No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

MARTIN G. LEWIS,

Petitioner,

v.

DEWAYNE HENDRIX,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2255(e), habeas corpus petitioners challenging the constitutional validity of federal convictions can obtain relief under 28 U.S.C. § 2241 if the remedy under 28 U.S.C. § 2255(a) was "inadequate or ineffective to test the legality of his detention." This case asks whether a petitioner has an adequate or effective shot at § 2255(a) relief when prior litigation was procedurally barred on grounds that the government later conceded was wrong. Mr. Lewis asserted that his prior federal conviction was invalid after *Burrage v. United States*, 571 U.S. 204 (2014). The government has conceded that *Burrage* is a substantive and retroactive decision in five Circuits, but successfully argued that the district court lacked jurisdiction over Mr. Lewis's § 2241 petition because prior claims had been barred on grounds of *Burrage*'s supposed non-retroactivity. The question presented is:

> Whether the government should be foreclosed from relying on prior litigation that it concedes incorrectly invoked a procedural bar to review on the merits to argue that the district court lacked habeas corpus jurisdiction because the petitioner had a prior adequate and effective opportunity to test the legality of his detention under 28 U.S.C. § 2255(e)?

PARTIES TO THE PROCEEDINGS

The petitioner, Martin Lewis, is a federal prisoner housed at the Federal Correctional Institution in Sheridan, Oregon. The respondent, DeWayne Hendrix, is the Warden of FCI Sheridan.

RELATED PROCEEDINGS

There are no related proceedings except a pending compassionate release motion under 18 U.S.C. § 3582(c)(1)(A)(i) in the case of *Lewis v. United States*, No. 00 Cr. 1118 (JSR) (S.D.N.Y. filed Sept. 24, 2020). The issue in that case only pertains to the sentence imposed, while this petition relates to the conviction itself.

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The petitioner, Martin G. Lewis, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 13, 2020.

Opinions Below

The United States District Court for the District of Oregon ordered the petitioner's habeas corpus petition dismissed in an unpublished order on December 20, 2018. Appendix 5. The Ninth Circuit affirmed the district court's dismissal in a memorandum opinion on

November 13, 2020. Appendix 1. The Ninth Circuit denied a timely petition for panel rehearing and rehearing en banc on January 22, 2021. Appendix 16.

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Statutory and Constitutional Provisions

The full text of 28 U.S.C. §§ 2241 (Power to grant the writ), 2244 (Finality of determination), and 2255 (Federal custody; remedies on motion attacking sentence) are set out in the Appendix. The most relevant parts of the statutes include the general habeas corpus power to grant the writ under § 2241:

> **(a)** Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * *
>
> **(c)** The writ of habeas corpus shall not extend to a prisoner unless—
>
> > **(1)** He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> >
> > **(2)** He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> >
> > **(3)** He is in custody in violation of the Constitution or laws or treaties of the United States; or

The statutory authority to bring a § 2255 motion provides the normal vehicle for constitutional challenges to the validity of federal convictions:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). However, the "escape hatch" or "savings clause" permits a § 2241 petition in lieu of a § 2255(a) motion when the remedy is "inadequate or ineffective to test the legality of his detention":

> 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).

The Suspension Clause of the Constitution guarantees that "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." U.S. Const. Art. 1, § 9. The Fifth Amendment's Due Process Clause, which incorporates the Fourteenth Amendment's protection against denial of "the equal protection of the laws," states that no person shall "be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. Amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954).

Summary Of Reasons For Granting A Writ Of Certiorari

According to the Solicitor General, an "entrenched conflict exists in the courts of appeals on whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation." *United States v. Wheeler*, No. 18-420, Pet. for Cert. at 23 (U.S. Oct. 3, 2018). The Ninth Circuit, and a majority of Circuits, have found that an intervening judicial opinion interpreting a statute can render earlier litigation "inadequate or ineffective," thereby allowing habeas corpus review of an otherwise defaulted claim under § 2255(e). But even among the majority of Circuits permitting review, the baseline of what constitutes an "unobstructed procedural shot" – under the Ninth Circuit's rubric – remains undefined.

The present case provides a clean vehicle for the Court to not only resolve the conflicts among the Circuits regarding the standard for determining whether earlier litigation was "inadequate or ineffective" under § 2255(e), but also to set a minimum standard addressing the recurring problem of the Executive Branch's adoption of inconsistent legal positions. This Court has expressed unease and provided limited remedies when the Executive Branch adopts inconsistent substantive legal arguments. But here, the Executive Branch obtained a *procedural* benefit, foreclosing habeas corpus relief based on prior litigation premised on the inconsistent substantive position.

Specifically, Mr. Lewis's initial pro se efforts to seek post-conviction relief were snuffed based on rulings that *Burrage* was not a retroactive substantive decision. In the Oregon district court, the government asserted those rulings foreclosed jurisdiction to

consider Mr. Lewis's *Burrage* claims, despite their inconsistency with the government's repeated concessions in at least five different Circuits that *Burrage* constituted a substantive and, therefore, retroactive decision.

Because Mr. Lewis has at all phases of the current litigation raised the Executive Branch's inconsistent positions on *Burrage* retroactivity, this case provides an excellent vehicle for review. The issue is exceptionally important because questions of § 2241 jurisdiction arise every time this Court provides a substantive interpretation of a federal criminal statute. The possible incarceration of a person whose conduct is not subject to the federal statute involves core liberty values, and the denial of a habeas corpus as a forum, or any forum for review, implicates both the suspension of the writ of habeas corpus and the guarantee that liberty will not be denied without due process of law.

The Court should grant the writ of certiorari and order full briefing on the merits. In the alternative, the Court should grant the writ, vacate the Ninth Circuit's ruling, and remand for the lower court to expressly address the Executive Branch's adoption of inconsistent position on the substantive issue, which resulted in a procedural windfall for the government.

Statement Of The Case

A. Initial Conviction And This Court's Intervening Authority In *Burrage*

In 2002, Mr. Lewis was convicted after jury trial of conspiracy to commit murder in aid of racketeering, murder in aid of racketeering, and use of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c), 1959(a)(1) and (2), and 1959(a)(5). The

government asserted that Mr. Lewis was a member of a criminal organization and, for a price, shot another gang member in the head, torso, and arm. At trial, consistent with circuit precedent at the time, neither the indictment nor the jury instructions required that Mr. Lewis's actions be proven as the but-for cause of the death of the deceased. The trial court excluded evidence and argument that the death resulted from intervening malpractice during intubation at the hospital rather than the non-fatal shooting.

On January 27, 2014, this Court issued its opinion in *Burrage v. United States*, 571 U.S. 204 (2014), reversing a conviction for death resulting from a drug transaction under 21 U.S.C. § 841(b)(1)(C). The Court in *Burrage* rejected the government's "contributes-to" theory of causation, holding that the government bore the burden to prove "but-for" causation for the death. 571 U.S. at 210-18. The Court based its reasoning on the common law as well as the need for certainty in criminal statutes on questions of causation. *Id.*

B. Pro Se Efforts At Review Rejected Based On Non-Retroactivity Of *Burrage*

Following *Burrage*, Mr. Lewis sought to establish that he was actually innocent of the murder charge because, while he contributed to the victim's death, he was not its "but-for" cause. Mr. Lewis twice applied in the Second Circuit for authorization to file a second or successive § 2255 motion. The Second Circuit denied relief, holding that *Burrage* was not a new rule of constitutional law that applied retroactively, citing as authority the non-retroactive decision of *Alleyne v. United States*, 570 U.S. 99 (2013). In any event, the

statute on second or successive claims for relief on its face does not apply to intervening changes in statutory law. 28 U.S.C. § 2244(d)(1).

Mr. Lewis next filed a § 2241 petition in the Middle District of Florida, where he was then confined. The Florida district court summarily denied relief based on the Second Circuit's determination that *Burrage* was not retroactive: "As noted in the Second Circuit's April 25, 2016, Order denying Petitioner's motion for leave to file a successive 28 U.S.C. § 2255 motion, *Burrage* did not announce a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review." *Lewis v. Salazar*, No. 19-35018, Docket No. 26, at 101 n.2 (9th Cir. 2020) (excerpts of record). The Florida district court certified that Mr. Lewis's appeal "is not taken in good faith" and directed the request to proceed in forma pauperis to the Eleventh Circuit. The Eleventh Circuit then adopted the district court's view that the change in case law applied prospectively only, deeming the appeal frivolous, denying in forma pauperis authorization, and dismissing the appeal for lack of prosecution.

On June 21, 2018, Mr. Lewis, now a prisoner in the District of Oregon, filed a pro se petition for a writ of habeas corpus under § 2241 asserting that his convictions and life sentence were invalid due to the retroactive effect of *Burrage*. *Lewis*, *supra*, Docket No. 26, at 80. In the pro se petition, he asserted that the jury was not permitted to determine whether he was the cause of the victim's death: the trial court did not require the government to establish but-for causation when the shots were not fatal; and the death actually resulted from the treating doctor's improper intubation of the victim. *Id.* at 89.

Mr. Lewis's petition relied on three sources to establish that his actions could not have been found beyond a reasonable doubt to have been the but-for cause of death. First, Mr. Lewis asserted that the trial testimony established that, upon arrival at the hospital, "the victim was expected to survive the gunshot wounds because none of the bullets had hit any vital areas in the body." *Lewis*, *supra*, Docket No. 26, at 90. He arrived alive and conscious, spoke to a detective, opened his eyes, and moved around. *Id.* The physician attending to the victim advised the detective that the victim was not going to die. *Id.* The victim was expected not only to survive but to be released from the hospital in a reasonable time. *Id.* at 91.

Second, Mr. Lewis's petition stated that the trial court excluded expert testimony from a medical examiner regarding the cause of death from improper intubation. *Lewis*, *supra*, Docket No. 26, at 91. Mr. Lewis's defense team attempted to raise a reasonable doubt regarding causation, arguing the improper intubation as the sole intervening cause of death. *Id.* at 31-32, 91, 106-07. The proffer for the defense included that the intubation was not medically necessary and that "the expert would require that he would list gunshot wounds as one of the causes [of death], albeit further down the list of causes. He would label the primary cause as pneumopericardia [from the intubation.]" *Id.* at 107. The trial court excluded the proffered expert evidence, citing New York state law on causation. *Id.* 91-92, 107-108.

Third, the petitioner submitted extrinsic evidence regarding the intubating doctor's record of malpractice. *Lewis*, *supra*, Docket No. 26, at 40-41, 46-58. He argued that the

doctor's record of improper medical procedures and subsequent bar from medical practice supported his inference that, while the shots contributed to the death, they were not the but-for cause. He asserted that, "But-For the improperly performed precautionary intubation procedure by a doctor who has since been stripped of his license to practice medicine[,]" the decedent would have survived. *Id.* at 40-41.

Under the dismissal standard, the facts and inferences alleged in the petition are viewed as true in determining whether they plausibly suggest an entitlement to relief.

C. The Government's Inconsistent Positions, Arguing Non-Retroactivity As To Mr. Lewis.

In the Oregon district court, the government moved to dismiss for want of jurisdiction, claiming the case did not fall within the "escape hatch" of § 2255(e) and therefore not cognizable under § 2241. *Lewis*, *supra*, at 60-61. Although Mr. Lewis noted the government concessions regarding *Burrage*'s retroactivity, the district court ruled the prior proceedings governed. *Id.* at 41. Despite finding that the defendant "had no opportunity to present his *Burrage* claim during either direct appeal or his first 28 U.S.C. § 2255 motion," the district court dismissed the motion for lack of jurisdiction because the defendant had presented "precisely this claim" in his earlier second and successive § 2255 applications in the Second Circuit and in his § 2241 petition in the Middle District of Florida. Appendix 12-13. Although the decisions regarding Mr. Lewis' earlier petitions were predicated on the procedural bar of non-retroactivity, an issue that the court did not

reach, the district court concluded that Mr. Lewis had failed to demonstrate lack of an unobstructed procedural shot under the Ninth Circuit's § 2255(e) standard. *Id.* at 13-14.

Mr. Lewis appealed the court's ruling to the Ninth Circuit, where he received appointed counsel for the first time in his post-*Burrage* efforts. He argued that the district court's dismissal directly contradicted the Ninth Circuit's ruling in *Alaimalo v. United States*, in which the court held that a § 2241 petition cannot be barred as successive as long as a change in the law occurred "after [the defendant] exhausted his direct appeal and first § 2255 motion" and as long as the abuse of the writ doctrine is not implicated. 645 F.3d 1042, 1047, 1049 (9th Cir. 2011). Mr. Lewis also asserted that his prior litigation should not bar merits review because the claims were not heard due to erroneous procedural rulings on retroactivity that were inconsistent with government concessions in other jurisdictions. *Lewis*, *supra*, Docket No. 25 at 12-13, 26-28; Docket No. 38 at 6-9.

The government's answering brief argued that the previous litigation in the Second and Eleventh Circuits, which culminated in rulings based on the non-retroactivity of *Burrage*, foreclosed jurisdiction over the petitioner's claims. *Lewis*, *supra*, Docket No. 30 at 12-13. The government did not adopt its prior concessions that *Burrage* is retroactive. Instead, it supported its earlier reliance on the Second and Eleventh Circuits by citing an unpublished Third Circuit case finding *Burrage* was not retroactive as well as *Alleyne*, the case relied upon by the Second Circuit to find *Burrage* did not apply retroactively. *Id.*

But two days before oral argument, the government submitted a letter to "clarify" its position, conceding: "*Burrage* is retroactive to cases involving 21 U.S.C. § 841's

'results from' sentencing enhancement." *Lewis*, *supra*, Docket No. 43 at 1. Despite the concession, the government continued to argue that *Burrage* did not apply retroactively in the context of Mr. Lewis's case because it asserted *Burrage* was limited to convictions under the Controlled Substances Act. *Id.*

Without reaching the merits, the Ninth Circuit affirmed the district court's dismissal for lack of jurisdiction. The court held that Mr. Lewis already had an adequate opportunity to present his *Burrage* claims in the Second and Eleventh Circuits:

> The district court reasoned that while Lewis did not have an opportunity to present his claim that *Burrage* has retroactive effect during his direct appeal or his first § 2255 motion, he had already presented the claim in two separate motions for leave to file a successive § 2255 motion in the Second Circuit and in another § 2241 habeas action in the Eleventh Circuit.
>
> Because Lewis has already had multiple opportunities to bring his *Burrage* claim, he cannot show that his remedy under § 2255 is inadequate or ineffective to test the legality of his detention. The district court was correct to dismiss Lewis's petition for want of jurisdiction.

Appendix 4. The court said nothing regarding the inconsistent positions taken by the government regarding retroactive application of *Burrage*.

Mr. Lewis petitioned for panel rehearing and rehearing en banc because the court failed to address the government's procedural advantage from inconsistent positions. *Lewis*, *supra*, Docket No. 48. Mr. Lewis asserted the government's inconsistent positions rendered the prior efforts at review "inadequate or ineffective under § 2255(e). On January 22, 2021, the Ninth Circuit denied rehearing. Appendix 16.

Reasons For Granting The Petition

I. In The Context Of The Courts Of Appeals' Deep Split Over The Scope Of The 28 U.S.C. § 2255(e), The Court Should Set A Minimum Standard That The Government's Adoption Of Inconsistent Legal Positions Can Render Previous Potential Remedies "Inadequate Or Ineffective."

Numerous courts of appeals and judges have acknowledged the Circuit split regarding the scope of § 2241 jurisdiction under the escape hatch in § 2255(e). *See, e.g., Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013) ("There is a deep and mature circuit split on the reach of the savings clause."), *overruled by McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc); *Wright v. Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar, J., concurring) (urging this Court to "step in," sooner rather than later, because "[t]he circuits are already split"); *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179 (3d Cir. 2017) ("Nine of our sister circuits agree, though based on widely divergent rationales, that the saving clause permits a prisoner to challenge his detention when a change in statutory interpretation raises the potential that he was convicted of conduct that the law does not make criminal."); *see generally* Brian R. Means, *Federal Habeas Manual* § 1:29, Westlaw (2020) (describing split). The Solicitor General has recognized the disarray and sought this Court's intervention. *Wheeler*, *supra*, Pet. for Cert. at 12-13. This Court should resolve the conflicting opinions by stating a clear and uniform standard allowing review where a change in law creates the potential that an incarcerated person is actually innocent.

A. The Circuit Conflict On The Scope Of § 2255(e) Implicates The Executive Branch's Procedural Advantage From Taking Inconsistent Substantive Positions On The Law.

As this Court has acknowledged, "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens." *Bradshaw v. Stumpf*, 545 U.S. 175, 189 (2005) (Souter, J., concurring) (quoting *Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995)); *see Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 175 (1996) ("[P]ostlitigation interpretations may be the product of unfair or manipulative Government litigating strategies, and we therefore view late changes of position by the Government with some skepticism."). Justice Scalia discouraged the Court from reflexive deference to inconsistent positions adopted by the government. *See Stutson v. United States,* 516 U.S. 163, 188-89 (1996) (Scalia, J., dissenting) (urging the Court to consider whether "deference should be accorded to a certiorari-stage switch of litigation position" in order to prevent the government from "alter[ing] the playing field on appeal" by way of a "bait-and-switch performance."); *Dep't of Interior v. S. Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting) (same).

In the present case, the government successfully argued that earlier cases based on the non-retroactivity of *Burrage* foreclosed relief for Mr. Lewis. In contrast, in published opinions, the government has conceded that *Burrage* is a substantive decision that applies retroactively:

- "The Warden's position makes our decision easy. He concedes that if applicable in the Guidelines context, *Burrage* would apply retroactively on collateral review." *Young v. Antonelli*, 982 F.3d 914, 918 (4th Cir. 2020).

- "It is also clear that *Burrage* is retroactive, as the Government commendably concedes." *Harrington v. Ormond*, 900 F.3d 246, 249 (6th Cir. 2018).

- "[The government] contends that even if *Burrage* is retroactively applicable, *Santillana* cannot meet her burden to show that "[she] may have been convicted of a nonexistent offense. . . .We disagree." *Santilla v. Upton*, 846 F.3d 779 (5th Cir. 2017).

- "The government agrees, conceding that *Burrage* is substantive because it defines an essential element of a federal crime in a way that creates the risk that individuals convicted before the *Burrage* decision were improperly convicted of that offense—or in this case, improperly subjected to the sentence mandated for that offense." *Krieger v. United States*, 842 F.3d 490 (7th Cir. 2016).

- "[T]he government conceded it could not prove but-for causation and *Burrage* applies retroactively, . . ." *Ragland v. United States*, 784 F.3d 1213, 1214 (8th Cir. 2015).

The government's inconsistent positions within the present litigation and with positions taken in other Circuits should result in a remand 1) to require that the government's concession on appeal be addressed in the first instance in the district court, and 2) to establish that Mr. Lewis's § 2241 petition is not barred by earlier denials of his § 2255 motions, which resulted from the government's unfair procedural advantage and were thus "inadequate or ineffective to test the legality of his detention" for purposes of the savings clause. 28 U.S.C. § 2255(e).

To be clear: the petitioner does not assert that the government is bound by the prior inconsistent positions on substantive questions of law. There may be governmental justifications articulated to the Court that would permit the government to take different merits positions. For example, the Executive Branch has authority to abandon a legal

position asserted by a previous Administration. Although inconsistent, the consequence of an election falls within the prerogatives of the Executive Branch, limited by concepts such as judicial estoppel. But this Court should establish a clear rule that, when the government adopts inconsistent litigation positions, the government cannot take procedural advantage of its inconsistent positions to bar a full and fair hearing on the merits of a criminal defendant's claims.

Here, the courts hearing Mr. Lewis's earlier *Burrage* claims incorrectly concluded that merits review was procedurally barred by the supposed non-retroactivity of *Burrage* to any case. Despite the fact that those opinions were contrary to the government's own concessions, the government nonetheless invoked them to argue that Mr. Lewis had already had his chance in court. But due to the erroneous premise that *Burrage* was a procedural opinion that is not retroactive, the courts never heard the merits of Mr. Lewis's argument that *Burrage*'s retroactive effect includes its reasoning on causation, not only its narrow holding. The Court should assure that the government disgorges the procedural benefits of its inconsistent positions and hold that a defendant has not received an adequate and effective means to test the legality of his detention when prior litigation is procedurally barred on grounds the government concedes is wrong.

This case provides an appropriate vehicle for this Court to resolve inconsistencies amongst the various Circuits' interpretations of § 2255(e) because its resolution requires this Court to establish a generally applicable standard under the escape hatch. In other words, Mr. Lewis's claim squarely presents this Court with an opportunity to resolve the

disarray among the courts of appeal by setting forth a clear standard by which courts may determine whether a claim under § 2241 may proceed to the merits by way of § 2255(e).

B. The Majority Of Circuits Allow Saving Clause Petitions That Raise Claims Previously Barred By Circuit Precedent That Have Since Been Overruled.

Nine courts of appeals permit saving clause petitions, at least under some circumstances, when circuit precedent at the time of the petitioner's original § 2255 motion precluded the petitioner's claim, but that precedent has since been overruled. Although these nine Circuits agree on the concept, they articulate the standard differently:

- *United States v. Barrett*, 178 F.3d 34, 51-52 (1st Cir. 1999);
- *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997);
- *In re Dorsainvil*, 119 F.3d 245, 247-48, 251 (3d Cir. 1997);
- *United States v. Wheeler*, 886 F.3d 415, 434 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1318 (2019);
- *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001);
- *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003);
- *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998);
- *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011);
- *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002);
- *Abdullah v. Hedrick*, 392 F.3d 957, 963 (8th Cir. 2004).

As the Government recently put it, these circuits "generally require [] a prisoner to demonstrate a 'material change in the applicable law' since his initial Section 2255 motion that undermines his conviction—for example, by indicating that his conduct was not in fact

a crime on a ground that previously was foreclosed by controlling precedent." *Hueso v. Barnhart*, No. 19-1365, Brief in Opposition at 17 (U.S. Sept. 11, 2020).

Although each of the Circuits articulates its test in its own ways, the basis for retroactivity is that new interpretations of law reflect meaning from enactment. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). The Second Circuit has stated that its test is "similar" to the rules applied by other courts; the Third Circuit has highlighted the "common theme" uniting the approaches; and the Ninth Circuit has described its rule as being shared by "many of our sister circuits." *Cephas v. Nash*, 328 F.3d 98, 104 n.6 (2d Cir. 2003); *United States v. Brooks*, 230 F.3d 643, 648 (3d Cir. 2000); *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (aligning Ninth Circuit rule with rules in Second, Third, Fourth, Fifth, Seventh, Eighth, and, at the time, Eleventh Circuits). The Ninth Circuit general statement of the rule in *Alaimalo* is correct and should be adopted.

C. Two Courts Of Appeals Take The Opposite Position.

The Tenth and Eleventh Circuits stand in stark contrast to the majority view. These courts hold that, even when binding circuit precedent foreclosed a claim, and even if the prisoner is actually innocent of the crime for which he is imprisoned as a result of that precedent being overruled, § 2255 is not "inadequate or ineffective" to test the legality of detention as required to invoke the saving clause as long as the petitioner was technically allowed to raise that certain-to-lose claim in a first § 2255 motion.

The Tenth Circuit in a split decision found "that the plain language of § 2255 means what it says and says what it means: a prisoner can proceed to § 2241 only if his initial § 2255 motion was itself inadequate or ineffective to the task of providing the petitioner with a chance to test his sentence or conviction." *Prost v. Anderson*, 636 F.3d 578, 587 (10th Cir. 2011). In so holding, the court rejected the "novelty" test, under which the saving clause is open when a legal argument had not been "in circulation at the time of his first § 2255 motion," as well as the "erroneous circuit foreclosure" test allowing saving clause petitions when the circuit law at the time of the initial motion plainly foreclosed the claim. *Id.* at 589-93. Instead, the court held that the saving clause only reaches cases in which a petitioner physically cannot file the § 2255 motion; for example, where the sentencing court has been "abolished" or "literally dissolve[d]." *Id.* at 588. Therefore, as long as a petitioner could have raised even a doomed-to-fail claim in a § 2255 petition, the Tenth Circuit bars relief. As with the *Prost* panel decision, the order denying rehearing en banc in *Prost* was evenly divided. *Prost*, No. 08-1455, Order (10th Cir. May 26, 2011).

Before *Prost*, the Eleventh Circuit had sided with the majority view and permitted saving clause petitions based on intervening decisions of statutory interpretation. *See Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999), *overruled by McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc). But in *McCarthan*, the Eleventh Circuit overruled *Wofford*, relying in part on *Prost*. In a 6-5 splintered decision that generated six different opinions, the majority held that "a change

in caselaw does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention,' 28 U.S.C. § 2255(e)." 851 F.3d at 1080.

The Eleventh Circuit decisions are especially pertinent to this case because Mr. Lewis was double-jinxed in his earlier litigation. Not only did the Eleventh Circuit summarily deny his petition for habeas corpus relief by mischaracterizing *Burrage* as a procedural, rather than a substantive, decision, the court would not have entertained the petition in any event based on *McCarthan*. The differences in treatment depending on the irrational variable of place of custody demonstrates the need for national uniformity.

D. The Minority View Of The Scope Of The Escape Hatch Violates Core Protections Against Incarceration Beyond The Scope Of Legislative Enactments.

The Tenth and Eleventh Circuits' approaches are inconsistent with this Court's repeated view of actual innocence requiring a remedy. A defendant becomes "factually" innocent when intervening authority retroactively changes the relevant legal parameters for the statutory offense. *See Fiore v. White*, 531 U.S. 225, 228 (2001) (state cannot, consistently with the Due Process Clause, convict a defendant for conduct that its criminal statute, as properly interpreted, does not prohibit); *Bousley v. United States*, 523 U.S. 614, 622-23 (1998) (permitting review of claim to determine factual innocence based on intervening change in federal law). To the same extent, Congress has explicitly instructed that a citizen cannot be held in prison except pursuant to a valid criminal sentence. 18 U.S.C. § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

To comply with the Constitution's protection of the writ of habeas corpus, collateral remedies must be available to adequately and effectively test the legality of incarceration. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). The prisoner has the right to "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation of relevant law.'" *Boumediene v. Bush*, 553 U.S 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302(2001)). "Congress should 'not be presumed to have effected such denial of habeas relief absent an unmistakably clear statement to the contrary.'" *Boumediene*, 553 U.S. at 738 (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006)).

This Court has repeatedly noted the importance of an available remedy for an allegation of actual innocence. *See Holland v. Florida*, 560 U.S. 631, 648-49 (2010) ("The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting [Antiterrorism and Effective Death Penalty Act]'s statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open."). Actual innocence has been a core reason for the writ, which this Court has protected in interpreting the AEDPA. *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) (applying *Schlup v. Delo*, 513 U.S. 298 (1995), to the AEDPA statute of limitations); *see also Maples v. Thomas*, 565 U.S. 266, 289 (2012) (confirming that "'fundamental fairness [remains] the central concern of the writ of habeas corpus'") (quoting *Dretke v. Haley*, 541 U.S. 386, 393 (2004)).

E. This Court Should Grant Certiorari To Resolve The Circuit Conflict And Address The Government's Procedural Advantage From Taking Inconsistent Substantive Legal Positions.

Despite acknowledging the split and having asked the Court to resolve it in the past, the United States has repeatedly opposed certiorari in a number of subsequent cases, largely on two grounds: that the Court has apparently decided to tolerate the conflict; and that the case provides a poor vehicle for review. The first argument ignores this Court's primary consideration on petitions for writs of certiorari of the need to resolve conflicts among the courts of appeals. The second provides no barrier to granting certiorari here. The glaring circuit conflict should be left unresolved no longer, especially in a context where, by taking inconsistent legal positions, the government evaded § 2255(e) jurisdiction on the merits of the defendant's claim.

The subject of the conflict is exceptionally important. The individual stakes are enormous, with the answer to the question presented determining whether individuals who were wrongly convicted of inapplicable crimes will remain incarcerated or allowed their freedom (or at least a new trial). At the same time, the depth of the split demonstrates that the question is recurring. Indeed, this is the rare situation in which every regional court of appeals has weighed in on the question. The sheer number of petitions for certiorari raising the question further confirms the frequency with which the issue arises. Although not frequent, construction of federal criminal statutes is part of this Court's routine docket. *See, e.g., Rehaif v. United States*, 139 S. Ct. 2191 (2019); *Mathis v. United States*, 136 S. Ct.

2243 (2016); *hambers v. United States*, 555 U.S. 122 (2009); *United States v. Santos*, 553 U.S. 507 (2008); *Begay v. United States*, 553 U.S. 137 (2008).

The disarray and confusion over when and how to apply the saving clause leads to disparate treatment of similarly situated individuals. Take the case of the Bruce brothers. In *Bruce v. Warden Lewisburg USP*, 868 F.3d 170 (3d Cir. 2017), the Third Circuit explained how two brothers were convicted of the same federal offenses, but only one was permitted to file a saving clause petition under § 2255 (because he was imprisoned in the Third Circuit) while the other was not (because he was held in the Eleventh). *Id.* at 180-81. The court lamented the "disparate treatment" of the brothers and stressed that these "difficulties" are bound to "remain, at least until Congress or the Supreme Court speaks on the matter." *Id.*

As *Bruce* illustrates, this disparity in treatment is particularly irrational because the availability of the saving clause depends on the petitioner's place of confinement, not conviction. *See Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004) (§ 2241 petitions are ordinarily filed in the district of custody). Therefore, "the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets. A federal inmate in Tennessee can bring claims that would be thrown out were he assigned to neighboring Alabama. Like cases are not treated alike." *Wright*, 939 F.3d at 710 (Thapar, J., concurring).

The present case illustrates the unfair disparity in treatment based on the vagaries of geography. Under the Eleventh Circuit's current law, Mr. Lewis had no basis for "escape hatch" jurisdiction under § 2255(e), while in the Ninth Circuit, he met the "escape hatch"

standard for consideration of his claims. But because he had been denied relief on procedural grounds in the Eleventh Circuit, the Ninth Circuit refused to consider his claims. The government, by capitalizing on a dismissal resulting from an inconsistent substantive legal position, foreclosed any merits review from ever occurring.

Prominent jurists have called for resolution of the conflict. For example, then-Judge Barrett, describing the state of affairs in the Seventh Circuit, commented that "the complexity of our cases in this area is 'staggering.' We have stated the 'saving clause' test in so many different ways that it is hard to identify exactly what it requires." *Chazen v. Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring). Similarly, Judge Thapar urged this Court to "step in" sooner rather than later because "[t]he circuits are already split. The rift is unlikely to close on its own." *Wright*, 939 F.3d at 710 (Thapar, J., concurring). Dissenting from denial of rehearing en banc in *Wheeler*, Judge Agee described the question presented as one of "significant national importance" that was "best considered by the Supreme Court at the earliest possible date." *United States v. Wheeler*, 734 F. App'x 892, 893 (4th Cir. 2018). The Court should heed those pleas and resolve this persistent and untenable conflict.

F. This Case Presents An Appropriate Vehicle For Resolving The Conflict.

This case presents the Court an appropriate vehicle for finally resolving the mature circuit conflict by articulating the scope of the escape hatch under § 2255(e). Mr. Lewis relied on the escape hatch to make a claim of actual innocence under this Court's opinion in *Burrage*, which represented a change in substantive law that occurred after Mr. Lewis

had already exhausted his initial appeal and first § 2255 motion. Nevertheless, the Ninth Circuit concluded that Mr. Lewis failed to meet the requirements of § 2255(e) because he had raised his *Burrage* claim in previous post-conviction litigation in the Second and Eleventh Circuits, notwithstanding that those courts erroneously found *Burrage* non-retroactive, counter to the government's concessions, and rejected the claim without ever reaching its merits.

The Government's adoption of inconsistent substantive legal positions resulted in an unwarranted and unfair procedural advantage. By adopting the Government's position on the previous litigation, the district court never reached the merits of Mr. Lewis's claims, instead dismissing on jurisdictional grounds. In adopting a uniform construction of § 2255(e), the Court should both clarify that the doors to the courthouse are open where retroactive substantive constructions of statutes create questions regarding factual innocence, and foreclose the government from asserting that, based on its inconsistent legal positions, earlier litigation provided an adequate and effective forum for determining the validity of a conviction.

Conclusion

For the foregoing reasons, the Court should grant a writ of certiorari for full briefing and review, or, in the alternative, grant the writ, vacate the judgment below, and remand for consideration based on the government's unwarranted procedural advantage from inconsistent legal positions.

Dated this 22nd day of April, 2021.

Stephen R. Sady
Attorney for Petitioner

NOT FOR PUBLICATION

FILED

NOV 13 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN G. LEWIS, Petitioner-Appellant, v. JOSIAS SALAZAR, Respondent-Appellee.	No. 19-35018 D.C. No. 3:18-cv-01091-SI MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted September 2, 2020
Seattle, Washington

Before: HAWKINS and McKEOWN, Circuit Judges, and KENDALL,** District Judge.

Petitioner Martin G. Lewis appeals the district court's decision denying his 28 U.S.C. § 2241 habeas petition for want of jurisdiction. The parties are familiar with the facts, so we do not repeat them here. Jurisdiction over petitioner's appeal

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

is conferred by 28 U.S.C. §§ 1291 and 2253. The Court reviews the dismissal of a habeas corpus petition de novo. *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003). The Court also reviews de novo whether a district court has jurisdiction over a § 2241 petition. *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006). We affirm.

A federal prisoner who wishes to challenge the legality of his federal conviction or sentence generally must do so by way of a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. *Harrison v. Ollison*, 519 F.3d 952, 954 (9th Cir. 2008). Only the sentencing court has jurisdiction in a § 2255 case. *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) (per curium). A prisoner challenging the manner, location, or conditions of that sentence's execution must bring a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the district where the petitioner is in custody. *Id*.

Despite the limitations, an exception exists by which a federal prisoner may seek relief under § 2241, referred to as the "savings clause" or "escape hatch" of § 2255. *Harrison*, 519 F.3d at 956. "[I]f, and only if, the remedy under § 2255 is 'inadequate or ineffective to test the legality of his detention'" may a prisoner proceed under § 2241. *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012) (quoting *Stephens*, 464 F.3d at 897). We have recognized that it is a narrow exception. *Ivy*, 328 F.3d at 1059. The exception will not apply merely because

§ 2255's gatekeeping provisions, such as the statute of limitations or the limitation on successive petitions, now prevent the courts from considering a § 2255 motion. *Id.*

We have held that § 2255 provides an "inadequate or ineffective" remedy, allowing a petitioner to proceed under § 2241, when the petitioner: "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Harrison*, 519 F.3d at 959 (quoting *Stephens*, 464 F.3d at 898); *accord Marrero*, 682 F.3d at 1192.

Lewis believes the district court erred when it concluded that he had an adequate procedural opportunity to present his claim that *Burrage v. United States*, 571 U.S. 204 (2014), has retroactive effect on the grounds that he raised it in two other courts after his first § 2255 motion. Lewis argues this is reversible error under *Alaimalo v. United States*, 645 F.3d 1042 (9th Cir. 2011). According to Lewis, the correct timeframe under the inadequate or ineffective remedy framework stops at the time he exhausted his first § 2255 motion because later proceedings were "incorrectly barred on procedural grounds."

Alaimalo explains that in determining whether the petitioner had an adequate procedural opportunity, the court considers: "(1) whether the legal basis for petitioner's claim did not arise until after he had exhausted his direct appeal and first § 2255 motion; and (2) whether the law changed in any way relevant to petitioner's

claim after that first § 2255 motion." 645 F.3d at 1047 (citing *Harrison*, 519 F.3d at 960). The district court reasoned that while Lewis did not have an opportunity to present his claim that *Burrage* has retroactive effect during his direct appeal or his first § 2255 motion, he had already presented the claim in two separate motions for leave to file a successive § 2255 motion in the Second Circuit and in another § 2241 habeas action in the Eleventh Circuit.

Because Lewis has already had multiple opportunities to bring his *Burrage* claim, he cannot show that his remedy under § 2255 is inadequate or ineffective to test the legality of his detention. The district court was correct to dismiss Lewis's petition for want of jurisdiction.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MARTIN G. LEWIS,

Petitioner,

v.

WARDEN SALAZAR,

Respondent.

Case No. 3:18-cv-01091-SI

ORDER TO DISMISS

SIMON, District Judge.

This 28 U.S.C. § 2241 habeas corpus case comes before the Court on Respondent's Motion to Dismiss for Want of Jurisdiction (#10). For the reasons that follow, the Motion is granted.

BACKGROUND

According to the case presented by the Government, Petitioner was a member of a criminal organization in New York when, in 2002, a fellow member paid him $10,000 to murder Joseph Conigliaro. Petitioner shot Conigliaro twice in the head, once

in the neck, and four times in the torso.[1] Conigliaro was still conscious when he was admitted to the hospital, but died later that day. As a result, in 2002, Petitioner was charged with conspiracy to commit murder in aid of racketeering, murder in aid of racketeering, and use of a firearm during a crime of violence.

Petitioner proceeded to a jury trial where he sought to call a defense expert concerning the victim's cause of death. He wished to call his own pathologist to testify that Conigliaro died primarily as a result of his preexisting pneumopericardia, a medical condition whereby air enters the pericardium area around the heart. The defense expert theorized that when the medical team intubated Conigliaro, the intubation triggered his pneumopericardia and contributed to stopping his heart. The expert could not pinpoint a single cause of death, and was of the opinion that the victim died of a variety of causes.

The trial judge refused to allow the expert to testify, finding that "no reasonable juror could have reasonable doubt on the issue of causation." A jury convicted Petitioner of all charges, and the trial court sentenced him to life in prison.

[1] Although Petitioner disagrees with some of these characterizations, such as his affiliation with a crime family and the number of times he shot Conigliaro, such differences are not material to the Court's decision.

Petitioner took a direct appeal wherein he argued a claim of prosecutorial misconduct not relevant here. The Second Circuit affirmed the trial court's decision, but remanded the case for sentencing considerations in light of *United States v. Booker*, 543 U.S. 220 (2005). On remand, the District Court validated Petitioner's life sentence, and the Second Circuit subsequently affirmed that sentence.

On May 27, 2007, Petitioner filed a 28 U.S.C. § 2255 Motion in the Southern District of New York which the District Court dismissed on its merits on September 21, 2009. The Second Circuit denied Petitioner's request for a certificate of appealability and dismissed the appeal on July 9, 2013.

In 2014, the Supreme Court decided *Burrage v. United States*, 571 U.S. 204 (2014). In *Burrage*, the defendant sold heroin to the victim, a long-time drug user, who was on "an extended drug binge." *Id* at 206. The victim smoked marijuana, injected cooked oxycodone, then purchased, cooked and injected the heroin. The following morning, the victim died. A search of the victim's home yielded heroin, alprazolam, clonazepam, oxycodone, hydrocodone, and other drugs.

The defendant in *Burrage* was convicted of distributing heroin that resulted in death, thereby subjecting him to a 20-year mandatory minimum sentence under the Controlled Substances

Act ("CSA"). The Supreme Court determined that the "death results" enhancement of the CSA was not appropriately applied and reasoned, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of [the CSA] unless such is a but-for cause of the death or injury." *Id* at 218-219.

On February 10, 2015, Petitioner asked the Second Circuit for leave to file a successive § 2255 motion. He argued that *Burrage* should apply retroactively and would enable him to establish his actual innocence because he did not cause Conigliaro's death. On March 19, 2015, the Second Circuit denied Petitioner's motion. It specifically determined that *Burrage* did not announce a new constitutional rule to be applied retroactively, and instead amounted to an application of *Alleyne v. United States*, 570 U.S. 99 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), neither of which apply retroactively. *Lewis v. United States*, 1:14-cv-010255-JSR (S.D.N.Y.), ECF No. 4.

On March 28, 2016, Petitioner filed another motion in the Second Circuit seeking leave to file a successive 28 U.S.C. § 2255 proceeding. This time, Petitioner reasoned that the Supreme Court's decision in *Montgomery v. Louisiana*, 136 S.Ct.

718 (2016),[2] compels the conclusion that *Burrage* applies retroactively to his case. One month later, the Second Circuit denied the motion, reiterating that *Burrage* involved an application of *Alleyne* and *Apprendi* and does not apply retroactively to cases on collateral review. *Lewis v. United States*, No. 16-935 (2d Cir. 2016) ECF #17.

On August 8, 2016, Petitioner filed a 28 U.S.C. § 2241 habeas corpus case in the Middle District of Florida, the place of his incarceration at that time. He once again argued that *Burrage* created a new constitutional right that applies retroactively to cases on collateral review and that, in light of *Burrage*, he is innocent of causing Conigliaro's death. The District Court for the Middle District of Florida found that Petitioner failed to demonstrate that § 2255 was an inadequate remedy and therefore dismissed the case for lack of jurisdiction. In doing so, it specifically concluded that neither *Burrage* nor any other pertinent Supreme Court or Eleventh Circuit decision applied retroactively to Petitioner's case. Petitioner's Exhibit A, p. 5.

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[2] In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id* at 465. On January 25, 2016, the Supreme Court concluded that it had announced a new, substantive rule of law in *Miller* that applied retroactively to cases on collateral review. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718, 736 (2016).

Petitioner appealed this decision, but the Eleventh Circuit found Petitioner's appeal to be frivolous and therefore denied him leave to proceed *in forma pauperis*. Like the District Court, it also determined that any change in caselaw following the conclusion of Petitioner's initial 28 U.S.C. § 2255 did not render § 2255 inadequate or ineffective to test the legality of his detention. *Lewis v. FCC Coleman Warden*, 5:16-cv-00508-WTH-PRL (M.D. Fl.), ECF No. 12.

Petitioner, now incarcerated at FCI-Sheridan, filed this new 28 U.S.C. § 2241 habeas corpus case on June 21, 2018 wherein he once again asserts that *Burrage* applies retroactively to his case. Respondent asks the Court to dismiss this case for lack of jurisdiction because 28 U.S.C. § 2241 is not Petitioner's appropriate remedy.

DISCUSSION

"A federal prisoner who seeks to challenge the legality of confinement must generally rely on a § 2255 motion to do so." *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012). However, under the "savings clause" or "escape hatch" of § 2255(e), a federal inmate may seek relief pursuant to 28 U.S.C. § 2241 "if, and only if, the remedy under § 2255 is 'inadequate or ineffective to test the legality of his detention.'" *Id* (citing *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006).

A petitioner satisfies the savings clause of § 2255(e) where he: "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (internal quotation marks omitted). The two factors to consider when assessing whether a petitioner had an unobstructed procedural opportunity to present his claim of innocence are: (1) whether the legal basis for petitioner's claim did not arise until the conclusion of his direct appeal and first 28 U.S.C. § 2255 motion; and (2) whether the applicable law changed in any relevant way after the conclusion of the petitioner's first § 2255 motion. *Harrison v. Ollison*, 519 F.3d 952, 960 (9th Cir. 2008).

Petitioner in this case asserts that in light of the *Burrage* decision, he can now establish that he is actually innocent because he that he did not cause Conigliaro's death. He further reasons that because *Burrage* was not decided until well after the conclusion of his direct appeal and initial 28 U.S.C. § 2255 motion, he never had an unobstructed procedural opportunity to present his claim of innocence. To support his

argument for *Burrage*'s retroactive application, he points to *Terry v. Shartle*, 2017 WL 2240970 (D. Ariz. May 23, 2017).[3]

In *Terry*, the defendant was convicted of distributing heroin resulting in the death of two individuals. The "death results" enhancement of the CSA subjected Terry to a 20-year mandatory minimum term, and increased the statutory maximum from 20 years to life imprisonment. *See* 21 U.S.C. § 841(b)(1)(c). After filing unsuccessful appeals, Terry filed a 28 U.S.C. § 2241 habeas petition in the District of Arizona wherein he argued that: (1) he was actually innocent of the "death results" sentencing enhancement by virtue of the reasoning in *Burrage*; and (2) *Burrage* applies retroactively to cases on collateral review. The District of Arizona noted that the Fifth and Seventh Circuits had both concluded that *Burrage* applies retroactively to cases on collateral review,[4] found the reasoning of those cases persuasive, and granted Terry habeas corpus relief.

While Petitioner in the case at bar had no opportunity to present his *Burrage* claim during either direct appeal or his first 28 U.S.C. § 2255 motion, he presented precisely the claim he makes here in another 28 U.S.C. § 2241 habeas action in the

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[3] This citation is to the underlying Report and Recommendation, which the District Judge adopted in 2017 WL 5151130 (D. Ariz. Nov. 7, 2017).

[4] *See Santillana v. Upton*, 846 F.3d 779, 783-84 (5th Cir. 2017); *Krieger v. United States*, 842 F.3d 490, 499-500 (7th Cir. 2016).

Middle District of Florida. That court found *Burrage* did not apply retroactively to Petitioner's case, and the Eleventh Circuit found the subsequent appeal to be frivolous. Petitioner also tested the viability of the claim when seeking leave to file a successive § 2255 motion in the Southern District of New York but, as detailed above, the Second Circuit twice assessed the arguments Petitioner makes here and specifically stated that *Burrage* does not apply retroactively.

Although courts have repeatedly provided Petitioner with results he finds disappointing, given the procedural history underlying this case it is difficult for him to come to this Court seeking to utilize the "escape hatch" of § 2255(e) on the basis that he has not yet had an unobstructed procedural opportunity to present his *Burrage* claim. In order to do so, he must demonstrate that there has been a "material change in the applicable law" governing his claim. *Harrison*, 519 F.3d at 960. Neither the Ninth Circuit nor the Supreme Court have held that *Burrage* applies retroactively to cases on collateral review. While the District of Arizona applied *Burrage* retroactively in the context of the CSA, that decision does not represent binding authority which would cause this Court to issue a decision directly contrary to the various courts which assessed the retroactivity issue in light of the particular facts of

Petitioner's case and resolved that issue adversely to Petitioner. To conclude otherwise leads to the result here: Petitioner continues to present the same claim, grounded in the same facts, to different courts residing in different circuits with the hopes of achieving an inconsistent result.

To be clear, this Court's decision need not and does not resolve whether *Burrage* announces a new rule that applies retroactively to cases on collateral review, an issue that remains open in the Ninth Circuit. Instead, in light of the particular procedural history of Petitioner's case, he fails to demonstrate that he has not had an unobstructed procedural opportunity to present his claim of innocence, and therefore he is unable to pass through the "escape hatch" of § 2255(e).

CONCLUSION

For the reasons identified above, Respondent's Motion to Dismiss (#10) is granted, and the Petition for Writ of Habeas Corpus (#1) is dismissed for lack of jurisdiction.

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Should Petitioner wish to appeal this result, the Court issues a Certificate of Appealability on the issues of: (1) whether Petitioner comes to this Court never having had an unobstructed procedural opportunity to present his *Burrage* claim; and (2) if so, whether *Burrage* applies retroactively to cases on collateral review.

IT IS SO ORDERED.

DATED this 20th day of December, 2018.

Michael H. Simon
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARTIN G. LEWIS, Petitioner-Appellant, v. JOSIAS SALAZAR, Respondent-Appellee.	No. 19-35018 D.C. No. 3:18-cv-01091-SI District of Oregon, Portland ORDER

Before: HAWKINS and McKEOWN, Circuit Judges, and KENDALL,* District Judge.

The panel votes to deny the petition for rehearing. Judge McKeown votes to deny the petition for rehearing en banc, and Judges Hawkins and Kendall so recommend. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

28 U.S.C. § 2241 (2006)

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless-

> **(1)** He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> **(2)** He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> **(3)** He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> **(4)** He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
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> **(5)** It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention,

transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, 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.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and

the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. § 2255 (2016)

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) 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.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

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