No. 21-857

In the Supreme Court of the United States

MARCUS DEANGELO JONES, PETITIONER

v.

DEWAYNE HENDRIX, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether petitioner is entitled to seek federal habeas corpus relief under 28 U.S.C. 2255(e) based on his claim that his conviction for possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e)(1) (1994), is invalid under *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 8 F.4th 683. The opinion of the district court (Pet. App. 14a-29a) is not published in the Federal Supplement but is available at 2020 WL 10669427.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2021. On October 29, 2021, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including December 9, 2021. The petition for a writ of certiorari was filed on December 7, 2021, and was granted on May 16, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2255 provides in pertinent part:

(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.

* * * * *

(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.

* * * * *

(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 Supreme Court, that was previously unavailable.

Other relevant constitutional and statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e)(1) (1994), and one count of making false statements to acquire a firearm, in violation of 18 U.S.C. 922(a)(6) (1994). Pet. App. 2a. He was sentenced to 327 months of imprisonment, to be followed by five years of supervised release. See *id.* at 15a; 2018 WL 2303783, at *1 (D. Kan. May 21, 2018). The court of appeals affirmed. 266 F.3d 804 (8th Cir. 2001).

In 2002, petitioner filed a motion under 28 U.S.C. 2255 to vacate, correct, or set aside his sentence, which ultimately resulted in the vacatur of one of his felon-in-possession convictions, but no change in his prison term. See 403 F.3d 604 (8th Cir. 2005); 185 Fed. Appx. 541 (8th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1273 (2007). In 2019, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Eastern District of Arkansas. The court dismissed the petition. Pet. App. 14a-29a. The court of appeals affirmed. *Id.* at 1a-13a.

1. In August 1999, petitioner purchased a semiautomatic handgun from a pawnshop in Missouri. 266 F.3d

at 808-809. As petitioner later admitted, he knew at the time that he had previously been convicted of a felony and was not allowed to possess a gun. *Id.* at 808, 810. In fact, petitioner had been convicted of 11 felonies and had served a prison sentence of more than a year on at least five of them. *Id.* at 811 & n.6. But when filling out the federal Form 4473 required to purchase the gun, he answered "no" to the question whether he had been convicted of a crime for which he could have been imprisoned for more than a year. *Id.* at 808.

On the same day that petitioner bought the gun, he was found in possession of it during a traffic stop and acknowledged possessing it to an undercover officer during a drug sale. 266 F.3d at 809. In October 1999, petitioner discharged the gun during a shootout. *Ibid.* Petitioner was later charged with two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e)(1) (1994), and one count of making false statements to acquire a firearm, in violation of 18 U.S.C. 922(a)(6) (1994). 266 F.3d at 807-808. After a jury trial, he was convicted on all counts. Pet. App. 15a.

In November 2000, the district court sentenced petitioner to a total of 327 months of imprisonment, consisting of concurrent sentences of 327 months on the felon-in-possession counts and a concurrent sentence of 60 months on the false-statement count. Pet. App. 15a; 00-cr-4010 D. Ct. Doc. 49 (W.D. Mo. Nov. 8, 2000). The court of appeals affirmed. 266 F.3d at 816. Petitioner was also separately convicted of drug-trafficking offenses and sentenced to 327 months of imprisonment, which he is serving concurrently with the sentences on the firearms convictions. *United States* v. *Jones*, 275 F.3d 673, 678 (8th Cir. 2001).

2. In August 2002, petitioner filed a motion under 28 U.S.C. 2255 to vacate, correct, or set aside his sentence on the firearms convictions. 02-cv-775 D. Ct. Doc. 1 (W.D. Mo. Aug. 12, 2002). That motion ultimately resulted in the vacatur of one of petitioner's two felon-in-possession convictions, but did not change his term of imprisonment. 02-cv-775 D. Ct. Doc. 27 (Aug. 4, 2005); see 185 Fed. Appx. at 542-543 (affirming).

Over the years that followed, petitioner "flooded the federal dockets" with additional "postconviction challenges, including numerous § 2255 motions and repeated petitions to [this] Court." Pet. App. 3a; see Pet. II-V (listing some cases); Br. in Opp. II-III (listing others). None yielded further relief. Pet. App. 3a.

3. In July 2019, petitioner again sought to collaterally attack his conviction, this time in a petition for a writ of habeas corpus under 28 U.S.C. 2241 filed in the United States District Court for the Eastern District of Arkansas, the district where he was then confined. Pet. App. 17a. The petition sought vacatur of his felon-in-possession conviction based on *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). In *Rehaif*, this Court held that in a prosecution for possessing a firearm while in a status covered by Section 922(g), the government not only "must show that the defendant knew he possessed a firearm," but "also that he knew he had the relevant status when he possessed it." *Id.* at 2194.

The district court dismissed the habeas petition for lack of jurisdiction. Pet. App. 14a-29a. The court determined that the petition was barred by 28 U.S.C. 2255(e), which provides that an "application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the

remedy by motion is inadequate or ineffective to test the legality of his detention." See Pet. App. 18a-29a. Although petitioner contended that his claim fit within Section 2255(e)'s final "saving" clause, the court construed a separate limit in Section 2255(h) to foreclose that contention by negative implication. See *id.* at 18a-19a. Section 2255(h) provides that a prisoner may file a "second or successive" Section 2255 motion only if that motion relies on either (1) "newly discovered evidence" that establishes the prisoner's factual innocence or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h). The district court concluded that because Section 2255(h) does not authorize a second or subsequent motion based on a statutory claim like petitioner's, it implicitly precludes him from invoking the saving clause to bring such a claim under habeas. Pet. App. 26a-27a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court reasoned that Section 2255 "'is not [in]adequate or ineffective where a petitioner had any opportunity to present his claim beforehand'" and that petitioner "could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion." *Id.* at 6a (citation omitted). The court further reasoned that even though such an argument would have been contrary to then-existing circuit precedent, "the question is whether [petitioner] could have raised the argument, not whether he would have succeeded." *Id.* at 7a; see *id.* at 6a-10a. And, like the district court, the court of appeals relied on an inference from Section 2255(h)'s limits on second or subsequent Section 2255 motions. *Id.* at 9a. The court of appeals also rejected petitioner's

contention that the Constitution's Suspension Clause required that his claim be cognizable. *Id.* at 10a-13a.

SUMMARY OF ARGUMENT

Although the court of appeals' judgment was correct, its categorical holding was not. The saving-clause exception to 28 U.S.C. 2255(e)'s bar on habeas corpus petitions by federal prisoners preserves a narrow but important category of claims based on intervening statutory-construction decisions of this Court that establish that a prisoner's conduct was noncriminal. Petitioner, however, cannot satisfy the strict prerequisites for such a claim, which require a showing of actual innocence that he cannot make.

I. Congress enacted Section 2255 to channel post-conviction claims by federal prisoners into an administratively convenient forum—the original sentencing court—while maintaining a remedial scheme equivalent in scope to the writ of habeas corpus. The saving clause ensures that equivalence by permitting recourse to habeas when the remedy by Section 2255 motion "is inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. 2255(e). That text and this Court's decisions instruct that the benchmark for evaluating the motion remedy's adequacy and efficacy is the habeas remedy that it was adopted to replace. Accordingly, in the rare circumstance where Section 2255's motion remedy would deny a prisoner an opportunity to raise a claim that would be cognizable in habeas, it is inadequate or ineffective to test the legality of his detention.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, limited the ability of both federal and state prisoners to raise factual or constitutional claims in a second or sub-

sequent collateral attack, whether via habeas or Section 2255, to specific types. Those parallel limits make clear that federal prisoners may not evade Section 2255(h)'s limits on additional motions by invoking the saving clause to raise other types of factual or constitutional claims, because habeas law includes equivalent limits.

Federal prisoners have, however, long been able to collaterally attack their convictions based on a purely *statutory* claim that a decision from this Court has changed the interpretation of a federal criminal law so as to make clear that their conduct was noncriminal. Before AEDPA, such a claim could be vindicated even in a second or subsequent collateral attack if a prisoner could show his actual innocence under the corrected construction of the statute. After AEDPA, such claims cannot be asserted in a second or subsequent Section 2255 motion. But they remain cognizable through the saving clause, because AEDPA modified neither the saving clause itself nor the relevant habeas principles to which it refers. And any doubt on that question is resolved by this Court's repeated instruction that Congress must speak clearly to restrict the availability of habeas relief—a principle that has special force here, where the relevant class of claims is limited to those brought by people who can show that they have been imprisoned for conduct that is not a crime.

II. A claim relying on this Court's decision in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), could conceivably satisfy the requirements for saving-clause relief. *Rehaif* is a decision from this Court that narrowed the scope of a federal crime, holding that knowledge of a prior felony conviction is an element of the felon-in-possession offense. But few prisoners asserting *Rehaif* claims will be able to make the demanding threshold

showing of actual innocence, which requires a prisoner to demonstrate that no reasonable juror would have found him guilty under the narrowed definition of the crime. And petitioner plainly cannot make that showing here. He was convicted of 11 felonies, spent more than a year in prison on several of them, and in fact admitted on the stand that he knew that he was not supposed to have a gun.

III. Although the court of appeals correctly upheld the dismissal of petitioner's habeas petition, it erred in interpreting the saving clause to categorically exclude statutory claims. The court departed from Section 2255(e)'s text by assessing the adequacy and efficacy of the Section 2255 remedy at the time of the prisoner's original Section 2255 motion, thereby reading "is" to mean "was." The court compounded its error by circularly comparing the adequacy of Section 2255's remedy to Section 2255 itself rather than to the habeas benchmark to which the saving clause refers. Finally, the Court drew an overbroad negative inference from Section 2255(h)'s limits on second or subsequent motions. Those limits—in conjunction with Section 2244's associated limits on habeas relief—bar prisoners from invoking the saving clause to bring subsequent collateral attacks based on factual or constitutional claims that fall outside Section 2255(h). But they do not foreclose the narrow and unusually compelling set of statutory claims at issue here.

IV. Petitioner, for his part, appears to assert that the saving clause is available whenever previous direct- or collateral-review proceedings misapplied substantive law in any way that calls into question the legality of a prisoner's detention. That broad reading rests on an outcome-focused retrospective inquiry that cannot be

reconciled with Section 2255(e)'s text. It also has no apparent meaningful limiting principle. And it is not supported by the canon of constitutional avoidance, because the various constitutional concerns that petitioner asserts are insubstantial. This Court should accordingly correct the court of appeals' reasoning but affirm its judgment.

ARGUMENT

This case presents the question whether and under what circumstances a federal prisoner who has previously filed a motion under 28 U.S.C. 2255 may file a habeas petition claiming that an intervening decision of statutory interpretation establishes that he was convicted of conduct that is not criminal. Since AEDPA adopted Section 2255(h)'s limits on second or subsequent motions, the government and the lower courts have struggled to reconcile the implications of those limits with Section 2255(e)'s saving clause, which AEDPA left undisturbed.

Initially, the government argued that habeas relief is categorically unavailable for statutory claims. In 1998, after several courts of appeals rejected that "restrictive reading," *Triestman* v. *United States*, 124 F.3d 361, 376 (2d Cir. 1997), the government reconsidered the matter. From 1998 until 2017, the government argued that the saving clause sometimes allows a prisoner to seek habeas relief based on a new decision of statutory interpretation. Most courts of appeals agreed—though they differed somewhat on the circumstances when such relief is available. See Br. in Opp. at 10-11, *Ham* v. *Breckon*, No. 21-763 (Feb. 24, 2022) (collecting cases). The Tenth and Eleventh Circuits, however, adopted the categorical position that habeas relief is never available. See *McCarthan* v. *Director of Goodwill Industries-*

Suncoast, Inc., 851 F.3d 1076, 1099-1100 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017); *Prost* v. *Anderson*, 636 F.3d 578, 588 (10th Cir. 2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012). In 2017, the government reconsidered the matter again and returned to that position.

In light of its varying positions on this important and difficult question, the government reexamined the issue anew after this Court granted certiorari in this case. Based on fresh consideration of the statutory text, context, and history, the government has determined that neither of its prior positions reflects the best interpretation of Section 2255. The categorical position the government urged below is difficult to reconcile with Section 2255(e)'s text and rests on an overly expansive negative inference from Section 2255(h). But the government's pre-2017 position was also insufficiently grounded in the text and in important respects too broad.

The position set forth in this brief follows from a natural reading of Section 2255(e), which allows a prisoner to rely on habeas if the Section 2255 remedy "*is* inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e) (emphasis added). That present-tense language requires an assessment of the adequacy and efficacy of the Section 2255 remedy at the time the prisoner seeks to file a habeas petition, not in the past. And the text and context make clear that the yardstick for measuring Section 2255's present adequacy and efficacy is the habeas remedy that Section 2255 was adopted to replace. Section 2255(e) thus generally permits reliance on habeas if Section 2255 does not enable consideration of a claim that would be cognizable in habeas.

Claims satisfying that standard will be rare. But as demonstrated below, the saving clause preserves habeas relief for a narrow class of claims that lie at the heart of habeas's core function of providing relief from unjust detention: a federal prisoner who is barred from filing a second Section 2255 motion under Section 2255(h) may invoke the saving clause and seek habeas relief if he (1) contends that a new statutory interpretation decision of this Court establishes that his conduct was not criminal, and (2) establishes that he is actually innocent in light of the narrowed definition of the offense—that is, that no reasonable juror would vote to find him guilty in light of all available evidence.

Petitioner has attempted to raise such a claim based on *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). But he cannot show that he is actually innocent; to the contrary, the record makes clear that he knew he was a felon. Petitioner thus cannot invoke the saving clause, and his habeas petition was properly dismissed.

I. THE SAVING CLAUSE PRESERVES HABEAS RELIEF FOR PRISONERS WHO CAN SHOW ACTUAL INNOCENCE BASED ON AN INTERVENING STATUTORY DECISION OF THIS COURT

Congress enacted Section 2255 to provide federal prisoners with a procedural alternative to habeas, not a substantively worse remedy. Habeas accordingly provides the saving clause's benchmark for determining whether the Section 2255 remedy is "inadequate or ineffective to test the legality of [a prisoner's] detention," 28 U.S.C. 2255(e). And a comparison of the two remedies, as they exist today, reveals that the Section 2255 remedy is an adequate and effective substitute for habeas in the context of factual and constitutional claims, but not for a circumscribed set of purely statutory

claims where a prisoner establishes actual innocence based on an intervening decision of this Court narrowing the scope of a federal crime.

A. The Saving Clause Safeguards Against Leaving Federal Prisoners With An "Inadequate Or Ineffective" Substitute For Habeas

Section 2255 provides federal prisoners a congruent substitute for habeas, with venue in the original sentencing court rather than the district where the prisoner happens to be confined. Section 2255(e)'s saving clause, in turn, ensures that the substitute procedure does not deny federal prisoners a true habeas analogue, preserving the availability of a habeas petition when Section 2255 turns out to be "inadequate or ineffective to test the legality" of a particular prisoner's detention because it forecloses a type of claim that otherwise would be remediable in habeas.

1. The first Congress authorized the federal courts to issue writs of habeas corpus to persons in federal custody. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82; see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807). In 1867, Congress made the writ available to any prisoner—state or federal—"restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

In the first half of the twentieth century, this Court construed the habeas statutes broadly, leading to "a great increase in the number of applications for habeas corpus filed in the federal courts by state and federal prisoners." *United States* v. *Hayman*, 342 U.S. 205, 212 (1952). Because a writ of habeas corpus acts on the prisoner's jailer, it is filed in the district where the prisoner is confined. See *Rumsfeld* v. *Padilla*, 542 U.S. 426, 447

(2004). For federal prisoners, the district of confinement is often located "far from the scene of the facts, the homes of the witnesses and the records of the sentencing court." *Hayman*, 342 U.S. at 213-214. And the increasing number of petitions by federal prisoners disproportionately burdened the handful of district courts whose territorial jurisdiction encompassed major penal institutions like Alcatraz. *Id.* at 214 n.18.

In 1948, Congress enacted 28 U.S.C. 2255 in response to a Judicial Conference proposal "to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement, by providing an equally broad remedy in the more convenient jurisdiction of the sentencing court." *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979); see Act of June 25, 1948, ch. 646, 62 Stat. 967-968; see also *Hayman*, 342 U.S. at 214-219. Section 2255 provided, and still provides today, that a "prisoner in custody under sentence of a [federal] court * * * 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 (Supp. II 1948); accord 28 U.S.C. 2255(a) (same).

The new remedy by motion, when available, was exclusive. In language now appearing in Section 2255(e), Congress generally precluded federal courts from "entertain[ing]" a habeas petition from a federal prisoner "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." 28 U.S.C. 2255 (Supp. II 1948); accord 28 U.S.C. 2255(e).

2. That preclusion of habeas relief, however, has always been subject to an exception—a "saving clause, providing that a writ of habeas corpus would be available if the alternative process" established in Section 2255 "proved inadequate or ineffective." *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008). The saving clause, both originally and now, specifies that a prisoner who could or did seek a remedy by motion is barred from filing a habeas petition "unless it also appears that the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255 (Supp. II 1948); accord 28 U.S.C. 2255(e). The saving clause thus ensures that Section 2255 does not deny a federal prisoner relief on a claim that habeas would allow. Specifically, its text asks whether the particular prisoner is able, at present, to use the Section 2255 remedy to obtain a merits decision on a claim that a habeas petitioner could vindicate in an analogous circumstance.

The saving clause's text focuses on "his"—*i.e.*, the specific prisoner's—circumstances. It looks to how Section 2255's motion remedy "is"—*i.e.*, currently would be—applicable. See 1 U.S.C. 1 (specifying that present-tense verbs generally refer to current and future); see also *Nichols* v. *United States*, 578 U.S. 104, 109 (2016) (construing present-tense verb to exclude past). The saving clause examines the motion remedy's ability to "test the legality of * * * detention"—*i.e.*, to provide the prisoner with "an *opportunity* to bring his argument" and obtain a decision, "right or wrong," on the "substantive law." *Prost*, 636 F.3d at 584; see, *e.g.*, *Webster's New International Dictionary* 2609 (2d ed. 1934) (defining "test" as "[t]o put to the test or proof; to try

the truth, genuineness, or quality of by experiment, or by some principle or standard") (*Webster's Second*); *Black's Law Dictionary* 1643 (4th ed. 1951) ("To bring one to a trial and examination, or to ascertain the truth or the quality or fitness of a thing") (*Black's*). And the saving clause specifically contemplates that the Section 2255 remedy may be inadequate or ineffective even after a prisoner has completed an initial Section 2255 motion, because it applies to a prisoner who has been "denied * * * relief" under Section 2255. 28 U.S.C. 2255(e).

The saving clause does not, however, unqualifiedly authorize resort to habeas any time some legal bar precludes Section 2255 relief. Instead, it applies only when the remedy by Section 2255 motion is "inadequate or ineffective." Those words require a comparison to some benchmark. "Inadequate" means "[i]nsufficient; disproportionate; lacking in effectiveness or in conformity to a prescribed standard or measure." *Black's* 902; see *Webster's Second* 1254 ("[n]ot adequate; insufficient; deficient"); 5 *Oxford English Dictionary* 132 (1933) ("[n]ot adequate; not equal to requirement; insufficient") (*OED*). "Ineffective" similarly means "[n]ot producing, or incapable of producing, the intended effect." *Webster's Second* 1271; see 5 *OED* 239 ("Of such a nature as not to produce any, or the intended, effect; insufficient; hence, without effect, ineffectual; inoperative."). "In asking whether § 2255 is 'inadequate or ineffective,'" therefore, "the question naturally arises: compared to what?" *Prost*, 636 F.3d at 584.

Section 2255(e)'s text and context supply the answer: compared to habeas. The "prescribed standard or measure," *Black's* 902, for judging the adequacy and efficacy of the Section 2255 remedy is the habeas remedy that the saving clause expressly refers to and that Sec-

tion 2255 was adopted to replace. As this Court has repeatedly recognized, Section 2255's "intended effect," *Webster's Second* 1271, was to provide an alternative to habeas that was different in form (primarily, in venue) but "afford[ed] federal prisoners a remedy *identical in scope* to federal habeas corpus." *Davis* v. *United States*, 417 U.S. 333, 343 (1974) (emphasis added); see *Addonizio*, 442 U.S. at 185 ("an equally broad remedy"); *Hill* v. *United States*, 368 U.S. 424, 427 (1962) ("exactly commensurate"); *Hayman*, 342 U.S. at 219 ("affording the same rights"). In line with that purpose, the saving clause ensures that Section 2255 does not disadvantage federal prisoners as compared to habeas.

This Court has understood the saving clause to serve that function. For example, in *Sanders* v. *United States*, 373 U.S. 1 (1963), the Court declined to read Section 2255 to incorporate principles of res judicata, which were inapplicable in habeas. The Court explained that if Section 2255 imposed a res judicata rule, it would fail to provide federal prisoners with "'a remedy exactly commensurate with' habeas." *Id.* at 14. Critically, the Court added that any attempt to "incorporat[e] *res judicata* in § 2255 * * * would probably prove to be completely ineffectual," because a "prisoner barred by *res judicata*" from bringing a successive Section 2255 motion "would seem as a consequence to have an 'inadequate or ineffective' remedy under § 2255 and thus be entitled to proceed in federal habeas corpus." *Id.* at 14-15. *Sanders* thus illustrates that the Section 2255 remedy is "inadequate or ineffective" if a legal barrier in Section 2255 prevents a prisoner from bringing a claim that would be cognizable in habeas—even if the prisoner has already sought relief under Section 2255.

The Court applied similar logic in *United States* v. *Hayman*. There, the Court emphasized that if Section 2255 were interpreted to preclude a hearing on a prisoner's claim, the saving clause would leave "the habeas corpus remedy * * * open to afford [a] necessary hearing." 342 U.S. at 223. Again, therefore, the Court reasoned that the saving clause applies to features of Section 2255 that would give the motion remedy less scope than habeas.

This Court has repeatedly applied the same understanding in placing "explicit reliance" on Section 2255's saving clause to "uphold[] the statute[] against constitutional challenges." *Boumediene*, 553 U.S. at 776. Because the Court has understood the saving clause to guarantee that federal prisoners will be able to rely on habeas when the scope of Section 2255 is more restrictive, the Court has found it "unnecessary" to assess whether the scope of the Section 2255 remedy itself might otherwise implicate the constitutional suspension of the writ. *Ibid.*; see *Hayman*, 342 U.S. at 209, 223. The Court took a similar approach in rejecting a constitutional challenge to an identically worded saving clause in a parallel statute applicable to the District of Columbia. *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); see *Boumediene*, 553 U.S. at 776. Like *Sanders* and *Hayman*, those decisions presuppose that the saving clause guarantees that Section 2255 does not deny federal prisoners the ability to assert claims that would be cognizable in habeas.

B. The Saving Clause Permits Consideration Of Second or Subsequent Habeas Petitions Raising A Limited Set Of Statutory Claims Based On Intervening Decisions Of This Court

Because Section 2255(e)'s text requires a present-tense comparison between a prisoner's Section 2255 remedy and the analogous habeas remedy, the inquiry necessarily turns on the current scope of those remedies. In light of AEDPA's changes to the federal habeas remedy, with corresponding changes to Section 2255, a federal prisoner cannot rely on the saving clause to bring a claim of factual or constitutional error in a second or subsequent application for postconviction relief (although the prisoner can proceed under Section 2255's motion remedy when the requirements in Section 2255(h) are satisfied). But the saving clause remains available for statutory claims when an intervening decision of this Court has narrowed the definition of the crime of conviction and the prisoner can show actual innocence—that is, true factual innocence. That narrow class of claims was traditionally cognizable in a second or subsequent application for postconviction relief, and nothing in AEDPA altered the relevant habeas principles or withdrew the saving clause's direction that habeas remains available when the Section 2255 motion remedy excludes a claim cognizable in habeas.

1. The habeas remedy allows statutory claims based on an intervening decision of this Court establishing that a prisoner is imprisoned for a non-criminal act

Only a limited class of claims are cognizable on collateral review. It has "long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Addonizio*, 442 U.S. at 184. In the years after

the Founding, habeas relief generally focused on "jurisdictional defects." *Brown* v. *Davenport*, 142 S. Ct. 1510, 1521 (2022). By the middle of the 20th century, the scope of the writ was recognized to include "constitutional claims." *Id.* at 1522. Certain factual errors can also be cognizable on collateral review. *Addonizio*, 442 U.S. at 185-186. But this Court has instructed that a purely statutory error does not justify a collateral attack on a criminal conviction unless it amounts to a "fundamental defect which inherently results in a complete miscarriage of justice." *Id.* at 185 (quoting *Hill*, 368 U.S. at 428).

In *Davis* v. *United States*, this Court recognized a narrow set of purely statutory claims by federal prisoners that satisfy that high standard: claims based on an "intervening change in substantive law" establishing that the prisoner's conduct was not criminal. 417 U.S. at 334. The prisoner in *Davis* had been convicted of delinquency from military induction. *Id.* at 338. During the pendency of his direct appeal, this Court held in another case, *Gutknecht* v. *United States*, 396 U.S. 295 (1970), that the regulation under which he had been classified as delinquent was ultra vires. *Davis*, 417 U.S. at 338. But although the lower courts refused to apply *Gutknecht* to the prisoner's direct appeal, the court of appeals later relied on "the authority of *Gutknecht*" to grant relief in a "virtually identical" case. *Id.* at 338-340. The prisoner in *Davis* then filed a Section 2255 motion, which the lower courts denied because he already had "unsuccessfully litigated" the same issue "on direct review." *Id.* at 342. This Court reversed, observing that the prisoner's claim suggested that his "conviction and punishment are for an act that the law does not make criminal" and emphasizing that "[t]here can be no room

for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief." *Id.* at 345-346 (brackets omitted).

Although *Davis* involved a Section 2255 motion, it relied on habeas principles. See 417 U.S. at 344-346. And as this Court has explained, *Davis* stands for the proposition that a federal prisoner may collaterally attack his conviction based on "a change in the substantive law that establishe[s] that the conduct for which [he] had been convicted and sentenced was lawful." *Addonizio*, 442 U.S. at 186-187. Such a "nonconstitutional" statutory claim, *Davis*, 417 U.S. at 345, is distinct from one that relies on the construction of a statute but is nevertheless couched in constitutional terms, such as a claim that a misunderstanding of the statutory elements of a crime produced a "constitutionally invalid" guilty plea, *Bousley* v. *United States*, 523 U.S. 614, 618-619 (1998), a claim that jury instructions misstated the offense elements, see *Neder* v. *United States*, 527 U.S. 1, 12-13 (1999), or a claim that the evidence at trial was constitutionally insufficient to establish guilt under a proper interpretation of the statute, see *Musacchio* v. *United States*, 577 U.S. 237, 243-244 (2016).

Davis arose in an unusual posture, and the Court did not have occasion to define with particularity the sort of change in law that is required to support the type of purely statutory collateral attack it authorized. But the Court's distinction of a prior decision that had upheld the denial of a similar claim, *Sunal* v. *Large*, 332 U.S. 174 (1947), indicates that the ultimate source of that change in law must be an intervening decision of this Court. *Davis* distinguished *Sunal* on the ground, *inter alia*, that *Sunal* had "not [been a case] where the law

was changed after the time for appeal had expired," *Davis*, 417 U.S. at 345 (quoting *Sunal*, 332 U.S. at 181). *Sunal*, in turn, had explained that where "the question of law ha[s] not been decided by th[is] Court," and is instead the proper subject of petitions for this Court's review, the case "is not one where the law has changed." 332 U.S. at 181 (cited at *Davis*, 417 U.S. at 345). Instead, in the absence of a decision by this Court, "the definitive ruling on the question of law ha[s] not crystallized." *Ibid.* (cited at *Davis*, 417 U.S. at 345).

A decision of a circuit court alone, therefore, cannot qualify as an "intervening change in substantive law," *Davis*, 417 U.S. at 334. As *Davis* recognized, however, a subsequent decision by a court of appeals may clarify whether an intervening decision of this Court in fact dictates the outcome in the circumstances of a particular prisoner's case. *Id.* at 338-340; see *id.* at 341 n.12, 345 (declining to decide whether the court of appeals correctly deemed *Gutknecht* applicable). The critical question is whether the substantive definition of the prisoner's offense, as applied by the trial court at the time of the "conviction," has now unambiguously been narrowed by a decision of *this* Court. *Id.* at 341.

2. Pre-AEDPA habeas principles generally require a prisoner who seeks to present a statutory claim in a second or subsequent collateral attack to show actual innocence

Davis involved an initial Section 2255 motion and defined the requirements for a purely statutory claim to be cognizable on collateral review at all. And even before AEDPA, a prisoner seeking to assert such a claim in a second or subsequent collateral attack would face a substantial additional hurdle, because this Court has exercised its equitable authority over the scope of the

writ to adopt strict limits on such "repetitive filings." *Brown*, 142 S. Ct. at 1523. The upshot of those limits is that pre-AEDPA habeas principles would ordinarily require a prisoner seeking to assert a *Davis* claim in a second or subsequent collateral attack to establish his actual innocence.

A prisoner who had already raised his claim in an initial collateral attack would be subject to the rules governing successive petitions, which require the prisoner to make a "colorable showing of factual innocence." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion). That requirement applies even if the prisoner's successive petition relies on an intervening decision of this Court. See *id.* at 442-443. And a prisoner who had *not* pressed his claim in his initial collateral attack would be subject to the rules governing abusive petitions, which likewise permit consideration of a previously omitted claim upon a "colorable showing of factual innocence." *McCleskey* v. *Zant*, 499 U.S. 467, 495 (1991) (quoting *Kuhlmann*, 477 U.S. at 454).*

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* A prisoner who failed to present a claim in an initial collateral attack traditionally could also excuse that default by showing "cause for failing to raise it and prejudice therefrom," the same standard that applies to excuse a failure to raise a claim on direct appeal. *McCleskey*, 499 U.S. at 494; see *Bousley*, 523 U.S. at 622. But those requirements would not likely be met in the context of a *Davis* claim. A narrowing construction of a statute adopted by this Court is highly unlikely to be "so novel that its legal basis [was] not reasonably available" at the time of the forfeiture. *Bousley*, 523 U.S. at 622 (citation omitted). In addition, the mere fact that a claim was "futile" in the sense of being foreclosed by circuit law does not qualify as "cause." *Id.* at 623 (citations omitted). And attorney errors generally cannot constitute cause when they occur on collateral review, where no right to counsel attaches. See *Coleman* v. *Thompson*, 501 U.S. 722, 752-753 (1991); see also *Martinez* v. *Ryan*, 566

That actual-innocence exception to otherwise-applicable procedural bars is deeply rooted in this Court's habeas jurisprudence. See *McQuiggin* v. *Perkins*, 569 U.S. 383, 392-393 (2013) (collecting cases). It recognizes "the imperative of correcting a fundamentally unjust incarceration." *Schlup* v. *Delo*, 513 U.S. 298, 320-321 (1995) (citation omitted). At the same time, because "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare," an actual-innocence standard respects "systemic interests in finality, comity, and conservation of judicial resources." *Id.* at 321-322 (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970)).

The Court has made clear that the standard for a "'colorable claim'" of actual innocence of a crime requires a prisoner to "show that it is more likely than not that no reasonable juror would have convicted him" of the crime as properly defined. *Schlup*, 513 U.S. at 322, 327 (citation omitted); see *McQuiggin*, 569 U.S. at 387, 399; *Bousley*, 523 U.S. at 622. Furthermore, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. "In other words, the Government is not limited to the existing record" and may "present any admissible evidence of [the prisoner's] guilt even if that evidence was not presented during" the original proceedings. *Id.* at 624; see *Schlup*, 513 U.S. at 327-328. In addition, "[i]n cases where the Government has forgone more serious charges in the course of plea bargaining, [the prisoner's] showing of actual innocence must also extend to those charges." *Bousley*, 523 U.S. at 624. The actual-innocence stand-

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U.S. 1, 16-17 (2012) (recognizing an exception for "limited circumstances" not applicable here).

ard is accordingly "demanding." *McQuiggin*, 569 U.S. at 387, 401.

3. AEDPA's restrictions on second or subsequent collateral attacks foreclose factual and constitutional claims under the saving clause, but not pure statutory claims

In AEDPA, Congress supplemented this Court's equitable habeas doctrines with new statutory limits on collateral attacks under both habeas and Section 2255. See *Brown*, 142 S. Ct. at 1524. But AEDPA left the saving clause undisturbed, so it continues to require the same present-tense comparison: the Section 2255 remedy is "inadequate or ineffective"—and habeas is available—if Section 2255 denies a prisoner the opportunity to raise a claim that would be cognizable in habeas. AEDPA's similar limits on the availability of second or subsequent postconviction applications based on factual or constitutional claims under both Section 2255 and habeas foreclose resort to the saving clause to bring other factual or constitutional claims. But the saving clause remains available for prisoners who can satisfy the stringent prerequisites for bringing a statutory claim under *Davis* in a second or subsequent collateral attack yet are precluded from pursuing the Section 2255 motion remedy.

a. Section 2255(h), the language of which was added to the statute by AEDPA § 105, 110 Stat. 1220, allows for the filing of a "second or successive motion" under Section 2255 only when it is "certified as provided in section 2244 * * * to contain" one of two specific types of claims. 28 U.S.C. 2255(h). The first, described in 28 U.S.C. 2255(h)(1), is a claim of "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." The second, described in 28 U.S.C. 2255(h)(2), is a claim based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

A federal prisoner who has previously sought Section 2255 relief thus cannot file another Section 2255 motion based on a factual claim that falls outside Section 2255(h)(1), a constitutional claim that falls outside Section 2255(h)(2), or a purely statutory claim—which by definition falls outside both Section 2255(h)(1) and Section 2255(h)(2). Instead, a federal prisoner seeking to file a second or subsequent collateral attack that does not satisfy either condition of Section 2255(h) would need to rely—if possible—on a habeas petition under the saving clause.

If such a second or subsequent collateral attack were premised on a factual claim falling outside Section 2255(h)(1) or a constitutional claim falling outside Section 2255(h)(2), however, the saving clause would provide no recourse, because the preclusion of such claims does not make the Section 2255 remedy "inadequate or ineffective" as compared to habeas. At the same time that Congress added the language in Section 2255(h) limiting second or subsequent motions by federal prisoners, Congress also amended Section 2244(b) to impose analogous restrictions on second or subsequent habeas petitions by state prisoners. AEDPA § 106(b), 110 Stat. 1220-1221; see 28 U.S.C. 2244(b)(2); *McQuiggin*, 569 U.S. at 396. Similar to Section 2255(h), Section 2244(b) forecloses habeas relief on a "claim presented in a second or successive habeas corpus application" by a state prisoner "that was not presented in a prior ap-

plication * * * unless" it satisfies one of two conditions. 28 U.S.C. 2244(b)(2). The first is where "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." 28 U.S.C. 2244(b)(2)(A). The second is where "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "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." 28 U.S.C. 2244(b)(2)(B). Those limits on additional constitutional and factual claims by state prisoners in habeas are analogous to (indeed, stricter than) the limits on federal prisoners in Section 2255(h)—which expressly cross-references Section 2244.

Because claims filed by state prisoners based on newly discovered facts or new rules of constitutional law are analogous in all relevant respects to such claims filed by federal prisoners, the limits on state prisoners' ability to file such claims in habeas reflect the imposition of general limits on the scope of federal habeas relief for state and federal prisoners alike. See, *e.g.*, *McQuiggin*, 569 U.S. at 396 (recognizing that Section 2244(b)(2)(B) imposed restrictions on habeas relief "that did not exist prior to AEDPA's passage"); see also *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) (describing Section 2244(b)'s limits on second or subsequent habeas petitions as "well within the compass of th[e] evolutionary process" of habeas). Particularly in light of Section 2255's express invocation of Section 2244, the Section

2255 remedy is not "inadequate or ineffective" when it bars second or subsequent factual and constitutional claims not permitted under Section 2255(h), because such claims would not be cognizable in habeas either.

b. AEDPA's limits on state-prisoner habeas claims did not, however, withdraw the habeas remedy for statutory claims of unauthorized imprisonment based on a since-recognized misconstruction of substantive federal criminal law. Such claims are uniquely federal. A state prisoner by definition has not been convicted under a federal statute, so any pure statutory claim of that sort would be a matter of state law and thus not remediable in federal habeas. See *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law.") (citation and internal quotation marks omitted). And the rare state-prisoner habeas claim that depends in part on the construction of a federal statute (such as a preemption claim) necessarily would rely on the Supremacy Clause, and thus could not be described as "nonconstitutional," *Davis*, 417 U.S. at 345. Cf. *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 315 (1964). AEDPA's restrictions on state-prisoner habeas claims therefore did not need to—and did not—address pure statutory claims.

Nothing in AEDPA justifies an inference that Congress silently repealed the traditional habeas remedy for federal prisoners who have been imprisoned for conduct that Congress did not criminalize. "The importance of the Great Writ, * * * along with congressional efforts to harmonize the new statute with prior law," instead "counsel[] hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong eq-

uitable claim would ordinarily keep open." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (citation omitted). Accordingly, this Court has repeatedly and recently emphasized in the habeas context that it "will not construe a statute to displace courts' traditional equitable authority absent the clearest command" and that "[e]quitable principles have traditionally governed the substantive law of habeas corpus." *McQuiggin*, 569 U.S. at 397 (citation omitted); see *Holland*, 560 U.S. at 646.

Indeed, in *Sanders*, this Court construed the then-current version of Section 2255 to align with the traditional habeas remedy even though the Court acknowledged that that the language of Section 2255 "literally" precluded that construction. 373 U.S. at 13; see *McCleskey*, 499 U.S. at 484. The Court in *Sanders* further suggested that if the Section 2255 remedy could not be construed to align with habeas, the saving clause—whose language is the same now as it was then—would be available to fill the gap between the Section 2255 motion remedy and habeas. 373 U.S. at 14-15.

Accordingly, because a pure statutory claim of the sort addressed in *Davis* is not available in a second or subsequent motion under Section 2255, but would be cognizable in a second or subsequent habeas petition, a prisoner with such a claim may be able to establish that "the remedy by motion is inadequate or ineffective," as compared to habeas, "to test the legality of his detention." 28 U.S.C. 2255(e). But that will be true only in the rare cases where the prisoner can satisfy the prerequisites for asserting such a claim in habeas: he must contend that an intervening decision of this Court means that he is in prison for conduct that is not a crime, and he must make the "demanding" showing that "it is

more likely than not that no reasonable juror would have convicted him" of the crime as properly defined. *McQuiggin*, 569 U.S. at 387, 399 (citations omitted).

c. That interpretation of the saving clause is grounded in Section 2255(e)'s text and the background principles of habeas to which that text points. It is consistent with the principles of "finality * * * and the orderly administration of justice," *Dretke* v. *Haley*, 541 U.S. 386, 388 (2004), that animate the statutory and prudential limits on postconviction review. And it is simpler and more limited than the approach taken by some courts of appeals (often at the government's urging prior to 2017), under which a prisoner can invoke the saving clause if (1) he contends that an intervening decision has narrowed the application of a federal criminal statute; and (2) controlling circuit precedent squarely foreclosed his claim at the time of his trial (or plea), appeal, and first motion under Section 2255. The interpretation in this brief differs from that approach in several important respects.

First, the interpretation here allows a prisoner to seek habeas relief only if he can make a threshold showing of actual innocence. That requirement limits relief to a narrow—but compelling—category of cases that lie at the core of the habeas remedy's concern with preventing unjust detention. And the actual-innocence standard is "objective in content, 'well-defined in the case law,' and 'familiar to federal courts.'" *Calderon* v. *Thompson*, 523 U.S. 538, 559 (1998) (brackets and citation omitted).

Second, the interpretation here requires a prisoner to assert a claim based on a new statutory-interpretation decision issued by *this* Court, because only such a decision constitutes a "definitive ruling" that changes the

governing law. *Sunal*, 332 U.S. at 181. An approach under which circuit law alone is sufficient is inconsistent with *Sunal*, allows for the vacatur of long-final convictions on grounds with which other courts—including this Court—may disagree, and is difficult to administer when decisional law in the circuits of conviction and confinement is not precisely equivalent.

Third, the interpretation in this brief demands a showing that the prisoner is in prison for conduct that Congress did not make criminal. That requirement is clearly satisfied when a subsequent decision of this Court narrows the scope of a criminal statute. And although this case does not present the issue, in the government's view it could also be satisfied when a subsequent decision establishes that a defendant is serving a sentence above an otherwise-applicable statutory maximum. Cf. *Haley*, 541 U.S. 391-394 (declining to resolve whether actual innocence applies to "noncapital sentencing error"). But that requirement would not be satisfied when a prisoner contends that he was incorrectly subject to a statutory minimum sentence but was sentenced to a term within the otherwise applicable statutory maximum.

Finally, the interpretation here does not require a prisoner to show that his claim was foreclosed by circuit precedent at the time of his direct appeal and initial Section 2255 motion. Courts of appeals have adopted that requirement, which could lead to difficult inquiries about the implications of circuit law at earlier stages of the prisoner's case. Cf. *McCarthan*, 851 F.3d at 1084. But *Davis* imposed no such circuit-foreclosure requirement, and reading such a backward-looking requirement into the saving clause would be inconsistent with the clause's present-tense text. The better interpreta-

tion thus requires that the prisoner's claim be based on a new decision of this Court that narrows the interpretation of the relevant criminal statute applied by the court of conviction, but does not require a further showing that the prisoner's claim was previously foreclosed by circuit precedent.

II. PETITIONER CANNOT RELY ON THE SAVING CLAUSE BECAUSE HE CANNOT SHOW ACTUAL INNOCENCE

This Court's decision in *Rehaif* narrowed the scope of the felon-in-possession offense by requiring proof that the defendant knew that he had been convicted of a felony. Accordingly, a pure statutory claim asserting the invalidity of a felon-in-possession conviction in light of *Rehaif* could in theory be filed in a second or subsequent collateral attack under the saving clause. As a practical matter, however, few *Rehaif* claims are likely to satisfy the saving clause, because a prisoner will rarely be able to show that he is actually innocent of the offense—that is, that it is more likely than not that no reasonable juror could have found that he knew he had been convicted of a felony. Cf. *Greer* v. *United States*, 141 S. Ct. 2090, 2098 (2021). And petitioner cannot make that showing here: the record makes abundantly clear that he knew that he had been convicted of multiple felonies and, moreover, actually knew that he was not supposed to have a gun.

A. The Court's Decision In *Rehaif* Is A Change In The Interpretation Of A Substantive Federal Criminal Law

Rehaif can provide the basis for the type of statutory claim that falls within the saving clause. Before *Rehaif*, the circuits had unanimously held that the government need not prove the defendant's knowledge of the facts that render his firearm possession unlawful as an ele-

ment of the unlawful-possession crime, see *Rehaif*, 139 S. Ct. at 2210 & n.6 (Alito, J., dissenting), and that was the standard applied in the court of conviction here. *Rehaif* then narrowed that understanding of the law's scope by interpreting 18 U.S.C. 922(g) and 924(a)(2) to contain such a knowledge element. See 139 S. Ct. at 2200 (majority opinion).

Rehaif involved a defendant convicted under 18 U.S.C. 924(a)(2) for having "knowingly violate[d]" Section 922(g), and whose disqualifying status was "being an alien" who "is illegally or unlawfully in the United States" under 18 U.S.C. 922(g)(5) and (A). But the government has acknowledged, and lower courts have uniformly agreed, that *Rehaif*'s holding—namely, that the government "must show that the defendant * * * knew he had the relevant status," 139 S. Ct. at 2194—applies equally to the other alternative status elements in Section 922(g), including the prior-felony-conviction status in Section 922(g)(1) at issue here. Similarly, although the Court's reasoning in *Rehaif* relied in part on 18 U.S.C. 924(a)(2), see 139 S. Ct. at 2195-2196, the Court's holding also applies to defendants (like petitioner) whose criminal proceedings for unlawful firearm possession relied on 18 U.S.C. 924(e)(1).

Because *Rehaif* makes clear that a person who actually lacked knowledge of his prohibited status would not be guilty of the unlawful-possession crime, it creates the possibility (even if remote, see *Greer*, 141 S. Ct. at 2098) that someone convicted under his circuit's prior construction was convicted for conduct that Congress did not criminalize. As a result, a federal prisoner convicted under the prior construction can point to *Rehaif* as an "intervening change in substantive law," *Davis*, 417

U.S. at 334, for purposes of seeking relief in a habeas petition under the saving clause.

B. Petitioner Cannot Satisfy The Threshold Requirement That He Establish His Actual Innocence

Although *Rehaif* thus may provide the basis for the sort of claim that could be brought under the saving clause, petitioner cannot satisfy the threshold requirement to bring such a claim because he cannot make the requisite showing of actual innocence: he plainly cannot show "that it is more likely than not that no reasonable juror would have convicted him" under *Rehaif*'s construction of the felon-in-possession crime. *Schlup*, 513 U.S. at 327.

As this Court recently emphasized, "demonstrating prejudice under *Rehaif*" even on *direct* review of a forfeited claim "'will be difficult for most convicted felons for one simple reason: Convicted felons typically know they're convicted felons.'" *Greer*, 141 S. Ct. at 2098 (citation omitted). And the record here establishes that petitioner knew that he was a felon at the time he possessed a firearm.

Petitioner had a total of 11 prior felony convictions—and had served more than a year in prison on at least five of them. 266 F.3d at 811 & n.6. He testified at his trial "that he knew he had been convicted of a felony" at the time he acquired the firearm. *Id.* at 810; see J.A. 48-49, 64. Petitioner suggests (Br. 5-6; Cert. Reply Br. 3) that he thought it possible that one or more (though not necessarily all) of his prior felony convictions might have been automatically expunged. But even if knowledge of non-expungement were part of *Rehaif*'s knowledge requirement, see 139 S. Ct. at 2194, petitioner went so far as to admit to the police at the time of his arrest "that he knew that he was not supposed to

have a gun," 266 F.3d at 808. Petitioner's own statements thus unambiguously establish that "he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200.

Moreover, to find petitioner guilty of knowingly making a false statement in the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6) (1994), the jury had to find that petitioner possessed "knowledge of his prior felony convictions," 266 F.3d at 811, the same finding required for a felon-in-possession conviction under *Rehaif*, see 139 S. Ct. at 2194. As the court of appeals recognized in his direct appeal, ample evidence established that petitioner possessed that knowledge. 266 F.3d at 811. Petitioner suggested at the certiorari stage (Reply Br. 7-8) that the jury might have premised its guilty verdict on the false-statement count on his use of the name "Jones," instead of his given name "Lee," on the requisite forms. But the trial testimony established that petitioner used "Jones" precisely because his felony convictions were under the name "Lee." 266 F.3d at 808-810; see J.A. 44-45. Any vote of guilt on the false-statement charge based on the false name therefore was premised on petitioner's knowledge of his status.

The record thus establishes that petitioner knew of his prohibited status. At a minimum, petitioner cannot show that "*no* reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327 (emphasis added). And because petitioner cannot show actual innocence, his statutory claim would not be a basis for habeas relief. Section 2255 thus is not "inadequate or ineffective to test the legality of *his* detention," 28 U.S.C. 2255(e) (emphasis added), and the dismissal of his habeas petition was correct.

III. THE COURT OF APPEALS ERRED IN INTERPRETING THE SAVING CLAUSE TO CATEGORICALLY FORECLOSE STATUTORY CLAIMS

Although the judgment below is correct, the court of appeals erred by adopting an overly restrictive reading of the saving clause. On its view, Section 2255(e) precludes *any* prisoner from raising *any* second or subsequent statutory claim—even if he can show that an "intervening change in substantive law" now establishes that his "conviction and punishment are for an act that the law does not make criminal," *Davis*, 417 U.S. at 334, 346, and even if he can meet the demanding actual-innocence standard. Had Congress intended to foreclose habeas relief in such circumstances, which present the most compelling case for collateral review, it would have directly addressed that issue and spoken clearly. See *McQuiggin*, 569 U.S. at 397. But the court of appeals' approach rests on no such textual instruction, and in fact contradicts the best reading of the statutory text and this Court's precedents addressing Section 2255(e).

A. The court of appeals correctly recognized that "the saving clause is interested in opportunity, not outcome." Pet. App. 6a. But the court mistakenly focused on the initial or previous Section 2255 proceedings, deeming Section 2255 adequate and effective whenever "a petitioner *had* any opportunity to present his claim beforehand." *Ibid.* (emphasis added; citation omitted). That interpretation contradicts Section 2255(e)'s text, which expressly contemplates that the saving clause may apply even when a prisoner has already been "denied * * * relief" in an earlier Section 2255 motion. 28 U.S.C. 2255(e).

In addition, the court of appeals' backward-looking inquiry is inconsistent with the saving clause's use of

the present tense ("*is* inadequate or ineffective"). See 1 U.S.C. 1; *Nichols*, 578 U.S. at 109. That focus on the present adequacy of the Section 2255 remedy was a deliberate congressional choice. The Judicial Conference's initial proposal used a formulation very similar to the court of appeals' reading, asking whether "it has not been or will not be practicable" to determine the legality of the prisoner's detention in a Section 2255 motion. *Hayman*, 342 U.S. at 216 n.23 (citation omitted). But Congress rejected that language, which focused on the past as well as the present. Under the statute Congress enacted, the question is not whether petitioner "could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion." Pet. App. 6a. Instead, the relevant inquiry is whether the remedy by Section 2255 motion *currently* "is inadequate or ineffective."

B. That inquiry, in turn, requires a fixed baseline against which to measure adequacy and efficacy. The court of appeals provided none—except, perhaps, a circular reference to the Section 2255 motion remedy itself, see Pet. App. 6a. But the contours of the motion remedy say nothing about whether that remedy "is inadequate or ineffective" when it forecloses a prisoner, who may already have been "denied * * * relief" by motion, from "test[ing]" his claim. 28 U.S.C. 2255(e).

The circularity of comparing a remedy to itself may explain why the only content the court of appeals' approach gives to the saving clause is to allow resort to habeas for claims for "good-time credits," claims challenging "parole determinations," or claims by a prisoner whose "sentencing court has been dissolved." *McCarthan*, 851 F.3d at 1093. The first two are not even clearly covered by Section 2255(a) in the first place, be-

cause they are not obviously characterized as "collateral attack[s]" for which an appropriate remedy would be "to vacate, set aside or correct the sentence" that the court of conviction imposed. 28 U.S.C. 2255(a). And limiting saving-clause relief to cases where the prisoner finds it impossible to file a motion in a nonexistent sentencing court is, among other things, in tension with Congress's rejection of the Judicial Conference's proposal, which had focused on "practicab[ility]," *Hayman*, 342 U.S. at 216 n.23 (citation omitted).

The enacted text of the saving clause, in contrast, is not limited to practical impediments, but instead looks to whether a Section 2255 motion "is inadequate or ineffective to test the legality" of detention. 28 U.S.C. 2255(e). As this Court recognized in *Sanders* and *Hayman*, the Section 2255 remedy may be considered "inadequate or ineffective" based on a legal impediment that Section 2255 itself uniquely imposes. See *Sanders*, 373 U.S. at 14-15 (res judicata bar); *Hayman*, 342 U.S. at 223 (limit on evidentiary hearing). The court of appeals' interpretation thus diverges from this Court's precedents.

C. The same circularity of comparing Section 2255's motion remedy to itself led the court of appeals to draw an overly broad negative inference from Section 2255(h). See Pet. App. 9a. As explained above (see Pt. I.B.3, *supra*), Section 2255(h) is explicitly intertwined with AEDPA's limitations on second or successive state habeas claims in Section 2244(b). Under the textually grounded approach that recognizes habeas as the benchmark for when the motion remedy "is inadequate or ineffective," see *Sanders*, 373 U.S. at 14-15, Sections 2244(b) and 2255(h) *inform* the saving-clause inquiry, but do not fundamentally alter its operation.

Those provisions show that Congress, in imposing linked limitations on second or subsequent factual and constitutional claims brought by state prisoners in habeas and federal prisoners under Section 2255, sought to impose an overarching limitation on all forms of federal collateral review for such claims. The Section 2255 remedy is not "inadequate or ineffective" simply for incorporating limitations that are analogous to, and cross-reference, corresponding limitations on habeas relief.

But a similar inference cannot be drawn in the context of pure statutory claims by federal prisoners asserting that their conduct has been retroactively reclassified by this Court as noncriminal. Nothing in Section 2255(h) (which does not itself apply to habeas petitions by federal prisoners), the saving clause (which AEDPA did not amend), or Section 2244(b)'s limits on habeas claims by state prisoners (which do not and could not address such statutory claims) requires the broader inference that Congress entirely foreclosed traditional habeas relief for uniquely federal statutory claims like those at issue here. That is especially true because Congress acted against the backdrop of the interpretation of Section 2255(e) adopted in *Sanders* and this Court's other decisions, which made clear that the saving clause could permit reliance on habeas if Section 2255 incorporated a legal barrier to considering a claim that would be cognizable in habeas.

D. The Eleventh Circuit viewed its categorically restrictive approach as necessary to ensure that prisoners who pursue second or subsequent statutory claims under the saving clause are not better off than counterparts who bring factual or constitutional claims in a second or subsequent motion under Section 2255(h). See *McCarthan*, 851 F.3d at 1091. But that policy concern

is no reason to depart from the natural reading of Section 2255(e)'s text. And the concern is overstated.

Most fundamentally, although a prisoner seeking to invoke the saving clause need not follow the special procedures in Sections 2244 and 2255(h), he must make a stringent threshold showing of actual innocence. That requirement forecloses petitioner's reliance on the saving clause here and illustrates how courts can weed out nonmeritorious invocations of the saving clause at the outset. See Pt. II.B, *supra*.

In addition, although habeas petitions under 28 U.S.C. 2241 are not subject to a statute of limitations, see *McCarthan*, 851 F.3d at 1091, courts can use their equitable discretion to preclude late filings—and can look to Section 2255's statute of limitations for guidance. See, *e.g.*, *McQuiggin*, 569 U.S. at 399; cf. *Kemp* v. *United States*, 142 S. Ct. 1856, 1864 (2022) (analogizing a "reasonable time" standard in a rule to an express time limit in a related provision). And as this Court has observed, "unjustified delay" might affect the actual-innocence inquiry. *McQuiggin*, 569 U.S. at 399.

Congress thus had no need to bar *all* second or subsequent statutory claims under Section 2255(e) in order to appropriately cabin the limited applications of the habeas remedy that the saving clause preserves. And Congress did not do so. If, unlike petitioner, a federal prisoner can in fact make a showing of actual innocence indicating that he is in prison for conduct now definitively understood not to be a crime under the correct interpretation of the statute of conviction, he may seek relief in a habeas petition under the saving clause—a result that lies at the very core of "the historic function of habeas corpus to provide relief from unjust incarceration." *Kuhlmann*, 477 U.S. at 452 (plurality opinion).

IV. PETITIONER'S INTERPRETATION OF THE SAVING CLAUSE IS ATEXTUAL AND OVERBROAD

In order to fit his own case within the saving clause, petitioner would construe the clause to cover a wide swath of claims—including, potentially, factual and constitutional claims outside the limits that Congress imposed on *both* Section 2255 motions and habeas petitions. That interpretation is inconsistent with the saving clause's text and lacks a coherent limiting principle. The saving clause's role is to preserve the established parameters of collateral review, not to upset the delicate balancing of fairness and finality that those parameters reflect. And petitioner errs in asserting that principles of constitutional avoidance support his approach.

A. Petitioner's Approach Cannot Be Squared With The Text

The starting point for petitioner's construction—the assertion that "the § 2255 remedy cannot 'test' the legality of a detention * * * if the court applies the wrong substantive law," Pet. Br. 16; see *id.* at 16-18—is undermined by the very definitions of "test" on which he relies. Those definitions use verbs like "try," "put to," and "ascertain," *id.* at 17 (citations and emphases omitted), all of which evoke a certain process—not a particular result. See *McCarthan*, 851 F.3d at 1086; *Prost*, 636 F.3d at 584. That evocation is even stronger when the word "test" appears in the context of a judicial "test," which reinforces the "focus on procedures rather than outcomes." *Taylor* v. *Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002). Petitioner's hypotheticals (Br. 18) are far removed from the present context and at most suggest that a "test" must be genuine and not a sham. But "[a]ll judges make mistakes," *Dietz* v. *Bouldin*, 579 U.S. 40, 53 (2016), and neither Congress nor any other reasona-

ble legal observer would say that a judge has failed to "test" a claim anytime she errs. See *Taylor*, 314 F.3d at 835 ("Judges sometimes err, but this does not show that the procedures are inadequate; it shows only that people are fallible.").

Petitioner's reading of "test" as invariably requiring application of the correct substantive law also lacks any limiting principle. It cannot logically be cabined to statutory claims, because a Section 2255 proceeding that applies an incorrect constitutional rule would also appear to satisfy petitioner's proposed framework. See, *e.g.*, Pet. Br. 29. Furthermore, petitioner's focus on prior judicial decisions—under which each circuit's settled construction of 18 U.S.C. 922(g) and 924(a) was a "test" only until the moment *Rehaif* was issued—is in tension with his own recognition (Br. 27) that the saving clause is focused on the prisoner's current Section 2255 remedy, not how a past motion was (or would have been) resolved. Petitioner's assertion (Br. 26) that Section 2255 is "ineffective" when "it procedurally allows [a prisoner] to make fruitless arguments previously foreclosed by circuit precedent" likewise mistakenly focuses on prior Section 2255 motions instead of the current one.

Petitioner also relies heavily (Br. 19-25) on the assertion that Congress used "inadequate" not in its ordinary sense, but as a term of art borrowed from equity jurisprudence, under which the chancery courts could provide a remedy where the remedy at law was deficient. Petitioner cites (Br. 20-22) various bills in equity—the equivalent of complaints, not judicial opinions—filed during the reigns of Richard II (1377-1399) and Henry VI (1422-1461, 1470-1471). But the relevance of those bills is unclear. All of them appear to have involved

claims related to fraud or abuse of process with respect to a civil proceeding; none stands for the proposition that equity would have permitted a collateral attack on a final criminal judgment on the ground that the trial court applied the wrong substantive criminal law. Cf. *United States* v. *Throckmorton*, 98 U.S. 61, 65-67 (1878) (explaining that "equity" does not "interfere to grant a trial of a matter which has already been discussed in a court of law") (citation omitted).

Even if petitioner could show that the bills he cites reflected a common practice in the Court of Chancery's infancy, Congress could not have employed the word "inadequate" with the expectation that it would be understood to require transposing an ancient civil doctrine across time and context. Cf. 1 Joseph Story, *Commentaries on Equity Jurisprudence* 23-24 (4th ed. 1846) (explaining that while "[i]n the early history" of equity, courts operated with "no certain limits or rules," that sort of "unlimited authority [had] totally been disclaimed" by Blackstone's time). It is especially unlikely that Congress would do so when the doctrine (according to petitioner, see Br. 22) would require that the standard remedy be supplanted whenever doing so would advantage the person seeking relief. The principal directive of Section 2255(e) is that federal prisoners should *not* generally be filing habeas petitions, and instead should use the substitute remedy by motion in the court of conviction. See 28 U.S.C. 2255(e); see also, *e.g.*, *Hayman*, 342 U.S. at 210-214 (describing statute's history). The saving clause's exception cannot become the default rule.

Petitioner can neither justify the expansive loophole he proposes nor meaningfully cabin its scope. He briefly suggests that the saving clause's reference to

claims concerning the "legality" of "'detention'" would preclude his proposed construction from becoming "disruptive to the federal system." Pet. Br. 34 n.3 (citation omitted). But he does not provide a specific view on what he would classify as a challenge to the "'legality of detention,'" other than by excluding "statutory procedural" claims, *ibid.*, that have not even been recognized as a basis for relief. See, *e.g.*, *Davis*, 417 U.S. at 346-347 (distinguishing claim recognized in that case from nonconstitutional procedural claims that are not cognizable on collateral review). And in any event, his proposal would override the express provisions of Sections 2255(h) and 2244(b), which otherwise limit when prisoners can bring additional factual or constitutional claims, including claims that challenge "detention." See Pet. Br. 28-29.

B. Petitioner's Asserted Constitutional Concerns Are Insubstantial

Petitioner's reliance on the constitutional-avoidance canon to bolster his reading of the statute is misplaced. Even assuming that petitioner's construction of the saving clause's text were "fairly possible," as the canon requires, he cannot identify any "serious constitutional problems" that it might be necessary to avoid. *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001).

1. Petitioner argues at length (Br. 34-42) that his reading is necessary to avoid violating the Suspension Clause. That contention cannot be reconciled with this Court's decision in *Felker* v. *Turpin*, which rejected the argument that AEDPA's limitations on second or subsequent habeas petitions violated that Clause. 518 U.S. at 663-664. The Court there recounted the evolution of habeas corpus from the Framing to the modern day and explained that the "added restrictions which [AEDPA]

places on second habeas petitions are well within the compass of this evolutionary process" and thus "do not amount to a 'suspension' of the writ." *Id.* at 664.

In an attempt to situate this case within the historical roots of habeas corpus before that evolution, petitioner asserts (Br. 36-42) that a district court lacks "jurisdiction" to convict a defendant based on what is later revealed to be an incorrect view of the law. But the decisions on which petitioner relies simply stand for the uncontroversial proposition that federal courts lack jurisdiction to create common-law crimes, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), or to adjudicate cases over which Congress has not granted them jurisdiction, *United States* v. *Hall*, 98 U.S. 343, 345 (1878). None suggests that a court deprives itself of jurisdiction whenever it misinterprets a criminal statute. To the contrary, as this Court made clear around the time of the saving clause's enactment, even a conviction under a "wholly unconstitutional" statute does not retroactively "oust [the trial] court of jurisdiction." *United States* v. *Williams*, 341 U.S. 58, 68 (1951); see *United States* v. *Cotton*, 535 U.S. 625, 630-631 (2002) (explaining that "defects in an indictment do not deprive a court of its power to adjudicate a case"). It follows *a fortiori* that a nonconstitutional error in the construction of a statute is likewise nonjurisdictional.

2. Petitioner's other constitutional arguments are likewise meritless. Petitioner briefly contends (Br. 42-43) that a denial of saving-clause relief would violate the separation of powers. Noting that "the exclusive power to define criminal acts resides with Congress," he theorizes that a conviction based on an incorrect interpretation of a statute would "usurp[] Congress's authority to define crime." *Ibid.* But "[i]t is emphatically the prov-

ince and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and a court does not usurp Congress's power simply because it turns out to have been mistaken in its construction of a statute. Moreover, the question in this case is whether Congress itself authorized federal courts to entertain a habeas petition like petitioner's. If Congress has not done so, it would be the entertaining of a habeas petition, not the denial of it, that would usurp congressional power.

Petitioner additionally suggests (Br. 43-45) that a denial of saving-clause relief would raise due process concerns. But the decision on which he relies, *Fiore* v. *White*, 531 U.S. 225 (2001) (per curiam), simply observed that the Due Process Clause "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.* at 229. That principle speaks to the quantum of proof that must be introduced at trial. This case concerns an entirely different question: the extent of the post-conviction procedures that must be available to allow a prisoner to assert such a claim of trial error. Petitioner cites no authority suggesting that due process forbids the sort of limits on second or subsequent collateral attacks that this Court upheld under the more specific Suspension Clause. See *Felker*, 518 U.S. at 663-664.

Petitioner's invocation (Br. 45-47) of the Eighth Amendment's prohibition against punishment in the absence of a crime rests on a similar conflation of a claim of error and the necessity of providing additional opportunities to raise that claim. The question in this case is whether and under what circumstances a federal prisoner who has been convicted of a crime is entitled to collaterally attack his conviction. The Eighth Amendment

would be relevant only if its ban on cruel and unusual punishment also implicitly requires the government to provide multiple rounds of postconviction review—a proposition for which petitioner identifies no support.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. I, § 9, Cl. 2 provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. 28 U.S.C. 2241 provides:

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

(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.

3. 28 U.S.C. 2241 (1964 & Supp. II 1966) provided:

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

(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.

4. 28 U.S.C. 2241 (Supp. II 1948) provided:

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

(5) It is necessary to bring him into court to testify or for trial.

5. 28 U.S.C. 2244 provides:

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) 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.

6. 28 U.S.C. 2244 (Supp. II 1966) provided:

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 and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(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.

7. 28 U.S.C. 2244 (Supp. II 1948) provided:

Finality of determination.

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, or of any State, 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 and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

8. 28 U.S.C. 2255 provides:

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 Supreme Court, that was previously unavailable.

9. 28 U.S.C. 2255 (Supp. II 1948) provided:

Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court of the United States 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.

A motion for such relief may be made at any time.

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.

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

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

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.

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.