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INADEQUATE AND INEFFECTIVE? FACTUAL INNOCENCE AND THE SAVINGS CLAUSE OF § 2255

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I. INTRODUCTION

The writ of habeas corpus has become the last call for prisoners contesting the legality of their sentences or convictions. The United States Constitution protects the right of habeas corpus relief in its Suspension Clause: "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."[1] Available to federal and state prisoners, the writ is embodied in 28 U.S.C. §§ 2241–2266. Section 2241 codifies the habeas corpus remedy and grants federal courts jurisdiction to hear habeas corpus petitions from a prisoner held "in custody in violation of the Constitution or laws or treaties of the United States."[2] The primary alternatives to § 2241 for attaining post-conviction relief are § 2254 (remedies for state prisoners)[3] and § 2255 (remedies for federal prisoners).

This Comment discusses whether a federal prisoner claiming factual innocence as a result of a new, retroactively applicable statutory interpretation may file a habeas corpus petition pursuant to 28 U.S.C. § 2241, when that prisoner is otherwise procedurally barred from filing a successive motion for collateral relief under 28 U.S.C. § 2255. Part II will provide an overview of the history and text of the relevant statutory provisions. Part III will discuss the rationales behind the conflicting opinions of the circuits that have considered the issue, and Part IV will analyze the suitability of these holdings as well as the potential implications of the competing views. Part V concludes that allowing prisoners to access § 2241 via the Savings Clause under limited circumstances strikes a necessary balance between the interests in finality and the overriding concern for avoiding an unconstitutional imprisonment.

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1. U.S. CONST. art. I, § 9, cl. 2.

2. 28 U.S.C. § 2241(c)(3) (2008).

3. *See* 7 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 28.2(b), n.34 (3d ed. 2010) ("[Section] 2254 limits the remedies state prisoners would otherwise have under § 2241; § 2241 and § 2254 govern a single post-conviction remedy, with § 2254 requirements applying to petitions by state prisoners, thus a state prisoner seeking post-conviction relief from a federal court may apply only for a writ of habeas corpus and [is] subject to the restrictions of § 2254.") (citing Medberry v. Crosby, 351 F.3d 1049 (11th Cir. 2003)).

II. BACKGROUND

A. The History of 28 U.S.C. § 2255

The Supreme Court reviewed the legislative history, policy rationales, and scope of § 2255 in *United States v. Hayman*.[4] As the *Hayman* Court explained, before the enactment of § 2255, federal prisoners sought habeas corpus relief under § 2241.[5] Because petitions filed pursuant to § 2241 must be filed in the district of the petitioner's incarceration,[6] the few districts with large concentrations of federal prisons became inundated with habeas petitions.[7] Furthermore, the filing requirements imposed by § 2241 often resulted in habeas adjudications being conducted far from the location of the sentencing court, which limited prisoners' access to relevant records, witnesses, and evidence.[8] To remedy this issue, Congress enacted § 2255 in 1948 as an alternative to the writ of habeas corpus, granting federal prisoners the ability to attack their confinements by filing a motion to vacate, to set aside, or to correct the sentence.[9] This motion applies to any situation in which a federal prisoner may raise a collateral attack.[10] The legislature's enactment of § 2255 ensured that the burden of entertaining federal habeas petitions would be applied more evenly among federal district courts and that the proceedings would be conducted in closer proximity to the relevant records and witnesses.[11]

The *Hayman* Court stressed that Congress, in enacting § 2255, did not in any way limit or alter the scope of the habeas corpus remedy previously available to federal prisoners under § 2241.[12] Instead, the

4. 342 U.S. 205 (1952).

5. *Hayman*, 342 U.S. at 212.

6. *Id*. at 213.

7. *Id.* at 213–14.

8. *Id.* (citing William H. Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337, 352 (1949)).

9. *Hayman*, 342 U.S. at 206–07. The Judicial Conference Committee on Habeas Corpus Procedure was established to assess the procedural difficulties in habeas corpus litigation, particularly with respect to federal prisoners. When the Committee submitted its findings, the Judicial Conference made a recommendation for the enactment of the precursor to § 2255. The Committee issued a statement in support of its recommendation, explaining that the proposed legislation "creates a statutory remedy consisting of a motion before the court where the movant has been convicted . . . . The motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus." *Id.* at 214–18. Additionally, the Reviser's Note on § 2255 states that the statute "provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." *Id.* at 218.

10. *Id.* at 217.

11. *Id.* at 210–19.

12. *Id*. at 219 ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.").

Court determined that "the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum."[13] As indicated in the *Hayman* ruling, "[T]he § 2255 motion has displaced the writ of habeas corpus under § 2241 as the basic collateral remedy for persons confined pursuant to a federal criminal conviction."[14]

B. The Purposes and Effects of the Antiterrorism and Effective Death Penalty Act

Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in part as part of numerous legislative efforts to reform habeas corpus litigation.[15] Promulgated largely in response to the demand for more effective crime prevention policies following the 1993 World Trade Center and 1995 Oklahoma City bombings,[16] Congress enacted the AEDPA "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes."[17] With regard to habeas corpus litigation, the AEDPA sought to limit excessive and frivolous motions—particularly those filed by death row inmates seeking federal review of their claims—in an effort to reduce delays in capital cases and to promote the finality of judgments.[18]

Habeas reform has been directed largely at curbing the numerous collateral attacks available to prisoners, especially state prisoners who enjoyed both state and federal avenues of relief.[19] However, the bulk of the AEDPA provisions apply broadly to habeas petitions, limiting the availability of such recourse to federal and state prisoners, whether convicted of capital or non-capital offenses.[20] The AEDPA also placed new restrictions on non-capital cases, including time limits for filing habeas petitions, the ability to file successive petitions, and the ability of federal courts to hold evidentiary hearings or review state court decisions on the merits.[21]

The limitations on successive filings are most relevant to this

13. *Id*.

14. LAFAVE, *supra* note 3, § 28.9(a).

15. CHARLES DOYLE, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 10 (Cong. Research Serv., 2006).

16. Holly Chapin, *Clarifying Material Support to Terrorists: The Humanitarian Project Litigation and the U.S. Tamil Diaspora*, 20 J. INT'L SERVICE 69, 71 (2011).

17. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (2006).

18. DOYLE, *supra* note 15, at 10–12.

19. *Id.*

20. LAFAVE, *supra* note 3, § 28.2(b).

21. DOYLE, *supra* note 15, at 14–15, 17–18.

analysis. The AEDPA added 28 U.S.C. § 2255(h), which states that before the district court may consider a successive § 2255 motion, a three-judge panel in the court of appeals must certify that the motion contains the following:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[22]

Thus, if a second § 2255 motion fails to introduce either new evidence or a new rule of constitutional law previously unavailable to the prisoner, the motion must be denied, unless the prisoner is granted leave to file a § 2241 habeas petition through a provision commonly known as the "Savings Clause."

C. The Savings Clause of § 2255

Despite its many revisions to habeas corpus jurisprudence, the AEDPA made no changes to the "safety-hatch" provision embodied in § 2255(e). This provision allows federal courts to continue to grant writs of habeas corpus to federal prisoners pursuant to § 2241. Section 2255(e), commonly referred to as the "Savings Clause," provides 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 this section, 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*.[23]

The *Hayman* decision, which came soon after the enactment of § 2255, analyzed the effect of that statute on original habeas corpus claims brought under § 2241.[24] The *Hayman* Court concluded that by substituting the collateral remedy afforded in § 2255, Congress did not suspend the right of federal prisoners to access the writ of habeas corpus.[25] The Court held, "In a case where the Section 2255 procedure

22. 28 U.S.C. § 2255(h) (2008). With limited exceptions, the doctrine of procedural default generally bars prisoners from bringing claims in a collateral appeal that could have been "fully and completely addressed" on direct appeal (based on the record established in the trial court), but were not raised at that earlier stage. Bousley v. United States, 523 U.S. 614, 622 (1998).

23. 28 U.S.C. § 2255(e) (2008) (emphasis added).

24. United States v. Hayman, 342 U.S. 205 (1952).

25. *Id*. at 223.

is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing."[26] Section 2255 was not intended to limit the collateral rights of federal prisoners in any manner, but was merely designed to serve as a convenient substitute for the traditional habeas corpus remedy.[27] For this reason, federal prisoners barred from filing a successive § 2255 motion may still access the writ of habeas corpus if they can show that § 2255 is "inadequate or ineffective" to challenge the legality of their detentions.[28]

III. THE CIRCUIT DEBATE

The circuit courts generally agree that the remedy under § 2255 is not rendered "inadequate or ineffective" merely because that section bars the petitioner's subsequent motions.[29] Such a construction would essentially nullify the AEDPA restrictions on successive § 2255 motions, and Congress would have accomplished nothing in its attempt to place limits on federal collateral review.[30] Likewise, a reading that federal prisoners may initiate only one collateral challenge to their convictions—unless they satisfy the stringent gatekeeping requirements of § 2255(h)—would render the Savings Clause of § 2255(e) impotent.[31] For these reasons, courts have acknowledged that federal prisoners who are barred from filing a subsequent § 2255 motion may still be granted leave to seek a writ of habeas corpus pursuant to § 2241, if § 2255 is "inadequate or ineffective" to test their claims. The question remains as to when and under what circumstances § 2255 is rendered "inadequate or ineffective." This has largely been the focus of the courts in the debate surrounding the Savings Clause.

A. Section 2255 is Inadequate or Ineffective When It Bars an Innocence Claim Based on a New Interpretation of the Law.

Many of the circuits addressing the applicability of the Savings Clause did so in the wake of the Supreme Court's decision in *Bailey v.*

26. *Id*.

27. *Id.* at 219.

28. 28 U.S.C. § 2255(e) (2008).

29. *See, e.g.*, *In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997); Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997).

30. *In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997); Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997).

31. *Triestman*, 124 F.3d at 376.

United States.[32] That case involved an interpretation of 18 U.S.C. § 924(c)(1), which imposed punishment on any person who "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm."[33] The *Bailey* Court construed § 924 to mean that a defendant could not be convicted of "using" a firearm unless he "actively employed the firearm during and in relation to the predicate crime."[34] Thus, numerous prisoners who had been convicted of "using" a firearm under that statute, when in fact they had not "actively employed" the firearm,[35] began raising claims of factual innocence in their collateral attacks.

The majority of the circuits that have faced the issue of recourse for prisoners who claim factual innocence but are barred from filing a § 2255 motion[36] have reached the same conclusion: the prisoner may file a writ of habeas corpus pursuant to § 2241. Although the circuit courts arrive at this conclusion in notably different ways, much of the courts' legal analysis is in agreement. Therefore, this subpart will begin by explaining the underlying rationales for allowing access to § 2241.

1. Arguments in Support of § 2241 Availability

Many of the circuits in favor of granting access to § 2241 began with a review of the text and legislative history of the Savings Clause. The Judicial Conference of the United States, responding to the problem surrounding the high concentration of habeas corpus petitions in the districts of the main federal penitentiaries, tasked a committee of judges with studying habeas corpus procedures in federal court.[37] After considering the report of the committee, the Judicial Conference recommended two bills: (1) a "procedural" bill designed to prevent abuses of the writ and (2) a "jurisdictional" bill meant to redirect

32. 516 U.S. 137 (1995), *superseded by statute*, Act to Throttle Criminal Use of Guns (1998), Pub. L. No. 105-386, 112 Stat. 3469, *as recognized in*, United States v. O'Brien, 130 S. Ct. 2169, 2179 (2010).

33. *Id.* at 138.

34. *Id.* at 150. In legislation colloquially known as the "Bailey Fix Act," Congress amended 18 U.S.C. § 924(c)(1)(A) to proscribe mere possession of a firearm during the commission of the offense. *O'Brien*, 130 S. Ct. at 2179.

35. *See, e.g.*, *Bailey*, 516 U.S. at 139, where the defendant was arrested during a routine traffic stop when police discovered cocaine in the driver's compartment of his car and a gun in the locked trunk of his car.

36. Courts have held that because *Bailey* did not create a "new rule of constitutional law" and was instead a new interpretation of statutory law, the exception provided by § 2255(h)(2) did not apply. *See In re* Vial, 115 F.3d 1192, 1195 (4th Cir. 1997) (en banc); Coleman v. United States, 106 F.3d 339, 341 (10th Cir. 1997) (per curium); United States v. Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997) (per curium); *In re* Blackshire, 98 F.3d 1293, 1294 (11th Cir. 1996) (per curium); Nunez v. United States, 96 F.3d 990, 992 (7th Cir. 1996).

37. United States v. Hayman, 342 U.S. 205, 214 (1952).

collateral attacks by federal prisoners to the sentencing courts.[38] The jurisdictional bill seemingly limited access to traditional habeas corpus to situations where "*practical* considerations precluded a remedy in the sentencing court."[39] However, courts allowing a § 2241 remedy contended that precisely because this language was omitted from the final version of § 2255, Congress declined to follow the advice of the Judicial Conference, and instead enacted habeas-preserving language not limited to these practical issues.[40] Furthermore, the courts assert that the language of the Savings Clause itself—that a § 2255 motion must be "inadequate or ineffective to test the *legality* of [the prisoner's] detention"—seems to incorporate legal inadequacies in addition to practical ones.[41] Subsequent case law holding that the Savings Clause allows recourse to § 2241 for legal insufficiencies supports this reading of the text.[42] Finally, the courts again noted that because the practical difficulty in transporting a prisoner to the sentencing court alone does not make § 2255 inadequate or ineffective, a contradictory reading that the Savings Clause is accessible only for practical problems with § 2255 would render that clause completely devoid of meaning.[43]

Because the legislative history indicates that § 2255 was intended to provide a remedy as broad as traditional habeas corpus, the courts also looked to the purposes of the writ of habeas corpus to analyze whether the limitations imposed by § 2255 rendered it inadequate to those purposes. The Seventh Circuit reasoned: "The essential function [of the writ of habeas corpus] is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence."[44] If a prisoner is unable to obtain such a determination due to procedural barriers under § 2255, then § 2255 must be inadequate to test the legality of his conviction. This conclusion rests on the rationale that a prisoner should be given one unobstructed shot at raising his claim; if that prisoner has been denied any opportunity to raise the claim, then § 2255 is inadequate.[45]

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38. *Id.* at 215.

39. Triestman v. United States, 124 F.3d 361, 374 (2nd Cir. 1997) ("No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, *unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such a motion, or for other reasons*.") (quoting H.R. 4233 and S. 1451, 79th Cong. 1st Sess. § 2 (1945)).

40. *See, e.g., id.* at 375; *In re* Dorsainvil, 119 F.3d 245, 250 (3d Cir. 1997).

41. *Triestman*, 124 F.3d at 375 (emphasis added).

42. *Id.* at 375–76 (citing Swain v. Pressley, 430 U.S. 372 (1977)).

43. *Id.* at 375.

44. *In re* Davenport, 147 F.3d 605, 609 (1998) (quoting Carafas v. LaVallee, 391 U.S. 234, 238 (1968)).

45. *Davenport*, 147 F.3d at 609.

Additionally, many of the courts cited *Davis v. United States*, which dealt with a Supreme Court interpretation of a criminal statute resulting in the incarceration of a prisoner whose conduct was not punishable by law.[46] In *Davis*, the Court determined that "such a circumstance inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under § 2255."[47] Recognizing that *Davis* was decided prior to the AEDPA amendments and did not directly govern this line of cases, the courts that support recourse to § 2241 reasoned that:

> If . . . it is a 'complete miscarriage of justice' to punish a defendant for an act that the law does not make criminal, thereby warranting resort to the collateral remedy afforded by § 2255, it must follow that it is the same 'complete miscarriage of justice' when the AEDPA amendment to § 2255 makes that collateral remedy unavailable.[48]

Thus, in this limited circumstance, § 2255 would be inadequate or ineffective to test the legality of the prisoner's detention.

Another rationale courts utilized in allowing access to § 2241 is that barring access could raise very serious questions as to the constitutionality of § 2255, if it results in the continued incarceration of a person convicted of an act that the law does not proscribe. These courts have recognized their duty to "construe a federal statute to avoid constitutional questions where such a construction is reasonably possible."[49] Again acknowledging Congress's intent to "preserve habeas corpus for federal prisoners in those extraordinary instances where justice demands it," these courts have found that, under these circumstances, the importance of addressing a potentially unconstitutional confinement outweighs the general interest in finality and discouraging piecemeal litigation.[50] Although the legislative history surrounding § 2255 is silent on the matter, the *Davenport* court speculated that Congress may have created the "safety-hatch" provision

46. 417 U.S. 333 (1974).

47. *Id.* at 346–47 (internal quotations omitted).

48. *In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

49. Triestman v. United States, 124 F.3d 361, 377 (2d Cir. 1997) (quoting Arnett v. Kennedy, 416 U.S. 134, 162 (1974)). The *Triestman* court further explained: "[W]e encourage the district courts to continue to find that habeas corpus may be sought whenever situations arise in which a petitioner's inability to obtain collateral relief would raise serious questions as to § 2255's constitutionality." *Id*. at 377.

50. *Triestman*, 124 F.3d at 378; *see also* Schlup v. Delo, 513 U.S. 298, 322 (1995) (recognizing that when interpreting the law of collateral review, courts should weigh the "systemic interests in finality . . . and conservation of judicial resources" against the "overriding individual interest in doing justice in the extraordinary case") (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default")).

precisely to avoid any claims that, by enacting § 2255, Congress had unconstitutionally suspended the writ of habeas corpus for federal prisoners.[51]

Finally, courts supporting recourse to § 2241 have generally not required that a defendant have challenged the interpretation of the statute at trial in order to preserve the issue for collateral attack. This is especially true when the law of the circuit at the time of trial was settled "so firmly against" the defendant that it would be unreasonable to expect the defendant to have foreseen potential future changes in statutory interpretation.[52] Likewise, the courts' interest in preserving the efficiency of the judicial system supports an exception in these rare situations. As the Seventh Circuit held in *Davenport*, "It would just clog the judicial pipes to require defendants, on pain of forfeiting all right to benefit from future changes in the law, to include challenges to settled law in their briefs on appeal and in post-conviction filings."[53] Therefore, a prisoner who failed to raise a novel argument against the interpretation of a law, where such an argument would have been practically inconceivable given the established law of the circuit at that time, is not barred from benefitting from a new interpretation of the statute applied retroactively.

2. Tests from the Circuits Supporting § 2241 Accessibility

In determining whether to grant access to § 2241 via the Savings Clause, the pro-access circuits have asked whether the prisoner ever had a reasonable opportunity to raise a claim of factual innocence, in light of the law of the circuit at the time of the prisoner's trial, direct appeal, and first § 2255 motion. Recognizing that abuse of the writ of habeas corpus was the central concern addressed by the AEDPA's enactment of § 2255's gatekeeping provisions, the Third Circuit concluded that "a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate" poses little threat of undermining congressional intent and may, therefore, file a § 2241 petition for consideration by the district court.[54] The Eleventh Circuit mirrored this analysis, denying a petitioner access to § 2241 because his sentencing claims were not based on a "circuit law-busting, retroactively applicable Supreme Court decision," and he had prior

51. *In re* Davenport, 147 F.3d 605, 609 (1998); *see also* U.S. CONST. art. I, § 9, cl. 2 [The "Suspension Clause"].

52. *Davenport*, 147 F.3d at 610.

53. *Id.*

54. *In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

procedural opportunities to raise each of his claims.[55]

Synthesizing the tests of the other circuits,[56] the Fifth Circuit held that the Savings Clause of § 2255 applies to a claim:

> (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion.[57]

Subsequent Fifth Circuit cases have construed this test narrowly, finding the Savings Clause to be available only when the petitioner claims to have been convicted of conduct that has since been decriminalized (and applied retroactively). This allowance is, however, not extended to: (1) claims that a prisoner is not guilty because a trial error rendered the jury verdict deficient;[58] (2) claims in which the prisoner is challenging only the validity of the sentence and not the conviction;[59] (3) claims where the prisoner was guilty of other aspects of the crime, despite being convicted of some conduct that is retroactively legal[60] or (4) claims in which the change in law would have "no effect on whether the facts of his case would support his conviction for the substantive offense."[61]

The Ninth Circuit further summarized the collective rule of the circuits to mean that the petitioner may proceed under § 2241 when the petitioner: (1) claims to be "legally innocent of the crime for which he

55. Wofford v. Scott, 177 F.3d 1236, 1244–45 (11th Cir. 1999) ("The savings clause of § 2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raise in the petitioner's trial, appeal, or first § 2255 motion.").

56. *See, e.g.*, Triestman v. United States, 124 F.3d 361, 363 (2d Cir. 1997), which allowed access to the savings clause in circumstances in which § 2255 is unavailable and a failure to allow collateral review would raise serious constitutional questions. That test was later clarified in Cephas v. Nash, 328 F.3d 98, 104 (2nd Cir. 2003) (holding that the savings clause is available to a prisoner who "(1) can prove 'actual innocence on the existing record,' and (2) 'could not have effectively raised [their] claim[s] of innocence at an earlier time'"); *see also In re* Davenport, 147 F.3d 605 (7th Cir. 1998) (holding that § 2255 is "'inadequate or ineffective to test the legality of [the] detention' when a legal theory that could not have been presented under § 2255 establishes the petitioner's actual innocence"). The *Davenport* holding was further explained in Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002) ("[Section] 2255 is inadequate or ineffective only when a structural problem in § 2255 forecloses even one round of effective collateral review—and then only when as in *Davenport* the claim being foreclosed is one of actual innocence.") (internal quotations omitted).

57. Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001).

58. *See* Jeffers v. Chandler, 253 F.3d 827, 831 (5th Cir. 2001) ("'Actual innocence' for the purposes of our savings clause test could only be shown if Jeffers could prove that based on a retroactively applicable Supreme Court decision, he was convicted for conduct that did not constitute a crime.").

59. *See* Padilla v. United States, 416 F.3d 424, 427 (5th Cir. 2005).

60. *See* Christopher v. Miles, 342 F.3d 378 (5th Cir. 2003).

61. *See* Wesson v. U.S. Penitentiary Beaumont, Tx, 305 F.3d 343, 348 (5th Cir. 2002).

has been convicted"; and (2) "has never had an unobstructed procedural shot at presenting this claim."[62] The Ninth Circuit clarified the innocence requirement, somewhat:

> To establish actual innocence for the purposes of habeas relief, a petitioner 'must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him'[63] . . . [a] petitioner is actually innocent when he was convicted for conduct not prohibited by law.[64]

Likewise, the Ninth Circuit has articulated a method for determining whether a petitioner had an "unobstructed procedural shot" at raising a claim. The court must consider: (1) whether the legal basis for the petitioner's claim did not arise until after the direct appeal and first § 2255 motion had been exhausted; and (2) whether the law changed in any way relevant to the petitioner's claim after that first § 2255 motion.[65] In sum, the Ninth Circuit requires not only that a subsequent change in the law make a previously unavailable claim viable,[66] but that the change in law be material as it applies to the petitioner's case.[67]

While the pro-access circuits use varying language to determine whether a petitioner may seek habeas recourse through § 2241, some common principles can be distilled: (1) the petitioner's claim must arise from retroactively applicable law; (2) the change in law must render the petitioner convicted of a nonexistent offense; and (3) the petitioner must not have been able to raise the claim at trial, on direct appeal, or in the first § 2255 motion. Regardless, these circuits agree that under the very limited circumstance in which a petitioner claims factual innocence based on a retroactively applicable Supreme Court decision, could not have raised this claim at an earlier time, and is barred from filing a successive § 2255 motion, the Savings Clause is available.

62. Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir. 2003) (internal quotations omitted), *followed by* Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006); *see also* Lorentsen v. Hood, 223 F.3d 950, 953–54 (9th Cir. 2000) (holding that the savings clause is accessible when a petitioner is "innocent of the crime for which he has been confined but has had no prior opportunity to test the legality of that confinement").

63. Alaimalo v. United States, 645 F.3d 1042, 1047 (9th Cir. 2011) (citing *Stephens*, 464 F.3d at 898).

64. *Id.* at 1047.

65. *Id.* (quoting Harrison v. Ollison, 519 F.3d 952, 960 (9th Cir. 2008) (internal quotation marks omitted)).

66. *Id*. at 1047.

67. *Id.* at 1048.

B. Section 2255 is Not Inadequate or Ineffective When It Bars an Innocence Claim Based on a New Interpretation of the Law.

The Tenth Circuit created a more significant split when the court issued its decision in *Prost v. Anderson*.[68] The petitioner in *Prost* pleaded guilty to engaging in a money laundering conspiracy as part of a drug trafficking scheme in violation of § 1956.[69] Prost subsequently brought a factual innocence claim based on the Supreme Court's decision in *United States v. Santos*.[70] The *Santos* Court construed 18 U.S.C. § 1956, the federal money laundering statute, to mean that the term "proceeds" encompasses only "profits," not "gross receipts."[71] Having already exhausted his initial § 2255 motion in a sentencing challenge, Prost filed a petition for habeas corpus pursuant to § 2241, claiming that he had laundered only gross receipts—not profits—and that his convictions relating to money laundering should therefore be overturned.[72] Because the decision in *Santos* did not form a new rule of constitutional law but was instead a new statutory interpretation, Prost's factual innocence claim under *Santos* did not fall within one of the exceptions to the bar against successive motions under § 2255(h).[73] For this reason, Prost sought to access the Savings Clause embodied in § 2255(e).[74]

In support of its reading of the Savings Clause, the Tenth Circuit looked to the text of § 2255(e). The court analyzed the terms "inadequate or ineffective" in relation to the second part of that clause, "to test the legality of [the prisoner's] detention."[75] The *Prost* court emphasized the word "test," concluding that § 2255 must be functionally unable to test the claim in order to be rendered inadequate or ineffective.[76] Under this reading of the text, the Tenth Circuit found that the Savings Clause concerned whether § 2255 affords an *opportunity* to test such a claim, not whether that opportunity provides adequate relief.[77] Following that logic, the Tenth Circuit further distinguished between "remedy" and "relief," recognizing that the text of the Savings Clause requires that the *remedy* be inadequate or

68. 636 F.3d 578 (10th Cir. 2011).
69. *Id.* at 580.
70. 553 U.S. 507 (2008).
71. *Id.* at 514.
72. *Prost*, 636 F.3d at 580–81.
73. *Id.* at 581.
74. *Id*.
75. *Id.* at 584.
76. *Id*.
77. *Id.* at 585.

ineffective.[78] Looking to another related statute, 28 U.S.C. § 2254(b)(1), the court interpreted "remedy" to be an "avenue for relief, not relief itself."[79] Thus, the court evaluated the functionality of § 2255 in providing an avenue for relief, regardless of whether § 2255 could have provided actual relief at the time of the initial motion.

Because the Supreme Court has recognized that § 2255 was not enacted to expand or "impinge upon prisoners' rights of collateral attack upon their convictions," but was instead created to provide an alternative venue for federal prisoners to challenge their convictions,[80] the Tenth Circuit concluded that Congress incorporated the Savings Clause "to ensure that [federal prisoners] who could not comply with § 2255's new venue mandate were still provided with at least one opportunity to challenge their detentions."[81] Thus, Congress, in enacting the AEDPA amendments to § 2255, intended to allow only one adequate and effective opportunity to test the legality of a detention—the initial § 2255 motion.[82] The *Prost* court explained that § 2255(f)(3) expressly allows for these types of claims to be raised in an initial § 2255 motion because:

> [T]he one-year statute of limitations for bringing a first § 2255 motion begins to run only from 'the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.'[83]

Since there is no risk of being time-barred from raising these claims in the first § 2255 motion, the Tenth Circuit reasoned that failure to do so did not render § 2255 inadequate or ineffective. The court further recognized that, despite Congress's awareness of the potential for a factual innocence claim arising from a retroactively applicable change in statutory law, Congress omitted these claims from the list of exceptions allowing a prisoner to file a second or successive § 2255 motion.[84] Therefore, while Prost may have had a good excuse for failing to bring this claim earlier, that was not enough to overcome the fact that Congress already determined which excuses are sufficient for the purposes of filing a successive § 2255 motion—those exceptions listed

78. *Id.* at 584–85.

79. *Id.* at 585.

80. *Id.* at 587–88 (quoting United States v. Hayman, 342 U.S. 205, 219 (1952)).

81. *Id.* at 588 (emphasis omitted). The *Prost* court conceded that the savings clause was not necessarily limited to addressing venue problems.

82. *Id.* at 586.

83. *Id.* at 585–86 (quoting 28 U.S.C. § 2255(f)(3) (2008)).

84. *Id.* at 586.

in § 2255(h).[85] Congress did not intend to allow "multiple bites at the apple" under these circumstances.[86]

Despite acknowledging that at the time of Prost's first § 2255 motion, neither Prost nor his counsel could have imagined the interpretation of 18 U.S.C. § 1956 set forth in the *Santos* decision, the Tenth Circuit rejected Prost's contention that he should not be punished for failing to raise a novel argument.[87] Instead, the *Prost* court held that the Savings Clause merely requires that "[t]he § 2255 remedial vehicle was fully available and amply sufficient to test the argument, whether or not Mr. Prost thought to raise it."[88]

Indeed, in explicitly identifying which scenarios it deems worthy of filing a successive § 2255 motion, the Tenth Circuit reasoned that Congress has already weighed the interest in accurate adjudications against the often competing interest in the finality of court judgments. The *Prost* court acknowledged that the American criminal justice system places considerable trust in the jury to arrive at an accurate conviction.[89] Additionally, our system relies heavily on the presumption of innocence, numerous evidentiary and procedural safeguards, Constitutional guarantees, and a multi-layered appeals process to prevent faulty convictions.[90] For these reasons, the *Prost* court concluded that once a conviction is deemed final, society has an interest in ending litigation and moving forward.[91] Thus, barring the two exceptions for filing a successive motion under § 2255(h), Congress has determined that once the initial § 2255 motion has been exhausted, finality concerns outweigh allowing another opportunity to challenge a conviction.

Accordingly, the Tenth Circuit denied Prost access to § 2241, and, in so doing, issued its own measure of when a prisoner may resort to the Savings Clause: "The relevant metric . . . is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion."[92] Regardless of whether the argument was available at the time of the first § 2255 motion, the *Prost*

85. *Id.* at 589.

86. *Id.* at 588.

87. *Id.* at 589 ("[I]n much the same way that a student's failure to imagine a novel or creative answer to an exam question doesn't make the exam an inadequate or ineffective procedure for testing his knowledge, the fact that Mr. Prost or his counsel may not have *thought* of a *Santos*-type argument earlier doesn't speak to the relevant question whether § 2255 *itself* provided him with an adequate and effective remedial mechanism for testing such an argument.").

88. *Id*.

89. *Id*. at 582–83.

90. *Id*.

91. *Id*.

92. *Id.* at 584.

court found that if the § 2255 mechanism is capable of addressing such a claim, technically speaking, then § 2255 is not inadequate or ineffective.[93] In sum, the Tenth Circuit held that "a prisoner can proceed to § 2241 only if his initial § 2255 motion was *itself* inadequate or ineffective to the task of providing the petitioner with a *chance* to *test* his sentence or conviction."[94]

IV. DISCUSSION

While *Prost*'s plain language interpretation of the Savings Clause is persuasive, this interpretation fails to account for the argument of the pro-access circuits that the underlying purpose of habeas corpus and other modes of collateral review is to ensure that the prisoner be afforded a "reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence."[95] As the concurrence in *Prost* makes clear, the flaw in the § 2255 remedy under these circumstances is not that it fails to provide a particular type of relief or that it prevents prisoners from filing multiple § 2255 motions—the reason § 2255 is inadequate and ineffective under these circumstances is that it fails to allow for a "*meaningful* opportunity" to raise a claim of factual innocence.[96] If the law of the circuit at the time of the prisoner's trial, direct appeal, and initial § 2255 motion was so firmly set against the present legal theory that raising it would have been practically unforeseeable and fruitless, then it cannot be said that the petitioner had an effective opportunity to raise that claim.[97]

The reality that denials of § 2255 motions are not readily appealable complicates the Tenth Circuit's determination that § 2255 is adequate as long as the mechanism remains intact. Under § 2253(c)(1), a circuit judge must issue a certificate of appealability in order for a petitioner to appeal the denial of a § 2255 motion, and the judge may do so "only if the applicant has made a substantial showing of the denial of a

93. *Id.* at 588 (stating that even though the law at the time of the first § 2255 motion did not support the petitioner's present claim, and § 2255 now bars this claim as a successive motion, this "doesn't mean that the § 2255 remedial regime is inadequate or ineffective to test such an argument").

94. *Id.* at 587.

95. *Id*. at 605 (Seymour, J. concurring in part and dissenting in part) (quoting *In re* Davenport, 147 F.3d 605, 609 (7th Cir. 1998) (emphasis omitted).

96. *Id*. at 606.

97. Both the majority and the dissent in *Prost* agreed that the petitioner had an opportunity to raise his claim in his initial § 2255 because there was no adverse circuit precedent at that time. Therefore, § 2255 was not inadequate or ineffective to test the petitioner's claim, and as a result he could not file a habeas petitioner pursuant to § 2241 via the savings clause.

constitutional right."[98] Even if a petitioner had the requisite creativity to dream up a legal theory entirely opposed to well-settled circuit law, the claim would almost certainly be denied, and there would be no means of appealing that denial. Realistically, the petitioner would gain no advantage by raising a novel theory in the initial § 2255 motion because it would likely be rejected, and the prisoner would still be denied an opportunity to test the claim in a successive motion if the Supreme Court finally affirmed that theory.

The *Prost* majority would counter that the tolling of the statute of limitations allows a petitioner under these circumstances to wait to raise an innocence claim until the Supreme Court issues a favorable ruling, without fear of being time-barred from filing a § 2255 motion.[99] Yet this would require a prisoner to wait, perhaps indefinitely, for the Supreme Court to provide an affirmative basis for challenging the conviction. A prisoner under these circumstances would likely have no way of predicting such an interpretation, nor would there be any certainty that such a favorable ruling would ever be issued. The one-year statute of limitations runs from the latest possible date based on a number of circumstances provided for in § 2255(f).[100] If a prisoner were to wait for the Supreme Court to consider a legal interpretation that that prisoner likely could not have imagined, that prisoner would be time-barred from pursuing other potential challenges to his conviction or sentence.

This expectation seems unreasonable itself, but the *Prost* ruling adds another layer of complications by contending that because the initial § 2255 motion was adequate and effective to test the prisoner's innocence claim, the prisoner should have raised the claim at that time.[101] Under this logic, the prisoner is punished for failing to raise a novel statutory interpretation theory in his initial § 2255 motion, which if raised, would likely have been denied. If the claim was denied, the prisoner would have then lost the only chance to challenge the conviction under § 2255. The *Prost* court seemingly suggests that, should the prisoner conceive of a novel statutory interpretation, the

98. 28 U.S.C. § 2253(c)(1)–(2) (1996).

99. *Prost*, 636 F.3d at 585–86.

100. 28 U.S.C. § 2255(f) (2008) ("A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.").

101. *Prost*, 636 F.3d at 585.

prisoner should wait patiently until the Supreme Court adopts that theory, meanwhile forfeiting any other means of challenging the conviction or sentence and extending the length of the prisoner's allegedly wrongful incarceration. Under these recommendations, it is unclear why a prisoner would ever bother testing a novel interpretation. Even if the prisoner did have the foresight and patience to challenge such a theory, the ability to test that theory in a higher court rests entirely on the ruling of a circuit judge in deciding whether to allow an appeal—a judge who governs the district of the prisoner's incarceration and has likely played a role in developing the circuit law that foreclosed the prisoner's novel interpretation to begin with.

Pursuing these strategies would be highly unrealistic even for an attorney. The situation is compounded by the fact that a significant number of § 2255 motions are filed *pro se* by prisoners who lack the expertise and creativity of attorneys trained in these matters.[102] Such a reading of § 2255 places harsh penalties on *pro se* litigants, and under the Tenth Circuit's interpretation of the Savings Clause, it is difficult to conceive of any situation in which the clause would have meaning. Citing the *Hayman* opinion, the *Prost* court suggested that because § 2255 was enacted to address the difficulties in administering habeas corpus petitions from federal prisoners, "Congress included the Savings Clause to ensure that those who couldn't comply with § 2255's new venue mandate were *still* provided with at least one opportunity to challenge their detentions."[103] The court did not provide examples of situations in which a prisoner would be unable to meet the venue requirements, but regardless, such complications would likely be rare, and the Savings Clause would have little, if any, applicability.

The *Prost* court did not address any of the constitutional concerns implicated in a situation where a prisoner is incarcerated for conduct that the law does not make criminal. A person imprisoned under these circumstances could conceivably allege violations of the Due Process Clause, the Eighth Amendment, and even the Suspension Clause. Interpreting the Savings Clause to permit the potentially unconstitutional result of barring judicial review of factual innocence claims would raise serious questions as to the constitutionality of the AEDPA amendments to § 2255.[104] Yet, this may have been precisely what the Tenth Circuit

102. *See* VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 86 (National Center for State Courts, 1994) (Tbl.22).

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

104. *See In re* Davis, 130 S. Ct. 1, 1 (2009) (Stevens, J., concurring), *referencing* Triestman v. United States, 124 F.3d 361, 377–80 (2d Cir. 1997) (discussing the constitutionality of the AEDPA in the context of § 2254, Justice Stevens noted, "Even if the court finds that § 2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence").

intended. The *Prost* court hints at the potential for challenging the constitutionality of § 2255 under this reading: "[U]nless and until Congress's currently expressed balance can be said to violate the Constitution," the courts must interpret the statute as it currently reads.[105] Arguably, construing and applying § 2255 in a manner that results in constitutional violations may be the most efficient and effective way of compelling the Supreme Court or Congress to provide guidance on this dispute.

The circuit split brings the interests of finality and justice to the forefront of this issue. Unfortunately, these interests appear to be in competition with one another. In the context of criminal cases, finality in judicial determinations promotes efficiency, prevents multiple post-conviction appeals by prisoners, minimizes the time and cost associated with potentially endless litigation, and allows those impacted by crime an opportunity to move on with their lives.[106] The potential for abuse of the writ is a foreseeable result of interpreting the Savings Clause too broadly. Nevertheless, this interest in finality cannot outweigh an even more critical interest: the interest in obtaining accurate judicial results. This interest is fundamental in every area of law, but it must be held in the highest esteem in criminal cases, where the result of an inaccurate outcome is the wrongful imprisonment of an innocent person.

The Savings Clause tests issued by the pro-access circuits balance these interests correctly. These tests are appropriately limited in their applicability, yet they avoid constitutional problems stemming from the continued imprisonment of a prisoner with a newly recognized claim of innocence. The Tenth Circuit's competing finality concerns are sufficiently accounted for in the requirement that, for the Savings Clause to apply, the prisoner cannot have had an unobstructed procedural opportunity to raise his claim of innocence. In fact, allowing access to § 2241 via the Savings Clause implicitly provides limited relief because this entire issue leads only to a very limited result—that a federal prisoner merely be allowed to file a habeas corpus petition pursuant to § 2241.[107] The decisions of the circuits allowing access to § 2241 have

105. *Prost*, 636 F.3d at 597; *see also Prost*, 636 F.3d at 602, 607 (Seymour, J. concurring in part and dissenting in part) (declining to address constitutional issues not raised in petitioner's brief). However, it should be noted that these questions were not raised precisely because the government conceded that the Fifth Circuit's circuit-foreclosure test governed, and merely argued that Prost did not meet its requirements). *Id.*

106. *Prost*, 636 F.3d at 582–83.

107. *In re* Dorsainvil, 119 F.3d 245, 252 (3d Cir. 1997) (explaining that "[t]he question before us is not whether Dorsainvil is actually innocent of violating § 924(c)(1), but . . . whether his claim that he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision is cognizable in a district court," and concluding that Dorsainvil presented a "sufficiently colorable claim" for the district court to review under § 2241).

absolutely no bearing on whether that petition will be granted. This lends even greater credence to the conclusions of the pro-access courts.

V. CONCLUSION

The AEDPA "should be interpreted in a manner that preserves a reasonable opportunity for assertion of newly recognized rights."[108] The only real policy argument against allowing access to § 2241 via the Savings Clause is the potential for abuse and subsequent congestion in the court dockets, an unlikely outcome given the somewhat limited holdings of the pro-access circuits. Regardless, when that interest is weighed against the potential for a factually innocent person to be wrongfully incarcerated—an issue that could be adjudicated fairly and accurately merely by allowing that prisoner to file a § 2241 petition—there can be no doubt that the courts should err on the side of fair adjudication. Courts should risk some logistical inconvenience if the alternative is a possible violation of a constitutional right in the nature of false imprisonment. Under such circumstances, the "overriding individual interest in doing justice in the extraordinary case" must prevail.[109]

108. United States v. Lloyd, 188 F.3d 184, 187 (3d Cir. 1999).

109. Schlup v. Delo, 513 U.S. 298, 322 (1995).