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# What a Relief? The Availability of Habeas Relief Under the Savings Clause of Section 2255 of the AEDPA

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# WHAT A RELIEF? THE AVAILABILITY OF HABEAS RELIEF UNDER THE SAVINGS CLAUSE OF SECTION 2255 OF THE AEDPA

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*In* Gilbert v. United States, *a majority of the Eleventh Circuit Court of Appeals held that the savings clause contained in § 2255 of the Antiterrorism and Effective Death Penalty Act (AEDPA) does not authorize a federal prisoner to bring in a habeas petition a claim, which the AEDPA's ban on second or successive motions would otherwise bar, that the sentencing guidelines were misapplied in a way that resulted in a longer sentence not exceeding the statutory maximum. The majority focused on finality interests and worried that allowing a prisoner to avoid the AEDPA's ban on second or successive motions would lead to abuse and delay. Some, including the* Gilbert *dissenters, have expressed concerns that denying a prisoner relief where a subsequent, but retroactively applicable, change in the law renders that prisoner's sentence incorrect or invalid could result in constitutional violations. This Article attempts to get past the rhetoric from both sides of the debate and proposes a middle-ground approach that would pacify both the administrative and constitutional concerns that have been raised.*



## I. INTRODUCTION

Known as the "Great Writ," the writ of habeas corpus, from the founding of our nation, has played a central role in our system of justice.[1] Constitutional

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scholar Erwin Chemerinsky has referred to it as "one of the most, if not the single most, important part of the Constitution which protects individual rights."[2] Borrowed from English common law, the writ of habeas corpus was once referred to by William Blackstone as "the most celebrated writ in the English law."[3] It was important enough to America's Founding Fathers that it was expressly included in the Constitution, and the first Congress, in the very Act that created the American judiciary, expressly gave federal judges the power to grant writs of habeas corpus.[4] Article I, Section 9 of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[5] At least one of the Founding Fathers, Thomas Jefferson, believed that the Constitution should contain affirmative provisions dealing with habeas corpus and criticized the Framers' decision not to include any such provision.[6]

Despite the vital role that the Writ has played in American criminal jurisprudence, it has not been without its problems. In 1988, in the face of growing concern and criticism regarding the ineffectiveness of habeas procedure, Chief Justice William Rehnquist created the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, known informally as the Powell Committee.[7] Chief Justice Rehnquist asked the committee "to inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases."[8] The Powell Committee eventually issued a report in which it observed several problems with the then-existing system of habeas, including delay, repetition, and the lack of finality.[9] Despite this report, however, Congress took several more years to pass any meaningful habeas reform.[10]

In 1996, in the wake of the Oklahoma City bombing, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA).[11] The AEDPA transformed post-conviction collateral relief procedures and limitations in

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1. Jennifer Ponder, *The Attorney General's Power of Certification Regarding State Mechanisms to Opt-in to Streamlined Habeas Corpus Procedure*, 6 CRIM. L. BRIEF, Fall 2010, at 38, 39.

2. Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 749 (1987).

3. *Id.* at 748 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129).

4. *Id.* (quoting U.S. CONST. art. I, § 9, cl. 2; Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867)); Ponder, *supra* note 1, at 39.

5. U.S. CONST. art. I, § 9, cl. 2.

6. Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1019 (1993).

7. *Id.* at 1048 (citing AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, JUDICIAL CONFERENCE OF THE U.S., COMMITTEE REPORT AND PROPOSAL 1 (1989) [hereinafter POWELL REPORT]).

8. *Id.* (quoting POWELL REPORT, *supra* note 7, at 1).

9. *Id.* (citing POWELL REPORT, *supra* note 7, at 2–3).

10. *See id.* at 1063; Ponder, *supra* note 1, at 40 (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221–26 (codified as amended at 28 U.S.C. §§ 2261–2266) (1996)).

11. Ponder, *supra* note 1, at 40 (citing § 107).

several extremely important ways.[12] This Article focuses on one of the major limitations that the AEDPA places on prisoners seeking post-conviction collateral relief—the ban on "second or successive" petitions absent special circumstances.[13] Part II of this Article will offer an abridged history of habeas. Part III will discuss the AEDPA's clamp down on second or successive habeas petitions[14] in more detail, including the requirements that a prisoner must satisfy in order to bring such a petition. Part IV will discuss situations where a prisoner with a legitimate claim that his sentence was incorrect or somehow invalid—based on intervening changes in the law—might fall through the cracks and be left with no remedy, as a recent case decided by the Eleventh Circuit Court of Appeals illustrates.[15] I will discuss the concerns raised by both sides of the debate: on one side, concerns that allowing prisoners to skirt the AEDPA's restrictions on second or successive petitions for collateral relief would destroy the all-important interest of finality of judgment; and on the other side, concerns that where the petitioner is denied relief in such unique situations, the AEDPA's restrictions on second or successive habeas petitions may violate the Suspension Clause of Article I, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments. I will attempt to get past the rhetoric on both sides, and suggest a middle-ground approach that would pacify both sides' concerns.

## II. AN ABRIDGED HISTORY OF HABEAS

The first known use of the writ of habeas corpus was in 1305 under the reign of King Edward I.[16] The writ was first codified in 1640,[17] and first issued by a court of common pleas in London, England, in 1670, in connection with the trial

12. *See generally* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 270–71 (2006) (citing 28 U.S.C. § 2244 (2006)) (discussing several provisions of the AEDPA and how they affect habeas procedure); James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 416–17 (2001) (citations omitted) (same).

13. *See* § 2244(b) (dealing with state prisoners); 28 U.S.C. § 2255(h) (2011) (dealing with federal prisoners).

14. *See supra* note 13. Although federal prisoners seeking relief under § 2255 are not technically "habeas petitioners," but are instead movants under the statute, because of the high degree of relatedness between habeas petitions and § 2255 motions, I will often refer to both as petitions for habeas corpus. For more detail on the distinction, and relatedness, of habeas petitions and § 2255 motions, see *infra* note 105.

15. Gilbert v. United States, 640 F.3d 1293, 1324 (11th Cir. 2011) (en banc).

16. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 446 n.9 (2007).

17. Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. J. INT'L L. 551, 555 (2009) (citing 1640, 16 Car. 1, c. 10 (Eng.)); James Robertson, Quo Vadis, *Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1069 (2008) (citing 16 Car. 1, c. 10 (Eng.)).

of William Penn and William Meade.[18] News of the events surrounding this trial reached the American colonies, eventually resulting in several colonies adopting the writ as part of their colonial charter or through legislation or their constitution.[19]

At the Constitutional Convention, there was some debate amongst the Framers as to whether to include a provision dealing with habeas in the federal Constitution.[20] Such a provision was first proposed by Charles Pinckney.[21] Eventually, the Framers decided not to include an affirmative guarantee of the writ but instead settled on a provision that prohibited the writ's suspension.[22] Just over two years after the Constitutional Convention, in its first session, the first Congress passed the Judiciary Act of 1789, section 14 of which granted federal courts the power to issue habeas writs.[23]

At first, only prisoners in federal custody could petition a federal court for habeas relief.[24] Moreover, even federal prisoners were limited as to the relief they could obtain through a habeas petition—a habeas court could only review whether the court that convicted the prisoner had competent jurisdiction; once it found that it did, the inquiry ended and relief was denied.[25] Congress expanded the writ for the first time in 1833, allowing state prisoners who were being held

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18. Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 336–37 (1983) (citing Bushell's Case, (1670) 124 Eng. Rep. 1006 (C.P.) 1018; Godfrey Lehman, *Gentlemen of the Jury*, LIBERTY, Jan.–Feb. 1982, at 20, 22).

19. *Id.* at 338 (citing Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.)). Judge Rosenn notes that the constitutions of Massachusetts, New Hampshire, and Georgia all incorporated the writ in some respect. *Id.* at 338 n.14 (citing GA. CONST. art. I, § 1, para. XV; MASS. CONST. pt. 2, ch. 6, art. VII; N.H. CONST. pt. 2, art. 91).

20. *Id.* at 338–39 (citing Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 339 & n.6 (1952)); *see also* Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 981 (2009) (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 541 (Adrienne Koch ed., 1966) [hereinafter MADISON'S NOTES]) (describing how some of the Framers did not think it necessary to include suspension of the writ of habeas corpus in the Constitution).

21. Falkoff, *supra* note 20, at 981 (quoting MADISON'S NOTES, *supra* note 20, at 485–86).

22. Rosenn, *supra* note 18, at 338 (citing U.S. CONST. art I, § 9, cl. 2); *see also* 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, 174 (2003) (quoting U.S. CONST. art. I, § 9, cl. 2) (explaining how the Framers decided to adopt the current text of the Suspension Clause).

23. Medberry v. Crosby, 351 F.3d 1049, 1055 (11th Cir. 2003) (citing § 14, 1 Stat. at 81–82); Rosenn, *supra* note 18, at 339 (citing Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2241)).

24. *Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845) (noting a federal court's inability to issue a writ of habeas corpus where a prisoner is in state custody); Rosenn, *supra* note 18, at 340.

25. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202–03 (1830) ("The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it."); Rosenn, *supra* note 18, at 340.

for an act that they committed pursuant to federal law to file habeas petitions.[26] Another expansion came in 1842, this time to allow for petitions from foreign nationals detained by a state in violation of a treaty.[27] Finally, in 1867, Congress overruled *Ex parte Dorr*[28] and expanded the writ once again, making it available to "any person . . . restrained of his or her liberty in violation of the constitution . . . or law of the United States."[29]

Despite Congress's expansion of the writ in 1867, courts continued to limit their habeas power based on the idea that a habeas court could review only the jurisdiction of the court of conviction.[30] To alleviate this problem, the Supreme Court, in a line of cases spanning the 1870s and 1880s, expanded the definition of "lack of jurisdiction."[31] These cases allowed for habeas relief where the Double Jeopardy Clause was violated,[32] the defendant was charged with violating an unconstitutional statute,[33] or the petitioner was convicted without an indictment from a grand jury.[34]

The jurisdictional limitation continued until 1915, when the Supreme Court decided *Frank v. Mangum*.[35] The defendant in *Frank* filed a habeas petition in federal court alleging a violation of his Fourteenth Amendment Due Process rights during his state criminal trial.[36] The *Frank* Court expanded habeas jurisdiction to cover state prisoners challenging their convictions based on alleged constitutional violations but limited such relief "to those constitutional claims that had not been decided in the state courts."[37] Nearly thirty years later, in *Waley v. Johnston*,[38] the Supreme Court finally eliminated the jurisdictional defect limitation for good.[39] As Judge Rosenn noted, "After *Waley* a habeas petitioner no longer needed to base his complaint on defects in jurisdiction. The habeas court was free to inquire into the circumstances of the state court

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26. Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CALIF. L. REV. 1243, 1280 (2007) (citing Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634–35 (codified as amended at 28 U.S.C. § 2241(c)(2) (2006))).

27. *See id.* (citing Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (codified as amended at § 2241(c)(4))).

28. 44 U.S. (3 How.) 103 (1845).

29. Rosenn, *supra* note 18, at 341 (quoting Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385 (codified as amended at 28 U.S.C. § 2241(c)(3))) (internal quotation marks omitted); *see also* Choper & Yoo, *supra* note 26, at 1280 (citing § 1, 14 Stat. at 385) (noting that it was not until 1867 that Congress "expand[ed] habeas to include cases where prisoners claimed they were held in violation of federal rights").

30. *See* Rosenn, *supra* note 18, at 344 (citing Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103–04 (1959)).

31. *See id.* (quoting Hart, *supra* note 30, at 104).

32. *See id.* (citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 164 (1873)).

33. *See id.* (citing *Ex parte* Siebold, 100 U.S. 371, 376 (1879)).

34. *See id.* (citing *Ex parte* Wilson, 114 U.S. 417, 429 (1885)).

35. 237 U.S. 309 (1915).

36. *See Frank*, 237 U.S. at 324–25.

37. Rosenn, *supra* note 18, at 346.

38. 316 U.S. 101 (1942).

39. *See* Rosenn, *supra* note 18, at 346 (citing *Waley*, 316 U.S. at 104–05).

proceedings to determine whether the state court had protected the petitioner's constitutional rights."[40] Approximately ten years later, the Supreme Court, for the first time, permitted federal habeas review of a state conviction where the state court had already decided the same issue.[41]

After ten years of confusion as to when and under what circumstances a federal court could decide issues already addressed by a state court, the Supreme Court offered guidance in *Townsend v. Sain*.[42] The *Townsend* Court confirmed a federal court's power to receive evidence and try facts de novo where the habeas petition "alleges facts which, if proved, would entitle [the petitioner] to relief."[43] The Court went on to formulate a test for when a federal habeas court is required to grant an evidentiary hearing.[44] Pursuant to *Townsend*, such a hearing is required if one of the following criteria is met:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[45]

In the words of Judge Rosenn, "Beginning as a rivulet during the early Colonial days, the Great Writ had now become a mighty river that served as a powerful force in the preservation of personal liberties."[46] However, many

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40. *Id.*

41. *See id.* (citing Brown v. Allen, 344 U.S. 443, 485–86 (1953)).

42. Townsend v. Sain, 372 U.S. 293, 310 (1963); *see also* David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), UCMJ*, 38 A.F. L. REV. 63, 100 (1994) (quoting *Townsend*, 372 U.S. at 313) (discussing the holding in *Townsend* and the named factors entitling a state habeas corpus applicant to a federal evidentiary hearing).

43. *Townsend*, 372 U.S. at 312; *see also* Jividen, *supra* note 42, at 100 (citing *Townsend*, 372 U.S. at 312) (discussing the holding of *Townsend*).

44. *See Townsend*, 372 U.S. at 313.

45. *Id.* On the same day that it decided *Townsend*, the Court also decided *Fay v. Noia*. Rosenn, *supra* note 18, at 352 (citing Fay v. Noia, 372 U.S. 391 (1963)). The petitioner in *Fay* was convicted of murder in state court based solely on what the petitioner characterized as an involuntary confession. *Id.* (citing *Fay*, 372 U.S. at 394–96). The petitioner purposely let the time for direct appeal expire and then sought habeas relief in federal court. *Id.* (citing *Fay*, 372 U.S. at 395–96, 439–40). The Supreme Court was asked to decide whether the petitioner was entitled to relief in light of his failure to seek direct review by a state court. *Id.* (citing *Fay*, 372 U.S. at 394). The Court in *Fay* concluded that the petitioner's actions did not preclude him from seeking habeas relief in federal court. *Id.* at 353 (citing *Fay*, 372 U.S. at 398–99). However, the Court in *Fay* did hold that a federal district court has the discretion to deny a habeas petitioner relief where that petitioner "has deliberately by-passed the orderly procedure of the state courts." *Id.* (quoting *Fay*, 372 U.S. at 438) (internal quotation marks omitted).

46. Rosenn, *supra* note 18, at 353.

commentators and other affected parties criticized this expansion—particularly state court judges who felt as though a federal court's ability to relitigate factual issues de novo was an insult to their integrity.[47] These concerns led Congress, in 1966, to limit the ability of a federal habeas court to review factual disputes already litigated in state courts, except in specifically defined situations.[48]

Beginning in the early 1970s, during the Nixon administration, the Court began to tip the scale back in favor of limiting the availability of habeas relief in federal courts.[49] In *Stone v. Powell*,[50] for example, the Court denied habeas relief to a petitioner who claimed that the state court of conviction admitted evidence obtained in violation of the Fourth Amendment.[51] The Court in *Stone* concluded that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[52] Post-*Stone*, a federal habeas court's power to grant relief to a state prisoner alleging a violation of the Fourth Amendment's exclusionary rule was significantly limited.[53]

A year later, the Court limited the availability of habeas relief even further in *Wainwright v. Sykes*.[54] The respondent in *Wainwright* sought review of his state court conviction on the ground that the state trial court admitted statements that were allegedly obtained in violation of his *Miranda* rights.[55] The respondent, however, failed to object to the admissibility of these statements during his trial, and the trial judge did not raise the issue sua sponte.[56] Even on direct appeal, the respondent failed to challenge the admission of these statements.[57] Instead, he raised his *Miranda* challenge for the first time in a motion to vacate the conviction filed in the state trial court and in a state habeas petition filed in the state's appellate courts.[58] These late attempts were unsuccessful.[59]

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47. *Id.* at 354.

48. *See id.* (citing Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104 (codified as amended at 28 U.S.C. § 2254(d) (2011))). As discussed in Judge Rosenn's article, in order to limit federal habeas review, Congress amended § 2254(d) of the 1948 habeas statute to list eight conditions, one of which must be met, in order for a federal habeas court to be able to review factual determinations already litigated and decided by a state court. *See id.* (citing Act of Nov. 2, 1966; § 2254(d)).

49. *See* Rosenn, *supra* note 18, at 355; *see also* Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 7–8 (2004) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Stone v. Powell, 428 U.S. 465, 494 (1976); *Stone*, 428 U.S. at 503 (Brennan, J., dissenting)) (discussing the Supreme Court's shift towards limiting habeas relief during the 1970s).

50. 428 U.S. 465 (1976).

51. Rosenn, *supra* note 18, at 357 (citing *Stone*, 428 U.S. at 469, 494).

52. *Stone*, 428 U.S. at 494.

53. *See* Rosenn, *supra* note 18, at 358.

54. 433 U.S. 72 (1977).

55. *See id.* at 75.

56. *Id.*

57. *See id.*

58. *Id.*

The respondent in *Wainwright* then filed a motion for relief under 28 U.S.C. § 2254 in federal court.[60] Both the district court, as well as the Fifth Circuit Court of Appeals, concluded that the respondent's failure to object to the admission of his statements at trial "would only bar review of the suppression claim where the right to object was deliberately bypassed for reasons relating to trial tactics,"[61] and, after the Fifth Circuit concluded that this was not a deliberate bypass case, the case was remanded to the state trial court for a hearing on whether the respondent knowingly waived his *Miranda* rights.[62]

Reversing, the Supreme Court applied the rule that it had announced one year prior in *Francis v. Henderson*[63]—unless the petitioner could show "cause" and "prejudice" resulting from a state procedural waiver, federal habeas review was unavailable where the petitioner waived his objection to the admission of a confession at trial.[64] The Court purposely did not define "cause" or "prejudice," but instead left the task of defining these terms for a later case.[65] Without much discussion, the Court denied the petitioner any relief, concluding that "[w]hatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here."[66]

Five years later, in *Rose v. Lundy*,[67] the Court was presented with a habeas petitioner who had filed a "mixed petition"—a petition containing both a claim for which the petitioner has exhausted her state remedies and a claim for which there was no such exhaustion.[68] The Court in *Lundy* adopted a bright-line rule requiring exhaustion of all claims and held that a district court was required to dismiss a mixed petition.[69] The Court concluded that where a petitioner filed a mixed petition, and the district court denied such a petition, the petitioner would have to choose between going back to state court and exhausting all of the claims, or submitting a new petition that included exhausted claims only.[70]

In support of its holding, the *Lundy* Court noted that the policy behind the exhaustion rule is "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings."[71] The Court held that

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59. *Id.*

60. *Id.* For a discussion of § 2254, see *infra* notes 92–98 and accompanying text.

61. *See id.* at 75–77 (citations omitted).

62. *See id.* at 77.

63. *See id.* at 87 (citing Francis v. Henderson, 425 U.S. 536 (1976)). *Francis* dealt with a state prisoner's challenge to the composition of the grand jury. *Francis*, 425 U.S. at 537.

64. *See Wainwright*, 433 U.S. at 87 (citing *Francis*, 425 U.S. at 542); *see also* Rosenn, *supra* note 18, at 358 (citing *Wainwright*, 433 U.S. at 87) (discussing the holding in *Wainwright* as seen through the principles established in *Francis*).

65. *See Wainwright*, 433 U.S. at 87 (citing Fay v. Noia, 372 U.S. 391, 438 (1963)).

66. *Id.* at 91.

67. 455 U.S. 509 (1982).

68. *See id.* at 510; *see also* Bellamy, *supra* note 49, at 8 (citing *Lundy*, 455 U.S. at 509–10) (discussing *Lundy*).

69. *See Lundy*, 455 U.S. at 510.

70. *Id.*

71. *Id.* at 518.

its "total exhaustion rule" would ensure that state courts were given the first chance to examine a petitioner's claims before those claims went to a federal court for review.[72] The Court also discussed how its rule would assist federal courts; in cases where a state petitioner asserting federal claims exhausts his state remedies before turning to a federal court for review, the factual record is more likely to be complete and comprehensive.[73]

The next major milestone in habeas corpus jurisprudence came in 1989, when the Supreme Court decided the landmark case of *Teague v. Lane*.[74] The defendant in *Teague* was convicted of attempted murder, armed robbery, and aggravated battery.[75] During jury selection, after the prosecution used all ten of its peremptory challenges to exclude African-Americans from the jury, defense counsel twice moved for a mistrial, and each time was denied.[76] After being convicted, Teague filed a direct appeal claiming that the prosecutor's actions violated his rights under the Sixth Amendment.[77] The state appellate courts rejected his claim, and the United States Supreme Court refused to grant certiorari.[78]

Teague filed a habeas petition in federal district court but was denied relief based on his failure to show systematic and purposeful exclusion of African-Americans from juries.[79] While his appeal of the district court's denial of habeas relief was pending, the United States Supreme Court decided *Batson v. Kentucky*,[80] where it overruled existing precedent and held that a defendant could make a prima facie showing of discrimination in jury selection by relying solely on facts concerning its selection in his case, as opposed to having to show systematic exclusion based on race.[81] Even after *Batson* was decided, however, the court of appeals affirmed the district court's denial of Teague's petition, holding that *Batson* did not apply retroactively to cases on collateral review.[82]

Granting certiorari, the Supreme Court affirmed the court of appeals, holding that *Batson* did not apply to Teague's case.[83] The Court in *Teague* held

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72. *See id.* at 518–19.

73. *See id.* at 519.

74. 489 U.S. 288 (1989); *see also* Bellamy, *supra* note 49, at 8 (citing *Teague*, 489 U.S. 288) (discussing *Teague*); James Basta, Note, *Supreme Court Review: Habeas Corpus: Unresolved Standard of Review on Mixed Questions for State Prisoners*, 83 J. CRIM. L. & CRIMINOLOGY 978, 983 n.47 (1993) (citing *Teague*, 489 U.S. 288) (same).

75. *Teague*, 489 U.S. at 292–93.

76. *Id.* at 293.

77. *See id.*

78. *Id.* (citing People v. Teague, 439 N.E.2d 1066, 1071 (Ill. App. Ct. 1982), *cert. denied*, 464 U.S. 867 (1983) (No. 82-6981)).

79. *See id.* (citing McCray v. New York, 461 U.S. 961, (1983); Swain v. Alabama, 380 U.S. 202, 227 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986)).

80. 476 U.S. 79 (1986).

81. *See Teague*, 489 U.S. at 295 (quoting *Batson*, 476 U.S. at 96).

82. *See id.* at 294 (citing Allen v. Hardy, 478 U.S. 255, 257–58 (1986) (per curiam); Teague v. Lane, 820 F.2d 832, 834 & n.4 (7th Cir. 1987)).

83. *See id.* at 296 (citing *Allen*, 478 U.S. 255).

that, although new rules of criminal procedure should be applied to all cases on direct review, [84] a new rule generally should not be applied to a case which has already become final—for example, a case on collateral review—at the time the new rule is created.[85] The *Teague* Court did carve out two exceptions: The first exception is where the new rule places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[86] The second exception applies to "watershed rules of criminal procedure."[87]

## III. THE AEDPA'S RESTRICTIONS ON SECOND OR SUCCESSIVE MOTIONS FOR POST-CONVICTION RELIEF

Between 1986 and 1995, members of Congress introduced more than eighty bills proposing habeas reform, attempting in particular to impose a statute of limitations for federal habeas relief.[88] None of those bills became law.[89] As has often been the case, it took a national tragedy to force real change. On June 7, 1995, less than two months after the terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City, and with widespread bipartisan support, the United States Senate passed the Comprehensive Terrorism Prevention Act of 1995, S. 735, the bill that would eventually become the AEDPA.[90] According to Congress, the purpose of the AEDPA was to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[91] The House of Representatives passed the final version of the AEDPA on April 18, 1996, just one day shy of the one-year anniversary of

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84. *See id.* at 304 (quoting Griffith v. Kentucky, 479 U.S. 314, 322 (1987)).

85. *Id.* at 310.

86. *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)); *see also* Katharine A. Ferguson, Note, *The Clash of* Ring v. Arizona *and* Teague v. Lane*: An Illustration of the Inapplicability of Modern Habeas Retroactivity Jurisprudence in the Capital Sentencing Context*, 85 B.U. L. REV. 1017, 1031 (2005) (citing *Teague*, 489 U.S. at 311–12) (discussing *Teague* and its exceptions).

87. *See Teague*, 489 U.S. at 311–12 (quoting *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring in part and dissenting in part)); Ferguson, *supra* note 86, at 1031 (citing *Teague*, 489 U.S. at 311).

88. Lonchar v. Thomas, 517 U.S. 314, 333 (1996) (app.); *see also* Bellamy, *supra* note 49, at 10 ("Congress embarked on a campaign for habeas corpus reform . . . .").

89. Bellamy, *supra* note 49, at 10 n.70.

90. *See* S. 735, 104th Cong., 141 CONG. REC. S7803 (daily ed. June 7, 1995) (enacted). For a discussion on the history of the bill and the events surrounding its passage, see generally Thomas C. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 205–06 (1996) (citations omitted).

91. Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2111 (2002) (quoting H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 924, 944) (citations omitted).

the Oklahoma City bombing.[92] Senator Orrin Hatch, one of the bill's sponsors, went on record stating that the AEDPA was "the only thing [Congress] could do to prevent even further suffering by [the victims of the Oklahoma City bombing]."[93]

The AEDPA includes two provisions limiting a prisoner's ability to file a second or successive habeas petition or habeas-like motion.[94] The first, 28 U.S.C. § 2244(b), relates to habeas petitions filed by state prisoners under § 2254.[95] That section requires dismissal of any claim "presented in a second or successive habeas corpus application under section 2254[96] that was presented in a prior application,"[97] as well as the dismissal of any such claim "not presented in a prior application,"[98] except in cases where the claim presented is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,"[99] or in situations where the facts underlying the claim, even with due diligence, could not have been discovered earlier,[100] and those facts "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[101] Section 2244(b) also makes the court of appeals the gate-keeper by requiring a habeas petitioner to submit to the court of appeals a motion for leave to file a second or successive petition in the district court.[102] A three-judge panel must then decide, within thirty days, whether to authorize the district court to consider such a petition based on whether the applicant "makes a prima facie showing that the application satisfies the requirements" of § 2244(b).[103] A petitioner may not appeal the panel's decision.[104]

The other provision of the AEDPA that limits the ability of a prisoner to petition for relief more than once is § 2255(h), which governs motions filed by prisoners in federal custody.[105] That section requires approval of a second or

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92. *Id.*; *see also* 142 CONG. REC. 7742, 7804–05 (1996) (Senate vote); 142 CONG. REC. 7937, 7973 (1996) (House vote).

93. *Id.* (alteration in original) (quoting 141 CONG. REC. 14447, 14525 (1995) (statement of Sen. Orrin Hatch)).

94. *See* 28 U.S.C. § 2244(b) (2006); *id.* § 2255(h).

95. § 2244(b); Felker v. Turpin, 518 U.S. 651, 656 (1996) (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220–21 (codified as amended at § 2244(b))).

96. Section 2254 deals specifically with the remedies that state prisoners may seek in federal court. *See* 28 U.S.C. § 2254 (2006).

97. *Id.* § 2244(b)(1).

98. § 2244(b)(2).

99. § 2244(b)(2)(A).

100. § 2244(b)(2)(B)(ii).

101. § 2244(b)(2)(B)(ii).

102. *See* § 2244(b)(3)(A).

103. § 2244(b)(3)(B)–(D).

104. *See* § 2244(b)(3)(E).

105. *See* 28 U.S.C. § 2255(h) (2011). Although a motion under § 2255 is often referred to as a "habeas petition," this is not technically correct. *See* § 2255(a). Section 2255 deals with motions to

successive motion by the procedures set forth in § 2244 and, like the previous provision, allows for such a motion only where there is "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense,"[106] or where the Supreme Court makes "a new rule of constitutional law" retroactively applicable and that new rule was not previously available.[107]

As the Eleventh Circuit Court of Appeals has noted, the changes made by the AEDPA in §§ 2254 (dealing with state prisoners) and 2255 (dealing with federal prisoners) "are materially identical in both types of cases, the evolution of the remedy and restrictions on it are materially identical, and the relationship of the AEDPA changes to that evolution are materially identical."[108] There is one major difference, however, between these two sections—§ 2255 contains a savings clause, and § 2254 does not.[109] The savings clause of § 2255 provides that a prisoner whose motion for relief made under § 2255 has been denied may subsequently apply for habeas relief if the remedy § 2255 provides "is inadequate or ineffective to test the legality of his detention."[110] The Eleventh Circuit offered a clear explanation of the interplay between § 2255's ban on successive motions and a prisoner's ability to petition for habeas relief pursuant to the savings clause:

> Typically, collateral attacks on the validity of a federal conviction or sentence must be brought under [28 U.S.C.] § 2255. When a prisoner has previously filed a § 2255 motion to vacate, he must apply for and receive permission from the court of appeals before filing a successive § 2255 motion. [The savings clause] of § 2255, however, permits a federal prisoner, under very limited circumstances, to file a habeas petition pursuant to [28 U.S.C.] § 2241.[111]

Although the structure of, and the language used in, the AEDPA tend to be somewhat confusing, its effect on multiple attempts at collateral relief is clear: a prisoner in state custody may apply for a writ of habeas corpus under § 2254 to

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vacate, set aside, or correct a sentence. *Id.*; *see also* United States v. Brierton, No. 98-10382, slip. op. at 3 (5th Cir. Jan. 12, 1999) (noting that § 2255 does not deal with habeas petitions, but instead deals with motions). However, the rights granted under § 2255 are the same as those granted by the habeas statute—the purpose of § 2255 was "to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." United States v. Hayman, 342 U.S. 205, 219 (1952) (citing John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 175 (1949)).

106. § 2255(h)(1).

107. § 2255(h)(2).

108. Gilbert v. United States, 640 F.3d 1293, 1317 (11th Cir. 2011) (en banc).

109. *See id.* (citing Felker v. Turpin, 518 U.S. 651, 664 (1996)).

110. § 2255(e).

111. Hill v. Warden, 364 F. App'x, 587, 588 (11th Cir. 2010) (per curiam) (citing 28 U.S.C. § 2244(b) (2006); § 2255(h); Sawyer v. Holder, 326 F.3d 1363, 1365 (11th Cir. 2003)).

challenge his custody on federal constitutional or statutory grounds.[112] However, a court will not entertain a second or successive petition brought under § 2254 if the claim was presented in a prior habeas petition or, even if it was not so presented, unless the petitioner meets the specific requirements of § 2244(b), discussed above.[113] A federal prisoner may challenge his sentence by filing a motion under § 2255.[114] After a federal prisoner moves once under § 2255, he must seek leave to file a second motion by the same procedures set forth in § 2244.[115] A prisoner authorized to a file a § 2255 motion may not normally apply for a writ of habeas corpus except where the mechanism provided under § 2255 proves to be "inadequate or ineffective to test the legality of his detention."[116]

## IV. ANALYSIS

### *A. The Case of Ezell Gilbert*

Congress's attempt at providing a comprehensive post-collateral-relief framework that would minimize delay and abuse yielded a perhaps unintended consequence—the possibility that a prisoner with a valid claim that his sentence was incorrect or invalid, based on intervening changes in the law, might be left with no remedy.[117] That scenario arose in the case of federal prisoner Ezell Gilbert.[118]

Gilbert pleaded guilty in federal court to possession of crack cocaine with intent to distribute and possession of marijuana with intent to distribute.[119] At sentencing, the government waived its right to argue for a mandatory life sentence pursuant to a federal statute which would have required such a sentence based on Gilbert's prior drug convictions.[120] Gilbert was sentenced as a career offender based on two prior convictions—one for possession of cocaine with intent to sell ("a controlled substance offense"), and the other for carrying a concealed weapon (a "crime of violence").[121] Based on the career offender enhancement, Gilbert's sentencing guideline range was between 292 and 365 months.[122] Without that enhancement, his range would have been between 151

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112. *See* 28 U.S.C. § 2254(a) (2011).

113. *Id.* § 2244(b); *see also supra* notes 97–104 and accompanying text (walking through the specific requirements).

114. *Id.* § 2255(a).

115. § 2255(h).

116. § 2255(e).

117. *See* Gilbert v. United States, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc).

118. *See id.* at 1324.

119. *Id.* at 1298.

120. *Id.*

121. *Id.* at 1299 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (1995)) (internal quotation marks omitted).

122. *Id.* at 1300.

and 188 months.[123] The district court rejected Gilbert's argument that carrying a concealed weapon was not a crime of violence, sentencing Gilbert to 292 months.[124] The district court judge made it clear that he disagreed with the severity of the sentence, but he lacked the discretion to downwardly depart:

> The fact that I think the sentence is too high is immaterial. . . . I don't see any authority under the law for me to downwardly depart. So, counsel, I have given you reversible error if you can convince the Eleventh Circuit that I'm wrong.
>
> . . . .
>
> If I'm wrong, they will correct it. Because if I could do it legally, I would. I don't think I can.[125]

Gilbert appealed his sentence to the Eleventh Circuit, arguing that carrying a concealed weapon was not a crime of violence for sentencing purposes.[126] The Eleventh Circuit rejected this argument and affirmed Gilbert's sentence.[127] The Supreme Court denied Gilbert's petition for certiorari.[128] One year later, Gilbert filed a § 2255 motion but failed to reiterate his crime of violence argument.[129] The district court denied this motion, and the Eleventh Circuit declined to issue a certificate of appealability.[130]

In 2008, after the United States Sentencing Commission published Amendment 706, providing for a two-level reduction in base offense levels for crack cocaine offenses, the district court sua sponte ordered a hearing to determine whether Gilbert was entitled to a reduced sentence under the Amendment.[131] Subsequent to the hearing, the district court concluded that Gilbert was not entitled to such a sentence reduction because he was sentenced under the career offender guideline, and not the crack cocaine guideline.[132]

After the district court issued its order denying a sentence reduction, Gilbert filed a "Motion to Reopen and Amend First 28 U.S.C. § 2255 Motion."[133] In this motion, Gilbert again raised the argument that had been rejected by both the district court as well as the Eleventh Circuit on direct appeal—that his career

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123. *Id.*

124. *Id.*

125. Gilbert v. United States, 609 F.3d 1159, 1161 (11th Cir. 2010), *rev'd en banc*, 640 F.3d 1293.

126. 640 F.3d at 1300.

127. *See id.* (quoting United States v. Gilbert, 138 F.3d 1371, 1371 (11th Cir. 1998), *abrogated by* United States v. Archer, 531 F.3d 1347 (11th Cir. 2008)).

128. *Id.* at 1300–01 (citing Gilbert v. United States, 526 U.S. 1111, 1111 (1999)).

129. *See id.* at 1301.

130. *Id.*

131. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL app. C amend. 706 (2007)).

132. *Id.* (quoting Order at 5, United States v. Gilbert, No. 8:95-CR-311-T-30TGW (M.D. Fla. Jan. 21, 2009)).

133. *Id.* (quoting Gilbert v. United States, 609 F.3d 1159, 1162 (11th Cir. 2010), *rev'd en banc*, 640 F.3d 1293) (internal quotation marks omitted).

offender status had been in error because carrying a concealed weapon was not a crime of violence.[134] This time, however, Gilbert had the law on his side. In 2008, after his appeals were exhausted and arguments rejected, the Supreme Court issued its decision in *Begay v. United States*,[135] in which it held that driving under the influence was not a violent felony for purposes of a sentencing enhancement provision.[136] Based on *Begay*, the Eleventh Circuit held, in *United States v. Archer*,[137] "that carrying a concealed firearm was not a 'crime of violence' . . . for purposes of the § 4B1.1 career offender enhancement,"[138] thereby overruling its own decision in *Gilbert v. United States*[139] and adopting the argument that Gilbert raised in both the district court and court of appeals.[140]

If Gilbert celebrated what, at first glance, appeared to be an epic victory—one that would result in a major reduction in his sentence and bring his release to within sight[141]—his celebration was short-lived. The district court rejected Gilbert's renewed motion, holding that the AEDPA's ban on second or successive petitions barred Gilbert from seeking relief.[142] Gilbert attempted to get around this roadblock in one of two ways: First, he argued that the district court could treat his motion as a motion to reopen and revisit its original order under Federal Rule of Civil Procedure 60(b).[143] Alternatively, Gilbert argued that his motion could be treated as a habeas petition under 28 U.S.C. § 2241[144] by using the savings clause of § 2255(e).[145]

As to the former argument, the district court held that Gilbert could not take advantage of Rule 60(b) under existing precedent forbidding the use of that rule to bring a § 2254 claim otherwise barred by AEDPA's ban on second or

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134. *See id.*

135. 553 U.S. 137 (2008).

136. *Gilbert*, 640 F.3d at 1301 (citing *Begay*, 553 U.S. at 148).

137. 531 F.3d 1347 (11th Cir. 2008).

138. *Gilbert*, 640 F.3d at 1301 (citing *Archer*, 531 F.3d at 1352).

139. 609 F.3d 1159 (11th Cir. 2010), *rev'd en banc*, 640 F.3d 1293.

140. *See Gilbert*, 640 F.3d at 1301–02.

141. As the dissent notes, had Gilbert's sentence been properly calculated without the career offender enhancement, his maximum sentence would have been approximately thirteen years. *Id.* at 1330 (Martin, J., dissenting). By the time the Eleventh Circuit's en banc opinion was issued, Gilbert had served more than fourteen years in federal prison. *Id.*

142. *Id.* at 1302 (majority opinion) (citing Gonzalez v. Crosby, 545 U.S. 524, 530–32 (2005)).

143. *Id.*

144. Section 2241 permits federal judges to grant writs of habeas corpus under certain circumstances. *See* 28 U.S.C. § 2241 (2011).

145. *Gilbert*, 640 F.3d at 1302 (citing Wofford v. Scott, 177 F.3d 1236, 1237, 1245 (11th Cir. 1999)); *see also supra* notes 110–11 and accompanying text (explaining the savings clause and its role in a prisoner's petition for habeas relief). The "savings clause" of § 2255(e) provides:

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

28 U.S.C. § 2255(e) (2006) (emphasis added).

successive petitions.[146] The court also rejected Gilbert's latter argument, holding that his claim did not meet the requirements of § 2255(e)'s savings clause.[147] On appeal, a panel of the Eleventh Circuit reversed the district court and held that Gilbert could file a habeas petition by way of the savings clause of § 2255(e).[148] The Eleventh Circuit then granted a rehearing en banc and reversed the panel decision.[149]

The en banc court began its decision by taking issue with the presumption that Gilbert's sentence would have been lighter had he been sentenced post-*Begay* and *Archer*.[150] The faulty logic behind this presumption, according to the majority of the en banc court, was that it required one to assume that, had *Begay* and *Archer* been decided prior to Gilbert's sentencing, the government would have waived its statutory right to a mandatory life sentence.[151] The court reasoned that, had the government known that Gilbert was facing a sentence of 151 to 188 months, as opposed to the enhanced 292 to 365 months, it likely would not have waived its right to seek a mandatory life sentence.[152] "It is one thing not to insist on a life sentence when the defendant is facing at least 292 months without the enhancement," the court held, "and quite another to forgo it if he might be sentenced to less than half that much time."[153] However, despite the reasons not to do so, the majority began with the assumption that, had *Begay* and *Archer* been decided prior to Gilbert's sentencing, he would have received a "substantially lighter sentence than . . . he did."[154]

Next, the majority took issue with another assumption that it characterized as faulty—that Gilbert would receive a shorter sentence if he were granted a new sentencing hearing.[155] The court noted that, if Gilbert were resentenced, the sentencing judge could consider certain statutory factors not considered in the first sentencing hearing to upwardly depart from the advisory sentencing guideline range, which could include Gilbert's criminal history, his prior probation violations, and the fact that during the crime for which he was sentenced in this case, he allegedly took his five-year-old daughter along to watch him sell drugs.[156] Again, however, the court accepted the assumption that

146. *Gilbert*, 640 F.3d at 1302 (citing *Gonzalez*, 545 U.S. at 530–32).

147. *Id.*

148. *Id.* (citing Gilbert v. United States, 609 F.3d 1159, 1165–68 (11th Cir. 2010), *rev'd en banc*, 640 F.3d 1293 (11th Cir. 2011)).

149. *Id.* (citing Gilbert v. United States, 625 F.3d 716, 716 (11th Cir. 2010)).

150. *See id.*

151. *See id.* at 1303; *see also supra* note 120 and accompanying text (describing how, at sentencing, the government waived its statutory right to a mandatory life sentence).

152. *Gilbert*, 640 F.3d at 1303.

153. *Id.*

154. *Id.* at 1304.

155. *See id.*

156. *See id.*

Gilbert's sentence would be substantially lower if he were granted a new hearing.[157]

The court then addressed the main issue of whether, pursuant to the savings clause of § 2255(e), Gilbert was permitted to file a § 2241 habeas petition after having filed an unsuccessful § 2255 motion.[158] Starting with the text of the statute, the court noted that the savings clause does not expressly authorize the filing of a § 2241 habeas petition to remedy a sentence miscalculation that may no longer be raised in a § 2255 motion.[159] Instead, the court held that the savings clause only allows the filing of a § 2241 petition when "the remedy [by § 2255] motion is inadequate or ineffective to test the legality of [the petitioner's] detention."[160] The court concluded that the reason Gilbert could not obtain relief through a § 2255 motion—the AEDPA's bar on second or successive motions—"cannot mean that § 2255 is 'inadequate or ineffective' to test the legality of Gilbert's detention within the meaning of the savings clause."[161] "If it did," the court reasoned, "the savings clause would eviscerate the second or successive motions bar, and prisoners could file an endless stream of § 2255 motions, none of which could be dismissed without a determination of the merits of the claims they raise."[162] The court declined to adopt an interpretation that it claimed would render the AEDPA's bar on second or successive motions "pointless."[163]

Next, the court discussed the finality interests involved in the case, holding that "[t]he critically important nature of the finality interests safeguarded by § 2255(h) also weighs heavily against an interpretation of the savings clause that would lower the second or successive motions bar and permit guidelines-based attacks years after the denial of an initial § 2255 motion."[164] The court noted the frequency in which the law interpreting sentencing guidelines—such as the meaning of *crime of violence* and whether a particular crime falls within this category—evolves, and reasoned that allowing a prisoner to use the savings clause to evade the bar on second or successive motions would result in "finality-busting effects."[165] The court listed several examples of sentencing enhancements that might be open for judicial interpretation in the future—including "physical contact," "bodily injury," and "reckless conduct"—and opined that the rule Gilbert was advancing would apply each time the definition

157. *Id.* at 1305.
158. *See id.* at 1305–06.
159. *Id.* at 1307.
160. *Id.* (alterations in original) (quoting 28 U.S.C. § 2255(e) (2006)) (internal quotation marks omitted).
161. *Id.* at 1307–08.
162. *Id.* at 1308.
163. *See id.*
164. *Id.* at 1309.
165. *See id.*

of such a term evolved.[166] Predicting a doomsday scenario under Gilbert's proposed interpretation of the savings clause, the majority continued:

> As a result, no federal judgment imposing a sentence would be truly final until the sentence was completely served or the prisoner had gone on to face a different kind of final judgment. The exception that Gilbert would have us write into § 2255(h) using the savings clause as our pen would wreak havoc on the finality interests that Congress worked so hard to protect with the AEDPA provisions.[167]

Because one of the main goals of the AEDPA was to promote finality for convictions,[168] and because the bar against second or successive motions is one of the AEDPA's main mechanisms for ensuring such finality,[169] the majority concluded that it could not adopt Gilbert's interpretation of the savings clause.[170]

The court then reviewed decisions from its sister circuits on the issue, and concluded that every circuit that had decided the issue before it had reached the same conclusion—that "the savings clause of § 2255(e) does not permit a prisoner to bring in a § 2241 petition a guidelines miscalculation claim that is barred from being presented in a § 2255 motion by the second or successive motions bar of § 2255(h)."[171]

Next, the majority rejected the dissent's position that the court's refusal to apply the savings clause in Gilbert's case resulted in a violation of the Suspension Clause of Article I, Section 9.[172] In support of this holding, the majority cited *Felker v. Turpin*,[173] in which the Supreme Court held that, in the context of a § 2254 petition, the AEDPA's bar on second or successive petitions did not violate the Suspension Clause.[174] The court in *Gilbert* reasoned that, although *Felker* dealt specifically with § 2254, the issue of whether there was a violation of the Suspension Clause was the same in the context of § 2255 because "[t]he changes made by the AEDPA restrictions on second or successive filings are materially identical in both types of cases, the evolution of the remedy and restrictions on it are materially identical, and the relationship of the AEDPA changes to that evolution are materially identical."[175] The majority then

166. *See id.* at 1309–10 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2A1.4(a)(2)(A), 2A2.2(b)(3), 2A2.4(b)(1)(A) (2010)) (internal quotation marks omitted).

167. *Id.* at 1310.

168. *Id.* (quoting Johnson v. United States, 340 F.3d 1219, 1224 (11th Cir. 2003)).

169. *Id.* at 1311.

170. *See id.* at 1312.

171. *Id.* For the cases the court cites in its opinion, see Okereke v. United States, 307 F.3d 117 (3d Cir. 2002); United States v. Peterman, 249 F.3d 458 (6th Cir. 2001); Kinder v. Purdy, 222 F.3d 209 (5th Cir. 2000).

172. *Gilbert*, 640 F.3d at 1316.

173. 518 U.S. 651 (1996).

174. *Gilbert*, 640 F.3d at 1317 (citing *Felker*, 518 U.S. at 663–64).

175. *Id.*

dismissed the dissent's argument that the savings clause of § 2255(e) is what prevented § 2255 from violating the Suspension Clause.[176] According to the majority, this argument could not stand in light of *Felker*, which upheld the constitutionality of § 2254 despite its lack of a savings clause.[177]

The *Gilbert* majority then rejected the argument that Gilbert's case fell under an actual innocence exception.[178] First, the court discussed the actual innocence exception contained in § 2255(h), which it described as "a narrow one."[179] The court noted that the statutory actual innocence exception "applies only when the claim is based on '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.'"[180] Because Gilbert's claim was not based on newly discovered evidence, a fact that Gilbert admitted was true, the majority concluded that the statutory actual innocence exception contained in § 2255(h) did not apply.[181]

Next, the majority discussed another actual innocence exception recognized by certain courts—referred to as the "*Bailey* actual innocence exception," after the Supreme Court's opinion in *Bailey v. United States*[182]—defining the term "use" as applied to possession of a firearm during a drug crime in a narrow fashion.[183] The court in *Gilbert* explained that the *Bailey* exception is used to allow, pursuant to the savings clause, "a claim of actual innocence of the crime of conviction to be brought in a § 2241 petition when it cannot be brought in a second or successive motion because of § 2255(h)."[184] The court noted that the *Bailey* exception is broader than the statutory exception contained in § 2255(h)(1) "because it encompasses innocence based on changes in the law where the evidence remains the same."[185] However, the court went on to hold that *Bailey* claims could succeed only where "a retroactively applicable, circuit law-busting decision of the Supreme Court established that [the petitioner] had been convicted of a nonexistent crime."[186] The court in *Gilbert* concluded that because the crime for which Gilbert was convicted was not rendered nonexistent, he could not bring a *Bailey* claim.[187]

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176. *See id.* (quoting *id.* at 1329 (Barkett, J., dissenting)).

177. *Id.* (citing *Felker*, 518 U.S. at 663–63).

178. *See id.* at 1318.

179. *Id.*

180. *Id.* (quoting 28 U.S.C. § 2255(h)(1) (2006)).

181. *See id.*

182. 516 U.S. 137 (1995), *superseded by statute*, Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469, *as recognized in* Abbott v. United States, 131 S. Ct. 18 (2010).

183. *See Gilbert*, 640 F.3d at 1318–19 (citing 18 U.S.C. § 924(c) (1994); *Bailey*, 516 U.S. at 150).

184. *Id.* at 1318.

185. *Id.*

186. *Id.* at 1319 (citing Wofford v. Scott, 177 F.3d 1236, 1244 (11th Cir. 1999)).

187. *See id.* at 1319–20. The majority rejected Gilbert's contention that the exception applied because he was "actually innocent of being a career offender." *Id.* at 1320 (quoting *En Banc* Brief

The Eleventh Circuit also discussed the "actual innocence of sentence exception" laid out in *Sawyer v. Whitley*.[188] The court noted that *Sawyer* did not involve the savings clause of § 2255(e) or sentencing guideline errors, but instead dealt with "a second or successive motion claiming constitutional error in a jury's determination that the petitioner should be sentenced to death" prior to the enactment of the AEDPA.[189] The *Gilbert* majority explained that, prior to the AEDPA, petitioners were not allowed to raise claims in second or successive petitions "unless the petitioner could show cause and prejudice or could establish a miscarriage of justice."[190] In turn, the court explained, the "miscarriage of justice exception required a showing of actual (factual) innocence."[191] In *Sawyer*, then, according to the *Gilbert* majority, the Supreme Court held that the actual innocence exception at issue in that case applied "to constitutional errors in capital sentencing only when the constitutional error resulted in the petitioner becoming statutorily eligible for a death sentence that could not otherwise have been imposed."[192]

The court in *Gilbert* discussed four reasons why the *Sawyer* actual innocence exception was inapplicable to the case before it.[193] First, Gilbert's case was not a capital punishment case.[194] Second, the court held that the *Sawyer* exception operated only where a constitutional error was alleged, not where the error claimed was a statutory or guidelines error.[195] Third, the court held that Gilbert would not be able to take advantage of the *Sawyer* exception even without these first two limitations because, according to the court, he failed to satisfy the requirement of showing that "but for the claimed error he would not have been statutorily eligible for the sentence he received."[196] The fourth and final reason the *Gilbert* majority gave as to why Gilbert could not take advantage of the *Sawyer* actual innocence exception was that actual innocence exceptions carved out prior to the AEDPA's enactment do not apply to guidelines errors post-AEDPA.[197]

Finally, the *Gilbert* majority addressed, and rejected, Gilbert's argument that his motion should have been treated as a motion for relief under Federal Rule of

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of Appellant Gilbert at 43, *Gilbert*, 640 F.3d 1293 (No. 09-12513-CC)). The court reasoned that, despite his contention, Gilbert was not convicted of being a career offender and, therefore, could not say that he was convicted of a nonexistent crime. *Id.* The court stated that this position "turns on treating sentences as convictions, and an argument that depends on calling a duck a donkey is not much of an argument." *Id.*

188. *Id.* at 1320 (citing Sawyer v. Whitley, 505 U.S. 333 (1992)).
189. *Id.* (citing *Sawyer*, 505 U.S. at 335).
190. *Id.* (citing *Sawyer*, 505 U.S. at 338–39).
191. *Id.* (alteration in original) (citing *Sawyer*, 505 U.S. at 339).
192. *Id.* (citing *Sawyer*, 505 U.S. at 348–50).
193. *Id.*
194. *See id.* at 1320–21 (citing *Sawyer*, 505 U.S. at 340–41).
195. *Id.* at 1321.
196. *Id.* at 1322.
197. *Id.* (citing Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997)).

Civil Procedure 60(b).[198] The court in *Gilbert* cited *Gonzalez v. Crosby*,[199] where the Supreme Court held that "state prisoners could not use Rule 60(b) to evade the second or successive petition bar contained in 28 U.S.C. § 2244(b) by either adding a new ground for relief or attacking the federal court's previous rejection of a claim on the merits."[200] Although the Supreme Court in *Gonzalez* explicitly limited its holding to state prisoner cases,[201] the court in *Gilbert* joined "every other circuit that ha[d] addressed the issue" and concluded that the rule in *Gonzalez* applied with equal force to federal prisoner cases.[202]

The majority in *Gilbert* concluded by holding that "the savings clause does not authorize a federal prisoner to bring in a § 2241 petition a claim, which would otherwise be barred by § 2255(h), that the sentencing guidelines were misapplied in a way that resulted in a longer sentence not exceeding the statutory maximum."[203] In the name of finality of judgment, the majority held that Gilbert was stuck with his original sentence.[204]

In a strongly worded dissent joined by two other judges, Judge Beverly Martin expressed her opinion that the savings clause of § 2255(e) provided Gilbert with a remedy under the extraordinary circumstances of his case.[205] If Gilbert is not entitled to relief under the savings clause, according to the dissent, then he "has been subjected to a deprivation of liberty of such magnitude that, when paired with no possible remedy, we are confronted with a constitutional question that we otherwise need not have reached."[206] That question, Judge Martin wrote, is whether the AEDPA, as interpreted by the majority of the court, violates the Suspension Clause of Article I of the Constitution.[207]

The dissent began its discussion by noting the avenues of relief that were not available to Gilbert.[208] First, the dissent noted that Gilbert was not able to raise his crime of violence argument in his first § 2255 petition because of Circuit precedent prohibiting the relitigation of issues already decided on direct appeal.[209] Next, the dissent continued, Gilbert could not avail himself of § 2255(h) because that section allows for second or successive motions only

198. *See id.* at 1323 (citing FED. R. CIV. P. 60(b)(5)–(6); Gonzalez v. Crosby, 545 U.S. 524, 532 (2005)). Specifically, Gilbert cited Rule 60(b)(5), which allows relief from a final judgment or order where "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable" and Rule 60(b)(6), which allows such relief for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(5)–(6).

199. 545 U.S. 524 (2005).

200. *Gilbert*, 640 F.3d at 1323 (citing *Gonzalez*, 545 U.S. at 532).

201. *See Gonzalez*, 545 U.S. at 538.

202. *Gilbert*, 640 F.3d at 1323.

203. *Id.*

204. *Id.* at 1324.

205. *Id.* at 1330 (Martin, J., dissenting).

206. *Id.* at 1330–31.

207. *Id.* at 1331 (citing U.S. CONST. art. I, § 9, cl. 2).

208. *Id.*

209. *See id.* (citing United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000)).

where there is newly discovered evidence or a retroactively applied new rule of constitutional law.[210] "This means that Mr. Gilbert, who was *never* a career offender in light of *Begay*'s retroactive application, has no remedy under § 2255(h) even though he will be incarcerated for just short of a quarter century based on a mistaken determination that he was a career offender."[211]

The dissent then discussed the savings clause of § 2255(e):

> Mr. Gilbert did not fail to apply for relief, but rather has diligently pursued every legal avenue available to him, including, of course, direct appeal to this Court. Since Mr. Gilbert still faces a sentence of more than 24 years despite our admission that we decided his case wrongly, his efforts can only be said to have been of no effect. Therefore, proceeding under the plain terms of the statute, as we must, § 2255 has been both inadequate and ineffective for Mr. Gilbert. Under the statute, therefore, Mr. Gilbert may turn to 28 U.S.C. § 2241.[212]

In support of the argument that Gilbert was entitled to relief under the savings clause, the dissent cited *Wofford v. Scott*,[213] where over ten years prior, the Eleventh Circuit noted that sentencing claims "based upon a retroactively applicable Supreme Court decision overturning circuit precedent" were the only claims that "may conceivably be covered" by the savings clause.[214] The dissent in *Gilbert* noted that, in the case before it, the government did not dispute that the Supreme Court's decision in *Begay*—which led to the Eleventh Circuit's holding that carrying a concealed firearm was not a crime of violence for purposes of the career offender sentencing enhancement—was a "retroactively applicable Supreme Court decision overturning circuit precedent."[215] According to the dissenters, the *Gilbert* majority opinion foreclosed the possibility left open in *Wofford*, and "remove[d] any possibility of habeas relief for Mr. Gilbert by equating the requirements for relief under § 2255(e) with those under § 2255(h) and, in the process, render[ing] the savings clause a dead letter."[216] The dissent continued:

> So now it is true that there is no relief in Alabama, Florida or Georgia for any person who is, for some reason, barred from relief under § 2255 but wrongfully incarcerated on account of a sentencing error. This is so,

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210. *Id.* (citing 28 U.S.C. § 2255(h) (2006)).
211. *Id.*
212. *Id.* at 1332 (citation omitted).
213. 177 F.3d 1236 (11th Cir. 1999).
214. *Gilbert*, 640 F.3d at 1332 (Martin, J., dissenting) (quoting *Wofford*, 177 F.3d at 1245) (internal quotation marks omitted).
215. *Id.* (quoting *Wofford*, 177 F.3d at 1245) (internal quotation marks omitted).
216. *Id.*

> even here, where that sentencing error leaves him incarcerated for a decade or more beyond what is called for by law.[217]

Next, the dissent discussed the constitutional concerns that arose when a prisoner was forced to satisfy the requirements of § 2255(h) in order to take advantage of the savings clause of § 2255(e).[218] Briefly reviewing the history and importance of the writ, the dissent cited *United States v. Hayman*,[219] a case from a half-century prior, in which the Supreme Court recognized the role of § 2241 in cases where the § 2255 procedure was rendered "inadequate or ineffective."[220] The *Gilbert* dissent acknowledged that *Hayman* was decided years before the AEDPA amendments to § 2255, but went on to opine that neither those amendments, nor any other developments since *Hayman*, "were intended to remove the power and responsibility of the judiciary to enforce § 2241."[221] In a strong, if not dramatic, passage, the dissent stated:

> Our duty to interpret [§ 2241] according to its plain terms is especially robust in light of the Suspension Clause of the U.S. Constitution. By today's decision we have shirked our duty in that regard, and in doing so we diminish the institution of the federal courts.
>
> As if to highlight the harm we do to the court, during oral argument the government stated that the only possible avenue of recourse for Mr. Gilbert is to seek clemency from the Executive Branch of government. Surely we neglect our responsibility when we turn away a wrongfully incarcerated defendant with the suggestion that he seek relief from the branch already charged with the vast responsibility of exercising executive powers. The responsibility for assuring individual justice is ours.[222]

The dissent then rebutted several of the majority's points.[223] First, according to the dissent, the majority's holding that the savings clause of § 2255(e) does not apply unless the requirements of § 2255(h) are satisfied violated the canon of statutory construction disfavoring the repeal of a statute by implication.[224] The majority's holding, the dissent opined, "flies in the face of Congress's deliberate choice to leave the savings clause intact when passing AEDPA."[225] The dissent also responded to the majority's discussion of the importance of finality:

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217. *Id.*
218. *Id.* at 1333.
219. 342 U.S. 205 (1952).
220. *See Gilbert*, 640 F.3d at 1333 (Martin, J., dissenting) (quoting *Hayman*, 342 U.S. at 223) (internal quotation marks omitted).
221. *Id.*
222. *Id.*
223. *See id.* at 1333–36 (citations omitted).
224. *Id.* at 1333 (citing Morton v. Mancari, 417 U.S. 535, 549–50 (1974)).
225. *Id.* at 1334.

> Surely Mr. Gilbert's case is a poor vehicle to promote the idea that finality builds confidence in our criminal justice system. Today we tell a man he must sit in the penitentiary for years beyond the sentence that a proper application of the law would have imposed, when we rejected his correct interpretation of what the law meant back in 1998.[226]

The dissent stated that none of the main principles promoted by finality—including confidence in the integrity of the judicial system, minimization of costs and delay, avoidance of spoliation of evidence, and comity—were advanced by denying Gilbert relief.[227] As to building confidence in the integrity of the judicial system, the dissent noted that this principle was not advanced because, to the world, it would appear as though the court was "refusing to acknowledge or make amends for its own mistake."[228] With regard to costs and delay, the dissent stated that these things had already been incurred and that granting Gilbert relief would actually eliminate the expenses of his incarceration.[229] Finally, the last two principles were not affected as there was no evidence that might be spoiled, and there were no comity concerns as Gilbert's sentence was imposed by a federal, and not a state, court.[230]

The dissent rebutted the majority's contention that every other circuit had agreed with its conclusion.[231] It cited *Triestman v. United States*,[232] where the Second Circuit held that the phrase "inadequate or ineffective," as used in § 2255(e), referred, at a minimum, to "the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions."[233] According to the dissent, this language from the Second Circuit did not foreclose relief to Gilbert.[234] "Surely it must be true," the dissent reasoned, "that keeping someone in the penitentiary for such a substantial duration beyond what the correct sentence would call for constitutes a 'serious constitutional question.'"[235]

The dissent also cited *In re Davenport*,[236] which the *Gilbert* majority interpreted as rejecting the argument that a § 2241 claim can be raised when a second or successive motion is barred by § 2255.[237] The dissent in *Gilbert* agreed with this interpretation of *Davenport* but noted that the *Davenport* court

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226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 1335 (quoting *id.* at 1308 (majority opinion)).
232. 124 F.3d 361 (2d Cir. 1997).
233. *Gilbert*, 640 F.3d at 1335 (Martin, J., dissenting) (quoting *Triestman*, 124 F.3d at 377) (internal quotation marks omitted).
234. *Id.*
235. *Id.*
236. *Id.* (citing *In re* Davenport, 147 F.3d 605 (7th Cir. 1998)).
237. *Id.* at 1308 (majority opinion) (citing *In re Davenport*, 147 F.3d at 608).

"concluded that '[a] federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction *or sentence* because the law changed after his first 2255 motion.'"[238] The *Gilbert* dissent reasoned that because Gilbert "has never had a 'reasonable opportunity' to obtain a judicial correction of such a fundamental defect, it may well be that he would prevail in the Seventh Circuit."[239] The dissent criticized what it saw as the majority's over-reliance on decisions from other circuits, noting that while decisions from other circuits might be helpful to consider, the ultimate decision as to Gilbert's fate was left in their hands only.[240]

Lastly, the dissent downplayed the majority's concern that granting relief to Gilbert would open the floodgates of litigation:

> Indeed if there are others who are wrongfully detained without a remedy, we should devote the time and incur the expense to hear their cases. What is the role of the courts, if not this? But what is important today is the consequence to Mr. Gilbert of our unwillingness to correct our past legal error.[241]

A separate dissent, written by Judge James C. Hill, referred to the majority's holding as the "'Catch-22' approach to sentencing claims."[242] In response to the majority's focus on the interest of finality, Judge Hill opined that "[a] judicial system that values finality over justice is morally bankrupt."[243] Judge Hill continued, "Surely, the Great Writ cannot be so moribund, so shackled by the procedural requirements of rigid gatekeeping, that it does not afford review of Gilbert's claim."[244] In a passage for which the label "stern" would be an extreme understatement, Judge Hill summed up his view of the majority's holding:

> Today, this court holds that we may not remedy such a sentencing error. This shocking result—urged by a department of the United States that calls itself, without a trace of irony, the Department of Justice—and accepted by a court that emasculates itself by adopting such a rule of judicial impotency—confirms what I have long feared. The Great Writ is dead in this country.[245]

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238. *Id.* at 1335 (Martin, J., dissenting) (quoting *In re Davenport*, 147 F.3d at 611).
239. *Id.* at 1335–36.
240. *See id.* at 1336.
241. *Id.*
242. *Id.* (Hill, J., dissenting).
243. *Id.* at 1337.
244. *Id.*
245. *Id.* at 1336.

### *B. Other Potential Constitutional Concerns*

Apart from the concern expressed by the *Gilbert* dissenters that denying a petitioner in Gilbert's position any relief may violate the Suspension Clause of Article I,[246] other courts have at least suggested that such a denial may also amount to a deprivation of Due Process.[247] In *Narvaez v. United States*,[248] decided just one month after the en banc decision in *Gilbert*, the Seventh Circuit was faced with a situation similar to the one presented in *Gilbert*.[249] The petitioner in *Narvaez* pleaded guilty to bank robbery and was sentenced as a career offender based on two prior escape convictions.[250] Narvaez filed a § 2255 motion, in which he argued, pursuant to the Supreme Court's decisions in *Begay v. United States*[251] and *Chambers v. United States*,[252] that he was not a career offender.[253] The district court denied Narvaez any relief, concluding that *Begay* and *Chambers* did not apply retroactively on collateral review.[254] Unlike in *Gilbert*, the petitioner in *Narvaez* raised his career offender argument in his first § 2255 motion; therefore, the Seventh Circuit did not have to address the AEDPA's ban on second or successive motions.[255] On appeal, Narvaez argued, among other things, that his increased term of imprisonment based on his incorrect designation as a career offender amounted to a deprivation of Due Process.[256] In an opinion reversing the district court's denial of relief, the Seventh Circuit, though not deciding Narvaez's Due Process claim,[257] noted that Narvaez had a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress."[258]

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246. *See id.* at 1329–30 (Barkett, J., dissenting); *id.* at 1333 (Martin, J., dissenting).

247. *See* Narvaez v. United States, 674 F.3d 621, 626–27 (7th Cir. 2011) (en banc); *cf. In re* Davenport, 147 F.3d 605, 611 (7th Cir. 1998) ("[I]t is an open question whether a right to a meaningful opportunity to correct judicial errors by means of appellate or collateral attacks on a criminal judgment is conferred by the due process clause as that clause is understood today.").

248. 674 F.3d 621 (7th Cir. 2011) (en banc).

249. *See id.* at 623–25 (citations omitted).

250. *Id.* at 623.

251. 553 U.S. 137 (2008).

252. 555 U.S. 122 (2009).

253. *Navraez*, 674 F.3d at 625 (citing *Chambers*, 555 U.S. 122; *Begay*, 553 U.S. 137).

254. *Id.*

255. *See id.* at 627 n.10, 630 n.14 (citing Gilbert v. United States, 640 F.3d 1293, 1306 (11th Cir. 2011) (en banc)) (noting that the Eleventh Circuit did not have to address the issue of an "initial collateral attack").

256. *See id.* at 627 n.10.

257. *See id.* at 630.

258. *Id.* at 627 (quoting Whalen v. United States, 445 U.S. 684, 690 (1980)) (internal quotation marks omitted).

### C. *Avoiding the Constitutional and Administrative Concerns: A Middle-Ground Approach*

The strongly worded opinions in *Gilbert* make it clear that major constitutional and administrative concerns arise on both sides of the debate. On the one hand, as the majority of the en banc court suggested,[259] the AEDPA's restrictions on second or successive motions reflect Congress's acknowledgment that allowing prisoners—who often have an abundant amount of time to research, draft, and file petitions for post-conviction relief—to file numerous and often repetitive post-conviction relief motions can lead to "'the abuse of the statutory writ of habeas corpus,'"[260] and may result in "'the acute problems of unnecessary delay and abuse in capital cases.'"[261]

The available statistics support Congress's concerns, as well as the concerns the majority in *Gilbert* raised, related to the problems of delay and abuse of post-conviction relief procedures.[262] According to the Bureau of Justice Statistics (BJS), a component of the Department of Justice, between 1985 and 1999, the number of habeas petitions and § 2255 motions increased from 4,932 per year to 9,342.[263] The rate at which inmates filed these petitions and motions, however, remained relatively unchanged during this same time period.[264] Interestingly, according to a 2002 BJS report, the number of habeas petitions and § 2255 motions actually increased in the four years after Congress passed the AEDPA.[265] The 2002 BJS Report shows that the number of habeas petitions and § 2255 motions increased from 20,958 in 1995 to 31,556 in 2000.[266] The filing rate also increased, from nineteen to twenty-three per 1,000 inmates during that time frame.[267] In 2000, for every 1,000 federal prison inmates, forty-four § 2255 motions and twenty-seven habeas petitions were filed.[268] According to a 2001

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259. *See Gilbert*, 640 F.3d at 1309–12 (citations omitted).

260. Zheng, *supra* note 91, at 2111 (quoting H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 924, 944).

261. *Id.* (quoting H.R. REP. NO. 104-518, at 111).

262. *See Gilbert*, 640 F.3d at 1309–12 (citations omitted); Zheng, *supra* note 91, at 2111 (quoting H.R. REP. NO. 104-518, at 111); *see also* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985–99, at 5 (Ser. No. NCJ 185055, 2001) [hereinafter FEDERAL CRIMINAL APPEALS], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fca99.pdf (showing an increase in the number of habeas corpus and motions to vacate a sentence from 1985–1999); JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 1 (Ser. No. NCJ 189430, 2002) [hereinafter PRISONER PETITIONS], *available at* http://bjs.gov/content/pub/pdf/ppfusd00.pdf (explaining how enactment of the AEDPA caused an increase in the rate of habeas corpus petitions filed).

263. FEDERAL CRIMINAL APPEALS, *supra* note 262, at 5.

264. *Id.* According to the report, 65% of habeas petitions and § 2255 motions filed in 1995 were dismissed. *Id.*

265. PRISONER PETITIONS, *supra* note 262, at 1.

266. *Id.*

267. *Id.*

268. *Id.* at 2–3.

report issued by the Administrative Office of the United States Courts, both habeas petitions and motions under §§ 2254 and 2255 "reached peak levels in 1997 before stabilizing" between 1997 and 2001.[269] That report also found that, despite the additional filing requirements that the AEDPA imposed on state prisoners, habeas petitions rose 50% between 1996 and 2001.[270] The report went on to opine that "[a]s a result, prisoners appear to have shifted from using [§ 2254] (specifically addressed in the AEDPA) to using [§ 2241] to challenge their imprisonment. Many of these petitions have been dismissed as frivolous or unfounded."[271]

The majority in *Gilbert* stated that finality interests, protected by § 2255(h), "weigh[] heavily against an interpretation of the savings clause that would lower the second or successive motions bar and permit guidelines-based attacks years after the denial of an initial § 2255 motion."[272] This notion was the very impetus behind Chief Justice Rehnquist forming the Powell Committee in 1988.[273] The *Gilbert* majority theorized that "the finality-busting effects of permitting prisoners to use the savings clause as a means of evading the second or successive motions bar" would not be limited to situations where subsequent developments rendered a career offender enhancement erroneous but would also apply "to every type and kind of enhancement, of which there are scores in the

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269. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS., FEDERAL JUDICIAL CASELOAD: RECENT TRENDS 11 (2001), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/20015yr.pdf.

270. *Id.*

271. *Id.*

272. Gilbert v. United States, 640 F.3d 1293, 1309 (11th Cir. 2011) (en banc).

273. *See supra* note 8 and accompanying text. Several authors have criticized how courts have dealt with finality when applying the AEDPA. Lee Kovarsky, for example, argues that "AEDPA jurisprudence has improperly abstracted comity, finality, and federalism to a level of generality that transforms those interests into a generalized presumption in favor of government respondents." Kovarsky, *supra* note 16, at 453. Kovarsky goes on to state: "Finality can compromise justice, so a desired state of finality implies a normative judgment about acceptable uncertainty. For the same reason that criminal procedure cannot eliminate all uncertainty, our habeas law cannot logically be organized around any numeric concept of 'correctness.'" *Id.* at 454; *see also* Karen M. Marshall, Note, *Finding Time for Federal Habeas Corpus:* Carey v. Saffold, 37 AKRON L. REV. 549, 576–77 (2004) (quoting DUKER, *supra* note 20, 3 (1980)) (criticizing the AEDPA's one-year statute of limitation, and arguing that the statute "forces the federal courts to choose the value of finality over any constitutional obligations," and that "[i]f federal habeas is to continue to have a role as the 'great writ of liberty' despite the AEDPA system, the Supreme Court must move away from formalities and back towards fairness."). Other scholars have written in support of the importance of finality in criminal jurisprudence. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963) ("Surely, then, it is naive and confusing to think of detention as lawful only if the previous tribunal's proceedings were 'correct' in this ultimate sense. If any detention whatever is to be validated, the concept of 'lawfulness' must be defined in terms more complicated than 'actual' freedom from error; or, if you will, the concept of 'freedom from error' must eventually include a notion that some complex of institutional processes is empowered definitively to *establish* whether or not there was error, even though in the very nature of things no such processes can give us ultimate assurances . . . .").

sentencing guidelines."[274] The dissent downplayed these concerns indicating that where finality does not promote the principles of confidence in the judicial system, minimization of cost and delay, avoidance of spoliation of evidence, or comity, it should not be the focus of attention.[275]

On the other hand, the *Gilbert* dissenters expressed concerns of their own, although theirs' were constitutional in nature.[276] The dissenters opined that denying relief to a prisoner in Gilbert's position raised grave constitutional concerns, including a violation of Article I's Suspension Clause.[277] Moreover, the dissenters asked how a court system—a system that is supposed to stand for justice and fairness—could turn its back on Gilbert after incorrectly applying a sentencing enhancement, incorrectly affirming that sentence, and then not allowing him to re-raise his wrongfully rejected arguments after those arguments were finally adopted by the highest Court in the land.[278]

Despite the strong rhetoric used by both sides of the *Gilbert* debate, and notwithstanding the many concerns expressed by each, a possible middle-ground approach exists. This proposed approach can be summarized as follows: In unique and relatively rare cases, like *Gilbert*, where a prisoner who has already filed a § 2255 motion can show that, due to a subsequent change in the law which has been made retroactively applicable, his sentence should have been significantly shorter, and where that prisoner can also show that he could not have raised the sentencing argument in his initial § 2255 motion, the savings clause of § 2255(e) would kick in to allow that prisoner to file a § 2241 habeas petition to challenge the length of his sentence.

The extremely narrow nature of this rule, and the class of prisoners to which it would apply, is such that any resulting abuse or delay would be minimal, at best. Further, as an added layer of protection, strict judicial screening procedures could be applied to assure that only those petitions that meet the specific requirements of this proposed rule would be allowed through. As for the specifics of these screening procedures, there are two options. The first is to apply the normal screening procedures set forth in § 2244(b), under which a prisoner must file a motion for leave with the court of appeals, at which time a three-judge panel must decide, within thirty days, whether to authorize the district court to consider the petition.[279] The second option is to apply Rule 4 of the Rules Governing Section 2254 Cases to screen out frivolous or otherwise improper petitions.[280] Under that Rule, the judge who receives a habeas

274. *Gilbert*, 640 F.3d at 1309–10.

275. *Id.* at 1334 (Martin, J., dissenting).

276. *See id.* at 1333.

277. *See id.*

278. *Id.* at 1330 (citing United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008); United States v. Gilbert, 138 F.3d 1371, 1372–73 (11th Cir. 1998), *abrogated by Archer*, 531 F.3d 1347).

279. 28 U.S.C. § 2244(b) (2006); *see also supra* notes 96–104 and accompanying text (explaining in detail § 2244(b)).

280. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS following 28 U.S.C. § 2254 [hereinafter HABEAS RULES], Rule 4. Although that Rule specifically

petition—normally a Magistrate Judge—must promptly examine the petition and, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."[281] Under the middle-ground approach proposed in this Article, a screening judge who promptly reviews a § 2241 habeas petition filed by a prisoner who has already filed a § 2255 motion for relief on the same grounds, would dismiss that habeas petition unless it appeared from the face of the petition that the prisoner met both of the proposed requirements: (1) That due to a retroactively applicable subsequent change in the law, his sentence should have been significantly shorter; and (2) He could not have raised the argument in his initial § 2255 motion.[282] If the screening judge determines that both of these showings have been made, the petition would be allowed through, and normal habeas procedures would then apply. Either of these screening procedures would prevent the proposed middle-

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deals with motions filed by state prisoners under § 2254, Rule 1 of that section provides that "[t]he district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)." *Id.* Rule 1(b).

281. *Id.* Rule 4.

282. In lieu of, or in addition to, § 2244(b) or Rule 4 of the Rules Governing Section 2254 Cases, some courts might choose to apply the screening provisions of the Prisoner Litigation Reform Act (PLRA). 28 U.S.C. § 1915A (2006). That provision states: "The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." *Id.* § 1915A(a). That statute goes on to discuss the grounds for dismissal: "On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." *Id.* § 1915A(b). Application of this statute would have the added benefit that petitions could be screened even before they were docketed by the court clerk. However, the majority of circuits have held that habeas petitions are not considered "civil actions" for purposes of § 1915A. *See, e.g.*, Anderson v. Singletary, 111 F.3d 801, 805 (11th Cir. 1997) ("[R]eview of the entire statute confirms . . . that the PLRA was not intended to apply in habeas corpus."); United States v. Simmonds, 111 F.3d 737, 741 (10th Cir. 1997), *overruled on other grounds by* United States v. Hurst, 322 F.3d 1256 (10th Cir. 2003) (citations omitted) (concluding, in accordance with other circuits, that habeas corpus proceedings are not "civil actions" under § 1915); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997) (holding that provisions of the PLRA regarding "civil actions . . . do not apply to habeas proceedings"); United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) ("Congress distinguished procedures to be followed in habeas actions from those used in other civil litigation," and, therefore, the PLRA is "inapplicable to habeas petitions."); Santana v. United States, 98 F.3d 752, 756 (3d Cir. 1996) (noting that habeas corpus petitions are not "civil actions" under the PLRA, and to find otherwise would undermine Congressional intent); Martin v. United States, 96 F.3d 853, 854 (7th Cir. 1996) (indicating that habeas petitions are not "civil actions" for the purposes of the PLRA); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (finding that the "civil action" language of the PLRA does not apply to habeas corpus proceedings). Accordingly, in these circuits, courts would have to apply the screening provisions of § 2244(b) or Rule 4, as opposed to § 1915A. Finally, another statute that requires the quick screening of habeas petitions is 28 U.S.C. § 2243, which provides: "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243 (2006).

ground approach from "eviscerating" the AEDPA's second or successive motions bar or opening the floodgates of post-conviction relief litigation and destroying finality of judgment,[283] while at the same time preventing the AEDPA's restriction on second or successive motions from violating the Suspension Clause or the Due Process Clause.

Under this narrowly tailored middle-ground approach, a subsequent habeas petition would not be allowed through unless the screening judge determined, from the face of the petition, that there exists a substantial likelihood that the petitioner's sentence would have been significantly shorter in light of the subsequent change in the law.[284] This would eliminate two categories of cases—cases in which it is not clear that the petitioner's sentence would have been any shorter, even in light of the subsequent change in the law; and cases where, even if the petitioner's sentence would likely have been shorter, the requested relief would not significantly shorten the sentence.[285] Further, a petition would not be allowed through unless it was clear that the requested relief would make an actual impact on the amount of time remaining on the petitioner's sentence (for example, where a petitioner was incorrectly sentenced to 120 months, but had already served 115 months by the time he filed his petition, his petition would be dismissed at the screening stage).[286] Additionally, under the proposed rule, a

283. *See supra* notes 162–63 and accompanying text.

284. This "substantial likelihood" standard finds support in another area of the law in which a district court is required to exercise its "screening" duties—motions for preliminary injunctions. In that context, a district court may grant a preliminary injunction only where the moving party demonstrates, among other things, "a substantial likelihood of success on the merits." Keeton v. Anderson–Wiley, 664 F.3d 865, 868 (11th Cir. 2011) (citing Bellsouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC, 425 F.3d 964, 968 (11th Cir. 2005)).

285. What would amount to a "significantly" lighter sentence under this proposed rule, of course, would be open for interpretation and not easily susceptible to a bright-line standard. However, this is not unlike many areas of the law where courts must exercise their discretion in the absence of a bright-line rule. As the Supreme Court has stated in relation to another area of criminal procedure, "[m]uch as a 'bright line' rule would be desirable . . . common sense and ordinary human experience must govern over rigid criteria." United States v. Sharpe, 470 U.S. 675, 685 (1985).

286. Gilbert, himself, would have met this standard. First, the sentencing judge in *Gilbert* clearly indicated that, had he had the opportunity to impose a lighter sentence, he would have. *See supra* note 125 and accompanying text. Second, it is clear that had Gilbert been properly sentenced, his maximum sentence under the guidelines would have been 188 months, as opposed to the minimum sentence of 292 months that applied in light of the enhancement. *See supra* notes 123–24 and accompanying text. Accordingly, at a minimum, Gilbert's sentence would have been 104 months—or over eight years—shorter without the sentencing enhancement. A more likely scenario, however, in light of the sentencing Judge's statements on the record, would have been a sentence of 151 months (the minimum sentence without the enhancement), which would have been 141 months, or nearly twelve years, shorter than Gilbert's actual sentence. The *Gilbert* majority even assumed that, without the enhancement, Gilbert's sentence would have been "substantially lighter." Gilbert v. United States, 640 F.3d 1293, 1304 (11th Cir. 2011) (en banc). *But see supra* notes 150–57 and accompanying text (discussing why these assumptions might not be accurate). Finally, at the time Gilbert filed his second motion, he still had more than ten years remaining on his sentence. *See*

petition would be dismissed at the screening stage if the screening judge determined that the petitioner could have raised the sentencing argument in his initial § 2255 motion but failed to do so. This would significantly narrow the number of cases in which a petitioner could take advantage of § 2255(e)'s savings clause and file a § 2241 petition.

This proposed middle-ground approach is certainly susceptible to criticism in that it would give screening judges leeway in determining, as an initial matter, which petitions would be let through and which would be quickly dismissed as frivolous or otherwise improper. This general criticism, however, can be levied against any statute containing language open for interpretation, including the Prisoner Litigation Reform Act (PLRA) itself. For instance, the PLRA's screening provision states that a prisoner complaint should be dismissed upon initial screening if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted."[287] This standard, which requires a judge to decide which complaints are "frivolous," "malicious," or both, clearly allows room for a screening judge to exercise considerable discretion. Despite this ambiguity, however, all indications are that the PLRA has been successful in decreasing prisoner filings in federal court.[288]

Further, the fact that judges would have to spend valuable time and resources to screen habeas petitions in order to determine whether a petition meets the criteria of this proposed rule is no different from what judges must do under existing law. Currently, even in jurisdictions such as the Eleventh Circuit where such petitions are not allowed,[289] prisoners can, and very frequently do, file improper habeas petitions in federal court.[290] Those petitions have to be screened by a judge—or by a three-judge panel of the court of appeals under § 2244(b)—before they are dismissed.[291] Accordingly, it is unlikely that applying the proposed rule would result in a significant increase in a judge's screening duties.

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*Gilbert*, 640 F.3d at 1300, 1301 (indicating that Gilbert was sentenced to 292 months imprisonment in 1997 and filed his second § 2255 motion in 2009).

287. 28 U.S.C. § 1915A(b) (2006).

288. *See* Johnson v. Daley, 339 F.3d 582, 595 (7th Cir. 2003) (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 (2003)) (noting that, in 1995, the year before the PLRA was enacted, "prisoners filed 39,008 federal civil-rights suits, or 24.6 suits per 1,000 inmates" and that, "[i]n 2001, they filed 22,206 such suits, at a rate of 11.4 per 1,000 inmates"); PRISONER PETITIONS, *supra* note 262, at 1 (noting that, since enactment of the PLRA, the number of prisoner filings in district court has decreased); STATISTICS DIV., *supra* note 269, at 11 (noting that prisoner filings have been "markedly reduced" by the PLRA).

289. *See Gilbert*, 640 F.3d at 1323.

290. *See* STATISTICS DIV., *supra* note 269, at 11.

291. Both the Rules Governing Section 2254 Cases and § 2243 provide for the judicial screening of post-conviction relief petitions and motions. *See* 28 U.S.C. § 2243 (2006); HABEAS RULES, *supra* note 280, Rule 4; *see also* 28 U.S.C. § 2244(b) (2006) (requiring a three-judge panel of the court of appeals to authorize the filing of a second or successive application).

## V. CONCLUSION

As the Eleventh Circuit's decision in *Gilbert* illustrates, there exists a very real and contentious debate regarding the availability of post-conviction relief to a prisoner who has already filed a § 2255 motion, but, after that motion is decided, a retroactively applicable change in the law renders that prisoner's sentence incorrect. One side of the debate, illustrated by the *Gilbert* majority, argues that allowing a prisoner in such a situation to skirt the AEDPA's restrictions on second or successive motions would have a "finality-busting effect[]," [292] and lead to habeas abuse and unnecessary delay. The other side, illustrated by the *Gilbert* dissenters, raises constitutional concerns—specifically, that denying a prisoner in such a situation any relief amounts to a violation of Article I's Suspension Clause, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments.

Despite the often sharp rhetoric from both sides of the debate, this Article has proposed a narrowly tailored middle-ground approach. Under that approach, a subsequent habeas petition would not be allowed through unless a screening judge determined, from the face of the petition, that there exists a substantial likelihood that the petitioner's sentence would have been significantly shorter in light of a retroactively applicable subsequent change in the law. Further, under this proposed approach, a petition would not be allowed through unless it was clear that the requested relief would make an actual impact on the amount of time remaining on the petitioner's sentence. Finally, a petition would be dismissed at the screening stage if the screening judge determined that the petitioner could have raised the sentencing argument in his initial § 2255 motion but failed to do so. If all of these requirements are established, however, the petitioner would be allowed to file a habeas petition by way of § 2255(e)'s savings clause. This narrowly tailored approach would prevent a flood of post-conviction relief litigation while also avoiding the constitutional concerns that have arisen.

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292. *Gilbert*, 640 F.3d at 1309.

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