NOTES

ADEQUATE AND EFFECTIVE: POSTCONVICTION RELIEF THROUGH SECTION 2255 AND INTERVENING CHANGES IN LAW

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Introduction

Law students, criminal justice majors, and casual viewers of crime dramas understand the basic structure of the federal criminal system from indictment to trial to the exhaustion of direct appeals in the Supreme Court. However, this is not the end of the story. After a grand jury has decided there is sufficient evidence to indict, a petit jury has decided there is enough evidence to support a conviction, a trial judge has imposed a sentence, an appellate court has affirmed the conviction, and the Supreme Court has either denied review or affirmed the circuit court decision, a federal prisoner has other mechanisms available to argue for relief. This Note focuses on the interaction between two of these postconviction or collateral appeal mechanisms: § 2255[1] and § 2241.[2] More specifically, this Note addresses when—or if—changes in law that happen after conviction and the usual appeals allow a federal prisoner to return to court for another look at whether the conviction is undermined by the intervening change in law.

This Note begins in Part I by providing a general introduction to modern postconviction relief, with special attention to the interaction between habeas corpus petitions and the § 2255 motion that performs much of the work traditionally assigned to the habeas writ. Section I.A begins to describe the debate in the federal circuit courts over the proper scope of the clause of § 2255 with which this Note is primarily concerned, the so-called "savings clause" of § 2255(e). Section I.B relates the importance of correctly construing the savings clause, as well as the dangers of a split in circuit interpretation for a uniform criminal system. Part II and Part III describe the majority and

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1 28 U.S.C. § 2255 (2018).

2 *Id.* § 2241.

minority approaches to interpreting § 2255(e). Part II does so primarily by describing two Fourth Circuit cases, *In re Jones*[3] and *United States v. Wheeler*,[4] as they are an instructive introduction to the majority position. Part IV evaluates the majority and minority positions and argues that the minority's narrow interpretation of the clause is superior to that of the expansive approach of the majority. Finally, Part V provides a diagnosis of the division between the circuits on the savings clause, as well as a brief conclusion on the relative merits of the two positions.

I. Introduction to the Habeas Writ and Statutory Equivalents

The federal criminal system allows an individual convicted of a federal crime to directly appeal that conviction first from the district court of conviction to a circuit court of appeals, and then to the Supreme Court.[5] After the direct appeal process is exhausted, there remains the option to collaterally attack either the imposition of the sentence or the legality of the conviction itself. At this point, the petitioner is federally incarcerated and is entitled to file one motion for postconviction relief under 28 U.S.C. § 2255.[6] Once the first postconviction appeal is exhausted, a second or successive motion to challenge the imposition of conviction or sentence must be approved, or "certified," by an appellate court.[7] Certification is only available in an extremely limited set of circumstances, and it requires new evidence strongly indicative of innocence or a new rule of constitutional law made expressly retroactive.[8]

In the alternative, the prisoner could file a traditional habeas corpus petition through 28 U.S.C. § 2241.[9] However, this route is rarely available. When Congress restructured collateral relief in 1948, it designed § 2255 to supersede § 2241, taking over the work previously performed by the old habeas petition.[10] Thus, Congress narrowly confined the circumstances

3 *In re* Jones, 226 F.3d 328 (4th Cir. 2000).

4 United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018).

5 For a more complete and in-depth discussion of the federal criminal and appellate process as related to direct and collateral review, see Jennifer L. Case, *Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause*, 45 U. Mem. L. Rev. 1, 5–8 (2014).

6 28 U.S.C. § 2255(a). As subsection (a) states, § 2255 is only applicable to "prisoner[s] in custody under sentence of a court established by Act of Congress," meaning it only applies to federal prisoners. *Id.* However, there is a parallel statute that provides state prisoners a similar relief mechanism. *See generally id.* § 2254. Federal prisoners attempting to utilize § 2255, rather than state prisoners and § 2254, are the sole focus of this Note.

7 *Id.* § 2255(h).

8 *Id.*

9 *See, e.g.*, 39 Am. Jur. 2d *Habeas Corpus* § 1 (2020) (discussing the purpose of the writ); *see also* Scott R. Grubman, *What a Relief? The Availability of Habeas Relief Under the Savings Clause of Section 2255 of the AEDPA*, 64 S.C. L. Rev. 369, 371–78 (2012) (providing a brief history of the writ of habeas corpus).

10 *See* Case, *supra* note 5, at 11 (discussing how Congress designed § 2255 to be superior to § 2241 because of the venue problems created by § 2241); *see also* McCarthan v. Dir.

under which a prisoner may use a habeas petition to challenge the validity of conviction.[11] The only situation in which a prisoner may bypass § 2255 and file a traditional habeas petition is when it is expressly allowed. Section 2255(e)—commonly referred to as "the savings clause"—permits a habeas petition *only* when a motion under § 2255 is "inadequate or ineffective."[12] Otherwise, courts are barred from hearing habeas petitions.[13]

Therefore, given the certification limits on second or successive motions under § 2255(h) and the barriers to pursuing a habeas petition in § 2255(e), a federal prisoner *usually* gets one and only one collateral or postconviction shot at obtaining a meaningful review of his or her conviction and sentence.[14] In theory, this restriction should cause only small problems for most prisoners; they simply must bring all of their arguments in a single § 2255 motion. Fair enough. But what happens when a change in law happens *after* the first motion and the prisoner is not eligible to file another motion under the gatekeeping requirements of § 2255(h)? Ostensibly, the prisoner is out of luck.

A. Introduction: A Simple Example

An example may help to clarify the background laid above. Imagine an individual steals a washing machine and is convicted in federal court under a

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of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1081 (11th Cir. 2017) ("Section 2255(e) makes clear that a motion to vacate is the exclusive mechanism for a federal prisoner to seek collateral relief unless he can satisfy the 'saving clause' . . . .").

11 Section 2255 is the means through which a prisoner may challenge the *validity* of a conviction, while § 2241 is how a prisoner may challenge the *execution* of a conviction. *See* Adams v. United States, 372 F.3d 132, 134–35 (2d Cir. 2004). The validity of a conviction or sentence concerns whether the sentence was imposed in violation of law or by a court without jurisdiction. *Id.* In contrast, the execution of a conviction or sentence deals with the administrative enforcement of the sentence, such as allegations of a denial of proper parole, poor prison conditions, or unjust disciplinary actions. *See* Prost v. Anderson, 636 F.3d 578, 581 (10th Cir. 2011) (distinguishing between attempts to attack the "legality" of a sentence from the nature of confinement). Accordingly, § 2241 does not generally allow a prisoner to challenge the merits of conviction or argue that he or she is in fact innocent.

12 28 U.S.C. § 2255(e); *see also* United States v. Hayman, 342 U.S. 205, 223 (1952) ("In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing." (quoting 28 U.S.C. § 2255(e))).

13 § 2255(e) (providing that "unless" the "remedy [through § 2255] is inadequate or ineffective," an "application for a writ of habeas corpus . . . shall not be entertained"); *see* Cephas v. Nash, 328 F.3d 98, 104 (2d Cir. 2003) ("[F]ederal jurisdiction to hear habeas claims based on the invalidity of a federal conviction or sentence [is limited] to § 2255 unless a petitioner can show that a motion pursuant to that section is 'inadequate or ineffective to test the legality of his detention.' If such a showing can be made, federal courts retain jurisdiction to hear the habeas petition pursuant to § 2241." (quoting 28 U.S.C. § 2255(e))).

14 *See Adams*, 372 F.3d at 135 (denying petitioner's habeas petition asserting that the district court lacked jurisdiction over his case and reasoning that "§ 2255 is the approved road for such a petitioner to travel in order to challenge his conviction").

law making it a felony to steal a dry-cleaning machine. A federal circuit court affirms the conviction and the Supreme Court denies review. Next, she again challenges her conviction, but this time collaterally through a motion under § 2255. Again, the reviewing court affirms the conviction. At this point, the individual has used up all her direct appeals and her first § 2255 motion—the only one that each prisoner is guaranteed. Barring extremely rare circumstances, the conviction is final.

What happens to that prisoner if the law under which the jury convicted her is judicially reinterpreted after all the above has happened? Say that the Supreme Court, or a federal appellate court, holds that merely stealing a washing machine is not within the scope of a statute making the theft of dry-cleaning machines a felony. This subsequent change in law means that if our prisoner's case was argued anew, she would likely be found not guilty; she did not steal a dry-cleaning machine, but a washing machine. Thanks to the appellate court's reinterpretation of the statute, we now know that the two machines are not the same. Does our prisoner get to argue that this reinterpretation of the statute applies retroactively to her case?

As discussed above, the gatekeeping requirements of § 2255(h) will bar her from getting a second § 2255 motion because the change in law is not a change in constitutional law, even if announced by the Supreme Court. Thus, the usual rule that a prisoner only gets one § 2255 motion will apply.

Our prisoner's only chance of getting a court to apply the new interpretation to her old case is the savings clause. When the savings clause applies, it operates as an escape hatch, letting a prisoner bypass the limits of § 2255 and instead use a traditional habeas petition under § 2241. For the savings clause to work, the prisoner's inability to get back into court—because of the limitations on additional motions from subsection (h)—would have to make § 2255 *inadequate or ineffective*, triggering the savings clause and allowing the prisoner to file a § 2241 habeas petition to have her case reconsidered.

Therefore, whether the prisoner gets back into court turns on the meaning of the triggering words of the savings clause: inadequate or ineffective. The remainder of this Note discusses how two circuit courts have interpreted those words.

B. Introduction: The General Contours of the Savings Clause Debate

This Note focuses on one of the pathways through which a federal prisoner can get another bite at the apple; specifically, § 2255(e), the savings clause.[15] As mentioned above, 28 U.S.C. § 2255's savings clause allows a federal prisoner to file a traditional habeas corpus petition through 28 U.S.C.

15 Section 2255(e) has also been referred to as the statute's "safety valve." 39 AM. JUR. 2D *Habeas Corpus* § 9 n.3 (2020) (citing United States *ex rel.* Perez v. Warden, FMC Rochester, 286 F.3d 1059 (8th Cir. 2002)) (discussing § 2255 as a statutory replacement of the writ).

§ 2241 if a motion under § 2255 would be "inadequate or ineffective to test the legality of his detention."[16]

This Note describes the debate surrounding when § 2255 is "inadequate or ineffective" for a second or successive motion. "It is beyond question that § 2255 is not inadequate or ineffective merely because an individual is unable to obtain relief under that provision."[17] That is so because § 2255(h), in its so-called "gatekeeping" provision, bars second or successive motions unless specific criteria are satisfied. Thus, there is something of a turf war between § 2255(h), which limits second or successive motions, and § 2255(e), which ostensibly allows a federal prisoner to escape the requirements of § 2255 and file a § 2241 habeas petition in lieu of certifying a second or successive motion.[18]

It is well worth noting at the outset that the § 2255(h) was not in the statute at enactment. The weight of authority suggests that, as originally enacted, § 2255 was meant to provide equivalent relief as was previously available under § 2241's habeas corpus petition,[19] which has been described as a broad and adaptable remedy.[20] However, Congress added the gatekeeping requirements of subsection (h) on second or successive collateral review several years later as part of the Antiterrorism and Effective Death Penalty Act (AEDPA),[21] an effort to restrict and qualify the availability of postconviction

16 § 2255(e); *see also* United States v. Wheeler, 886 F.3d 415, 419 (4th Cir. 2018). Here "habeas corpus" is used as a generic term to refer to what would be more traditionally and properly named "the writ of habeas corpus ad subjiciendum" or "the 'Great Writ.'" 39 AM. JUR. 2D *Habeas Corpus* § 2 (2020) (citing Stone v. Powell, 428 U.S. 465 (1976)). Historically these more precise terms would have been necessary to distinguish among the numerous writs contained under the generic heading of "habeas corpus" in English statutory and common law. *Id.*

17 *In re* Jones, 226 F.3d 328, 333 (4th Cir. 2000).

18 *Id.* (reasoning that "there must exist some circumstance in which resort to § 2241 would be permissible" for a second or successive motion blocked by the gatekeeping provisions or "the savings clause itself would be meaningless").

19 *See, e.g.*, Hill v. United States, 368 U.S. 424, 427 (1962) (noting that § 2255 "was intended simply to provide . . . a remedy exactly commensurate with" habeas corpus); United States v. Hayman, 342 U.S. 205, 219 (1952) ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.").

20 *See* 39 AM. JUR. 2D *Habeas Corpus* § 1 (2020) ("Habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes, and the very nature of the writ demands that it be administered with initiative and flexibility essential to insure that injustices within its reach are surfaced and corrected.").

21 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified at 28 U.S.C. § 2255(h)). Enacted in April 1996, AEDPA placed "limits on second and successive collateral attacks on convictions." *In re* Jones, 226 F.3d at 330. *See generally* Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171 (2003) (describing the collateral relief landscape before and after enactment of AEDPA).

appeals.[22] A crucial part of the debate over the savings clause is the extent to which the tenor of § 2255 changes through the addition of subsection (h), and whether it affects the overall availability of second or successive collateral relief through subsection (e).[23]

A majority of federal circuit courts hold that § 2255 is ineffective—and accordingly the savings clause permits a § 2241 petition—if a petitioner "had no earlier opportunity" to bring an argument.[24] The early proponents of the majority view reasoned that a petitioner had "no reasonable opportunity" to bring an argument if, at the time of the first § 2255 motion, it was foreclosed by binding precedent,[25] and now the procedural barriers of § 2255(h) would prevent certification of a subsequent motion.

As articulated by the Fourth Circuit, the savings clause operates when a retroactive change in substantive law occurs after exhausting a first § 2255 motion, the change results in a fundamental defect in sentence, and the gatekeeping provisions of subsection (h) bar certification of a second or successive motion.[26] Under these circumstances, the savings clause allows the petitioner to file a traditional habeas petition heard on the merits in the district where the prisoner is confined. Therefore, the majority approach, in brief, excuses a petitioner for not bringing an argument that would have been foreclosed by precedent at the time, allowing the petitioner to bring that argument through the savings clause once the precedent is overturned.[27]

In contrast, the minority view construes the savings clause more narrowly. In this view, the savings clause only guarantees prisoners an *opportunity* to test the legality of their conviction; the scope of the savings clause is identical to the scope of what a generic § 2255 motion is capable of doing. A § 2255 motion is perfectly capable of determining whether existing precedent should be overturned; in fact, that is one of the things it is designed to do. Therefore, the first motion provides a prisoner with an adequate and effective opportunity to test the legality of confinement, including any adverse precedent.

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22 AEDPA also added subsection (f), which provided a new one-year statute of limitations for filing § 2255 motions. *See* § 2255(f); Prost v. Anderson, 636 F.3d 578, 586 (10th Cir. 2011) (noting that, through AEDPA, Congress intended "to place limits on federal collateral review" (quoting Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997))).

23 For example, then-Judge Gorsuch's argument in *Prost v. Anderson* rests on a comprehensive reading of the statute that considers "the savings clause's near neighbor, § 2255(h)," and how it changes the meaning of the § 2255 remedy. *Prost*, 636 F.3d at 585.

24 *In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997); *see, e.g.*, Abdullah v. Hedrick, 392 F.3d 957, 960–63 (8th Cir. 2004); Ivy v. Pontesso 328 F.3d 1057, 1059–60 (9th Cir. 2003); Martin v. Perez, 319 F.3d 799, 805 (6th Cir. 2003); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001); *In re* Jones, 226 F.3d at 333–34; *In re* Davenport, 147 F.3d 605, 610 (7th Cir. 1998); *Triestman*, 124 F.3d at 377.

25 *See In re* Davenport, 147 F.3d at 610.

26 United States v. Wheeler, 886 F.3d 415, 419 (4th Cir. 2018).

27 *See* Wright v. Spaulding, 939 F.3d 695, 699, 703 (6th Cir. 2019) (describing the basics of the majority view).

For example, the Eleventh Circuit's interpretation in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.* is that the savings clause only applies when a claim is not cognizable under § 2255 or when the venue requirements of filing in the district of conviction deny an adjudicatory forum.[28] Thus, in those circumstances, a § 2255 motion is inadequate or ineffective because it is not an effective vehicle, denying the petitioner even an opportunity to bring an argument. But a § 2255 motion, under this view, is not inadequate or ineffective simply because then-existing substantive law made success unlikely. The opportunity to test the validity of the confinement by challenging unfavorable laws was enough.[29]

The fact that a prisoner did not make an argument in her first motion because circuit or Supreme Court precedent ostensibly foreclosed the argument does not make § 2255 inadequate or ineffective for the purpose of testing the substantive laws underlying confinement.[30] The same is true when a prisoner brings an argument that precedent should be overturned in a first motion but does not manage to convince the reviewing court to make the change. In fact, the minority position would argue that a subsequent change in law itself—the fact that an individual other than the prisoner was able to successfully argue against and change the then-existing precedent—demonstrates that such a motion was effective.[31] Under this approach, a petitioner's failure to prevail does not undermine the effective and adequate opportunity § 2255 provides to challenge the legality of confinement. In short, viewed abstractly from the situation of any particular prisoner, if § 2255 is capable of providing the type of relief sought through a first motion, the Section is not inadequate or ineffective.

With the basic contours of these two views of the savings clause in mind, consider again the prisoner in the fictitious example of the dry-cleaning statute above. As applied to those facts, the majority view would treat the adverse precedent characterizing a washing machine as within the crime's scope as effectively preventing the prisoner from having a reasonable opportunity to argue that she was innocent in her first motion. Further, she is unable to file a second § 2255 motion because those are only permitted for constitutional reinterpretations, not mere statutory ones. At this point, the majority approach would likely reason that the change in law combined with her inability to file another motion renders § 2255 ineffective as applied to the prisoner's case. Accordingly, the majority would hold these facts trigger the savings clause and allow the prisoner to file a habeas petition.

In a minority-view jurisdiction, however, the matter would come out quite differently. Under the minority interpretation, the prisoner's first motion was an effective way for her to challenge everything about the statute

28 *See* McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1088 (11th Cir. 2017).

29 *Id.* at 1087.

30 *Id.* at 1090 ("Neither [the petitioner's] failure to bring this claim earlier nor his odds of success on the merits are relevant to the savings clause inquiry.").

31 *See* Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011).

under which she was convicted, including adverse precedent. Although she would be denied a second motion, § 2255 was adequate and effective because her first motion gave her an opportunity to test the law, regardless of whether she fully availed herself of the option the first time around or not.

C. The Importance of the Savings Clause Debate

The debate between the majority and minority positions concerns when it is proper to apply the savings clause. However, there is no debate as to what occurs when it does. The savings clause not only allows a federal prisoner another bite at the apple that would be denied by § 2255(h); it also prompts a change in venue. Traditional habeas petitions under § 2241 are filed in the district in which the prisoner is confined.[32] Congress, in enacting § 2255, funneled most of those petitions into § 2255 motions that must be filed in the original district where the prisoner was convicted.[33] Before the enactment of § 2255, collateral appeals were concentrated in districts with substantial federal prison populations.[34] This concentration caused "a number of practical problems, among which were difficulties in obtaining records and taking evidence in a district far removed from the district of conviction, and the large number of habeas petitions filed in districts containing federal correctional facilities."[35] Thus, § 2255 attempted to eliminate—or at least substantially cure—this issue by redirecting collateral attacks to the district that imposed the conviction. The question arises again then, given this purpose: How large is the savings clause? How many petitions does it allow to escape the constraints of § 2255 and proceed to traditional habeas relief?

In some respects, the debate is a minute one. It is rare that a case implicates the rival interpretations of § 2255. However, the interpretation is of obvious import to any prisoner to whom it applies and contains significant implications for the fairness of the criminal justice system. As Judge Thapar recently noted, it "bother[s] courts" and "seem[s] unfair" to allow the procedural bar on second and successive motions stop a prisoner from gaining another shot at relief when a change in substantive law occurs after a first § 2255 motion and undermines the legitimacy of the conviction.[36] Intuition suggests that there must be a way to reconsider a petitioner's conviction in

32 28 U.S.C. § 2241(a) (2018); *see also Prost*, 636 F.3d at 581 ("[Section] 2241 petitions must be brought in the district of incarceration . . . ."). *See generally* 39 AM. JUR. 2D *Habeas Corpus* § 5 (2020) (describing the function and scope of the habeas corpus writ).

33 28 U.S.C. § 2255(a) ("A prisoner . . . may move *the court which imposed the sentence* to vacate, set aside or correct the sentence." (emphasis added)); United States v. Hayman, 342 U.S. 205, 220 (1952) ("The very purpose of Section 2255 is to hold any required hearing in the sentencing court . . . .").

34 *Hayman*, 342 U.S. at 213–14 (noting that the "practical problems" of gaining access to witnesses and records from the district of conviction were "greatly aggravated by the fact that the few District Courts in whose territorial jurisdiction major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions").

35 *In re* Jones, 226 F.3d 328, 332 (4th Cir. 2000) (citing *Hayman*, 342 U.S. at 212–14).

36 Wright v. Spaulding, 939 F.3d 695, 699 (6th Cir. 2019).

light of a change in substantive law, and the savings clause presents a possible route to relief.[37] Yet law—rather than intuition or notions of fairness—must control judicial decisions of statutory interpretation.[38]

As such, the split in circuit opinion reflects deeper issues than the surprisingly complex interaction between a few statutes. First, it forms but another part of the disagreement on the proper role of an appellate court in the context of habeas and collateral relief. Second and relatedly, the debate forms one facet of the continual discussion over the proper role of judges in the American legal system.

For example, in *Wheeler*, the court describes its role in the process as being "entrusted with ensuring Appellant has a meaningful opportunity to demonstrate that he is entitled to relief from his allegedly erroneous sentence."[39] Under this framing, appellate courts have a broad role—similar to their role for common-law habeas corpus writs—to fashion appropriate relief for those the court deems wrongly incarcerated or deprived of justice.[40] In contrast, the court in *McCarthan* has a more constrained view of the role of an appellate court. Given its interpretation of the text, *McCarthan* finds itself bound by Congress's language and reasons that it "cannot 'engraft an exception onto the habeas statute not envisioned by Congress and inconsistent with the clear mandate of the Act.'"[41]

As envisioned by *Wheeler*, the circuit courts have a significant task, which necessarily involves careful consideration of a multitude of policy determinations as related to the fairness of any particular prisoner's sentence in light of changed law. However, while it does involve policy and broad equity-based decisions, it is not necessarily outside of the proper role of an Article III court. The question is whether Congress did in fact give courts that role.

Therefore, the debate over the interaction of the savings clause and the gatekeeping provisions for second and successive motions necessarily draws upon statutory interpretation principles. In brief, the primary debate is over the extent to which legislative purpose in enacting § 2255 and then amending it through AEDPA informs application of the text. For example, the majority of circuits, represented by the Fourth Circuit's opinions in *In re Jones*

37 As a policy matter, intuition strongly suggests that *some* remedial vehicle should be available. But, as Judge Sutton stated in an entirely different context, "[s]ometimes an intuition is just an intuition." Thomas More Law Ctr. v. Obama, 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring in part), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

38 Federal judges do not have the freedom to craft equitable decisions that judges enjoyed at common law. As all students of federal civil procedure will recall, "[t]here is no federal general common law." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

39 United States v. Wheeler, 886 F.3d 415, 426 (4th Cir. 2018).

40 39 Am. Jur. 2d *Habeas Corpus* § 1 (2020) (describing the writ of habeas corpus as an "adaptable remedy" adjusted by courts "in accordance with equitable and prudential considerations").

41 McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1088 (11th Cir. 2017) (alterations omitted) (quoting Duckworth v. Serrano, 454 U.S. 1, 5 (1981) (per curiam)).

and *Wheeler*, take the view that § 2255 is intended to function as a mere codification and slight reorganization of traditional habeas practice.[42] Under this understanding, courts retain broad powers to ensure petitioners receive effective relief and § 2255—other than subsection (h)'s express limitation—did not reduce the opportunities for relief that were traditionally available.[43]

The majority approach just described is typical of a dynamic theory of statutory interpretation, in which courts are considered "cooperative partners of Congress," where "part of the courts' task in statutory interpretation" is "the protection of social values."[44] The majority interpretation could also be explained as an example of purposivism, in which courts mold statutory text to fit Congress's intended purpose.[45] A proponent of purposivism would argue that legislatures are motivated by a particular mischief and enact broad language to address it; courts must then expand or contract text to accord with what Congress really meant.[46]

In contrast, the minority has a more textualist interpretation, viewing courts as "faithful agents" of legislative decisionmaking authoritatively embodied in statutory language.[47] Sometimes criticized as blinded by "thick grammarian[ ] spectacles,"[48] textualists hold that legislative purpose cannot be reliably found outside of the words Congress enacted. Accordingly, the minority circuits focus their inquiry on the text, trusting that Congress expressed its purpose such that a careful reading could apprehend and faithfully apply it.

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42 *In re* Jones, 226 F.3d 328, 332–33 (4th Cir. 2000) ("Section 2255 thus was not intended to limit the rights of federal prisoners to collaterally attack their convictions and sentences." (citing Davis v. United States, 417 U.S. 333, 343 (1974))).

43 Boumediene v. Bush, 553 U.S. 723, 776 (2008) (reasoning that Congress "granted to the courts broad remedial powers to secure the historic office of the writ" of habeas corpus); *Wheeler*, 886 F.3d at 426 ("Indeed, 'the sole purpose [of § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum.'" (alteration in original) (quoting *Davis*, 417 U.S. at 344)).

44 Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

45 *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("[A] thing may be within the letter of the statute and yet not [be] within the statute, because [it is] not within its spirit, nor within the intention of its makers.").

46 *See id.* (arguing that "frequently words of general meaning are used in a statute," but consideration of the circumstances and purposes of enactment make "it unreasonable to believe that the legislator intended" the result the text requires); *see also* Borella v. Borden Co., 145 F.2d 63, 64–65 (2d Cir. 1944) ("[L]egislators . . . do not deal in rigid symbols . . . . We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them . . . ."). *But see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 39 (2012) (arguing that perceived statutory "imperfection is [often] the consequence of a compromise that it is not the function of the courts to upset—or to make impossible for the future by disregarding the words adopted").

47 *See* Barrett, *supra* note 44, at 110.

48 W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting).

In addition, the availability of collateral relief touches sensitive policy debates over the appropriate balance between finality and error correction in criminal justice. The delicate equipoise between these two interests is particularly salient for successive motions and habeas petitions, as collateral attacks on convictions "undermine society's legitimate interest in the finality of its criminal judgments."[49] Certainly "the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, 'is essential to the operation of our criminal justice system.'"[50] The question is where to locate that point where reopening past convictions outweighs finality interests;[51] but, perhaps even more crucially, the question is who should make that determination in a constitutional republic.

Finally, resolving the split is of great importance as the majority of federal circuit courts to consider § 2255(e) have found the bar against hearing habeas corpus petitions not allowed by the savings clause jurisdictional.[52] That means that Congress likely intended to strip federal courts of the power to hear habeas petitions unless the savings clause allows it.[53] Thus, the debate is not one of judicial freedom or discretion. Rather, a court hearing a habeas petition that is not authorized by subsection (e) has exceeded its authority and is without power to act. Accordingly, any relief granted or denied by such a court acting without jurisdiction is void as *coram non judice*.[54] It is crucial that federal court decisions not only reach the correct substantive outcome but also be procedurally legitimate.

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49 39 AM. JUR. 2D *Habeas Corpus* § 5 (2020).

50 Prost v. Anderson, 636 F.3d 578, 582 (10th Cir. 2011) (quoting Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion)).

51 *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (discussing finality and error correction in the context of federal review of state court decisions through habeas corpus petition).

52 *See* United States v. Wheeler, 886 F.3d 415, 424–25 (4th Cir. 2018) (noting the split of opinion among circuit courts and siding with the Eleventh Circuit and the majority position that § 2255 is a jurisdictional requirement that cannot be waived). *Contra* Harris v. Warden, 425 F.3d 386, 388 (7th Cir. 2005) (finding § 2255 does not impose a restriction on subject matter jurisdiction).

53 The *Wheeler* court makes compelling arguments that Congress created a jurisdictional bar when it drafted subsection (e). *Wheeler*, 886 F.3d at 422–26 (finding the language at issue similar to other text the Supreme Court has found jurisdictional, and that the text "demonstrates that 'Congress intended to, and unambiguously did strip the district court of the power to act . . . unless the savings clause applies.'" (omission in original) (quoting Williams v. Warden, 713 F.3d 1332, 1339 (11th Cir. 2013))). In contrast, minority positions draw support from the Supreme Court's caution against unconsidered, "drive-by jurisdictional rulings." Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)).

54 *See Coram Non Judice*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *coram non judice* as a proceeding before a court or a judge that cannot legally decide the matter, or more literally as "not before a judge"); *see also* City of Lawton v. Int'l Union of Police Ass'ns, Local 24, 41 P.3d 371, 375 n.20 (Okla. 2002) ("A case is said to be *coram non judice* when the court in which it is brought has no jurisdiction to settle the dispute.").

II. The Majority View[55]

A natural place to start describing the majority view is *In re Jones*.[56] Though not the first case to interpret the savings clause or adopt the view that has come to characterize the majority of federal circuit courts,[57] *In re Jones* nevertheless provides an instructive beginning. For that reason, this Part not only describes the legal reasoning the Fourth Circuit employed but also describes the underlying facts of the cases under review so as to provide a demonstration of some of the abstract discussion earlier of postconviction appeals.

A. In re Jones

Jones was convicted of using a firearm in connection with a drug offense under 18 U.S.C. § 924(c)(1).[58] After Jones filed his first motion under § 2255, the Supreme Court decided that the statute under which Jones was convicted required that the firearms be actually used in connection with the crime, not merely present at the crime.[59] The Court also specified that the interpretation applied retroactively.[60] The prosecution in Jones's case had not demonstrated that he had *used* a firearm during the drug offense and thus had not met the standard for conviction *Bailey* required. That much was clear. Certainly, this retroactive intervening change in law undermined the legitimacy of Jones's conviction—perhaps even decisively so. The trouble for Jones came in how he could get a federal court to reassess his case in light of *Bailey*.

One option would be to file a second § 2255 motion. However, there was an issue with this route. A "second or successive" § 2255 motion must be certified by an appellate court before it can proceed.[61] Section 2255(h)[62]

55 The majority view is embraced in various forms by nine circuit courts. *See* Petition for a Writ of Certiorari at 23–25, *Wheeler*, 886 F.3d 415 (No. 18-420). Though there is variation among the circuit's interpretations, this Note focuses on the Fourth Circuit's iteration of the majority position as it is among the most recent examples of the majority view and is generally representative of the reasoning of the other circuits in the majority. *See id.* at 23–24 (describing the common dimensions of the majority position); *see also* Case, *supra* note 5, at 53–57 (summarizing the various interpretations utilized by the circuits that have addressed the issue).

56 226 F.3d 328 (4th Cir. 2000).

57 The Third Circuit was the first to articulate what has become the majority position. *See In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

58 *In re* Jones, 226 F.3d at 330.

59 *Id.* (citing Bailey v. United States, 516 U.S. 137, 143 (1995)).

60 *Id.*

61 28 U.S.C. § 2255(h) (2018).

62 *Id.* ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—(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.").

provides that a second or successive motion must be certified as containing either conclusive new evidence or "a new rule of constitutional law, made retroactive."[63] Jones had no new evidence, nor did he have a newly decided, retroactive constitutional rule announced by the high court. Instead, he had a newly decided, retroactive *statutory* rule announced by the high court.[64] The difference is enough to defeat any possibility of a second motion through § 2255.[65]

At this point, Jones attempted something more novel. He argued that his inability to present a second or successive petition under § 2255 rendered the relief under that statute "inadequate" and "ineffective" within the meaning of subsection (e), allowing Jones to file a traditional habeas corpus petition under § 2241.[66] The Fourth Circuit agreed.[67] In doing so, *In re Jones* promulgated a new three-part test to govern the operation of the savings clause:

> [Section] 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.[68]

The Fourth Circuit in *Jones* decided that the savings clause authorizes habeas petitions when intervening caselaw—like the Supreme Court's decision in *Bailey*—undermines a prisoner's conviction; it did so in spite of the fact that a motion under § 2255 would be denied under those circumstances. Accordingly, the court allowed Jones to escape the confines of § 2255 and file a habeas petition.[69]

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63 *Id.*

64 Jones conceded that, if applicable, the gatekeeping provisions of § 2255(h) would bar his claim for a second or successive motion. Nevertheless, he attempted to argue that § 2255(h) as enacted through AEPDA was impermissibly retroactive as applied to his motion. The Fourth Circuit rejected that argument. *In re* Jones, 226 F.3d at 332.

65 The Fourth Circuit continues to hold this limitation on second or successive motions, while using the savings clause as a runaround to a determination on the merits. *See* United States v. Wheeler, 886 F.3d 415, 426–27 (4th Cir. 2018). However, even within the Fourth Circuit there are dissenters. Before being vacated en banc, a majority panel reasoned that only a Supreme Court decision could "open the door to successive relief" because § 2255(h) requires "a new rule of constitutional law, made retroactive . . . by the Supreme Court" to certify a second or successive motion. United States v. Surratt, 797 F.3d 240, 259 (4th Cir. 2015) (quoting § 2255(h)(2)), *vacated on grant of reh'g en banc, appeal dismissed as moot*, 855 F.3d 218 (4th Cir. 2017)).

66 *In re* Jones, 226 F.3d at 331; *see also* 28 U.S.C. § 2255(e).

67 *In re* Jones, 226 F.3d at 334.

68 *Id.* at 333–34.

69 *Id.* at 330.

To reach this result, *Jones* relied on a theory of the purpose of § 2255 that influenced later courts, particularly *Wheeler*. The *Jones* court relied on statements by prior courts asserting that, as enacted, § 2255 did not constrain the ability of federal prisoners to obtain collateral review; instead, it merely redirected that review away from § 2241 and channeled it through § 2255.[70] Thus, Congress intended § 2255 to be simply a more efficient tool to achieve the same end as § 2241. It follows, then, that when § 2255 ceases to be that effective tool, courts may allow prisoners to use § 2241. Further, because under this view the essence of habeas petitions has simply been redirected into a new format and not significantly changed, federal courts retain their traditional, broad role in habeas corpus of ensuring that prisoners have a meaningful opportunity to gain relief.[71] That is, in essence, the underlying logic of *In re Jones*,[72] a case that is largely representative of much of the majority view reasoning.[73]

B. United States v. Wheeler

In re Jones established the modern foundation, at least within the Fourth Circuit, that a second or successive § 2255 motion can be inadequate or ineffective—triggering the savings clause and allowing a habeas petition—in some circumstances when the motion would be otherwise barred by the gatekeeping requirements of § 2255(h).[74] Thus, in spite of the fact that Jones's second motion under § 2255 would be barred because it was based on a changed statutory rather than constitutional rule, he could pursue relief on the merits through a § 2241 habeas corpus petition. *United States v. Wheeler*, while certainly following the path cleared by *In re Jones*, breaks new ground.[75]

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70 *Id.* at 332 (reasoning that Congress's purpose in addressing the practical problems of § 2241 petitions means that § 2255 "was not intended to limit the rights of federal prisoners to collaterally attack their convictions and sentences").

71 39 AM. JUR. 2D *Habeas Corpus* § 1 (2020) (describing the common law writ of habeas corpus as an "adaptable remedy" adjusted by courts "in accordance with equitable and prudential considerations").

72 *See, e.g.*, Triestman v. United States, 124 F.3d 361, 373 (2d Cir. 1997) (reasoning that § 2255 "was not intended to limit the collateral rights of federal detainees in any way. It was simply designed to serve as a convenient substitute for the traditional habeas corpus remedy").

73 This logic rests on shaky foundations. *Jones* and *Wheeler* focus on congressional intent for subsection (e), while largely ignoring AEDPA's addition of subsection (h) and (f). Specifically, whether, by adding subsection (h) expressly limiting second and successive motions for collateral relief, Congress capped all second or successive motions, or simply those available through § 2255. *See* 28 U.S.C. § 2255(h) (2018) (limiting second or successive motions); *id.* § 2255(f) (providing for a statute of limitations for second and successive motions). *In re Jones* cites various prior cases to support that Congress did not limit collateral relief by enacting § 2255 but merely reorganized the method for seeking it. *See In re* Jones, 226 F.3d at 332–33. However, most of these cases were decided before Congress amended § 2255 through AEDPA. *Id.*

74 *In re* Jones, 226 F.3d at 333–34.

75 *Wheeler* is notable not only because it is among the most recent cases addressing the topic but also because it demonstrates the resolve that exists within the Fourth Circuit to

Wheeler presents a slightly different issue than does *In re Jones*. In *Jones*, the question was whether § 2255 was inadequate or ineffective because a second motion was not available for a retroactive statutory decision pursuant to the gatekeeping requirements of subsection (h).[76] There, the Supreme Court's new retroactive statutory decision necessitated overturning Jones's conviction because the prosecution had failed to prove an essential element of the charge.[77] In contrast, in *Wheeler*, there was not a viable claim that Wheeler was innocent.[78] Rather, the argument was that a change in circuit sentencing practices meant that Wheeler had been improperly sentenced.[79]

Nevertheless, the *Wheeler* court determined that the logic of *In re Jones* was not limited to testing the legality of the underlying conviction but extended to testing sentences as well, provided the alleged errors were fundamental.[80] Further the *Wheeler* court clarified *Jones* by determining that a Supreme Court decision is not necessary; a change in circuit precedent is sufficient.[81]

Therefore, after *Wheeler*, second or successive collateral relief that would be blocked by § 2255(h) is available through a habeas petition if there has been a retroactive change in law since the first attempt at collateral relief was filed and the change either undermines the movant's conviction or is sufficiently grave as to constitute a fundamental defect in sentence.[82] While none

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maintain and even extend its position. In *United States v. Surratt*, a divided Fourth Circuit panel decided to construe *Jones* narrowly and not extend it to the sentencing context. *See* United States v. Surratt, 797 F.3d 240, 269 (4th Cir. 2015)), *vacated on grant of reh'g en banc, appeal dismissed as moot*, 855 F.3d 218 (4th Cir. 2017). The Fourth Circuit promptly decided to rehear the case en banc. After the case was ultimately dismissed due to a presidential pardon, the Fourth Circuit decided to hear argument in *Wheeler* as an alternative to express its continued endorsement of the savings clause interpretation announced in *Jones*. United States v. Surratt, 855 F.3d 218 (4th Cir. 2017) (dismissing the case as moot); *see* United States v. Wheeler, 886 F.3d 415, 421–22 (4th Cir. 2018) (providing a full history of the *Surratt* decision).

76 *See In re* Jones, 226 F.3d at 333.

77 *Id.* at 334.

78 The Sixth Circuit, though a member of the majority, would reject Wheeler's claim as not falling "within any arguable construction of [§ 2255(e)] because [he has] not shown an intervening change in the law that establishes . . . actual innocence." United States v. Peterman, 249 F.3d 458, 462 (6th Cir. 2001).

79 *Wheeler*, 886 F.3d at 434.

80 *Id.* at 429.

81 The vacated *Surratt* panel posited that only a Supreme Court decision can "open the door to successive relief" given the limits § 2255(h) imposes on second or successive motions. United States v. Surratt, 797 F.3d 240, 259 (4th Cir. 2015), *vacated on grant of reh'g en banc, appeal dismissed as moot*, 855 F.3d 218 (4th Cir. 2017); *see Wheeler*, 886 F.3d at 428 (disagreeing with *Surratt*'s interpretation of subsection (h)).

82 *Wheeler*, 886 F.3d at 429 ("[Section] 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of §2255(h)(2) for second or successive motions; and (4) due to

of the other circuits adopting the majority position have extended the savings clause so far as to apply to retroactive changes in sentencing standards,[83] the general position and reasoning of *Jones* and *Wheeler* is common to the majority circuits.[84]

As displayed in *Jones* and *Wheeler*, the rationale of the majority position is that when an argument is foreclosed by binding precedent, a first § 2255 motion did not provide a reasonable opportunity to test the legality of conviction.[85] Accordingly, if a second or successive § 2255 motion is procedurally barred by the certification requirements of subsection (h), § 2255 has *in fact* been inadequate and ineffective as regarding the prisoner's claim. Accordingly, the aptly named "savings clause" steps in to allow the prisoner to assert an argument based on the intervening change in law through a habeas petition.

III. THE MINORITY VIEW

In contrast to the expansive interpretation of the savings clause's scope discussed above, there is also an approach that construes the clause more narrowly. The Tenth and Eleventh Circuits are the primary adherents to this position.[86]

The narrow view posits that a § 2255 motion is only inadequate or ineffective to test the legality of confinement when such a motion is theoretically *incapable* of producing the result sought. Stated differently, if "a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion," then the motion is not inadequate or ineffective for the purpose.[87]

Consider how this reasoning would apply to *In re Jones*. There, Jones's motion would not have been ineffective to test the legality of his sentence because, in spite of adverse circuit precedent, he could have brought the same arguments that the Supreme Court eventually accepted in *Bailey*. Thus, although his chances of success were probably slim, a § 2255 motion still was an adequate vehicle to test the legality of his confinement under the Tenth Circuit's reasoning in *Prost v. Anderson*.

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this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.").

83 *See* Petition for a Writ of Certiorari, *supra* note 55, at 13.

84 There is some variation in phrasing and application among the majority. *See* Case, *supra* note 5, at 53–57 (providing a summary of the positions of the various circuits); *see, e.g.*, Wooten v. Cauley, 677 F.3d 303, 307 (6th Cir. 2012) (noting that the Sixth Circuit requires the petitioner to demonstrate "actual innocence" in addition to being barred through the gatekeeping provisions of § 2255).

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

86 *See, e.g.*, McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017); Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011). The United States Solicitor General also endorses a version of this view in a petition for certiorari to the Fourth Circuit's decision in *United States v. Wheeler*. *See* Petition for a Writ of Certiorari, *supra* note 55, at 14–23.

87 *Prost*, 636 F.3d at 584.

Further, the motion does not become inadequate or ineffective merely because Congress excluded that type of argument from being certified for a second or successive motion under § 2255.[88] This interpretation construes the savings clause as a process guarantee that gives federal prisoners access to an opportunity to bring an argument, rather than a guarantee of success.[89] Thus, when Congress writes that a habeas petition is available when "the remedy by motion is inadequate or ineffective,"[90] the word "remedy" refers to an "avenue for relief, not relief itself."[91]

Therefore, the savings clause is limited to situations when a § 2255 motion simply does not provide an avenue for relief. For example, since § 2255 motions must be filed in the sentencing court, the savings clause would kick in if the sentencing court no longer exists.[92] Or, since § 2255 is limited to motions to vacate or correct a sentence,[93] it would be inadequate or ineffective relief to test "a prisoner's claim about the *execution* of his sentence because that claim is not cognizable under § 2255(a)."[94] In either case, the savings clause would then apply to ensure the petitioner had an opportunity to obtain relief through the habeas petition of § 2241.

Unlike the test applied in the Fourth Circuit, the savings clause would not apply simply because Supreme Court or circuit precedent was "settled" or

88 The question as posed in *Prost* is not whether a second or successive motion is ineffective or inadequate, but whether § 2255 as a remedial vehicle on the whole is inadequate or ineffective. Thus, if a first § 2255 motion could have raised an argument, § 2255 is an effective and adequate means of testing the legality of conviction under that argument, regardless of the likelihood of success. Barring that same argument as a cause for granting a second motion does not change the initial determination and make § 2255 inadequate, rather it simply reflects a congressional decision that finality trumps the possibility of error correction for all but the most narrow and serious causes. *See Prost*, 636 F.3d at 588; *see also* 28 U.S.C. § 2255(h) (2018) (providing a careful balancing between finality interests and error correction by allowing certification for successive motions on some grounds and—by necessary implication—not on others).

89 *Prost*, 636 F.3d at 584 ("In this way, the clause is concerned with process—ensuring the petitioner an opportunity to bring his argument . . . guaranteeing nothing about what the opportunity promised will ultimately yield in terms of relief." (emphasis omitted)). This contrasts sharply with the Fourth Circuit view that deems the motion ineffective if adverse circuit precedent renders success unlikely. *See* United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018).

90 28 U.S.C. § 2255(e).

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

92 *See, e.g.*, Spaulding v. Taylor, 336 F.2d 192 (10th Cir. 1964) (permitting a § 2241 motion because the sentencing court to which a § 2255 motion had to be directed had been abolished, and thus the remedial mechanism of § 2255 was inadequate to test the legality of the petitioner's confinement). Similarly, military tribunals are customarily disbanded after courts-martials and are no longer available to test the legality of a prisoner's confinement, rendering a § 2255 motion addressed to the nonexistent body ineffective. *See, e.g.*, Ackerman v. Novak, 483 F.3d 647, 649 (10th Cir. 2007) (per curiam).

93 *See* 28 U.S.C. § 2255(a) ("A prisoner . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.").

94 McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1088 (11th Cir. 2017).

successful relief would require judicial acceptance of a novel legal argument.[95] Because § 2255 guarantees a remedy—a means of pursuing relief and not relief itself—the opportunity to test the legality of conviction does not become inadequate when the prevailing substantive law makes success unlikely.[96] Instead, it is the "infirmity of the § 2255 remedy itself, not the failure to use it or to prevail under it, that is determinative."[97] Similarly, an intervening change in precedent does not trigger the savings clause either because the petitioner could have raised and pursued the argument that eventually prevailed in the first § 2255 motion.[98] Under this view, for example, Jones's remedy through § 2255 was not inadequate or ineffective because he could have used his first motion to—among other things—challenge the then-prevailing interpretation of the law under which he had been convicted. Viewed in this manner, a § 2255 "motion to vacate is not often an inadequate or ineffective remedy."[99]

This way of interpreting the savings clause is supported by § 2255's history. Congress enacted § 2255 to serve the purposes of § 2241 while avoiding the crowding and other practical problems that came with funneling all collateral appeals through the few district courts in which the majority of federal prisoners were housed.[100] Section 2255 cures the issue by redistributing postconviction remedies back to the court of conviction,[101] where the case records are located and witnesses are likely present.[102] Since this was the primary change § 2255 originally made in the existing collateral landscape,[103] it follows that the savings clause would primarily operate to correct any venue snags inadvertently created when Congress switched the forum for most collateral appeals.[104]

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95 *See* United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018).

96 *McCarthan*, 851 F.3d at 1086–87 (reasoning that it is sufficient that a petitioner have "a meaningful opportunity to present his claim and test the legality of his sentence" through "the chance to have precedent overruled en banc or by the Supreme Court").

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

98 *McCarthan*, 851 F.3d at 1099 ("Even if a prisoner's claim fails under circuit precedent, a motion to vacate remains an adequate and effective remedy for a prisoner to raise the claim and attempt to persuade the court to change its precedent, and failing that, to seek certiorari in the Supreme Court.").

99 *Id.* at 1088.

100 *See* United States v. Hayman, 342 U.S. 205, 212–14 (1952) (discussing the history of § 2255 and particularly describing the burden borne by the courts located in districts with substantial prison populations).

101 28 U.S.C § 2255(a) (2018).

102 *Hayman*, 342 U.S. at 214.

103 *Id.* at 219 ("[T]he history of Section 2255 shows that it was passed . . . to meet practical difficulties that had arisen in administering" habeas corpus, where "the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.").

104 *Prost* leaves open the possibility that the savings clause can apply to more than just the venue issues Congress likely had in mind but firmly states that "Congress's purpose in enacting it surely wasn't to ensure that a prisoner will win relief on a meritorious successive

Further, this view draws upon the overall structure of federal collateral relief to find that Congress "has chosen to afford every federal prisoner the opportunity to launch at least one collateral attack."[105] This, after all, is precisely what § 2255(a) promises the prisoner. However, Congress, through AEDPA, has provided more narrow limits on when a petitioner may pursue a second collateral attack. Given its consideration of finality interests, "Congress has specified that only certain claims it has deemed particularly important—those based on newly discovered evidence . . . or on retroactively applicable constitutional decisions—may be brought in a second or successive motion."[106]

In summation, the minority position relies on textual arguments to construe the savings clause narrowly as a process guarantee and not a promise of likely success. Accordingly, "[w]hen a prisoner's motion attacks his sentence based on a cognizable claim that can be brought in the correct venue, the remedy by motion is adequate and effective to test his claim."[107]

IV. Analysis: The Minority as the Superior Interpretation

The split between the majority and minority approaches to the savings clause is not likely to be fixed without intervention from the Supreme Court. The Fourth Circuit doubled down on its adherence to the majority view in *Wheeler*, squashing any attempt by the *Surratt* panel to limit the reasoning of *In re Jones* to its direct factual context.[108] Similarly, the Tenth[109] and Eleventh Circuits stand boldly opposed to the long-settled view of the majority of circuit courts to address the question.[110] The Eleventh Circuit—a former member of the majority—even disparages its prior test as "plainly and palpably wrong,"[111] and that of the majority circuits as "pragmatic" and "atextual."[112] Clearly, this is an entrenched split of opinion between the circuits that will not be settled without authoritative intervention.[113]

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motion, or receive multiple bites at the apple." Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011).

105 *Id.* at 583.

106 *Id.* at 583–84.

107 McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1089 (11th Cir. 2017).

108 *See* United States v. Wheeler, 886 F.3d 415, 428 (4th Cir. 2018); *see also supra* note 75 (describing the Fourth Circuit's reaction to the *Surratt* decision).

109 Then-Judge Gorsuch, writing for the court in *Prost*, denied, somewhat dubiously, that the decision was creating a circuit split. *See Prost*, 636 F.3d at 594.

110 The Eleventh Circuit in *McCarthan* overturned its eighteen-year adherence to the majority view in an en banc decision in 2017. *See McCarthan*, 851 F.3d at 1079–80.

111 *Id.* at 1096 (quoting Bryan A. Garner et al., The Law of Judicial Precedent 388 (2016)).

112 *Id.* at 1084–85.

113 *See* Petition for a Writ of Certiorari, *supra* note 55, at 23–25 (describing the division between the circuits as "entrenched" and calling for Supreme Court intervention). There are signs, however, that some majority circuits may be interested in reconsidering their positions. *See, e.g.*, Wright v. Spaulding, 939 F.3d 695, 706–10 (6th Cir. 2019) (Thapar, J.,

Irrespective of which side correctly interprets the savings clause, Congress or the Supreme Court should authoritatively resolve the split to eliminate the serious geographic inequities resulting from conflicting tests across the various circuit courts. The legitimacy of the federal criminal justice system is directly undermined to the same extent that prisoners incarcerated in the majority-view circuits receive significantly more favorable treatment than similarly situated prisoners located in the minority circuits.

Though in the minority, the Tenth and Eleventh Circuits have the stronger interpretation of the savings clause. Specifically, these circuits give proper weight to congressional intent as authoritatively articulated in the text of § 2255 and construct a cohesive framework that makes sense of § 2255 and Congress's postconviction relief system as a whole.[114] This is perhaps best seen by considering the weaknesses of the majority position as articulated in the Fourth Circuit.

A. The Shortcomings of the Fourth Circuit and Majority Approach

The Tenth and Eleventh Circuit's reading of the savings clause is superior to that of the majority position because a narrow reading makes better sense of the statute as a whole.

First, the Fourth Circuit's test undermines Congress's decision to limit collateral relief through the gatekeeping provisions of subsection (h). By using a petitioner's failure to satisfy the gatekeeping requirements of subsection (h) as a reason to trigger the savings clause, the Fourth Circuit makes subsection (h) self-defeating and counterproductive.

Manifestly, subsection (h) limits collateral relief under § 2255.[115] In enacting AEDPA and subsection (h), Congress was undoubtedly aware that changes in law would occur; however, Congress only allowed for second or successive motions when the intervening change met three narrow criteria: the change was issued by the Supreme Court, was retroactive, and was a rule of constitutional law.[116] In doing so, Congress created a clear separation between changes in law that are—in its considered judgment—sufficient to justify reopening a prior conviction to judicial review and those that are not.

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concurring) (arguing the Sixth Circuit version of the majority approach is atextual and usurps Congress's role); United States v. Surratt, 797 F.3d 240, 259 (4th Cir. 2015), *vacated on grant of reh'g en banc, appeal dismissed as moot*, 855 F.3d 218 (4th Cir. 2017).

114 While the minority has a superior interpretation of § 2255, that is not to say that the balance Congress has created therein is necessarily an ideal one. *See generally* Grubman, *supra* note 9 (providing an analysis of competing arguments on finality and error correction). Yet, the Tenth and Eleventh Circuits' interpretations recognize that Congress takes precedence in this space, and courts are not permitted to spurn congressional decisions in favor of a different balancing of finality and error correction. *See, e.g.*, Prost v. Anderson, 636 F.3d 578, 586 n.6 (10th Cir. 2011) ("But whatever Congress's intent, and even if one might prefer otherwise, Congress was free to legislate (as it did) that—after one round of collateral review—finality interests outweigh the interests in favor of (again) reopening final judgments to permit new statutory interpretation claims.").

115 *See* 28 U.S.C. § 2255(h) (2018).

116 *Id.*

Through the savings clause, the majority view attempts to adjust that line of separation, shifting it to grant additional review for intervening changes that—in judicial judgment—are worthy of reconsideration. In doing so, the majority attempts to play subsection (h) off against subsection (e). Using the failure to qualify for a second or successive chance under § 2255 to expand relief through subsection (e) defeats the statute's internal consistency, violating basic principles of statutory interpretation.[117] As Judge Pryor, writing for the Eleventh Circuit en banc in *McCarthan*, notes, "[t]he procedural bars mean nothing if they can be avoided through the saving clause."[118]

However, allowing intervening changes in law to trigger the savings clause does not simply upset Congress's postconviction apple cart in order to give a petitioner a second or successive bite at spilled apples. It further requires the courts adopting that interpretation to grant themselves an expansive, legislative role in defining appropriate and fair collateral relief opportunities.[119] The Fourth Circuit in *Wheeler* finds itself "entrusted with ensuring [prisoners have] a meaningful opportunity to demonstrate" grounds for relief.[120] Here, the *Wheeler* court is describing its role in terms more suited for the broad, equitable authority granted to courts at common law in determining the scope of traditional habeas corpus relief and not the legislatively created and constrained § 2255 remedy.[121] For example, recall the four-part test employed by the Fourth Circuit in determining whether a particular prisoner's claim merits use of the savings clause.[122] *Wheeler*, in order to "honor the tradition of habeas corpus," reads the savings clause to apply when, inter alia, circuit and Supreme Court precedent is sufficiently "settled" and an intervening change in law is "sufficiently grave" as to be a "fundamental" defect.[123] Some elements of the test are easily passed or

117 *See* SCALIA & GARNER, *supra* note 46, at 180.

118 McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1092 (11th Cir. 2017).

119 *See* Wright v. Spaulding, 939 F.3d 695, 706–77 (6th Cir. 2019) (Thapar, J., concurring) (arguing that the majority approach exceeds the role entrusted to courts and second-guesses congressional policy decisions).

120 United States v. Wheeler, 886 F.3d 415, 426 (4th Cir. 2018).

121 *See* 39 AM. JUR. 2D *Habeas Corpus* § 1 (2020) (describing the common-law writ of habeas corpus as an "adaptable remedy" courts expand or contract "in accordance with equitable and prudential considerations"). However, habeas corpus no longer remains judicial free rein after Congress expressly redirected and constrained the writ into the statutory procedures of § 2241 and § 2255. Whatever common-law role remains in the habeas context is further constrained by Congress's decision to give precedence to § 2255 and place § 2241 as a substitute. *See* Hill v. United States, 368 U.S. 424, 427 (1962). Further, the supposed expansive ability to grant relief is compromised by the *Wheeler* court's own admission that § 2255(e) is jurisdictional, limiting the Fourth Circuit to legislative judgment. *See Wheeler*, 886 F.3d at 425.

122 The court even styles its efforts as "The *New* Savings Clause Test," as if to acknowledge that the test is not textually required, prompted, or derived. *Wheeler*, 886 F.3d at 428 (emphasis added).

123 *Id.* at 429 (finding § 2255 inadequate or ineffective when (1) "settled law of this circuit or the Supreme Court established the legality of the sentence;" (2) after direct

failed, but others require minute decisions about whether a defect is truly fundamental or a precedent—since overturned—was sufficiently settled that a petitioner can be retroactively excused for failing to bring the argument in a prior § 2255 motion.

While the *Wheeler* test involves nuanced factual and legal determinations that may be difficult to administer uniformly,[124] it may grow gradually easier over time as the Fourth Circuit and other circuits that apply it develop a case-by-case gloss on the new test.[125] However, whether administrable or not, the test constitutes a judicial redetermination of when error correction should prevail over finality interests.[126] Each opportunity for appeal, especially in the collateral-relief sphere, "undermine[s] society's legitimate interest in the finality of its criminal judgments."[127] Query whether unelected, life-tenure federal judges acting through independent circuit courts are the appropriate decisionmakers for a decision that touches national criminal justice policy.[128] Further, until such time as the test's contours are settled, the lack of finality creates legal uncertainty and will doubtlessly cause a significant uptick in the amount of appeals filed directly with courts in the district of conviction to determine whether the new savings clause test applies.[129] Accordingly, an expansive interpretation of the savings clause results in increasing burden on those few districts that encompass the vast majority of federal prisoners—

appeal and first § 2255 motion, a retroactive intervening change in law occurred; (3) the "prisoner is unable to meet the gatekeeping provisions" of subsection (h); and (4) the intervening change in law makes the sentence "error sufficiently grave to be deemed a fundamental defect").

124 *See, e.g.*, Wooten v. Cauley, 677 F.3d 303, 308–09 (6th Cir. 2012) (providing an example of the intricacies of determining a single element of the analysis: whether a prior ruling is retroactive on collateral appeal).

125 However, the Eleventh Circuit abandoned its test that attempted to strike a similar balance to that of *Wheeler* because, after eighteen years of trying, the Eleventh Circuit finally determined that it was unworkable. *See* McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1097–98 (11th Cir. 2017) (noting that the test produced heavy burdens on courts, convoluted choice of law for prisoners transferred from other circuits, and only inconsistent and aberrational relief).

126 The Solicitor General notes that, in enacting § 2255(h), Congress "redefine[d] the point at which concern for finality should take precedence over the interest in additional error-correction." *See* Petition for a Writ of Certiorari, *supra* note 55, at 19–20.

127 *See* 39 AM. JUR. 2D *Habeas Corpus* § 5 (2020) (noting this phenomenon as related to postconviction appeals and habeas corpus petitions in particular); *see also* Bator, *supra* note 51, at 441 (discussing the acute societal tension and complex tradeoffs inherent in the balance between finality and ensuring that "justice has been done").

128 *See, e.g.*, *infra* note 141. *See generally* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (discussing the appropriate balance between the executive, legislative, and executive branches in criminal law).

129 In moving away from such a test, the Eleventh Circuit notes that it "placed a heavy burden" on district courts, leading "perhaps thousands[ ] of prisoners" to file "petitions citing [the test] in the various districts where federal prisons are located," which "required wardens to defend decades-old sentence determinations and resurrected the exact problems that Congress attempted to solve when it created [§ 2255]." *McCarthan*, 851 F.3d at 1098.

exactly the incongruity Congress attempted to eliminate by enacting § 2255.[130]

Second and similarly, interpreting intervening changes in statutory law as sufficient to escape the constraints of § 2255(h) eliminates the statute of limitations imposed in subsection (f),[131] giving limitless time to press a habeas claim through § 2241.[132] This not only defeats the purpose of subsection (f) but also leads to an odd result. Consider the circumstances of two prisoners who have both exhausted their direct appeals and first § 2255 motions. Subsequent to those appeals, the Supreme Court announces a retroactive constitutional law decision that applies to the first prisoner's case and a circuit court announces a retroactive statutory decision that applies to the second prisoner's case. Under the Fourth Circuit and majority reasoning, the second prisoner may file a § 2241 habeas petition. In contrast, the first prisoner must file a § 2255 petition, obtain a certificate of appealability from a circuit court in accord with subsection (h), and satisfy the one-year statute of limitations imposed by subsection (f). Thus, the incongruous result emerges that a prisoner with an intervening change in statutory law has a superior remedy to that afforded the prisoner with the intervening change in constitutional law announced by the Supreme Court.[133]

Congress decided to privilege intervening constitutional law decisions made retroactive by the Supreme Court and newly discovered evidence indicative of innocence by making them the narrow exceptions to the general rule of subsection (h) that each prisoner gets one and only one postconviction motion through § 2255.[134] As the example above shows, the Fourth Circuit's test upsets this hierarchy, creating additional exceptions that effectively prioritize statutory claims over constitutional claims—the exact opposite of what Congress expressly intended.

Finally, allowing prisoners to avoid § 2255 and file habeas petitions through § 2241 is not a mere change in statute number. It also changes

130 *See* United States v. Hayman, 342 U.S. 205, 213–14, 220 (1952) (noting that a central purpose of moving hearings to the sentencing court was to avoid the "practical problems" of crowding the "few District Courts" with jurisdiction over "major federal penal institutions," as these court "handle[d] an inordinate number of habeas corpus actions").

131 *Compare* 28 U.S.C. § 2255(f) (2018) ("A 1-year period of limitation shall apply to a motion under this section."), *with id.* §§ 2241–43 (describing the scope of the habeas corpus writ without providing for a statute of limitations).

132 *See* Wooten v. Cauley, 677 F.3d 303, 306 (6th Cir. 2012) (contrasting the one-year statute of limitations of § 2255 with the lack of such a limitation "for federal prisoners filing habeas petitions").

133 *See* Petition for a Writ of Certiorari, *supra* note 55, at 19–20 (arguing that the Fourth Circuit's "construction of the savings clause . . . has the practical effect of granting inmates greater latitude" in pursuing statutory claims rather than the constitutional claims Congress specifically favored).

134 *See McCarthan*, 851 F.3d at 1090 ("Congress recognized that courts would make mistakes, but provided for successive motions only in specific circumstances. The statute limits each prisoner to a 'single collateral attack, unless the conditions of [2255(h)] have been met.'" (alteration in original) (quoting Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002))).

which court hears the claim. Section 2255 motions are filed in the district of conviction,[135] while § 2241 petitions are filed in the district of confinement.[136] There is both a practical and an interpretative concern with this result.

Practically, the majority-view circuits have to be concerned that those districts that house a disproportionately large number of federal prisoners will be flooded by an increase in § 2241 petitions as the size of the savings clause increases. This potential for crowding counsels in favor of a narrow construction of the savings clause.

As a matter of interpretation, this result is troublesome as well. When Congress enacted § 2255, one of the reasons it did so was to redirect habeas-style appeals away from overwhelmed districts of confinement,[137] redistributing them to districts of conviction to address the practical problem mentioned above; disproportionately crowded venues was the mischief Congress primarily sought to remedy.[138] Congress's statutory reorganization of habeas through § 2255 and § 2241 prevented districts with large prison populations from being overwhelmed by collateral appeals and reflected the fact that witnesses, evidence, and documents are located in the district of conviction.[139] Thus, an expansive view of the savings clause that directs numerous collateral appeals back to districts of confinement threatens to reverse the very work Congress set out to do. At the very least, an interpretation of Congress's enacted text that revives the identical venue problem Congress sought to solve should give a court pause.

Therefore, the Fourth Circuit's test in *Wheeler* misconstrues the text of the savings clause, subverts Congress's considered scheme of postconviction remedies, attempts to resurrect judicial primacy over collateral relief, and unwittingly causes the very harms and venue considerations to resurface that caused Congress to narrow and constrain collateral relief through § 2255 in the first place.[140] Accordingly, the Fourth Circuit was required to step further into the legislative role by developing and inventing its own policy-based

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135 28 U.S.C. § 2255(a) ("A prisoner . . . may move *the court which imposed the sentence* to vacate, set aside or correct the sentence." (emphasis added)).

136 28 U.S.C. § 2241(a); *see also* Prost v. Anderson, 636 F.3d 578, 581 (10th Cir. 2011) ("[Section] 2241 petitions must be brought in the district of incarceration . . . .").

137 *See* United States v. Hayman, 342 U.S. 205, 220 (1952) ("The very purpose of Section 2255 is to hold any required hearing in the sentencing court . . . .").

138 *Id.*

139 *Id.* at 213–14 ("These practical problems have been greatly aggravated by the fact that the few District Courts in whose territorial jurisdiction major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions far from the scene of the facts, the homes of the witnesses and the records of the sentencing court solely because of the fortuitous concentration of federal prisoners within the district.").

140 *See id.* at 219 (noting congressional concerns with overburdened district courts with large prison populations as a primary motivation for enacting § 2255).

test to balance finality and error correction,[141] as well as to limit the escape hatch its interpretation opened in § 2255's savings clause. For these reasons, the Fourth Circuit iteration of the majority test is a less-than-ideal construction of the savings clause.[142]

B. The Strengths of the Minority Position

On the other hand, the approach taken by the Tenth and Eleventh Circuits places proper emphasis on the text of § 2255 as amended by AEDPA as the authoritative statement of the law, respecting congressional constraints as expressed rather than expanding the savings clause to reach a different outcome. Accordingly, the minority correctly construes the savings clause as a process guarantee that only applies in the narrow set of circumstances when § 2255 simply does not and could not provide an adjudicatory forum.

First, the Tenth and Eleventh Circuits engage in a full and sustained textual analysis of the text of § 2255(e) that considers the provision in its full statutory context. They consider each word and phrase in great detail, employing dictionary definitions, popular usage, and nearby equivalents to construct a strong textual grounding for their interpretation.

Key to the minority argument is the phrasing of the latter portion of subsection (e), which states that a writ of habeas corpus is not available "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."[143] Here the subsection is contrasting "inadequate or ineffective" with the ability "to test."[144] As *Prost* points out, "to test" implies that Congress is ensuring prisoners have an opportunity or attempt to bring an argument, rather than guaranteeing success or providing

141 As an example, consider the policy judgments required in deciding first that a fundamental error in sentence is sufficient to grant another day in court after having already exhausted direct appeals and one § 2255 motion, and second what constitutes a fundamental error, as opposed to a serious error, a significant error, or merely a minor error. These questions have a striking resemblance to the policy judgments a deliberative, legislative body with competence to create a national standard are uniquely equipped to answer. And Congress did answer those questions when it decided to permit certification for second and successive appeals for new evidence suggestive of innocence and intervening Supreme Court decisions concerning constitutional law expressly made retroactive. *See* 28 U.S.C. §2255(h) (2018); McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1090 (11th Cir. 2017) ("Congress recognized that courts would make mistakes, but provided for successive motions only in specific circumstances. . . . If Congress wanted an exception for all intervening changes in law, it could have said so."). The Fourth Circuit, along with the majority, has opted to readdress these questions through the savings clause.

142 Other majority circuits tend to resolve this issue similarly to the Fourth Circuit; the Sixth Circuit, for example, imposes a more restrictive standard. *Compare* United States v. Peterman, 249 F.3d 458, 461–62 (6th Cir. 2001) (requiring the intervening change in law give rise to the petitioner's "actual innocence"), *with* United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018) (requiring the intervening change be a "fundamental defect" in conviction *or* sentence).

143 28 U.S.C. § 2255(e).

144 *See id.*

a balancing test that considers whether the substantive arguments are meritorious or the underlying conviction particularly egregious.[145] "In this way, the clause is concerned with process," not outcomes.[146]

But what process does § 2255(e) promise? Even if interpreted as a process guarantee, petitioners like those in *United States v. Wheeler* and *In re Jones* who have exhausted their first § 2255 motion and cannot obtain a second under the constraints of subsection (h) would argue that no process for testing their detention is available to them. Does this make § 2255 ineffective within the meaning of the savings clause? In short, no. As written, the savings clause only applies when the *remedy* § 2255 offers is itself inadequate or ineffective, not when a particular petitioner is unable to utilize it or prevail under it.[147] In using these terms, the subsection is recognizing a distinction between "remedy"[148]—a procedural mechanism—and "relief," what the petitioner hopes to receive.[149] Therefore, the savings clause only applies when § 2255 as a procedural mechanism considered in the abstract is not equipped to adjudicate a claim, such as when an issue is simply not cognizable or fails to provide a forum through a venue-related complication.[150] Accordingly, as long as, say, the petitioner in *Wheeler* had the opportunity "to test" the legality of his conviction through the first motion, the subsequent denial of a second motion does not make the remedy ineffective. Rather, it simply means that Congress has decided to narrowly limit the opportunities in which subsequent motions are permissible.

Consider, for example, the petitioner in *McCarthan*. There the petitioner had exhausted his direct appeals and his first § 2255 motion.[151] Subsequent to his first § 2255 motion, the Supreme Court overturned Eleventh Circuit statutory precedent that bore on McCarthan's conviction.[152] Because it was a statutory decision and not constitutional, McCarthan was not eligible for a second or successive motion under § 2255(h).[153] At this point, it may appear that § 2255 is inadequate and ineffective for McCarthan to test the legality of his detention. However, recall that the savings clause promises a

145 Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011).

146 *Id.*

147 For example, that "a particular argument is doomed under circuit precedent says nothing about the nature of the motion to vacate. The motion to vacate is still 'adapted to the end' of testing the claim regardless of the claim's success on the merits." McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1087 (11th Cir. 2017).

148 An "[i]nadequate remedy at law" is one "unfitted or not adapted to the end in view." *Inadequate Remedy at Law*, BLACK'S LAW DICTIONARY (2d ed. 1910).

149 *See* 28 U.S.C. § 2255(e) (contrasting situations in which a "court has denied him *relief*" from where "the *remedy* by motion is inadequate or ineffective" (emphases added)); *Prost*, 636 F.3d at 584–85 (noting that "remedy," as used in § 2255 and neighboring provisions means an "avenue for relief, not relief itself").

150 *See supra* note 92 and accompanying text; *see also McCarthan*, 851 F.3d at 1088 (describing when a claim is not cognizable under § 2255).

151 *McCarthan*, 851 F.3d at 1080.

152 *Id.*

153 28 U.S.C. § 2255(h).

remedy—a procedural vehicle—not relief. Though McCarthan did not attempt to overturn the adverse precedent in his first motion, that is "exactly the kind of claim that a motion to vacate is designed to 'remedy.'"[154] This conclusion becomes apparent when one notes that the intervening change in statutory law that McCarthan sought to use as grounds for arguing that § 2255 was inadequate, was in fact overturned by a prisoner who took the opportunity afforded by his first § 2255 motion to test the legality of his detention by successfully challenging the adverse precedent in the Supreme Court;[155] thus, demonstrating that, as a procedural mechanism, § 2255 was up to the job of addressing and testing adverse precedent.[156] Accordingly, McCarthan had an adequate and effective opportunity to test the legality of his detention in his first motion.[157] That is all the savings clause guarantees.

Second, the minority position adopts a proper judicial role, recognizing that congressional policy as enacted in § 2255 is binding on courts. In doing so, this position recognizes more expansive interpretations of the savings clause as "no more than . . . frank policy disagreement[s] with § 2255(h)."[158] As the Tenth Circuit notes "[t]he simple fact is that Congress decided that, unless subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack."[159] Whether Congress is correct in its judgment that finality ranks above error correction when neither new evidence suggestive of innocence nor retroactive constitutional decisions arise is open to policy debate.[160] However, it is not open as a matter of law. Courts are not "free to reopen and replace Congress's judgment with [their] own."[161] After all, the judicial duty is not to invent the law or

154 *McCarthan*, 851 F.3d at 1086.

155 *See id.* at 1087 (citing Chambers v. United States, 555 U.S. 122, 123 (2009)).

156 *Id.* ("It is unclear why the chance to have precedent overruled en banc or by the Supreme Court would not qualify as a theoretically successful challenge or meaningful opportunity.").

157 Petitioners have the burden of proving that the remedy available through § 2255 is inadequate or ineffective. *See, e.g.*, Abdullah v. Hedrick, 392 F.3d 957, 959 (8th Cir. 2004); Miller v. Marr, 141 F.3d 976, 977 (10th Cir. 1998). Thus, any uncertainty in whether the § 2255 motion is inadequate or ineffective is resolved in favor of finality interests.

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

159 *Id.*

160 *See, e.g.*, Lauren Casale, Note, *Back to the Future: Permitting Habeas Petitions Based on Intervening Retroactive Case Law to Alter Convictions and Sentences*, 87 FORDHAM L. REV. 1577, 1597–1603 (2019) (presenting efficiency, equity, and policy arguments for an expansive interpretation of the savings clause). On the other hand, placing finality over error correction draws support from an analogy to stare decisis, where it has long been the view that "it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting) (reasoning that law should remain settled even if incorrect, "even where the error is a matter of serious concern, *provided* correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." (emphasis added) (footnote omitted)).

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

ensure it reaches the best result; instead, the judiciary has but the humble duty of saying "what the law is."[162]

Therefore, the minority position conducts an in-depth textual analysis that interprets the savings clause as a process guarantee rather than a promise of a particular substantive result. This construction places a proper emphasis on congressional intent as authoritatively expressed in the statute itself and results in an interpretation in harmony with surrounding provisions, including the constraints on successive motions imposed by subsections (h) and (f). Thus, unlike the majority, the Tenth and Eleventh Circuit view renders the statute a unified whole: it avoids resurrecting the venue discrepancy Congress solved through § 2255 and also avoids placing the savings clause in tension with the AEDPA amendments. They also resist the understandable temptation to expand the savings clause to grant increased error correction, recognizing that courts are not permitted to readjust the congressional balancing between finality interests and error correction enacted in subsection (h) by expanding the savings clause.

CONCLUSION

While the division of opinion regarding the savings clause will likely only be resolved by Supreme Court intervention, at present the Tenth and Eleventh Circuits present the best guide to interpreting the scope of the savings clause.[163]

The majority, as represented in this Note primarily by the Fourth Circuit, is attempting to respond to a significant fairness concern that arises when changes in law undermine prisoners' convictions and opportunities for relief are barred by § 2255(h). However, these circuits err when they disregard congressional restraints on postconviction relief in favor of judicially crafted equitable tests. Congress, in enacting limits on collateral appeals, "weighed error correction against finality and made some difficult policy judgments."[164] Interpreting § 2255 as inadequate or ineffective because existing precedent made success unlikely does not comport with the text, history, or purpose of the provision. Instead, it second-guesses statutory balancing, usurping the role of the people's elected representatives in Congress.

The minority view, in contrast, correctly holds that the savings clause only applies when procedural hurdles render § 2255 as a remedial tool simply incapable of addressing the question. Thus, the "inadequate or ineffec-

162 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

163 The Solicitor General also holds to a substantially identical position but has only recently repudiated its adherence to the majority view and may reverse course again under the influence of a new presidential administration. *See* Petition for a Writ of Certiorari, *supra* note 55, at 8–11 (explaining the Solicitor's reasons for adopting the minority position); *see also* United States v. Wheeler, 886 F.3d 415, 434 n.12 (4th Cir. 2018) (attributing the government's changing views to leadership changes in the justice department).

164 Wright v. Spaulding, 939 F.3d 695, 707 (6th Cir. 2019) (Thapar, J., concurring) (arguing that the majority approach exceeds the role entrusted to courts and second-guesses Congressional policy decisions).

tive" language does not act as an amorphous workaround to congressional limits on certification of second or successive appeals.[165] Rather, it is a narrow failsafe for claims not cognizable under § 2255 at all. Stated differently, "the saving[s] clause does not authorize habeas petitions based on statutory claims that Section 2255(h) would otherwise preclude."[166] Finally, these courts adopt a properly constrained view of the judicial role in postconviction appeals and statutory interpretation. They conclude that—regardless of policy considerations about the relative merits of finality and correcting errors discovered through subsequent changes in substantive law—Congress's statutory limitations on collateral appeals are binding.[167] Courts are not free to adjust statutes to reach outcomes they perceive as more fair or equitable, nor can they do "violence to . . . statutory text that creates only two exceptions" by inserting a new one.[168] Instead, courts must act as the faithful agents and interpreters of congressional decisions embodied in statutory text.[169]

165 28 U.S.C. § 2255(e) (2018).

166 Petition for a Writ of Certiorari, *supra* note 55, at 10.

167 *See* Barrett, *supra* note 44, at 113–17 (describing faithful agency and arguing for legislative supremacy rather than judicial and legislative cooperation in reaching socially desirable outcomes).

168 McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1091 (11th Cir. 2017).

169 *See* Barrett, *supra* note 44, at 113.