No. 21-332

IN THE

SUPREME COURT OF THE UNITED STATES

William A White — PETITIONER
(Your Name)

vs.

Daniel Sproul, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

William A White #13888-084
(Your Name)
United States Penitentiary -- Marion
PO Box 1000
(Address)

Marion, IL 62959
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

When, if ever, is relief available under 28 USC §2241 and 28 USC §2255(e), where a person stands convicted and remains in custody for a non-existant offense, in this case supposedly violating 18 USC §373, barring the solicitation of a violent felony, by soliciting obstruction of justice in violation of 18 USC §1503?

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LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.
[X] status of publication is unknown.

The opinion of the United States district court appears at Appendix C to the petition and is

[X] reported at 2020 US Dist LEXIS 226429 (SD Ill 2020)
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
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JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 15, 2021.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

1) This case involves a pure issue of law. No one disputes that the crime of which I am nominally convicted in the underlying criminal proceeding United States v White ND Ill Case No: 08-cr-851, namely violating 18 USC §373, "Solicitation to commit a crime of violence", by soliciting a violation of 18 USC §1503, "Influencing or injuring officer or juror generally", is not prohibited by an act of Congress, as 18 USC §1503 is not a "crime of violence." Until United States v Davis 139 S Ct 2319 (2019), the Seventh Circuit used a conduct approach to interpret the elements-clause-like language of 18 USC §1503; we know this because when the District Court dismissed the indictment for failure to state an offense, the Seventh Circuit re-instated the indictment using a conduct approach. But, while this false conviction has added 42 months directly and another 122 months indirectly to my federal sentence, the Seventh Circuit will not vacate because they believe that I could have raised this issue on direct or on 28 USC §2255, despite the fact that I did raise the issue, had the indictment dismissed, and, had them reinstate the indictment. As this is a very "clean" case, and, as this Court has never resolved the three way Circuit split in the interpretation of 28 USC §2255(e) and 28 USC §2241 post-AEDPA, I ask this Court to grant me certiorari and to clarify this confused area of the law.

Procedural And Factual Background

2) I was arrested October 17, 2008, in the underlying criminal matter, and, I was charged with soliciting a violent felony in violation of

18 USC §373, the violent felony being a violation of 18 USC §1503, the general obstruction of justice statute. The factual basis of the indictment was that I posted on an internet site the address, phone number, and, some limited personal information regarding Mark Hoffman, the jury foreman in United States v Hale ND Ill Case No: 03-cr-011. Not relevant here, my conviction was obtained by perjury suborned by the US Attorney's Office for the Northern District of Illinois, as discussed in greater detail United States v White MD Fl Case No: 13-cr-304 Doc 208-1.

3) The indictment in this matter was dismissed for failure to state an offense July 26, 2009. United States v White 638 F Supp 2d 935 (ND Ill 2009). The specific argument made was that my speech could not constitute a violent felony because it was Constitutionally protected. On June 28, 2010, the Seventh Circuit ordered the indictment reinstated on the basis that the government could satisfy the elements-clause-like language of 18 USC §373 by proving conduct that would constitute a "crime of violence", specifically:

> "The indictment ... charges White with having the intent for another person to injure Juror A and soliciting another person to do so ... The indictment properly charges a federal solicitation because injuring a juror for rendering a verdict is a federal offense under 18 USC §1503 ... We only look to see if an offense is sufficiently charged, and, on its face, the indictment adequately performs that function."

United States v White 610 F 3d 936 (7th Cir 2010).

To date, no one disputes that this ruling was incorrect and the indictment did not actually charge a federal offense.

4) Trial on the underlying criminal matter was January 3 to 5, 2011. I was convicted January 6, 2011.

5) On April 19, 2011, judgment of acquittal was entered pursuant to Fed. R.Crim.P. 29 on the basis that the United States had failed to prove that any conduct that I had solicited would have constituted a violent felony. United States v White 779 F Supp 778 (ND Ill 2011). On October 26, 2012, the Seventh Circuit again reinstated the conviction, finding that the government's evidence was sufficient to prove that whatever conduct I had solicited would have violated 18 USC §1503 by conduct that constituted a "crime of violence":

> "The underlying felony White allegedly solicited was to harm Juror A, which is prohibited by 18 USC §1503 ... So, to convict White of solicitation, the government had to prove beyond a reasonable doubt: (1) with 'strongly corroborative' circumstances that White intended for another person to harm Juror A; and, (2) that White solicited, commanded, induced, or otherwise tried to persuade that other person to carry out that crime ..."

United States v White 698 F 3d 1005 (7th Cir 2012).

6) On February 20, 2013, I was sentenced to 42 months imprisonment. Certiorari was denied April 2013. White v United States 133 S Ct 1740 (2013). Since that case was decided, my sentencing in two other matters, United States v White WD Va Case No: 13-cr-013 and United States v White MD Fl Case No: 13-cr-304, were each enhanced by one category, and, in the latter case, by an upward variance, adding a total of about 102 additional months to those sentences, based upon the conviction in the instant underlying offense. So, I have had my total sentence increased by about 144 months due to my conviction for this non-crime, from about 20 years imprisonment to 32 1/2 years imprisonment.

7) The first timely 28 USC §2255 motion in this matter alleged ineffective assistance of counsel in jury selection and in failure to present

mitigating evidence at sentencing; it was denied May 5, 2016. White v United States ND Ill Case No: 13-cv-9042. CoA was granted, the appeal was denied, and, a motion to recall the mandate based on an intervening decision of this Court was denied July 14, 2017.

8) A 28 USC §2241 motion to correct the sentencing calculation in this matter was settled favorably April 13, 2018. White v True SD Ill Case No: 17-cv-1262.

9) I have filed three post conviction motions predicated on the government's use of torture (see, eg, White v Berger 769 Fed Appx 784 (11th Cir 2017)):

   a) a pre-filing authorization ("PFA") motion denied by the Seventh Circuit February 9, 2017. In Re: White 7th Cir App No: 17-1143;

   b) a Fed.R.Civ.P. 60(b)(6) motion alleging ineffective assistance of counsel which I have asked to voluntarily dismiss in light of the FIRST STEP Act;

   c) an 18 USC §3582(c) motion filed September 30, 2019, which is counselled and remains pending.

10) I have filed two post-conviction motions alleging Brady violations which remain pending:

   a) a February 9, 2019, 28 USC §2255 motion, White v United States ND Ill Case No: 18-cv-5053; amd,

   b) essentially the same presented as a Fed.R.Civ.P. 60(d)(3) motion in the original 28 USC §2255 proceedings March 5, 2019.

11) I have filed two other post-conviction motions based on the fact that 18 USC §1503 does not define a crime of violence:

   a) a November 22, 2016, motion pursuant to 28 USC §2255 and 28 USC §1651, which I voluntarily dismissed in favor of the instant

motion after Davis (2019) was decided. White v United States ND Ill Case No: 16-cv-10950; and,

b) a PFA based on Sessions v Dimaya 138 S Ct 1204 (2018) which was denied by the Seventh Circuit May 17, 2018. In Re: White 7th Cir App No: 18-1899.

12) As Davis demands a new statutory interpretation of the elements-clause-like language of 18 USC §373 that makes me convicted of acts not prohibited by an Act of Congress, I filed the instant 28 USC §2241 proceeding October 21, 2019. Doc 1. The motion was dismissed December 3, 2020. Doc 15; White v Sproul 2020 US Dist LEXIS 226429 (SD Ill 2020).

13) Appeal was timely noted December 15, 2020. Doc 16. The District Court's order dismissing the habeas petition was affirmed June 15, 2021. In affirming the dismissal, the Seventh Circuit erroneously claimed that the conduct approach that they did in actuality apply in White (7th Cir 2010) was not a conduct approach, and, because my counsel could have used a different argument to obtain dismissal of the indictment, one that asked the Seventh Circuit to extend its 18 USC §924(c) case law to 18 USC §373, the ruling in White did not constitute law of the case that would have prohibited me from raising such a challenge on direct or 28 USC §2255. As the Seventh Circuit put it:

"In short, Davis did not change our application of the categorical approach to statutes containing elements-clause like language. So, White was previously free to raise an argument -- under Taylor [v United States 495 US 575 (1990)] -- that unlawfully influencing a juror is not categorically a crime of violence under §373 during his trial, direct appeal, or, first collateral attack. His failure

to do so does not render §2255 inadequate or ineffective. see, eg Liscano v Entzel F Appx 15 (7th Cir 2021)..."

14) As The Seventh Circuit's interpretation of 28 USC §2241 violates Congress' clear statutory command that:

"No citizen shall be imprisoned or detained by the United States except pursuant to an act of Congress."

18 USC §4001(a), enacted by the Repeal Of The Emergency Detention Act Of 1950, Sep 25, 1971, PL 92-128 §1(a), (b), 85 Stat 347; as well as the basic principles of justice, common law, and, the Constitution, I ask that this Court grant this write of certiorari to overrule the Seventh Circuit's interpretation of 28 USC §2255(e) and 28 USC §2241, and, find that a person imprisoned for acts that are not prohibited by an act of Congress is entitled to habeas relief regardless of any statutory or other procedural bar.

REASONS FOR GRANTING THE PETITION

I Stand Convicted Of An Act Not Made Criminal By Congress

15) 18 USC §373(a) states, in pertinent part, that:

"Whoever, with the intent that another person engage in conduct consituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United Sattes, and, under circumstances strongly corroborative of that intent, solicits, commands, induces, or, otherwise endeavors to persuade such other person to engage in such conduct shall be imprisoned ..."

This provision was enacted as part of the Comprehensive Crime Control Act of 1984, Oct 12, 1984, PL 98-473, 98 Stat 1976, 2138 §1003(a).

16) 18 USC §1503(a) provides, in pertinent part, that:

"Whoever corruptly or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or any officer of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property or on account of any verdict or indictment assented to by him, or on account of his having been such a juror, or injures any such officer, magistrate judge, or other committing magistrate in his

person or property on account of the performance of his official duties, or corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due administration of justice, shall be punished ..."

17) The Seventh Circuit held in United States v Alvarez 914 F 2d 915 (7th Cir 1990) that "in considering whether an offense is a crime of violence ... we must look to the underlying conduct as well as the elements of the offense as charged." United States v McNeal 900 F 2d 119 (7th Cir 1990) (for purposes of a sentencing enhancement); United States v Poff 926 F 2d 588 (7th Cir 1991) (expanding the conduct approach to statutory definitions of "crime of violence."); see also, United States v Chapple 942 F 2d 439 (7th Cir 1991) (Posner, dissent) (arguing against continuing the use of this approach). When this Court decided United States v Taylor 495 US 575 (1990), requiring that a categorical approach be used in the interpretation of 18 USC §924(c), the Seventh Circuit continued to use a conduct approach to interpret the phrase "crime of violence" and a "felony that has as an element the use, attempted use, or threatened use of physical force against property or or the person of another ..." and similar permutations of that phrase; it used a conduct approach to uphold the indictment in this matter for violating 18 USC §373 in White (7th Cir 2010).

18) In Davis (2019), however, this Court found no reason "why Congress would have wanted courts to take such dramatically different approaches to classifying offenses as crimes of violence in these provisions," and, as 18 USC §373 was, like 18 USC §924(c), enacted as part of the Comprehensive Crime Control Act of 1984, this Court's

ruling that the various sections of that statute should be constructed separately demands that the Seventh Circuit's interepretation of 18 USC §373(a) in White (7th Cir 2010) that allowed the underlying criminal matter here to proceed be abrogated. In short, the Seventh Circuit's interpetation of 18 USC §373 in a manner different from that which it interpreted 18 USC §924(c) and the term "crime of violence" was always wrong and the indictment in the underlying criminal matter here never stated an offense.

19) Rather than acknowledge their own ruling in White (7th Cir 2010), the Seventh Circuit proceeded in this matter as if they had never made a ruling that the indictment stated an offense and stated that my defense counsel, who successfully obtained dismissal of the indictment for failure to state an offense, should have made an argument for extending Taylor to 18 USC §373, and, that by failing to do so, and by my taking the Seventh Circuit at its word and not raising under 28 USC §2255 an issue that had already been decided, I have to be condemned to first spend twelve years in prison and three years on supervised release before I can obtain relief through writ of error coram nobis. see, eg, United States v Morgan 346 US 502 (1954); Chaidez v United States 568 US 342 (2012); Wall v Kholi 562 US 345 (2010). In other words, the Seventh Circuit believes that I'm in Lewis Carroll's Through The Looking Glass, where the punishment comes first and then, after my release, we can see if I go on to commit a crime that merits it.

20) Because 18 USC §1503 may be committed corruptly, it is not a "crime of violence." Because 18 USC §1503 is not a crime of violence, it is not a violation of 18 USC §373 to solicit someone to commit a violation of 18 USC §1503. Because it is not a crime to solicit

someone to violate 18 USC §1503, I am to be detained twelve years, give or take, for an act not prohibited by Congress, and, thus, in violation of 18 USC §4001(a) if not also the US Constitution.

Relief Pursuant To 28 USC §2255(e) And §2241 Is Available When A Person Stands Convicted Of An Act Not Prohibited By Congress

21) Since the passage of the Anti-Terrorism And Effective Death Penalty Act of 1996, April 24, 1996, PL 104-132, 110 Stat 1220, this Court has repeatedly found that conviction for acts not made criminal by Congress and other forms of actual innocence form an equitable exception to procedural bars for habeas relief. In Mcquiggins v Perkins 185 L Ed 2d 1019 (2013), this Court found that actual innocence overcomes the statutory statute of limitations for a state prisoner seeking relief under 28 USC §2254. In so doing, it noted that it had never decided if there was an equitable exception to the statute of limitations for claims of actual innocence or even if a free standing claim of actual innocence was available. McQuiggins citing Herrera v Collins 506 US 390 (1993). It then noted the long history of claims of actual innocence and convictions for acts not prohibited by Congress serving as gateways for consideration of otherwise defaulted habeas claims. McQuiggins citing Schlup v Delo 513 US 298 (1995), House v Bell 547 US 518 (2006), Sawyer v Whitley 505 US 333 (1992), Murray v Carrier 477 US 478 (1986), Kuhlmann v Wilson 477 US 436 (1986) (successive petitions), McClesky v Zant 499 US 467 (1991) (claims that were available in a first petition), at alia. This Court also found that "the miscarriage of justice exception ... survived AEDPA's passage." McQuiggins citing Calderon v Thompson 523 US 538 (1998), Bousley v United States 523 US 614 (1998) (failure to raise on direct review).

22) The dissent in McQuiggins argued that the "actual innocence" exception applied only to judicially-created doctrines and should not apply to procedural bars created by statute. McQuiggins, however, involved a state prisoner, and, Congress has never passed a statute barring the detention by the states of persons who are actually innocent or convicted of acts not made criminal by state law. This case, however, involves a federal prisoner, and, Congress has explicitly stated that it does not want persons detained federally except pursuant to an act of Congress. 18 USC §4001(a). The procedural default, too, in this case, involves the judicially created doctrine of In Re: Davenport 147 F 3d 605 (7th Cir 1998), and, not the text of the statutes 28 USC §2255(e) and 28 USC §2241. Thus, strict construction of 18 USC §4001(a), a backdrop against which the Anti-Terrorism And Effective Death Penalty Act of 1996 was passed and which was not repealed by Congress, suggests that while relief under 28 USC §2241 is available, the judicially-created procedural bar of Davenport should not apply to it. And, in fact, one justice of this Court has stated, pre-AEDPA, that 18 USC §2241 is the proper vehicle for enforcing claims under 18 USC §4001(a). Howe v Smith 452 US 473 (1981) (Stewart, dissent).

23) Simiarly, this Court has consistently rejected finality concerns where a person stands, as I do here, imprisoned "for an act that the law does not make criminal." Bousley

citing Davis v United States 417 US 333 (1974). In Welch v United States 136 S Ct 1257 (2016), this Court ruled that "where the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest. As Judge Harlan wrote, 'There is little societal interest in permitting the criminal process to end at a point where it ought pro-

properly never to repose." Mackay v United States 401 US 667 (1971). Justice Blackman, in his dissent in Herrera, argued that the Eighth Amendment, not suspension of the writ principles, required that a person convicted of a non-existant offense "must have recourse to the judicial system." As the Second Circuit stated in Triestman v United States 124 F 3d 361 (2nd Cir 1997), "in its pre-AEDPA 'abuse of the writ' cases, this Court repeatedly held that habeas and §2255 would remain available to all prisoners -- not just those facing execution -- even absent a showing of cause for failure to raise the issue at an earlier time, where the alleged error 'has probably resulted in the conviction of one who is actually innocent. Murray v Carrier 477 US 478 (1980)." Even forfeiture is excused in cases where a "petitioner ... [was] justifiably ignorant of the alleged facts or unaware of the legal significance" of a claim showing conviction for acts not made criminal. Price v Johnston 334 US 266 (1948). And, all of this is because, "The same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to prosecribe the defendant's conduct or impose a given punishment. '[E]ven the use of impeccable factfinding procedures would not legitimate a verdict' where 'the conduct being penalized is constitutionally [or, here, statutorily] immune from punishment.' United States v US Coin & Currency 401 US 715 (1971) Nor could the use of flawless sentencing procedures legitimate a punishment where the Constitution immunizes a defendant from the sentence imposed." Montgomery v Louisiana 193 L Ed 2d 5991 (2016).

24) Further, as noted in Davis (1974), principles of finality have never barred habeas petitioners claiming imprisonment for acts not made criminal, at least as far back as 18th century England, where the

the issue was one of res judicata. At common law, the denial by a court or judge of an application for habeas corpus was not res judicata. King v Suddis 1 East 306 (KB 1801); Burdett v Abbot 14 East 1 (KB 1811); Ex parte Partington 13 M & W 679 (Ex 1845); Church, Habeas Corpus (1884), §386; Ferris and Ferris, Extraordinary Legal Remedies (1926) §55. "A person detained in custody might thus proceed from court to court until he obtained his liberty." Cox v Hakes 15 AC 506 (HL 1890). That this was a principle of American habeas law as well as the English was assumed to be the case from the earliest days of federal habeas jurisdiction. cf Ex Parte Burford 3 Cranch 448 (1806). And, this Court has noted "the familiar principle that res judicata is inapplicable in habeas proceedings." Fay v Noia 372 US 391 (1915). This is because conventional notions of finality of litigatoin have no place where life or liberty is at stake. If "government ... [is] always [to] be accountable to the judiciary for a man's imprisonment," access to the courts on habeas must not be thus impeded. Fay.

The Circuit Split

25) There is roughly a three way Circuit spli as to when 28 USC §2255-(e)'s savings clause applies and when relief is available under 28 USC §2241, what the Third Circuit in Bruce v Warden Lewisburg USP 868 F 3d 120 (3rd Cir 2017) called an "extended split amongst the courts of appeals regarding the extent to which a change in statutory interpretation permits a federal prisoner to resort to §2241 for an additional round of collateral relief." Essentially, the Second and Third Circuits have found that a federal prisoner is entitled to relief pursuant to 28 USC §2241 whenever they can make a showing that they are imprisoned for an act that the law does

not make criminal, while the Fourth, Fifth, Seventh and Eighth Circuits also require a showing that the claim raised was not available at the time of the filing of the first 28 USC §2255 petition, or, in some cases, during its pendency. The First, Sixth, Ninth and DC Circuits agree that relief pursuant to 28 USC §2255(e) and 28 USC §2241 is available in some circumstances where a person is convicted of an act not made criminal, but, they disagree as to when. The Tenth and the Eleventh Circuits never allow a person convicted of acts not made criminal to obtain relief pursuant to 28 USC §2255(e), as they believe that the statute was intended to allow the executive to detain persons for acts not criminal, as long as some form of review occurred.

26) Justice Barrett of this Court, while serving on the Seventh Circuit in 2019, noted that case law on the availability of relief pursuant to 28 USC §2255(e) and §2241 was not applied consistently even within that Circuit. Chazen v Marske 958 F 3d 851 (7th Cir 2019) (Barrett, concur). She noted, as did the Third Circuit in Bruce, that both the split and the failure to include relief for acts not made criminal in the AEDPA appear to be the result of a drafting error by Congress. Chazen citing Hart & Wechsler The Federal Courts And The Federal System 1302 (Richard H Fallam Jr, et al, eds. 7th ed 2015). She also called on the courts to "think through the implications of forgoing a 'newness' requirement in the savings clause context", noting that "this body of law is plagued by numerous complex issues" and that "at some point we need to give litigants and courts better guidance." Chazen.

27) There is also a substantial minority in the Eleventh Circuit, consisting of Judges Jordan, Wilson, Martin, Rosenbaum, J Pryor, and,

in one case Hull, who have called on that Circuit to overturn its precedent in McCarthan v Director of Goodwill Industries Suncoast Inc 851 F 3d 1076 (11th Cir 2017). McCarthan (Jordan, Wilson, Martin, Rosenbaum, dissent); McCarthan (Wilson, J Pryor, dissent); In Re: Cason 2020 US App LEXIS 25760 (11th Cir 2020) (Martin, Hull, concur), et al.

Circuits That Misapply Finality Principles To Persons Convicted Of Acts Not Made Criminal

The Seventh Circuit

28) The Seventh Circuit laid out its standards for relief pursuant to 28 USC §2255(e) and 28 USC §2241 in Davenport. There, two cases, those of James Davenport and Sherman Nichols, were combined. Davenport sought relief from a statutory sentencing enhancement under the Armed Career Criminal Act, 18 USC §924(e), on the basis that a prior burglary conviction was not a violent offense; Nichols sought relief from a conviction for use of a firearm in furtherance of a drug trafficking offense, 18 USC §924(c), in light of this Court's ruling in Bailey v United States 516 US 137 (1995), that rendered his conduct of conviction non-criminal and overruled the Seventh Circuit's prior binding precedent. Davenport was denied relief because he was claiming relief from a sentencing enhancement and not a conviction and because he had had an "obstructed procedural shot" at raising the issue. Davenport. Nichols, however, was granted relief, and, the Seventh Circuit fashioned this test for when relief would be available under 28 USC §2255(e) and 28 USC §2241, that:

a) such relief is based on a decision of statutory interpretation;

b) the statutory rule of law both:

i) must apply retroactively on collateral review; and,

ii) could not have been raised in a first §2255 motion;

c) a failure to afford the prisoner collateral relief would amount to an error "grave enough" to constitute a "miscarriage of justice".

Warman v Entzel 953 F 3d 1004 (7th Cir 2020) citing Montana v Cross 829 F 3d 775 (7th Cir 2016)

The Seventh Circuit then extended this ruling to persons convicted of acts that the law does not made criminal, allowing them to continue to be detained despite their innocence in Montana. This standard, allowing people who have not violated the law to be imprisoned, was the standard used in this case.

The Fourth Circuit

29) The Fourth Circuit joined the Seventh in finding relief available when an intervening Supreme Court case of statutory interpretation renders the conduct of conviction no longer criminal in In Re: Jones 226 F 3d 328 (4th Cir 2000), a case applying Bailey to an 18 USC §924(c)(1) conviction where relief had been previously barred pursuant to United States v Paz 927 F 2d 176 (4th Cir 1991). The Fourth Circuit then extended its ruling so as to bar relief to a person convicted of a non-existent offense in Rice v Rivera 617 F 3d 802 (4th Cir 2010). There, both the prisoner, Rice, and, the United States moved for relief on the basis of Rice's conviction for a non-existent offense; the Fourth Circuit found Rice's motion barred but granted the government's motion. Then, in United States v Wheeler 886 F 3d 415 (4th Cir 2018), the Fourth Circuit expanded the availability of relief to new Circuit level rulings of statutory interpretation.

30) Of particular interest in the Fourth Circuit's jurisprudence is Judge Wynn's concurrence in Hahn v Moseley 937 F 3d 295 (4th Cir 2019) (Wynn, concur), where he explained the difference between actual innocence and conviction for a non-existent offense. Actual innocence may be rebutted by the government by the introduction of new evidence and new arguments; conviction for a non-existent offense is decided by applying the law to the existing record and is a lower standard. Hahn (Wynn, concur).

The Fifth Circuit

31) In Reyes-Requena v United States 243 F 3d 893 (5th Cir 2001), the Fifth Circuit adopted the Seventh Circuit's position in Davenport as well as the position that the Seventh Circuit later adopted in Montana (7th Cir 2016). There have been two notable dissents from this. Judge Wiener, in In Re: Swearingen 556 F 3d 344 (5th Cir 2009)(Wiener, dissent), would allow a freestanding claim of actual innocence to be brought under the savings clause. In Beras v Johnson 978 F 3d 246 (5th Cir 2020) (Oldham, dissent), Judge Oldham argued that Reyes-Requena should be oveturned and that the Fifth Circuit should join the Tenth and Eleventh Circuits in permitting the government to imprison persons who have not committed a crime.

The Eighth Circuit

32) Failing to distinguish between the approaches of the Fourth, Fifth, and Seventh Circuits, on the one hand, and, the Second and Third Circuits on the other, the Eighth Circuit adopted what it believed was their common approach, and, what was actually the approach of the Fourth, Fifth, and, Seventh Circuits, in Abdullah v Hedrick 392 F 3d 957 (8th Cir 2004) cert denied 2005 US LEXIS 5158 (2005).

Judge Beright dissented from the ruling, arguing that habeas counsel's ineffectiveness in the first proceeding was sufficient for the petitioner, Abdullah, to invoke 28 USC §2255(e) and thereby avail himself of relief under 28 USC §2241.

Circuits Where Any Person Convicted Of A Non-Existent Offense May Obtain Release From Imprisonment

The Third Circuit

33) The first case decided at the Circuit level on the post-AEDPA interpretation of the savings clause was In Re: Dorsainvil 119 F 3d 245 (3rd Cir 1997), also a Bailey case. There, the Third Circuit relied on the Court's ruling in Felker v Turpin 135 L Ed 2d 827 (1996) to find that the AEDPA had not repealed 28 USC §2241 by inference, and, that the savings clause of 28 USC §2255(e) served the same function function under the AEDPA as it had by the Act of June 25, 1948, ch 646 62 Stat 967, leaving 28 USC §2241 standing in the same relationship to 28 USC §2255 as it had when the Court decided United States v Hayman 342 US 205 (1952) and Swain v Pressley 430 US 372 (1977). Dorsainvil. The Third Circuit then relied upon Hayman to find that in enacting §2255, Congress did not intend "to impinge upon prisoner's rights of collateral attack upon their convictions." but solely intended "to minimize the difficulties encountered in habeas hearings by affording the same rights in another and more convenient forum." Dorsainvil. It then found Dorsainvil's Bailey claim comparable to that of Davis in Davis (1974), and, granted relief. This reasoning parallels that of this Court in Hill v United States 368 US 424 (1962) finding the relief available under §2255 "exactly commensurate" to that available under §2241. And, the Third Circuit noted in Bruce that, unlike the Fourth, Fifth, Seventh and Eighth

Circuits, it has never required that "applicable circuit precedent foreclosed such an argument at the time" of the first 28 USC §2255 proceeding for relief to be available under 28 USC §2241.

The Second Circuit

34) The Second Circuit, in Triestman, was the second Circuit to interpret the savings clause post-AEDPA, and, it found that relief was available where an intervening case of statutory interpretation rendered a petitioner convicted of acts that Congress did not criminalize. It first found that "serious constitutional questions would arise if a person who can prove his actual innocence on the existing record -- and who could not have effectively raised his claim of innocence at an earlier time -- had no access to judicial review." Triestman. It then ruled more broadly that, "We now hold that ['inadequate and ineffectie'] is, at the least, the set of cases in which the petitioner cannot, for whatever reason, utilize §2255 and in which failure to allow for collateral review would raise serious constitutional questions." Triestman. One of those constitutional questions was then explicitly said to be whether US Const Amend VIII barred the imprisonment of an innocent person. Triestman citing Herrera (Blackmun, dissent). This continues to be the most liberal standard in the twelve circuits.

Circuits Where Persons Convicted Of Non-Existent Offenses May Obtain Relief In At Least Some Circumstances, The Contours Of Which Are Not Clear

The Ninth Circuit

35) While the Ninth Circuit nominally followed the Fourth, Fifth, Seventh and Eighth Circuits in Ivy v Pontesso 328 F 3d 1057 (9th Cir

2003), it has never denied relief in a published case where a person was able to show that they had been convicted of a non-existent offense. Further, the Ninth Circuit's ruling in Alaimalo v United States 645 F 3d 1042 (9th Cir 2011), suggests that it wouldn't. There, the petitioner, Alaimalo, had repeatedly brought the same claim of being convicted of the non-existent offense of importing drugs from Guam to the United States. Alaimalo. The Ninth Circuit correctly found that the common law principles underlying Ivy's requirement that there had been no prior "unobstructed opportunity" to raise the issue did not apply when a person stood convicted of a non-existent offense. Alaimalo citing McClesky, Sanders v United States 373 US 1 (1963), Kuhlmann, and Engle v Isaac 456 US 107 (1982). It then went against a prior panel's ruling on the same claim and vacated Alaimalo's drug importing convictions. Alaimalo.

The Sixth Circuit

36) The Sixth Circuit has done some contortions to avoid joining the Second and Third Circuits explicitly, as in Martin v Perez 319 F 3d 799 (6th Cir 2003). There, the petitioner, Martin, had damaged a private home with a pipe bomb. Relying on United States v Lopez 514 US 549 (1995), Martin argued throughout his initial habeas proceedings that there was insufficient nexus between the home and interstate commerce to sustain his conviction. The Seventh Circuit found that the claim was waived because it was not raised properly at trial. Martin then filed a 28 USC §2241 petition whose appeal reached the Sixth Circuit, which discerned that Jones v United States 529 US 848 (2000), which applied Lopez to the federal arson statute, sufficiently qualified as a new rule of statutory interpretation to justify granting Martin relief pursuant to 28 USC §2241. It also

suggested that this Court's ruling in Bousley required that such a remedy be available for all claims of conviction for a non-existent offense, a position that it has never since repudiated, adopted, or clarified.

The First Circuit

37) The First Circuit's precedential case on the availability of the savings clause, United States v Barrett 178 F 3d 341 (1st Cir 1999), did not clearly distinguish between the case law in the Second, Third, and, Seventh Circuits on which it relied. In Trenkler v United States 536 F 3d 85 (1st Cir 2008), a case involving coram nobis, it clarified that "actual innocence", understood to include conviction for a non-existant offense, was required to justify relief. Thus, the contours of when relief would be available under 28 USC §2255(e) and 28 USC §2241 in the First Circuit are unclear.

The DC Circuit

38) The DC Circuit has only found that, where another Circuit would allow a person seeking relief from a criminal judgment to petition that Court under 28 USC §2241, the person should petition that Court and not the DC Circuit. In Re: Smith 285 F 3d 6 (DC Cir 2002).

Circuits That Allow The Imprisonment of Persons Who Have Not Committed A Criminal Act

The Tenth Circuit

39) In Prost v Anderson 636 F 3d 578 (10th Cir 2011), Justice Gorsuch, then sitting on the Tenth Circuit, relied on common law principles of finality to find that a person convicted of conduct that the law does not make criminal may be imprisoned if they did not properly

seek such relief in their first motion pursuant to 28 USC §2255, regardless of futility or any other bar. Specifically, Judge Gorsuch found that imprisoning innocent people brought "a conclusion, a termination" to such proceedings (except, of course, for the wrongfully imprisoned persons, whose interests were not considered.) Prost. Justice Gorsuch also found that, by refusing to release wrongfully imprisoned people from prison, such people, even when facing a life sentence or the death penalty, could "move forward rather than look back." Prost. The ruling is very thinly reasoned given its extraordinary nature, and, no consideration was given to the wide body of case law stating that principles of finality do not apply when a person was convicted of a non-existent offense, or, to statutory commands like that of 18 USC §4001(a).

The Eleventh Circuit

40) In McCarthan, the Eleventh Circuit joined the Tenth Circuit, overruling its prior precedent of Wofford v Scott 177 F 3d 1236 (11th Cir 1999).

Relief Should Be Available To Any Person Imprisoned For Acts That The Law Does Not Make Criminal Regardless Of Statutory Or Procedural Bar

41) As this Court noted in Montgomery, upholding the conviction of a person for an act that the law does not make criminal is fundamentally different than upholding a conviction marred by a minor procedural error; there is no possibility of factual guilt in the former case. And, this is why the common law principles of finality, res judicata, and, similar doctrines give way before such a showing. Welch; Davis (1974); Mackey; Murray; Pri ce; Engle. This Court has always found that the right to be free of imprisonment for a

non-existent offense cannot be forfeited; it can only be waived, and, that requires a deliberate act. Price citing Wang Doo v United States 265 US 239 (1924); Fay.

42) The restriction that the Fourth, Fifth, Seventh, and Eighth Circuits have placed on a claim of being imprisoned for a non-existent offense, that one not have had an unobstructed chance to raise the claim is a judge made rule and a rule of forfeiture. While allowing relief pursuant to 28 USC §2255(e) and 28 USC §2241 when the law determines that the conduct of conviction is not criminal correctly applies habeas as it has always been known and accomodates a drafting error in the AEDPA so as to preserve the statute's Constitutionality, imposing requirements drawn from the rules of finality and forfeiture has no basis in English or American habeas jurisprudence; in fact, such requirements have always been rejected by this Court. Thus, while the Fourth, Fifth, Seventh, and, Eighth Circuits are correct in allowing persons convicted of non-existent offenses to obtain habeas relief in some circumstances, their test for determining those circumstances is incorrect. Further, the Tenth and Eleventh Circuits are simply incorrect that any principle at all allows the United States to imprison people who have not violated an act of Congress or to maintain such imprisonment after the error has been discovered. Congress has clearly stated in 18 USC §4001(a) that this is not permissible, and, allowing their existing precedent to stand raises fundamental questions of rule of law, which is supposed to prevent the imprisonment of people

unless they have broken the law.

When it is certain that a person has not violated the law, that is different from a run of the mill habeas claim, and, any procedural bar to raising that issue must give way.

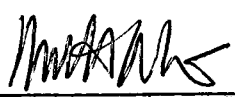
The Seventh Circuit Erred In Applying Its Own Davenport Test To My Case

43) Even if the Court should adopt the Seventh Circuit's Davenport test and find that the right to be freed from prison when one has not committed a criminal offense can be forfeited, the Seventh Circuit erred in applying its Davenport test to my case. The Seventh Circuit's ruling in White (7th Cir 2010) found that the indictment stated an offense, and, once that ruling was handed down, the issue was law of the case. see, eg, Key v Sullivan 925 F 2d 105 (7th Cir 1991) ("[A]fter an appellate court either expressly or by necessary implication decides an issue, the decision [is] binding upon all subsequent proceedings in the same case."); Montana v United States 400 US 147 (1979). There is no way that the Seventh Circuit could have upheld my conviction without necessarily using its conduct approach to the interpretation of 18 USC §373, and, the ruling by the Seventh Circuit otherwise is them taking a gray area of the law and a judicially crafted test they've formulated and applying it arbitrarily, just as Justice Barrett has stated that they do.

Conclusion

44) This Court needs to set a standard for the applicability of the savings clause to create uniformity amongst the federal judiciary and it should grant this Petition for Writ of Certiorari to do so.

Respectfully Submitted,



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August 2, 2021
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