detainees may file a petition for a writ of habeas corpus under 28 U.S.C. § 2241 to challenge their convictions or sentences.<sup>65</sup> A prisoner must bring a § 2241 petition in the district where he or she is imprisoned.<sup>66</sup>

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56. See 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (Jonathan Elliot ed., 2d ed. 1881) (conveying the New York ratifying convention's belief that anyone who is "restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful"); see also *Boumediene v. Bush*, 553 U.S. 723, 744 (2008).

57. See U.S. CONST. art. I, § 9, cl. 2.

58. See KING & HOFFMANN, *supra* note 51, at 9.

59. *Federal Habeas Corpus*, DEP'T JUST., <https://www.justice.gov/usam/usam-9-37000-federal-habeas-corporus> [<https://perma.cc/9DHW-3YDS>] (last visited Feb. 12, 2019).

60. 28 U.S.C. § 2241(c) (2012).

61. *Id.* § 2255(a); see also YACKLE, *supra* note 51, at 86 (observing that "in 1948 Congress largely eliminated the ability of federal convicts to attack their . . . sentences under § 2241 and substituted a [§ 2255] motion procedure to perform the same function").

62. *Federal Habeas Corpus*, *supra* note 59.

63. Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 81 (2005).

64. See *Boumediene v. Bush*, 553 U.S. 723, 774–75 (2008); Nicholas Matteson, Note, *Feeling Inadequate?: The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*, 54 B.C. L. REV. 353, 358–59 (2011) (observing that the 1867 act "resulted in habeas petitions disproportionately clogging the dockets of those federal courts" because it required prisoners to file habeas petitions in the district where they are confined and allowed state prisoners to file habeas petitions); see also *In re Davenport*, 147 F.3d 605, 608–09 (7th Cir. 1998).

65. 28 U.S.C. § 2241.

66. *Protocol for the Effective Handling of Collateral Attacks on Convictions Brought Pursuant to 28 U.S.C. 2241*, DEP'T JUST., <https://www.justice.gov/jm/criminal-resource-manual-745-introduction-federal-habeas-corporus> [<https://perma.cc/7TRS-P629>] (last visited Feb. 12, 2019) (noting that this imposes a heavy burden on districts that house more prisoners and causes judges "wholly unfamiliar with the prosecution" to consider the petition).

Section 2241 petitions focus on the *implementation* of a prisoner's sentence.<sup>67</sup> For example, an inmate may use a § 2241 habeas petition to challenge “the administration of his parole, computation of his sentence by parole officials, disciplinary actions taken against him, the type of detention, and prison conditions in the facility where he is incarcerated.”<sup>68</sup> As discussed in Part I.B.3, the ability of federal prisoners to bring petitions under this provision is very limited.

Federal prisoners may also file a motion to “vacate, set aside or correct [a] sentence” under 28 U.S.C. § 2255.<sup>69</sup> This provision does not apply to inmates in state custody,<sup>70</sup> who instead must avail themselves of traditional § 2241 habeas petitions.<sup>71</sup> A federal inmate may use a § 2255 motion to dispute the “*imposition* of his sentence.”<sup>72</sup> In such a challenge, a petitioner may argue that a sentence: (1) is unconstitutional or violates federal law; (2) was imposed by a court that lacked jurisdiction; (3) exceeds the statutory maximum; or (4) is otherwise subject to a collateral challenge.<sup>73</sup> These motions are federal inmates' initial, and often sole, method of collateral attack.<sup>74</sup>

Prisoners did not have access to these motions until Congress enacted § 2255 in 1948.<sup>75</sup> Congress intended § 2255 to solve the issue of “habeas petitions disproportionately clogging the dockets of those federal courts with federal prisons within their territorial jurisdiction.”<sup>76</sup> Consequently, the statute departs from § 2241 in some respects. One significant distinction is that federal inmates must bring § 2255 motions in the district court that initially sentenced them rather than in the district where they are imprisoned.<sup>77</sup>

Moreover, § 2255 largely prohibits federal prisoners from seeking relief with § 2241 habeas petitions.<sup>78</sup> Section 2255 declares that if prisoners eligible to bring § 2255 motions fail to file them or if courts have already rejected them, their writs of habeas corpus “shall not be entertained.”<sup>79</sup>

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67. See *Adams v. United States*, 372 F.3d 132, 135 (2d Cir. 2004).

68. *Id.*

69. 28 U.S.C. § 2255(a).

70. Matteson, *supra* note 64, at 359 (stating that § 2255 is a procedure created for federal prisoners); see also 28 U.S.C. § 2255 (entitled “Federal Custody”).

71. 28 U.S.C. § 2241(d) (referring to a habeas petition “made by a person in custody under the judgment and sentence of a *State court*” (emphasis added)).

72. *Adams*, 372 F.3d at 135.

73. 28 U.S.C. § 2255(a).

74. See *Bruce v. Warden*, 868 F.3d 170, 178 (3d Cir. 2017).

75. See Brief for *Amicus Curiae* the Constitution Project in Support of the Petitioner at 3, *McCarthy v. Collins*, 138 S. Ct. 502 (2017) (No. 17-85), 2017 WL 3531410, at \*3 [hereinafter Constitution Project Brief].

76. Matteson, *supra* note 64, at 358 (emphasis added); see *United States v. Hayman*, 342 U.S. 205, 214 n.18 (1952) (observing that when § 2255 was passed over 60 percent of habeas petitions were filed in just five courts); see also Constitution Project Brief, *supra* note 75, at 3.

77. Matteson, *supra* note 64, at 359.

78. See 28 U.S.C. § 2255(e).

79. *Id.*

However, if federal inmates are able to satisfy an exception codified in § 2255(e), courts may consider their habeas petitions.<sup>80</sup>

## 2. Restrictive Amendments to Habeas Relief

Congress further restricted habeas petitions with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>81</sup> In doing so, Congress intended to “curb the abuse of the statutory writ of habeas corpus.”<sup>82</sup> The AEDPA added requirements for habeas relief to continue § 2255’s original purpose of bolstering, not weakening, collateral relief.<sup>83</sup> Nevertheless, courts have grappled with the AEDPA’s revisions since its enactment.<sup>84</sup> These changes have elicited strong responses, such as that of Professor Anthony G. Amsterdam of NYU School of Law, who called the AEDPA an “atomic bomb . . . on the federal judiciary, [which] shatter[ed] the preexisting structure of habeas corpus law.”<sup>85</sup>

Notable AEDPA amendments to § 2255 include a one-year statute of limitations<sup>86</sup> and a ban on successive motions unless a federal circuit court approves them.<sup>87</sup> The proscription on successive motions only permits a prisoner to bring a second or consecutive § 2255 motion if a circuit court certifies that it either: (1) includes newfound evidence demonstrating a prisoner’s innocence, or (2) focuses on a new interpretation of *constitutional law* that the Supreme Court deemed retroactive.<sup>88</sup> These constraints on motions to vacate, set aside, or correct a sentence are codified in 28 U.S.C. § 2255(h).<sup>89</sup> Nevertheless, the limits on second or successive habeas

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80. *See id.* This clause, 28 U.S.C. § 2255(e), is the primary focus of this paper. *See infra* Part I.B.3 for further analysis.

81. YACKLE, *supra* note 51, at 110; Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996).

82. H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.). *But see* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015) (contending that the AEDPA was “misconceived at its inception and born of misguided political ambition”).

83. *See* Boumediene v. Bush, 554 U.S. 723, 776 (2008).

84. *See* Lincoln Caplan, *The Destruction of Defendants’ Rights*, NEW YORKER (June 21, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights> [<https://perma.cc/JTM4-QA4D>] (noting that the Supreme Court has interpreted the AEDPA in approximately seventy cases).

85. Anthony G. Amsterdam, *Foreword* to 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, at v, v (7th ed. 2018); *see also* Caplan, *supra* note 84 (remarking that the AEDPA “gutted the federal writ of habeas corpus”).

86. *See* 28 U.S.C. § 2244(d)(1) (2012); *see also* Matteson, *supra* note 64, at 361; Note, *Suspended Justice: The Case Against 28 U.S.C. § 2255’s Statute of Limitations*, 129 HARV. L. REV. 1090, 1096–97 (2016).

87. *See* 28 U.S.C. § 2244(b)(3)(B).

88. Matteson, *supra* note 64, at 361.

89. 28 U.S.C. § 2255(h).

petitions are consistent with common-law principles.<sup>90</sup> These modifications are a modern codification of common-law limits to prevent “abuse of the writ.”<sup>91</sup>

Furthermore, § 2255 recognizes a distinction between *constitutional* and *statutory* decisions. To bring a § 2255 motion for a new constitutional decision, “an inmate can only assert a claim anchored upon a new Supreme Court ruling within one year of that ruling, so long as that ruling is retroactively applicable to cases on collateral review.”<sup>92</sup> In 2001, the Supreme Court clarified the standard for retroactivity in *Tyler v. Cain*.<sup>93</sup> The *Tyler* decision explained that petitioners only satisfy the stringent retroactivity standard if the Supreme Court applies a rule on collateral review or issues further holdings making the rule retroactive.<sup>94</sup> In practice, these “austere retroactivity provisions”<sup>95</sup> prevent lower courts from using a rule that would render a prisoner’s conviction or sentence illegal solely because the Supreme Court has not yet made it retroactive.<sup>96</sup> This Note, however, focuses on new *statutory* decisions, which petitioners can raise in savings clause claims.

### 3. The Savings Clause

The restrictions on § 2255 motions discussed in Part I.B.2 do not apply to § 2241 petitions, which renders these petitions more appealing to inmates trying to bring collateral challenges.<sup>97</sup> Federal prisoners may file habeas corpus petitions under 28 U.S.C. § 2241 if they: (1) are challenging the *execution* of their sentences,<sup>98</sup> or (2) satisfy the exception in 28 U.S.C. § 2255(e), known as the savings clause.<sup>99</sup> Otherwise, courts lack jurisdiction

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90. *See* *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *see also* *Boumediene v. Bush*, 553 U.S. 723, 774 (2008) (stating that these provisions “did not constitute a substantial departure from common-law habeas procedures”).

91. *Felker*, 518 U.S. at 664 (considering the limits on second or successive petitions); *see also* *McCleskey v. Zant*, 499 U.S. 467, 489 (1991) (defining “abuse” of the writ as “a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions”).

92. Thomas H. Gabay, Note, *Using Johnson v. United States to Reframe Retroactivity for Second or Successive Collateral Challenges*, 84 *FORDHAM L. REV.* 1611, 1623 (2016) (quoting 28 U.S.C. § 2255(f)(3)).

93. 553 U.S. 656, 663–64, 666 (2001); Leah M. Litman, *Judge Gorsuch and Johnson Resentencing (This Is Not a Joke)*, 115 *MICH. L. REV. ONLINE* 67, 69 (2017).

94. *Tyler*, 553 U.S. at 663–64, 666; Litman, *supra* note 93, at 69.

95. Gabay, *supra* note 92, at 1624 (noting that this “significantly limit[s] the availability of collateral relief even on a colorable claim of a new rule”).

96. *See* Litman, *supra* note 93, at 69.

97. *See id.* at 68 (explaining that federal inmates prefer § 2241 petitions because “Congress imposed a litany of draconian conditions on prisoners’ ability to challenge their convictions under section 2255”).

98. *See supra* notes 68–69 and accompanying text; *see also* *Federal Habeas Corpus*, *supra* note 59 (providing an example of petitions alleging that the Bureau of Prisons miscalculated a sentence or that prison conditions were inadequate).

99. *United States v. Wheeler*, 886 F.3d 415, 419 (4th Cir. 2018), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018); *see also* 28 U.S.C. § 2255(e) (2012); *Federal Habeas Corpus*, *supra* note 59.

to consider federal prisoners' habeas petitions that challenge their convictions or sentences.<sup>100</sup> The savings clause states that:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [§ 2255], shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*<sup>101</sup>

Thus, § 2241 habeas petitions may only proceed under the savings clause where a § 2255 motion is deemed “inadequate or ineffective.”<sup>102</sup> This clause provides a safety hatch that preserves habeas relief in limited circumstances rather than barring writs of habeas corpus for federal prisoners in most situations.<sup>103</sup> By passing this provision, Congress preemptively avoided claims that it unconstitutionally suspended habeas corpus.<sup>104</sup>

When Congress passed the savings clause, it rejected proposed language that would have been more restrictive.<sup>105</sup> Today, the savings clause continues to present a challenge.<sup>106</sup> Because the Supreme Court has not circumscribed the provision's reach, this inquiry has been left to the lower courts, which are largely divided.<sup>107</sup>

## II. A SPLIT IN THE SAVINGS CLAUSE: DIVERGENT INTERPRETATIONS OF “INADEQUATE OR INEFFECTIVE”

This Part examines what Fourth Circuit Judge Steven G. Agee characterized as the “deep and mature circuit split on the reach of the savings clause.”<sup>108</sup> Part II.A describes the Tenth and Eleventh Circuits' minority approach, which prohibits habeas relief through the savings clause for intervening retroactive changes in case law. Part II.B covers the varied

100. *Protocol for the Effective Handling of Collateral Attacks on Convictions Brought Pursuant to 28 U.S.C. 2241*, *supra* note 66 (observing that most § 2241 habeas petitions are jurisdictionally defective because prisoners could bring § 2255 challenges for these claims).

101. 28 U.S.C. § 2255(e) (emphasis added).

102. *Id.*; *see also* YACKLE, *supra* note 51, at 86–87.

103. *See In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998).

104. *Id.*; *see supra* notes 54–57 (discussing the importance of the writ of habeas corpus to the American constitutional order).

105. *See* Jennifer L. Case, *Text Me: A Text-Based Interpretation of 28 U.S.C. § 2255(e)*, 103 KY. L.J. 169, 178 (2014) (observing that the Judicial Conference Committee on Habeas Corpus Procedure recommended another formulation of the savings clause, which “prohibit[ed] a prisoner from filing a § 2241 habeas petition unless it was not ‘practicable to determine his rights to discharge from custody on [a § 2255] motion because of his inability to be present at the hearing on such motion, or for other reasons’” (second alteration in original) (quoting *United States v. Hayman*, 342 U.S. 205, 215 n.23 (1952))); *see also infra* Part III.C.

106. *See* Matteson, *supra* note 64, at 363.

107. *See id.*; *infra* Part II.

108. *United States v. Wheeler*, 734 F. App'x 892, 894 (4th Cir. 2018) (mem.) (Agee, J., statement respecting denial of petition for rehearing en banc) (quoting *Bryant v. Warden*, 738 F.3d 1253, 1279 (11th Cir. 2013), *overruled by* *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1084 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 502 (2017)).

approaches of the ten circuits that permit habeas petitions under the savings clause for retroactive changes in law. This Part primarily focuses on the Third and Fifth, Sixth and Seventh, and Fourth Circuits' interpretations of the savings clause.

*A. The Minority Approach: Prisoners May Never Challenge Their Convictions or Sentences Through the Savings Clause*

The Tenth and Eleventh Circuits have the most restrictive view of the savings clause and almost entirely foreclose this provision as a means of relief.<sup>109</sup> These circuits only allow savings clause habeas relief where “something about the initial § 2255 procedure . . . itself is inadequate or ineffective for *testing* a challenge to detention.”<sup>110</sup> Under this standard, a new legal rule alone is not sufficient to warrant relief in the form of a § 2241 petition.<sup>111</sup> Instead, successful savings clause petitioners must demonstrate a weakness in the actual § 2255 court proceedings.<sup>112</sup> Examples of the limited infirmities that are sufficient for savings clause relief include the dissolution of the sentencing court,<sup>113</sup> “practical considerations,”<sup>114</sup> or a challenge to the implementation of a sentence.<sup>115</sup> The Tenth Circuit adopted this test in a 2011 opinion written by then-Judge Neil Gorsuch, *Prost v. Anderson*.<sup>116</sup>

The *Prost* court justified its test on several grounds.<sup>117</sup> First, Judge Gorsuch argued that the statute compels different meanings of the terms “remedy” and “relief.”<sup>118</sup> A court not granting relief to a prisoner is different from the savings clause’s requirement that the “*remedy* by motion is inadequate or ineffective.”<sup>119</sup> From this distinction, Judge Gorsuch deduced that so long as a prisoner had a chance to raise his or her claim, regardless of his or her success on the merits, he or she cannot bring a subsequent habeas

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109. Petition for a Writ of Certiorari, *supra* note 42, at 16–17 (discussing the circuit split and observing that “the Tenth Circuit, like the Eleventh Circuit . . . has categorically rejected the proposition that an intervening and retroactively applicable statutory-interpretation decision of this Court provides a basis for relief under Section 2255(e)” unlike the majority of circuit courts).

110. *Prost v. Anderson*, 636 F.3d 578, 589 (10th Cir. 2011); *see also McCarthan*, 851 F.3d at 1080.

111. *Prost*, 636 F.3d at 589.

112. *Id.*

113. *McCarthan*, 851 F.3d at 1093 (explaining that for military prisoners, for example, court martial proceedings cease to exist after sentencing).

114. *Id.* (observing that this may occur if there is more than one sentencing court).

115. *Id.* at 1092–93 (describing challenges to parole decisions).

116. 636 F.3d 578, 588 (10th Cir. 2011). Now a Supreme Court justice, Gorsuch could be an instrumental figure should the Supreme Court take up the savings clause debate. *See Litman, supra* note 93, at 67 (discussing Judge Gorsuch before President Trump appointed him to the Supreme Court and stating that *Prost* “provides a nice glimpse into how Judge Gorsuch might address matters that are reasonably susceptible to different resolution, as many of the Supreme Court’s cases are”).

117. *Prost*, 636 F.3d at 584–88.

118. *Id.* at 584–85.

119. *Id.*

petition under the savings clause.<sup>120</sup> Second, the court determined that Congress was aware that prisoners could raise challenges based on new statutory interpretation rules.<sup>121</sup> Congress's ban on second or successive petitions in § 2255(h), however, would be pointless if courts read the savings clause expansively.<sup>122</sup> Third, subsections (e), (f), and (h) of § 2255 focus on "providing a single opportunity to test arguments" rather than the success of such arguments.<sup>123</sup> Consequently, § 2255(e) should be taken at face value and courts should only allow § 2241 petitions if the prisoner had no chance to raise his or her argument.<sup>124</sup> Fourth, the savings clause was not intended to give prisoners "multiple bites at the apple."<sup>125</sup> Instead, Congress passed § 2255 to address venue difficulties in habeas proceedings, not to change the scope of prisoners' rights in seeking collateral relief.<sup>126</sup>

The Eleventh Circuit followed in 2017 with *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*<sup>127</sup> In *McCarthan*, the Eleventh Circuit eschewed its former rule<sup>128</sup> and credited the Tenth Circuit's interpretation as the only one faithful to the statute.<sup>129</sup> These circuits foreclose challenges premised on unfavorable circuit precedent at the time of the initial § 2255 motion<sup>130</sup>—a common basis for savings clause relief in other circuits.<sup>131</sup> The justification provided by these circuits is that petitioners may always contest adverse circuit case law in their initial § 2255 motions, which are "fully available and amply sufficient."<sup>132</sup> Drawing a comparison, *Prost* rationalizes that "a student's failure to imagine a novel or creative answer to an exam

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120. *Id.* at 585 (stating that the savings clause "emphasizes its concern with ensuring the prisoner an opportunity or chance to test his argument" and that "with this opportunity comes no guarantee about outcome or relief").

121. *Id.* at 585–86.

122. *See id.* at 586.

123. *Id.* at 587.

124. *Id.*

125. *Id.* at 588.

126. *Id.* at 587–88.

127. 851 F.3d 1076 (11th Cir.), *cert. denied*, 138 S. Ct. 502 (2017). In this case, petitioner Daniel McCarthan sought to dispute his prison sentence stemming from a felon-in-possession charge. McCarthan was originally sentenced as a "career offender" because of three earlier convictions. However, an intervening retroactive decision held that one of McCarthan's prior convictions did not count toward the career offender designation. Accordingly, McCarthan argued that his sentence should be reviewed because the sentencing court relied on incorrect benchmarks. *See id.* at 1079–81; Petition for a Writ of Certiorari, *supra* note 42, at 5–6; *see also infra* Part IV.D.

128. The Eleventh Circuit previously employed a five-prong test, which allowed for savings clause relief based on new precedent. However, it only permitted relief in two cases using that former test. *See McCarthan*, 851 F.3d at 1080, 1096–99 (explaining that prior "precedents have failed to adhere to the text of section 2255(e), have not incurred significant reliance interests, and have proved unworkable, [thus] today we overrule them").

129. *See id.* at 1080, 1085 (noting that "[w]e join the Tenth Circuit in applying the law as Congress wrote it" and avowing that "[o]nly the Tenth Circuit has adhered to—or even seriously considered—the text of the saving clause").

130. *See id.* at 1086–87; *Prost*, 636 F.3d at 590.

131. *See infra* Part II.B for further discussion of the different majority interpretations.

132. *Prost*, 636 F.3d at 589–90 (observing that the petitioner's entire argument was based on the improbability of success if he challenged circuit precedent because "he was entirely free to raise and test" the law); *McCarthan*, 851 F.3d at 1086.

question doesn't make the exam an inadequate or ineffective procedure for testing his knowledge."<sup>133</sup> Accordingly, even if settled law squarely contradicts their position, petitioners and their lawyers are expected to brainstorm compelling challenges to precedent.<sup>134</sup>

### B. The Majority Approach

Ten circuits allow prisoners to bring § 2241 challenges through the savings clause under certain circumstances.<sup>135</sup> On the whole, these circuits find that an intervening change in legal precedent makes other relief inadequate or ineffective under § 2255(e), albeit under different circumstances in different circuits.<sup>136</sup> The circuits that follow the majority view have diverse rules for § 2255(e) relief with significant implications for petitioners.<sup>137</sup> A critical point of departure is that some circuits only permit savings clause relief to challenge the legitimacy of an underlying *conviction*, whereas others also permit relief to dispute the validity of a *sentence*.<sup>138</sup>

As a threshold matter, in conviction or sentence disputes, petitioners seeking to use the savings clause must first demonstrate that they have exhausted all other opportunities for relief under § 2255.<sup>139</sup> A petitioner could be successful, for example, by showing that he or she previously filed

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133. *Prost*, 636 F.3d at 589.

134. *See id.*; *see also* Adam Liptak, *Serving Extra Years in Prison, and the Courthouse Doors Are Closed*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/politics/trump-justice-department-prison-sentences.html> [<https://perma.cc/3K4P-VR3E>].

135. *See* United States v. Wheeler, 886 F.3d 415, 428–29 (4th Cir. 2018), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018); Bruce v. Warden, 868 F.3d 170, 180 (3d Cir. 2017); Hill v. Masters, 836 F.3d 591, 594–95 (6th Cir. 2016); Brown v. Caraway, 719 F.3d 583, 586 (7th Cir. 2013); Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006) (requiring savings clause petitioners to (1) claim they are actually innocent, and (2) show that they have not had an unobstructed procedural opportunity to bring their challenge); Abdullah v. Hedrick, 392 F.3d 957, 960 (8th Cir. 2004) (using the same test as the Ninth Circuit); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002) (failing to adopt the Seventh Circuit's test or create its own test but relying on Seventh Circuit precedent for the idea that "§ 2255 'can fairly be termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense" (quoting *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998))); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001) (requiring petitioners to allege they: (1) are imprisoned for actions that are no longer criminal due to an intervening retroactive Supreme Court decision, and (2) have had no prior opportunity to dispute this conviction based on the intervening change); United States v. Barrett, 178 F.3d 34, 52 (1st Cir. 1999) (observing that savings clause relief is allowed in some instances but deciding that "it is not necessary in this case to articulate those circumstances precisely—we leave that task for another day"); Triestman v. United States, 124 F.3d 361, 377 (2d Cir. 1997) (stating that savings clause claims are viable in "at the least, the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions").

136. *See* Petition for a Writ of Certiorari, *supra* note 40, at 23–24.

137. *See infra* Part III.A.

138. *See infra* Part II.B.

139. *See* United States v. Wheeler, 734 F. App'x 892, 894–96 (4th Cir. 2018) (mem.) (Thacker, J., statement on petition for rehearing en banc) (noting that Wheeler lacked another way to bring a challenge because he previously filed a direct appeal and § 2255 motion); *supra* notes 87, 88–90 and accompanying text (discussing § 2255(h)'s ban on multiple motions).



a § 2255 motion on other grounds.<sup>140</sup> Since § 2255(h) largely limits second or successive motions under that statute, the petitioner must show that he or she has no other vehicle for invoking new retroactive case law.<sup>141</sup> Significantly, since petitioners could already bring second or successive § 2255 motions if the case law announces a new constitutional rule, they must also assert that the new precedent they are invoking is a statutory interpretation decision.<sup>142</sup> These considerations apply in every circuit that allows some degree of savings clause relief.<sup>143</sup>

Beyond these initial considerations, the circuits have set different limits on the reach of § 2255(e) relief. First, Part II.B.1 examines the Third and Fifth Circuits' standard, which permits prisoners to use intervening retroactive case law to challenge the validity of their underlying convictions but not the implementation of their sentences.<sup>144</sup> Part II.B.2 next looks at the Sixth and Seventh Circuits' standard, which is distinct in permitting prisoners to rely on intervening retroactive case law to challenge the validity of their sentences in addition to their convictions.<sup>145</sup> Finally, Part II.B.3 analyzes the recently extended Fourth Circuit rule, which also permits challenges to sentences through the savings clause. The Fourth Circuit broadened its interpretation of the savings clause in March 2018, which is the basis of a petition for a writ of certiorari pending before the Supreme Court. This section also discusses the intracircuit disagreement over the reach of the Fourth Circuit's test.

### 1. Many Circuits Allow Prisoners to Challenge Their Underlying Convictions Through the Savings Clause

Most circuits allow prisoners to use the savings clause to challenge their convictions.<sup>146</sup> Of these majority approaches, the Third and Fifth Circuits rely on a stricter construction of the savings clause which requires that prisoners demonstrate their "actual innocence."<sup>147</sup> Under this theory, prisoners must (1) allege that they are imprisoned for actions that are *no longer deemed criminal* due to an intervening Supreme Court decision that

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140. See *Wheeler*, 734 F. App'x at 895 (Thacker, J., statement on petition for rehearing en banc); *supra* notes 87, 88–90 and accompanying text (discussing § 2255(h)'s ban on multiple motions).

141. See *Wheeler*, 734 F. App'x at 894–95 (Thacker, J., statement on petition for rehearing en banc) (noting that *Wheeler* was left with a "conundrum").

142. See *id.* (noting that *Wheeler*'s challenge did not involve a constitutional rule); *supra* notes 87, 88–90 and accompanying text.

143. These factors are part of § 2255 and bear on the meaning of "inadequate or ineffective" under the savings clause. See *supra* notes 87–90 and accompanying text.

144. In such challenges, an inmate argues that, based on an intervening decision, his or her conduct does not fulfill the requirements of the crime for which he or she was convicted. Thus, the inmate contests his or her conviction and argues that he or she is not guilty under the law. See *infra* Part II.B.1.

145. An inmate bringing this type of challenge contends that due to an intervening decision, the original court incorrectly sentenced him. See *infra* Parts II.B.2–3.

146. See *supra* note 135 and accompanying text.

147. See, e.g., *Bruce v. Warden*, 868 F.3d 170, 180 (3d Cir. 2017); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

applies retroactively, and (2) have had no prior opportunity to dispute these convictions based on the intervening change in precedent.<sup>148</sup>

The first prong of this test follows the Supreme Court’s standard for actual innocence. This requires petitioners to show that, based on all evidence presented, “it is more likely than not that no reasonable juror would have convicted” them.<sup>149</sup> Retroactivity is determined in accordance with the plurality opinion in *Teague v. Lane*.<sup>150</sup> Under *Teague*, new cases interpreting constitutional issues of criminal procedure do not apply retroactively.<sup>151</sup> A new rule may only be retroactive if it is substantive<sup>152</sup> or a “watershed rule[] of criminal procedure.”<sup>153</sup> This test’s second prong distinguishes between Supreme Court constitutional decisions and statutory interpretation decisions.<sup>154</sup> Because § 2255 already permits additional motions based on new Supreme Court rules of constitutional law, such decisions are not sufficient for savings clause relief.<sup>155</sup> Therefore, only claims based on statutory interpretation decisions may proceed through the savings clause.<sup>156</sup>

The Third and Fifth Circuits are unique in that they *only* permit savings clause claims to proceed on a theory of actual innocence.<sup>157</sup> However, the Fourth, Sixth, and Seventh Circuits, which this Note discusses in the following two sections, also allow savings clause challenges to convictions.<sup>158</sup> As the Third Circuit observed, permitting challenges to underlying convictions avoids the “thorny constitutional issue” that would arise if an inmate continued to be incarcerated despite statutory case law

148. *Bruce*, 868 F.3d at 180 (quoting *United States v. Tyler*, 732 F.3d 241, 246 (3d Cir. 2013)); *Reyes-Requena*, 243 F.3d at 904 (explaining that the second prong is met where the petitioner’s claim was foreclosed by circuit precedent at earlier times when it could have been raised). Gary Bruce’s argument based on *Fowler* is an example. *See supra* notes 20–24, 31–36 and accompanying text. If Gary had been able to show that, based on all the evidence, it was more likely than not that the victims would not have communicated with federal officials as required for witness-tampering murder, he may have prevailed. *See supra* note 34.

149. *Bruce*, 868 F.3d at 184 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)).

150. 489 U.S. 288 (1989).

151. *Id.* at 310.

152. *Id.* at 307 (describing a substantive rule as one that makes “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring))).

153. *Id.* at 311 (stating that a new rule of criminal procedure is one that “requires the observance of ‘those procedures that . . . are ‘implicit in the concept of ordered liberty’” (quoting *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring))).

154. *See Reyes-Requena v. United States*, 243 F.3d 893, 904–05 (5th Cir. 2001).

155. *See id.*

156. *Bruce v. Warden*, 868 F.3d 170, 179–80 (3d Cir. 2017); *Reyes-Requena*, 243 F.3d at 904–05.

157. *See, e.g., Bruce*, 868 F.3d at 177; *Reyes-Requena*, 243 F.3d at 904.

158. *See, e.g., Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (observing that the Seventh Circuit has gone further than its prior holdings, which were limited to actual innocence); *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012) (stating that the Sixth Circuit’s actual innocence standard stems from *Bousley* and, before the Sixth Circuit allowed challenges to convictions, this was the only way to obtain savings clause relief in the circuit); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000) (establishing the Fourth Circuit’s test for actual innocence savings clause claims).

establishing his or her innocence.<sup>159</sup> Importantly, though, the Fourth, Sixth, and Seventh Circuits take a broader view and also entertain challenges to sentences.

## 2. The Sixth and Seventh Circuits Also Permit Petitioners to Dispute Their Sentences Through the Savings Clause

Besides viewing the savings clause as permitting relief for challenges to convictions, the Sixth and Seventh Circuits espouse the same test for inmates who seek to use the savings clause to challenge their sentences.<sup>160</sup> On such claims, petitioners must demonstrate that they are relying on: (1) a case involving a statutory interpretation dispute (2) that is retroactive and could not have been raised in their first § 2255 motions and (3) that “the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect.”<sup>161</sup> The Seventh Circuit first drew this conclusion from a textualist approach in *Brown v. Caraway*<sup>162</sup> and the Sixth Circuit later followed in *Hill v. Masters*.<sup>163</sup> Both averred that savings clause petitioners can have a plausible claim for collateral relief by disputing the validity of their detentions without showing that they are innocent of their underlying convictions.<sup>164</sup> Thus, in the Sixth and Seventh Circuits, the savings clause can be invoked without proving actual innocence.<sup>165</sup>

Notably, the Sixth and Seventh Circuits did not seem to foresee this interpretation applying broadly. The Sixth Circuit believed that its test would be limited to a small portion of petitioners.<sup>166</sup> While both circuits adopted the test as described above, they also referred to another consideration—the U.S. Sentencing Guidelines (“Guidelines”).<sup>167</sup> The Sixth Circuit stated that only prisoners who were sentenced under the Guidelines before *United States v. Booker*,<sup>168</sup> which rendered them advisory as opposed to mandatory, could

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159. *Bruce*, 868 F.3d at 179.

160. *Hill v. Masters*, 836 F.3d 591, 595 (6th Cir. 2016); *accord Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013).

161. *Hill*, 836 F.3d at 595; *accord Brown*, 719 F.3d at 586. For example, Hill claimed the following: First, in *Descamps v. United States*, 576 U.S. 254 (2013), the Supreme Court arguably restricted how courts determine if a state crime is a “violent felon[y]” that enhances a sentence under the Armed Career Criminal Act. *Hill*, 836 F.3d at 595. Based on *Descamps*, the Fourth Circuit later determined that one of Hill’s predicate offenses, which enhanced his sentence, was not a violent felony. *Id.* at 595–96. Second, the government conceded that the statutory interpretation decision in *Descamps* and the subsequent Fourth Circuit case applied retroactively. *Id.* at 595–96. Since they were not constitutional decisions, prisoners could not raise these cases in second or successive motions under § 2255(h). *Id.* Third, the court erroneously subjected Hill to a sentencing enhancement, and so he argued that his misapplied sentence under the Guidelines was a “fundamental error.” *Id.*

162. 719 F.3d 583 (7th Cir. 2013).

163. *Hill*, 836 F.3d at 599; *Brown*, 719 F.3d at 588.

164. *See Hill*, 836 F.3d at 598; *Brown*, 719 F.3d at 588.

165. *Hill*, 836 F.3d at 595; *Brown*, 719 F.3d at 586 (departing from other circuits’ interpretations, including that of the Fifth Circuit, which requires actual innocence).

166. *See Hill*, 836 F.3d at 599–600.

167. *Id.*; *Brown*, 719 F.3d at 588.

168. 543 U.S. 220 (2005).

challenge their sentences through the savings clause.<sup>169</sup> The Seventh Circuit similarly said that “a petitioner may utilize the savings clause to challenge the misapplication of the career offender Guideline, at least where, as here, the defendant was sentenced in the pre-*Booker* era.”<sup>170</sup>

In *Hill*, the Sixth Circuit also supported its holding with Judge Robert Gregory’s dissenting opinion in the since-vacated Fourth Circuit case written by Judge Agee, *United States v. Surratt*.<sup>171</sup> The court compared *Hill* and *Brown* to *Surratt*, noting, “Serving a sentence imposed under mandatory guidelines (subsequently lowered by retroactive Supreme Court precedent) shares similarities with serving a sentence imposed above the statutory maximum. Both sentences are beyond what is called for by law . . . and both raise a fundamental fairness issue.”<sup>172</sup> Therefore, these circuits seem to permit a prisoner to challenge his or her sentence under the savings clause based on retroactively applicable statutory precedent if the sentence: (1) exceeds the statutory maximum; or (2) was imposed under mandatory Guidelines subsequently made noncompulsory, regardless of whether the sentence was above or below the statutory maximum.<sup>173</sup>

### 3. The Fourth Circuit’s Recent Expansion of the Savings Clause Also Encompasses Sentence-Based Challenges

In March 2018, the Fourth Circuit reconsidered and revised its interpretation of § 2255(e) in *United States v. Wheeler*.<sup>174</sup> Despite previously limiting savings clause petitions to actual innocence claims, the Fourth Circuit adopted a more expansive savings clause test in *Wheeler*.<sup>175</sup> In October 2018, the government filed a petition for a writ of certiorari.<sup>176</sup>

In 2008, the Western District of North Carolina sentenced Gerald Wheeler to ten years’ imprisonment.<sup>177</sup> Due to Wheeler’s 1996 felony conviction, the Guidelines mandated an enhanced sentence of ten years to life.<sup>178</sup> At sentencing, the court expressed its dissatisfaction with the mandatory sentencing restrictions, remarking, “[T]he sentence that is required to be imposed upon you is a harsh sentence. It’s a mandatory minimum sentence. I don’t have any discretion in that area.”<sup>179</sup>

169. See *Hill*, 836 F.3d at 599–600.

170. *Brown*, 719 F.3d at 588.

171. 797 F.3d 240 (4th Cir. 2015), *vacated as moot*, 855 F.3d 218 (4th Cir. 2017).

172. *Hill*, 836 F.3d at 599.

173. See *id.* at 599–600; accord *Brown*, 719 F.3d at 587.

174. *United States v. Wheeler*, 886 F.3d 415, 428–29 (4th Cir. 2018), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018).

175. See *United States v. Wheeler*, 734 F. App’x 892, 893 n.1 (4th Cir. 2018) (mem.) (Agee, J., statement respecting denial of petition for rehearing en banc) (noting that the Third and Fifth Circuits’ actual-innocence standard is consistent with the Fourth Circuit’s prior case law, which only permitted savings clause challenges to convictions).

176. See *generally* Petition for a Writ of Certiorari, *supra* note 40.

177. *Wheeler*, 886 F.3d at 419.

178. *Id.*

179. *Id.* at 420.

Wheeler's subsequent savings clause petition relied on *United States v. Simmons*,<sup>180</sup> which was decided in 2011.<sup>181</sup> Under *Simmons*, which the Fourth Circuit determined applied retroactively, Wheeler's 1996 conviction was not a felony drug offense.<sup>182</sup> Consequently, Wheeler did not qualify for a sentencing enhancement under the Guidelines.<sup>183</sup> Absent this enhancement, Wheeler would have faced a Guidelines range of seventy to eighty-seven months and a statutory range of five to forty years in prison, which is a significant difference from the range under which he was sentenced in 2008.<sup>184</sup> In permitting Wheeler to dispute his sentence, the Fourth Circuit set the following parameters: (1) "at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence;" (2) the law changed after the prisoner appealed and filed an initial § 2255 motion and this change applies retroactively; (3) the prisoner cannot fulfill § 2255(h)(2)'s requirements for second or successive motions; and (4) the retroactive change caused a mistake in sentencing that is "sufficiently grave to be deemed a fundamental defect."<sup>185</sup>

The Fourth Circuit justified extending the savings clause to sentence challenges by reasoning that prisoners would otherwise have no way to rectify "a fundamental defect which inherently results in a complete miscarriage of justice."<sup>186</sup> The *Wheeler* majority also cited Sixth and Seventh Circuit precedent to support its test,<sup>187</sup> though this later generated pushback.<sup>188</sup> The court specifically relied on *Hill* and *Brown* for the premise that a mistake in sentencing could qualify as a fundamental defect even if the sentence imposed did not surpass the legal maximum.<sup>189</sup> This rule was instrumental in Wheeler's case because, even applying *Simmons*,<sup>190</sup> he could be resentenced to the same ten-year term under the statutory range.<sup>191</sup> However, after *Wheeler*, Judge Agee cast doubt on this interpretation.<sup>192</sup> Judge Agee disputed the *Wheeler* majority's characterization of *Hill* and

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180. 635 F.3d 140 (4th Cir.), *vacated and remanded*, 649 F.3d 237 (4th Cir. 2011).

181. *Wheeler*, 886 F.3d at 421 (citing *Simmons*, 635 F.3d 140).

182. *Id.* (explaining that *Simmons* was made retroactive in *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013)).

183. *Id.*

184. *Id.* at 420; *see supra* notes 177–79 and accompanying text.

185. *Wheeler*, 886 F.3d at 429.

186. *Id.* at 428 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

187. *Id.* at 429, 432.

188. *See United States v. Wheeler*, 734 F. App'x 892, 893 (4th Cir. 2018) (mem.) (Agee, J., statement respecting denial of petition for rehearing en banc).

189. *See Wheeler*, 886 F.3d at 433 ("Thus, like the Seventh Circuit, the Sixth Circuit also recognizes the fundamental significance of a proper sentencing range. We agree with our sister circuits' view . . .").

190. Under *Simmons*, Wheeler's 1996 conviction was not a predicate offense warranting a sentencing enhancement. *See supra* notes 181–84 and accompanying text.

191. While the district court's stated dissatisfaction with the Guidelines makes the ten-year sentence unlikely, Wheeler could have received up to forty years regardless. *See Wheeler*, 886 F.3d at 420.

192. *See Wheeler*, 734 F. App'x at 893 (Agee, J., statement respecting denial of petition for rehearing en banc) (questioning the majority's approach and calling on the Supreme Court to review this issue).

*Brown* and claimed that the Fourth Circuit adopted the broadest interpretation of the savings clause and “fundamental defect.”<sup>193</sup> He argued that, contrary to the majority opinion, savings clause sentence challenges are only viable in the Sixth and Seventh Circuits if prisoners will be imprisoned for a period longer than Congress has authorized.<sup>194</sup>

Judge Agee’s argument highlights what Fourth Circuit Judge Stephanie Thacker characterized as a legal “conundrum.”<sup>195</sup> Though Wheeler could receive the exact same punishment on remand, the intervening change in law is significant because his sentence no longer reflects a statutorily *mandated* minimum.<sup>196</sup> Judges Agee and Thacker disagree over the proper reading of *Brown* and *Hill* and whether the petitioners in those cases were originally sentenced below or above the statutory maximum.<sup>197</sup> Accordingly, there is a dilemma regarding whether claims like Wheeler’s would indeed be foreclosed under the Sixth and Seventh Circuits’ test.<sup>198</sup>

### III. AN IMPERATIVE INTERPRETATION: THE IMPORTANCE OF THE SUPREME COURT CONSTRUING THE SAVINGS CLAUSE EXPANSIVELY

The courts of appeals’ distinct interpretations of the savings clause present a puzzling circuit split that prejudices inmates detained in certain locations. As Third Circuit Judge D. Michael Fisher noted, “[B]y enacting § 2255[,] Congress sought to alleviate the inefficiencies [of § 2241] . . . . Now those difficulties have returned, though in a new form. And so they will remain, at least until Congress or the Supreme Court speaks on the matter.”<sup>199</sup> The circuits’ conflicting interpretations have transformed the savings clause into an inefficient provision due to the disparate and unpredictable results it creates for inmates.<sup>200</sup> Currently, some prisoners may invoke new case law for potential release, while others imprisoned in different circuits will remain incarcerated without review.<sup>201</sup>

Furthermore, prisoners have no “constitutional right to counsel when mounting collateral attacks.”<sup>202</sup> Thus, most habeas petitions are filed by pro

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193. *Id.* (observing that the majority “relies on these cases in error”). *But see Wheeler*, 886 F.3d at 433 (stating that it agrees with the Sixth and the Seventh Circuits, which hold that “a sentencing error need not result in a sentence that exceeds statutory limits in order to be a fundamental defect”).

194. *Wheeler*, 734 F. App’x at 893 (Agee, J., statement respecting denial of petition for rehearing en banc).

195. *Id.* at 894 (Thacker, J., statement on petition for rehearing en banc).

196. *See id.* at 894–95 (observing the difficulties Wheeler faced to challenge the legality of his detention where a court sentenced him under an erroneous mandatory minimum).

197. *Compare id.* at 893 (Agee, J., statement respecting denial of petition for rehearing en banc), with *Wheeler*, 886 F.3d at 432. For further discussion see *infra* Part IV.B.

198. *Compare Wheeler*, 734 F. App’x at 893 (Agee, J., statement respecting denial of petition for rehearing en banc), with *Wheeler*, 886 F.3d at 433.

199. *See Bruce v. Warden*, 868 F.3d 170, 181 (3d Cir. 2017).

200. *See infra* Part III.B.

201. *See supra* Part II.

202. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.”).

se litigants.<sup>203</sup> The uncertainty surrounding the savings clause's scope makes collateral review even more challenging for prisoners to navigate. For this reason, Judge Agee also implored the Supreme Court to consider this issue as soon as possible.<sup>204</sup> Agee observed that a prompt Supreme Court decision would ensure "that the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results in this important area of law."<sup>205</sup>

Agreeing with the government, which filed a petition for a writ of certiorari in *Wheeler*, and Judges Agee and Fisher, this Part argues that the Supreme Court must decisively interpret the savings clause. Though Judge Fisher is correct that Congress could remedy the savings clause dispute, parties on both sides concur that a legislative solution is unlikely.<sup>206</sup> Accordingly, the Court should grant certiorari in a case that presents this issue. Importantly, the most likely candidate for Supreme Court review at the moment, *Wheeler*, does not squarely present the issue.<sup>207</sup> *Wheeler* focuses on savings clause challenges to sentences rather than convictions.<sup>208</sup> In 2017, the Court denied certiorari in *McCarthan* and declined to review the Eleventh Circuit's refusal to extend savings clause relief under either theory.<sup>209</sup> Given the circuit split's recent expansion,<sup>210</sup> the Court should grant certiorari in *Wheeler*. However, if the Supreme Court finds that *Wheeler* is not a suitable vehicle for review or if the case becomes moot,<sup>211</sup> the Court should grant certiorari upon receiving a viable petition addressing this issue.

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203. Jude Obasi Nkama, Note, *The Great Writ Encumbered by Great Limitations: Is the Third Circuit's Notice Requirement for Habeas Relief a Structural Bias Against "Persons in Custody?"*, 26 SETON HALL LEGIS. J. 181, 184 (2001).

204. *Wheeler*, 734 F. App'x at 894 (Agee, J., statement respecting denial of petition for rehearing en banc). In October 2018, the government filed a petition for a writ of certiorari in *Wheeler*. See generally Petition for a Writ of Certiorari, *supra* note 40. In this petition, the Solicitor General urges the Supreme Court to adopt the Tenth and Eleventh Circuits' interpretation—a position that the government had only recently embraced. The government argues that the Supreme Court should prohibit savings clause challenges for intervening retroactive changes in case law. See *id.* at 13. In November, *Wheeler*'s counsel waived his right to reply to the petition. Waiver of Right to Respond for Respondent, *United States v. Wheeler*, No. 18-420 (U.S. Nov. 5, 2018). Nevertheless, the Supreme Court requested a reply brief from *Wheeler*. Response Requested, *United States v. Wheeler*, No. 18-420 (U.S. Nov. 13, 2018). On January 14, 2019, *Wheeler*'s counsel filed a reply brief opposing the petition. Brief in Opposition, *United States v. Wheeler*, No. 18-420 (U.S. Jan. 14, 2019).

205. *Wheeler*, 734 F. App'x at 894 (Agee, J., statement respecting denial of petition for rehearing en banc).

206. See Petition for a Writ of Certiorari, *supra* note 40, at 13 (arguing that "[o]nly [the Supreme] Court's intervention can provide the necessary clarity" in the government's petition for certiorari); Petition for a Writ of Certiorari, *supra* note 42, at 26 (observing the "unlikelihood of congressional intervention" in a prisoner's petition for certiorari).

207. See *supra* Part II.B.3.

208. See *supra* Part II.B.3.

209. See Petition for a Writ of Certiorari, *supra* note 42, at I (stating that the question presented involves whether a petitioner can use the savings clause to bring a habeas petition "to raise a claim that his conviction or sentence is invalid under an intervening and retroactively applicable statutory-interpretation decision of this Court" (emphasis added)).

210. See *supra* Part II.B.3.

211. See *United States v. Wheeler*, 734 F. App'x 892, 893 (4th Cir. 2018) (mem.) (Agee, J., statement respecting denial of petition for rehearing en banc) (recognizing "the potential

This Note posits that the Court must preserve both avenues of savings clause relief—sentences and convictions. While Congress has not directly addressed the circuits’ divergent interpretations of the savings clause, broad savings clause relief aligns with its recent interest in criminal justice initiatives.<sup>212</sup> The Supreme Court’s final interpretation of § 2255(e)’s scope is necessary to reduce arbitrariness and legal and judicial inefficiencies. Moreover, the savings clause presents a recurring and fundamental issue that mandates the Court’s intervention.

#### A. *The Circuit Split Fosters Arbitrariness for Prisoners*

Together, venue requirements and contradictory interpretations of the savings clause create a predicament for habeas petitioners.<sup>213</sup> As discussed above, parties must file § 2241 habeas petitions in the district where they are imprisoned, not the district that convicted and sentenced them.<sup>214</sup> Inmates are assigned to prisons based on various factors.<sup>215</sup> Once a federal court sentences a defendant, it delegates exclusive authority to the Bureau of Prisons to determine where the defendant will be imprisoned.<sup>216</sup> Generally, the Bureau endeavors to incarcerate defendants in a prison located within a 500-mile radius of their homes, but such placements are not guaranteed.<sup>217</sup> Furthermore, even when defendants are imprisoned within this radius, there is no assurance that the prison is necessarily located within the circuit of their initial convictions.<sup>218</sup>

Since neither prisoners nor courts control where inmates are sent, inmates face the possibility of being denied an opportunity that is given to otherwise similarly situated prisoners.<sup>219</sup> The *Bruce* cases underscore the potentially grave consequences of disjointed interpretations of § 2255(e).<sup>220</sup> The Bruces committed the same underlying offenses together, were charged with and convicted of identical crimes, and sentenced to the same prison terms.<sup>221</sup> The only fork in the Bruces’ road through the criminal justice system stemmed from disparate approaches to the savings clause.<sup>222</sup> Though the circuit permitting relief ultimately did not rule in Gary Bruce’s favor, offering only one brother the opportunity to challenge his detention is problematic in

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that the case may become moot if Wheeler is released from incarceration in October 2019, as projected,” which caused Judge Agee to decline to poll the Fourth Circuit for rehearing en banc to “expedite the path for the Government to petition for certiorari to the Supreme Court”).

212. See *infra* notes 255–61 and accompanying text.

213. See *supra* text accompanying note 77.

214. See *supra* notes 66, 77 and accompanying text.

215. See *Designations*, FED. BUREAU PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/designations.jsp](https://www.bop.gov/inmates/custody_and_care/designations.jsp) [<https://perma.cc/QP8G-CB93>] (last visited Feb. 12, 2019).

216. See *id.*

217. *Id.* (stating that if inmates are placed outside this radius, “generally, it is due to specific security, programming, or population concerns”).

218. See *id.* (failing to mention a judicial circuit as a consideration in placing inmates).

219. See *supra* notes 1–4, 11–37 and accompanying text.

220. See *supra* notes 1–4, 11–37 and accompanying text.

221. See *supra* notes 4, 27–37 and accompanying text.

222. See *supra* notes 26–34 and accompanying text.



itself.<sup>223</sup> This disparate treatment highlights why “nationwide uniformity as to the savings clause’s scope” is desirable and “only [the Supreme] Court’s intervention can ensure” it.<sup>224</sup>

*B. The Circuit Split Promotes Legal and Judicial Inefficiency*

Parties on both sides of this debate agree that differing interpretations of § 2255(e) contradict, rather than advance, Congress’s purpose in enacting this statute.<sup>225</sup> After examining the legislative history of § 2255, the Supreme Court found no indication of legislative intent to curtail collateral remedies.<sup>226</sup> Rather, its “sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.”<sup>227</sup> This solution, however, is now the source of other obstacles for prisoners attempting to rely on the savings clause. Without binding Supreme Court precedent, the government and individual circuits may revisit and change their constructions of the savings clause whenever they see fit.<sup>228</sup> This presents confusion and uncertainty for petitioners, judges, and lawyers alike.<sup>229</sup>

Over the last twenty years, the Department of Justice (DOJ) has changed its official construction of the savings clause three times.<sup>230</sup> Soon after Congress passed the AEDPA in 1996, the DOJ interpreted the clause as foreclosing § 2241 habeas petitions even for inmates arguing that new case law makes them innocent.<sup>231</sup> In 1998, the DOJ shifted its position and maintained that prisoners could bring § 2241 petitions under the savings clause if, based on a new rule, their sentences either exceeded the statutory maximum or were incorrectly calculated from the Guidelines.<sup>232</sup> Yet, in the DOJ’s *McCarthan* brief in October 2017, it returned to its initial stance.<sup>233</sup> Later, in its petition for a writ of certiorari in *Wheeler*, the DOJ justified this shift.<sup>234</sup> In this petition, the DOJ noted that “its original interpretation of Section 2255(e) was correct, and . . . a contrary reading would be insufficiently faithful to the statute’s text and to Congress’s evident purpose in limiting the circumstances in which a criminal defendant may file a second or successive petition for collateral review.”<sup>235</sup>

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223. See *supra* notes 26–36 and accompanying text.

224. Petition for a Writ of Certiorari, *supra* note 40, at 25–26.

225. *Id.* at 13; Constitution Project Brief, *supra* note 75, at 13.

226. See *United States v. Hayman*, 342 U.S. 205, 219 (1952).

227. *Id.* at 219 (emphasis added).

228. See *supra* note 204 and accompanying text.

229. See *supra* note 204 and accompanying text.

230. Brief for Respondent in Opposition at 12, *McCarthan v. Collins*, 138 S. Ct. 502 (2017) (No. 17-85).

231. See *id.*; Petition for a Writ of Certiorari, *supra* note 40, at 24–25.

232. See Brief for Respondent in Opposition, *supra* note 230, at 12; Petition for a Writ of Certiorari, *supra* note 40, at 13.

233. See Brief for Respondent in Opposition, *supra* note 230, at 11–13.

234. Petition for a Writ of Certiorari, *supra* note 40, at 13.

235. *Id.*

While the government is certainly entitled to revise its understanding of statutes, the latest modification was characterized as uncommon<sup>236</sup> and “opportunistic.”<sup>237</sup> Further, the Fourth Circuit expressed skepticism of the government’s reasons for backtracking.<sup>238</sup> The court criticized the government, stating that its “about-face is particularly distasteful in this case wherein [it] cannot identify any principled reason for its turnabout” and noting that “[i]t was not until oral argument that the [government] attributed this change of position to ‘new leadership in the [DOJ].’”<sup>239</sup>

Moreover, the DOJ also reversed course regarding whether the Supreme Court should be involved in reviewing the savings clause.<sup>240</sup> Just one year before the DOJ filed a petition for a writ of certiorari in *Wheeler*, it opposed certiorari on a savings clause claim in *McCarthan*.<sup>241</sup> In November 2017, the DOJ resisted Supreme Court review and indicated that, instead, it was developing a legislative solution to resolve the savings clause’s ambiguities.<sup>242</sup> An expert on collateral review, Professor Leah Litman of the University of California Irvine School of Law, described the DOJ’s earlier resistance to the Supreme Court’s involvement as “incredibly unseemly” and “not a good look.”<sup>243</sup> Now, however, the DOJ has changed its tune once again—avowing that “[o]nly [the Supreme] Court’s intervention can provide the necessary clarity” for the savings clause.<sup>244</sup>

Without a conclusive Supreme Court decision, the DOJ can continue modifying its position irrespective of its impact on prisoners. For example, the DOJ could easily modify its interpretation whenever it best supports a different DOJ policy or a new political party is at the DOJ’s helm. Before its most recent reconsideration, the DOJ invoked its 1998 interpretation in at least eleven Supreme Court briefs.<sup>245</sup> Furthermore, the DOJ implored the Supreme Court to side with its positions on other issues by “leverag[ing] its [prior] acceptance of the majority” savings clause standard.<sup>246</sup> Thus, future modifications to the DOJ’s interpretation of the savings clause would create

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236. See Liptak, *supra* note 134.

237. See Leah Litman & Lark Turner, *DOJ Goes Big So Prisoners Can’t Go Home*, TAKE CARE (Oct. 26, 2017), <http://takecareblog.com/blog/doj-goes-big-so-prisoners-can-t-go-home> [<https://perma.cc/8F5X-QGP8>].

238. See *United States v. Wheeler*, 886 F.3d 415, 434 (4th Cir. 2018) (calling it “curious then that the Government chose now—literally in the middle of Appellant’s case—to completely change course”), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018); see also *infra* Part II.B.1.

239. *Wheeler*, 886 F.3d at 434 n.12.

240. Compare Liptak, *supra* note 134 (commenting that the DOJ was considering legislative, rather than judicial, solutions), with *Petition for a Writ of Certiorari*, *supra* note 40, at 13 (stating that “[o]nly this Court’s intervention can provide the necessary clarity”).

241. Liptak, *supra* note 134.

242. See *id.*

243. *Id.*; see also Reply Brief for the Petitioner, *supra* note 1, at 2 (stating that “when the government changes position on a concededly important question that has divided the circuits, it should at least have the courage of its convictions and be willing to defend its new position on the merits in this Court”).

244. *Petition for a Writ of Certiorari*, *supra* note 40, at 13 (emphasis added).

245. See Reply Brief for the Petitioner, *supra* note 1, at 3.

246. *Id.* at 5.

confusion and cast doubt on other areas of supposedly settled law. Furthermore, the statute's far-reaching and significant implications for prisons make stability even more desirable.<sup>247</sup>

*C. The Circuit Split Presents a Recurring and Fundamental Issue to Prisoners' Equitable Treatment*

The savings clause's effect is particularly pronounced because of the provision's relevance to weighty criminal cases.<sup>248</sup> Typically, when the Supreme Court rejects lower courts' interpretations of a federal criminal statute in favor of a more restrictive one, the Supreme Court's interpretation is retroactively applicable.<sup>249</sup> The Supreme Court has issued many such decisions over the last decade, but only inmates in certain circuits can currently benefit from them.<sup>250</sup> Prisoners located in the Tenth and Eleventh Circuits are foreclosed from invoking such retroactive precedent on collateral review.<sup>251</sup> Consequently, inmates are either detained for activity that is no longer criminal or for a term beyond what the law recommends.<sup>252</sup> Despite these concerns, the Supreme Court denied certiorari in *McCarthan* and refused to take up the issue.<sup>253</sup>

The government filed a petition for a writ of certiorari in *Wheeler* only ten months after the Supreme Court denied certiorari in *McCarthan*.<sup>254</sup> However, recent criminal justice reform supports bolstering prisoners' rights. In December 2018, President Trump signed the First Step Act into law.<sup>255</sup> Notably, the First Step Act makes the Fair Sentencing Act of 2010 retroactive.<sup>256</sup> The Fair Sentencing Act lessened distinctions in sentencing for those convicted of crimes involving crack versus powder cocaine.<sup>257</sup> Prisoners convicted before 2010 may only take advantage of the Fair Sentencing Act's retroactivity by petitioning a court.<sup>258</sup> Since Congress—

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247. See *infra* Part III.C.

248. See Petition for a Writ of Certiorari, *supra* note 42, at 21.

249. See *id.* at 21–22 (citing *Schiro v. Summerlin*, 542 U.S. 348, 351–52 (2004)).

250. See *id.* at 21.

251. See *id.* at 22, 26.

252. *Id.* at 22.

253. *Id.* at 21 (recognizing the split as “recurring and fundamental to the fairness of the criminal justice system”).

254. See generally *McCarthan v. Collins*, 138 S. Ct. 502 (2017); Petition for a Writ of Certiorari, *supra* note 40.

255. Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://perma.cc/HZ6T-WPVZ>]; Justin George, *What's Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018, 12:45 PM), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act> [<https://perma.cc/9PBP-K28Z>].

256. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222; see also George, *supra* note 255; Charlotte Resing, *How the First Step Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018, 4:00 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward> [<https://perma.cc/2MRB-MPAA>].

257. George, *supra* note 255; Resing, *supra* note 256.

258. See George, *supra* note 255. The First Step Act's other reforms also expand prisoners' rights, though they are not retroactive. See Resing, *supra* note 256.

rather than a court—made the Fair Sentencing Act retroactive, inmates can seek relief through a motion for imposition of a reduced sentence rather than the savings clause.<sup>259</sup> Nevertheless, the U.S. Sentencing Commission estimates that this change will impact 2660 prisoners convicted of crack offenses before 2010.<sup>260</sup> Jared Kushner, the president’s advisor and son-in-law, noted that “[f]or all those who are deserving of a second chance, this legislation will make a meaningful and measurable difference in their lives.”<sup>261</sup> This emphasis on granting prisoners a second chance underscores the importance of resolving the circuit split in their favor.

#### IV. A DEFINITIVE SAVINGS CLAUSE TEST: RESOLVING THE CIRCUIT SPLIT ON § 2255(E)

The Supreme Court must permit habeas petitioners to challenge their sentences or convictions through the savings clause. First, the Supreme Court should explicitly define the savings clause to allow prisoners to bring habeas petitions if they claim that intervening retroactive case law either renders them actually innocent of their underlying *convictions* or creates a fundamental defect in their *sentences*. Second, the Fourth Circuit’s interpretation of the savings clause is consistent with that of the Sixth and Seventh Circuits, contrary to the position taken by Judge Agee and the DOJ.<sup>262</sup> Third, this Note’s expansive approach to the savings clause is consistent with the text, history, and purpose of 28 U.S.C. § 2255.

##### *A. A Proposed Solution: Construing the Savings Clause Broadly to Permit Challenges to Convictions and Sentences*

This Note posits that the Supreme Court must construe the savings clause to allow prisoners to test the legality of their convictions, as exemplified by the Third and Fifth Circuits,<sup>263</sup> and their sentences, as permitted in the Fourth, Sixth, and Seventh Circuits.<sup>264</sup> This Note’s test lessens the current savings clause confusion by combining elements from different circuits’

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259. Soon after President Trump signed the First Step Act, a prisoner named Matthew Charles filed a motion for imposition of a reduced sentence. *See generally* Matthew Charles’s Motion for Imposition of a Reduced Sentence Pursuant to Section 404 of the First Step Act, United States v. Charles, No. 3:96-00051 (M.D. Tenn. Dec. 27, 2018), ECF No. 251. The U.S. District Court for the Middle District of Tennessee granted the motion and released Charles. Order, United States v. Charles, No. 3:96-00051 (M.D. Tenn. Jan. 3, 2019), ECF No. 253.

260. U.S. SENTENCING COMM’N, SENTENCING AND PRISON IMPACT ESTIMATE SUMMARY S. 756, THE FIRST STEP ACT OF 2018 (AS PASSED BY THE SENATE ON DEC. 18, 2018) tbl.1 (2018), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/December\\_2018\\_Impact\\_Analysis.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/December_2018_Impact_Analysis.pdf) [https://perma.cc/2R6Q-MGC9]; *see also* George, *supra* note 255; Resing, *supra* note 256.

261. Annie Karni, *The Senate Passed the Criminal Justice Bill. For Jared Kushner, It’s a Personal Issue and a Rare Victory.*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html> [http://perma.cc/5qmj-lug6].

262. *See supra* notes 192–94 and accompanying text.

263. As discussed earlier, the Fourth, Sixth, and Seventh Circuits similarly allow actual innocence challenges. *See supra* Part II.B.1.

264. *See supra* Part II.B.

tests.<sup>265</sup> Under the proposed standard, a motion under § 2255 is “inadequate or ineffective to test the legality of [a federal prisoner’s] detention”<sup>266</sup> where the prisoner, who has already exhausted his or her § 2255 remedies, claims that a retroactive<sup>267</sup> and binding intervening statutory interpretation decision<sup>268</sup> (1) renders the prisoner “actually innocent” of the underlying criminal *conviction*, or (2) creates a “fundamental defect” in his or her *sentence*. For purposes of this test, establishing “actual innocence” requires petitioners to show that “it is more likely than not that no reasonable juror would have convicted” them considering all available evidence.<sup>269</sup> A subsequent case creates a “fundamental defect” in sentencing if it *changes* the applicable statutory sentencing framework such that a defendant was sentenced under an *improper sentencing range*. Examples include, but are not limited to, cases restricting the factors that a court may consider in applying a mandatory sentencing enhancement.<sup>270</sup>

Importantly, a “fundamental defect” is *not* limited to sentences greater than the statutory maximum.<sup>271</sup> A prisoner may invoke the savings clause even if his or her sentence is less than the appropriate statutory ceiling.<sup>272</sup> For purposes of this test, a “statutory maximum” is the maximum sentence that the sentencing court could have imposed with the earlier precedent that is now being disputed.<sup>273</sup> Thus, this test permits savings clause relief even if a sentencing court could have imposed the same sentence absent the “fundamental defect.”

*B. The Fourth Circuit Test Is Equivalent to the Sixth and Seventh Circuit Test*

The *Wheeler* dissent and the government’s conflict with the *Wheeler* majority is grounded in each side’s distinct understandings of the relevant statutory maximum.<sup>274</sup> Judge Agee and the government contend that the

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265. This Note’s test is most consistent with the Fourth, Sixth, and Seventh Circuits’ tests, which allow challenges to convictions or sentences. Most cases, however, including the recent *Wheeler* decision, only focus on one type of challenge. This Note argues that a comprehensive standard is ideal to promote judicial efficiency. While the Supreme Court may decline to discuss challenges to underlying convictions if it grants certiorari in *Wheeler*, this Note’s test is intended to fully eliminate the savings clause circuit split.

266. 28 U.S.C. § 2255(e) (2012).

267. See *supra* notes 150–53 and accompanying text.

268. See *supra* notes 154–56 and accompanying text.

269. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see *supra* note 149 and accompanying text.

270. One example of such a decision is *United States v. Simmons*, 635 F.3d 140 (4th Cir. 2011), which was the basis of *Wheeler*’s claim. See *supra* notes 181–84 and accompanying text. A second example is *Chambers v. United States*, 555 U.S. 122 (2009), the basis of *McCarthan*’s claim. See *Petition for a Writ of Certiorari*, *supra* note 42, at 6–7. A third example is *Descamps v. United States*, 576 U.S. 254 (2013), which Hill relied on. See *supra* note 161.

271. See *infra* notes 281–95 and accompanying text.

272. See *infra* notes 281–95 and accompanying text.

273. See *infra* notes 281–95 and accompanying text for analysis of “statutory maximum” and this definition.

274. See *supra* notes 192–96 and accompanying text.

Fourth Circuit majority erroneously applied *Hill* and *Brown*.<sup>275</sup> Accordingly, they claim that the Sixth and Seventh Circuits only permit savings clause challenges to sentences if they allege “the prisoner is being, or at some point will be, detained by the warden *beyond the time legally authorized by Congress* for his offense of conviction.”<sup>276</sup> Conversely, the *Wheeler* majority cited precedent from those circuits for the opposite premise.<sup>277</sup> *Wheeler* identifies the same dispositive statutory maximum as the Sixth and Seventh Circuits.<sup>278</sup>

The Fourth, Sixth, and Seventh Circuits agree that the pertinent statutory maximum is the one that the original sentencing court should have applied given the correction to the maximum established by a subsequent case.<sup>279</sup> Judge Agee and the government instead focus on the maximum sentence the original court could have imposed based on its interpretation at the time of sentencing, notwithstanding the subsequent correction.<sup>280</sup> As discussed below, the prior Sixth and Seventh Circuit cases are consistent with the *Wheeler* majority opinion.

The Seventh Circuit adopted its savings clause test and rationale in *Brown v. Caraway*.<sup>281</sup> The District of Delaware originally sentenced Brown to 360 months in prison.<sup>282</sup> The district court erroneously designated Brown as a career offender, which subjected him to a then-mandatory Guidelines range of 360 months to life in prison rather than 262 to 327 months.<sup>283</sup> Thus, Brown’s sentence of 360 months was *below* the statutory maximum due to his erroneous career offender label.<sup>284</sup> On review, the Seventh Circuit focused on the erroneous maximum, not the statutory maximum that should have applied had Brown not been incorrectly designated a career offender.<sup>285</sup>

Further, *Brown* quoted *Narvaez v. United States*<sup>286</sup> for the proposition that “to ‘increase, dramatically, the point of departure of [the prisoner’s] sentence’ . . . is ‘certainly *as serious* as the most grievous misinformation’”

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275. *United States v. Wheeler*, 734 F. App’x 892, 893 (4th Cir. 2018) (mem.) (Agee, J., statement respecting denial of petition for rehearing en banc); *Petition for a Writ of Certiorari*, *supra* note 40, at 24–25; *see also supra* notes 192–94 and accompanying text.

276. *Wheeler*, 734 F. App’x at 893 (Agee, J., statement respecting denial of petition for rehearing en banc) (emphasis added); *see also* *Petition for a Writ of Certiorari*, *supra* note 40, at 24–25.

277. *See supra* notes 188–89 and accompanying text.

278. *See supra* notes 188–89 and accompanying text.

279. *See United States v. Wheeler*, 886 F.3d 415, 432–33 (4th Cir. 2018), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018); *Brown v. Caraway*, 719 F.3d 583, 587–88 (7th Cir. 2013); *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011).

280. *See* *Petition for a Writ of Certiorari*, *supra* note 40, at 24–25; *see also Wheeler*, 734 F. App’x at 893 (Agee, J., statement respecting denial of petition for rehearing en banc) (distinguishing between the Fourth Circuit’s approach and that of the Sixth and Seventh Circuits).

281. 719 F.3d at 587–88.

282. *Id.* at 585.

283. *Id.*

284. *Id.*

285. *Id.*

286. 674 F.3d 621 (7th Cir. 2011).

that has led to habeas relief.<sup>287</sup> This language signals that that the Seventh Circuit intended to continue granting savings clause review to remedy convictions, regardless of the statutory maximum.<sup>288</sup> Moreover, the *Narvaez* decision explicitly indicated that a petition could be successful even if a sentence does not exceed the statutory maximum.<sup>289</sup>

The Sixth Circuit later adopted the Seventh Circuit's interpretation in *Hill v. Masters*.<sup>290</sup> The *Hill* court stated that *Brown's* sentence "did not exceed the statutory maximum."<sup>291</sup> Again, this supports the *Wheeler* majority's emphasis on the *erroneous* statutory maximum.<sup>292</sup> The District of South Carolina originally sentenced Hill to 300 months in prison due to his inaccurate designation as a career offender, which subjected Hill to a Guidelines range of 292 to 365 months.<sup>293</sup> Hill argued that absent his mistaken label as a career offender, he would have been subject to a Guidelines range of 235 to 293 months.<sup>294</sup> Nevertheless, the court clarified that Hill's sentence fell below the statutory maximum life sentence.<sup>295</sup> After examining Sixth and Seventh Circuit precedent, the government's contention that these circuits' decisions were limited to sentences beyond "the applicable maximum under a statute or under a mandatory Sentencing Guidelines regime"<sup>296</sup> is inaccurate.

### C. Evaluating a Broad Construction of the Savings Clause Through Its Text, Purpose, and History

The text, purpose, and history of 28 U.S.C. § 2255 support this Note's proposed construction of the savings clause. Together, this compels savings clause relief for challenges to convictions and sentences. As amicus curiae in *McCarthan*, the Constitution Project framed the issue as a simple choice between antithetical alternatives.<sup>297</sup> In passing and later codifying the savings clause, Congress either: (1) created a useless provision that would not facilitate its goals, or (2) tried to safeguard prisoners by giving them "a meaningful opportunity to raise challenges to the fundamental legality of their convictions or sentences that cannot be raised under Section 2255."<sup>298</sup>

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287. 719 F.3d at 587–88 (emphasis added) (quoting *Narvaez*, 674 F.3d at 629).

288. See *United States v. Wheeler*, 886 F.3d 415, 432–33 (4th Cir. 2018) (discussing the Seventh Circuit's savings clause rationale), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018).

289. *Narvaez*, 674 F.3d at 629 ("The fact that Mr. Narvaez's sentence falls below the applicable statutory-maximum sentence *is not alone determinative* of whether a miscarriage of justice has occurred.") (emphasis added).

290. 836 F.3d 591, 599 (6th Cir. 2016).

291. *Id.* at 597.

292. See *Wheeler*, 886 F.3d at 433; *supra* notes 189–91 and accompanying text.

293. *Hill*, 836 F.3d at 593.

294. *Id.*

295. *Id.* at 596.

296. *Petition for a Writ of Certiorari*, *supra* note 40, at 24.

297. See Constitution Project Brief, *supra* note 75, at 20.

298. *Id.* Consistent with this Note's proposal, the Constitution Project advocated for the second option. *Id.*

The phrasing of § 2255(e) neither defines “inadequate or ineffective” nor indicates what may qualify as such.<sup>299</sup> Thus, courts have largely inferred the text’s meaning from other words in the clause.<sup>300</sup> The savings clause allows habeas petitions if “the court which sentenced [the prisoner] has denied him relief” through a § 2255 motion and if the “remedy by motion is inadequate or ineffective.”<sup>301</sup> Accordingly, courts could refuse relief based on a claim’s merits or procedural deficiencies, such as the limit on successive § 2255 motions.<sup>302</sup> However, in *Prost v. Anderson*,<sup>303</sup> Judge Gorsuch focused on the distinction between the words “remedy” and “relief.”<sup>304</sup>

Judge Gorsuch’s contention that remedy and relief are dissimilar<sup>305</sup> is overstated. *Black’s Law Dictionary* defines “remedy” as “[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief.”<sup>306</sup> Similarly, it defines “relief” as “[t]he redress or benefit . . . that a party asks of a court,” which is “[a]lso termed *remedy*.”<sup>307</sup> Professor Litman has noted that federal statutes often use these words in conjunction with each other, with a remedy causing relief as its outcome.<sup>308</sup> Furthermore, the Supreme Court itself has used these words interchangeably.<sup>309</sup> Thus, whether a prisoner obtained *relief* may be relevant to the question of inadequacy or ineffectiveness, even if he or she had access to a § 2255 motion as a *remedy*.<sup>310</sup>

The savings clause goes on to state that a prisoner can bring a habeas petition if a § 2255 motion “is inadequate or ineffective to test the legality of his detention.”<sup>311</sup> Both “test” and “legality” shed light on the meaning of

299. See 28 U.S.C. § 2255(e) (2012).

300. See, e.g., *United States v. Wheeler*, 886 F.3d 415, 428–29 (4th Cir. 2018), *petition for cert. filed*, No. 18-420 (U.S. Oct. 3, 2018); *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1085–95 (11th Cir.), *cert. denied*, 138 S. Ct. 502 (2017); *Prost v. Anderson*, 636 F.3d 578, 584–85 (10th Cir. 2011).

301. 28 U.S.C. § 2255(e).

302. *Id.*; see also Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 488 (2018).

303. 636 F.3d 578 (10th Cir. 2011).

304. *Id.* at 584–85; *supra* notes 117–20 and accompanying text; see also Litman, *supra* note 302, at 488.

305. See *Prost*, 836 F.3d at 584–85; *supra* notes 118–20 and accompanying text; see also Litman, *supra* note 302, at 488.

306. *Remedy*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Remedy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/remedy> [<https://perma.cc/76MX-RLPQ>] (last visited Feb. 12, 2019) (defining “remedy” as “something that corrects or counteracts” or “the legal means to recover a right or to prevent or obtain redress for a wrong”).

307. *Relief*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Relief*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/relief> [<https://perma.cc/ZH8Q-EPPS>] (last visited Feb. 12, 2019) (defining “relief” as “removal or lightening of something oppressive, painful, or distressing” or “legal remedy or redress”).

308. Litman, *supra* note 302, at 488.

309. Litman, *supra* note 93, at 74 (“But the Court has used ‘remedy’ to refer to the result a plaintiff obtained by filing suit, not just the process applicable to different kinds of lawsuits.”).

310. *Cf.* Litman, *supra* note 302, at 488 (arguing that “Section 2255(e)’s use of the word ‘remedy’ does not signify that it is irrelevant whether a prisoner is able to obtain *relief* under Section 2255”). *But see Prost v. Anderson*, 636 F.3d 578, 584–85 (10th Cir. 2011).

311. 28 U.S.C. § 2255(e) (2012).



“inadequate or ineffective.” Yet, “to test” does not command courts to disregard relief.<sup>312</sup> For example, if a prisoner raises an argument in a § 2255 motion that prior precedent squarely opposes, that remedy (meaning the § 2255 motion) may not have been an adequate “test.”<sup>313</sup>

Moreover, the word “detention” should not be read to exclude challenges to convictions or sentences.<sup>314</sup> One scholar argues that Congress intentionally chose the word “detention” in § 2255(e) as opposed to “sentence,” which appears in § 2255(a).<sup>315</sup> From this distinction, the author posits that the savings clause only allows claims “related to the very act of confinement itself.”<sup>316</sup> However, prisoners can already challenge that subset of claims in § 2241 petitions,<sup>317</sup> which renders this reading of the savings clause superfluous. Moreover, prisoners are detained pursuant to their convictions and sentences. Thus, whenever an inmate’s conviction or sentence is flawed, “the legality of his detention”<sup>318</sup> is called into question.

Finally, in *Prost*, Judge Gorsuch relied on structuralism to elucidate the savings clause’s text. Gorsuch argued that the savings clause must foreclose relief so that § 2255(h)’s restrictions on multiple motions are not undermined.<sup>319</sup> He opined that Congress believed that finality should prevail and prohibit prisoners from raising the same claims again.<sup>320</sup> While this may accurately describe Congress’s motive for passing § 2255(h), it does not explain the safety net<sup>321</sup> that § 2255(e) provides. Congress enacted § 2255(e) nearly fifty years before § 2255(h).<sup>322</sup> Construing § 2255(e) based on § 2255 as a whole “would ‘effectively nullify the gatekeeping provisions’ that Congress carefully wrote into that statute.”<sup>323</sup> Therefore, the expansive time span between these provisions further weakens Gorsuch’s argument that § 2255(e) should be read to comply with § 2255(h).<sup>324</sup>

Since the savings clause does not explicitly define “inadequate or ineffective,” the purpose and history behind this statute are particularly compelling. Judge Gorsuch erroneously claims that § 2255(e)’s history shows that Congress “surely” did not intend for it to allow prisoners to “win relief on a meritorious successive motion, or receive multiple bites at the

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312. See Litman, *supra* note 302, at 488 (arguing that “the word ‘test’” does not “imply a limitation on the kinds of claims that can be brought under Section 2255”). *But see* Case, *supra* note 105, at 192–93.

313. *Contra Prost*, 636 F.3d at 589.

314. *But see* Case, *supra* note 105, at 190–92.

315. *Id.*

316. *Id.* at 192.

317. See *supra* notes 67–68 and accompanying text.

318. 28 U.S.C. § 2255(e) (2012).

319. *Prost v. Anderson*, 636 F.3d 578, 585–86 (10th Cir. 2011); see also *supra* notes 121–22 and accompanying text.

320. *Prost*, 636 F.3d at 588.

321. See *supra* note 103 and accompanying text.

322. See Litman, *supra* note 93, at 75.

323. *Lester v. Flournoy*, 909 F.3d 708, 716 (4th Cir. 2018) (quoting *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000)).

324. See Litman, *supra* note 93, at 75.

apple.”<sup>325</sup> On the contrary, both Congress and the courts have progressively extended the scope and availability of collateral review.<sup>326</sup>

For § 2255 specifically, Congress’s “purpose and effect . . . was *not to restrict access* to the writ but to make postconviction proceedings more efficient.”<sup>327</sup> Although the AEDPA somewhat constrained habeas procedures, its restrictions largely codified long-standing common-law principles.<sup>328</sup> Judge Gorsuch relied on a 1952 Supreme Court decision, *United States v. Hayman*,<sup>329</sup> to support his claim that Congress did not enact the savings clause “to expand or ‘impinge upon prisoners’ rights of collateral attack.”<sup>330</sup> Notably, however, *Prost* largely neglects *Boumediene v. Bush*,<sup>331</sup> in which the Supreme Court clarified that § 2255 and its savings clause were “designed to strengthen, rather than dilute, the writ’s protections.”<sup>332</sup> Strengthening a statute’s efficacy is not incompatible with extending prisoners’ rights.

Furthermore, a broad reading of the savings clause will not compromise Congress’s purpose.<sup>333</sup> Congress wanted § 2255 to lessen the burden on courts located in districts with federal prisons, which were inundated with habeas petitions.<sup>334</sup> This desire, however, does not mandate keeping prisoners incarcerated against the law.<sup>335</sup> Though prisoners file habeas petitions through the savings clause in the district where they are incarcerated, a broad reading of the provision is not a free-for-all. The majority of circuits, and this Note’s proposed test, have restrictive conditions that inmates must satisfy.<sup>336</sup>

Despite the dearth of legislative history discussing the savings clause’s meaning, the historical context surrounding this statute supports this Note’s suggested interpretation of the savings clause.<sup>337</sup> Though various iterations

325. *Prost*, 636 F.3d at 588.

326. *See Boumediene v. Bush*, 553 U.S. 723, 773 (2008); *see also Hill v. United States*, 368 U.S. 424, 427–28 (1962).

327. *Boumediene*, 553 U.S. at 774–75 (emphasis added); *see also Hill*, 368 U.S. at 427–28.

328. *See supra* notes 90–91 and accompanying text; *see also* Constitution Project Brief, *supra* note 75, at 3 (“[T]hose restrictions merely codified common law doctrines designed to prevent the ‘abuse of the writ’ by sandbagging or repeated relitigation of the same claims.”).

329. 342 U.S. 205 (1952).

330. *Prost*, 636 F.3d at 588–89 (quoting *Hayman*, 342 U.S. at 219).

331. 553 U.S. 723 (2008).

332. *Id.* at 776.

333. *Contra* Petition for a Writ of Certiorari, *supra* note 40, at 21.

334. *See supra* note 76 and accompanying text.

335. *Contra* *McCarthy v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1092 (11th Cir.), *cert. denied*, 138 S. Ct. 502 (2017); Petition for a Writ of Certiorari, *supra* note 40, at 20–21.

336. *See supra* Parts II.B, IV.B.

337. *See, e.g., Wofford v. Scott*, 177 F.3d 1236, 1241 (11th Cir. 1999) (observing that there is “nothing in the legislative history explaining” changes to the language in the savings clause or what prompted the change); *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998) (stating that “legislative history is uninformative” regarding why Congress created the savings clause and that “there is no helpful legislative history” indicating why Congress kept the savings

of § 2255 used different language, the provision always provided federal prisoners with some access to § 2241.<sup>338</sup> In 1943, the first version of this bill, entitled “A Bill to Regulate the Review of Judgments of Conviction in Certain Criminal Cases,” appeared in the Report of the Judicial Conference of Senior Circuit Judges.<sup>339</sup> That version of the statute prohibited a prisoner from filing a petition for a writ of habeas corpus “unless it appears that it has not been or will not be practicable to have his right to discharge from custody determined on such motion because of the necessity of his presence at the hearing, *or for other reasons*.”<sup>340</sup> A Senate report in 1948, which considered this bill with slightly different language, indicated that the “other reasons” would be viewed with significant flexibility.<sup>341</sup>

While the Senate passed the aforementioned bill, the House of Representatives failed to act.<sup>342</sup> Nevertheless, Congress integrated that bill into a later version that it approved, albeit with different wording.<sup>343</sup> The language that Congress first enacted is identical to the current formulation of the savings clause.<sup>344</sup> Thus, the operative savings clause has always hinged on inadequacy or ineffectiveness, which is “broader language” than that of earlier proposals.<sup>345</sup> Though there is no legislative history conclusively delineating the savings clause’s reach, this information signals that Congress intended this clause to provide more extensive access to § 2241. Ultimately, a broad construction of the savings clause best conforms to its text, purpose, and history.

#### *D. Comprehensive and Calculated: Applying the Savings Clause*

Should the Supreme Court adopt this Note’s test, petitioners such as Robert Bruce and Daniel McCarthan would have the opportunity to fully dispute their imprisonments. The Eleventh Circuit, which takes the most restrictive approach,<sup>346</sup> previously denied both of these petitioners the chance to bring habeas petitions through the savings clause.<sup>347</sup> Robert Bruce sought

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clause after the AEDPA); *see also* Litman, *supra* note 93, at 71 (stating that “there is no legislative history to suggest” the meaning of “inadequate or ineffective”).

338. *See Wofford*, 177 F.3d at 1239–41 (discussing various versions of § 2255(e), which all reference situations in which a court could entertain a writ of habeas corpus).

339. *See* REPORT OF THE JUDICIAL CONFERENCE, SEPTEMBER SESSION, 1943, at 23 (1943), [https://www.uscourts.gov/sites/default/files/1943-09\\_0.pdf](https://www.uscourts.gov/sites/default/files/1943-09_0.pdf) [<https://perma.cc/9M4L-8JXW>].

340. *Id.* at 24 (emphasis added); *see also supra* note 105 and accompanying text.

341. *See* S. REP. NO. 80-1526, at 2 (1948) (noting that there is “a wide discretion in the use of habeas corpus where” a motion is unfeasible).

342. *Wofford*, 177 F.3d at 1241.

343. *See id.*

344. *Compare id.* at 1241 (quoting the “reworded” savings clause as prohibiting prisoners from seeking relief under § 2241 “unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention”), *with* 28 U.S.C. § 2255(e) (2012) (also prohibiting a prisoner from bringing a § 2241 petition “unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention”).

345. *See Wofford*, 177 F.3d at 1241; *see also supra* note 105 and accompanying text.

346. *See supra* Part II.A.

347. *See supra* notes 28–30, 209 and accompanying text.

to dispute his underlying conviction whereas Daniel McCarthan tried to challenge his sentence.<sup>348</sup>

If Robert Bruce's petition were to proceed, the outcome would likely correspond with the Third Circuit's decision for his brother, Gary Bruce.<sup>349</sup> On the merits, Robert likely would not be able to show that he is actually innocent of witness-tampering murder.<sup>350</sup> Yet, the savings clause's significance lies in the opportunity it affords petitioners, irrespective of a petition's ultimate success or rejection.<sup>351</sup>

If the Eleventh Circuit were to review McCarthan's petition, he likely would obtain full habeas relief. In 2003, McCarthan pleaded guilty to being a felon in possession of a weapon.<sup>352</sup> The prosecution noted that McCarthan's three prior convictions were predicate offenses under the Armed Career Criminal Act (ACCA).<sup>353</sup> Accordingly, the Middle District of Florida sentenced McCarthan to 211 months in prison with five years of supervised release.<sup>354</sup> The court imposed this sentence based on the enhanced mandatory minimum sentence of fifteen years in prison with five years of supervised relief.<sup>355</sup> Absent the enhancement, McCarthan's maximum sentence would have been ten years' imprisonment with three years of supervised release.<sup>356</sup> After the district court sentenced McCarthan, the Supreme Court decided *Chambers v. United States*,<sup>357</sup> which led to the Eleventh Circuit's decision in *United States v. Lee*.<sup>358</sup> Under *Lee*, McCarthan's prior offense of walkaway escape is no longer a crime of violence and thus not an ACCA predicate offense.<sup>359</sup>

McCarthan could not contest his erroneous sentence enhancement because he had previously filed a § 2255 motion and the Eleventh Circuit foreclosed savings clause relief.<sup>360</sup> If, however, the Supreme Court adopted a broad reading of the savings clause, McCarthan would have a viable savings clause habeas petition. For example, McCarthan would argue that after he received an enhanced ACCA sentence, *Lee*—which is a retroactive statutory decision—disqualified his walkaway escape as a violent felony. Applying *Lee*, McCarthan would allege the court erroneously enhanced his sentence.

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348. *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1079 (11th Cir.), *cert. denied*, 138 S. Ct. 502 (2017); *Bruce v. Warden*, 658 F. App'x 935, 937–38 (11th Cir. 2016) (per curiam), *cert. denied*, 137 S. Ct. 683 (2017).

349. *See Bruce v. Warden*, 868 F.3d 170, 180–81 (3d Cir. 2017); *supra* notes 31–32, 34 and accompanying text.

350. *See Bruce*, 868 F.3d at 183, 188–89; *supra* note 34 and accompanying text.

351. *See supra* note 34 and accompanying text.

352. *McCarthan*, 851 F.3d at 1080; *see also* Petition for a Writ of Certiorari, *supra* note 42, at 5.

353. Petition for a Writ of Certiorari, *supra* note 42, at 5.

354. *Id.*

355. *Id.*

356. *Id.*

357. 555 U.S. 122 (2009). In *Chambers*, the Supreme Court recognized that certain escapes are not violent felonies under the ACCA. *Id.* at 123, 130.

358. 586 F.3d 859 (11th Cir. 2009).

359. *Id.* at 874; *see also* Petition for a Writ of Certiorari, *supra* note 42, at 6.

360. *See* Petition for a Writ of Certiorari, *supra* note 42, at 8–9.

Furthermore, McCarthan would note that this is a “fundamental defect” in sentencing because his sentence exceeds the statutory maximum without the enhancement of seven years’ imprisonment and two years of supervised release. Though McCarthan’s erroneous sentence does exceed the correct statutory maximum,<sup>361</sup> this Note’s test is not limited to such circumstances. As the Fourth Circuit explained, “incorrectly applied sentencing benchmarks are fundamentally problematic because they wrongly cabin the district court’s discretion to impose a lower sentence when the facts of the crime warrant it.”<sup>362</sup> In the end, a court would likely find McCarthan’s savings clause claim to be meritorious and vacate and remand his case for resentencing.

#### CONCLUSION

Ultimately, prohibiting prisoners from challenging their detentions when a new decision directly invalidates their convictions or sentences contradicts the savings clause. Contrary to Judge Gorsuch’s inapt analogy,<sup>363</sup> unlawfully incarcerating an individual is wholly different from the consequences that a student may face for failing an exam. Congress enacted § 2255 and its savings clause to foster efficiency in U.S. courts, not to curtail prisoners’ rights. Under the guise of judicial restraint, the Tenth and Eleventh Circuits have transformed this provision into a hurdle for prisoners.<sup>364</sup> Further, the discord among the remaining circuits regarding the savings clause’s scope is unnecessarily confusing. All sides to this debate agree that the Supreme Court is tasked with interpreting and resolving conflicting interpretations of the law. To be faithful to Congress’s goal in § 2255 of making habeas relief more efficient, the Supreme Court must conclusively permit prisoners to challenge their sentences or convictions under the savings clause.

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361. *See supra* notes 354–56 and accompanying text.

362. *Lester v. Flournoy*, 909 F.3d 708, 714 (4th Cir. 2018).

363. *See Prost v. Anderson*, 636 F.3d 578, 589 (10th Cir. 2011).

364. *See supra* Part II.A.