No.

In the Supreme Court of the United States

MARCUS DEANGELO JONES,
PETITIONER,

v.

DEWAYNE HENDRIX

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2255, federal inmates can collaterally challenge their convictions on any ground cognizable on collateral review, with successive attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. § 2255(h). 28 U.S.C. § 2255(e), however, also allows inmates to collaterally challenge their convictions outside this process through a traditional habeas action under 28 U.S.C. § 2241 whenever it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [their] detention."

The question presented is whether federal inmates who did not—because established circuit precedent stood firmly against them—challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under § 2241 after this Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction.

RELATED PROCEEDINGS

1. *United States* v. *Jones*, No. 2:00-cr-04010-SRB-1 (W.D. Mo.). On July 25, 2000, petitioner was convicted by a jury of one count of making false statements to acquire a firearm and two counts of possessing a firearm as a felon under 18 U.S.C. § 922(a)(6), (g)(1).

2. *United States* v. *Jones*, No. 00-3706 (8th Cir.). On September 12, 2001, the Eighth Circuit affirmed petitioner's conviction.

3. *Jones* v. *United States*, No. 4:02-CV-00775 (W.D. Mo.). On August 12, 2002, petitioner filed his first Motion to Vacate Sentence under 28 U.S.C. § 2255. On January 29, 2003, the district court denied petitioner's first § 2255 motion.

4. *United States* v. *Jones*, No. 03-2282 (8th Cir.). On April 12, 2005, the Eighth Circuit reversed the district court's denial of petitioner's § 2255 motion. On remand, the district court corrected petitioner's sentence, but denied petitioner's motions asking for a new sentencing hearing, to appoint him counsel, and to allow him to appear before the court.

5. *United States* v. *Jones*, No. 05-3435 (8th Cir.). On June 29, 2006, the Eighth Circuit affirmed the district court's decision.

6. *Jones* v. *United States*, No. 06-4015 (8th Cir.). On December 6, 2006, petitioner requested to file a successive § 2255 motion. The Eighth Circuit denied this request on June 19, 2007.

7. *Jones* v. *United States*, No. 06-9259 (U.S.). On March 5, 2007, the Supreme Court denied certiorari.

8. *Jones* v. *Revell*, No. 05-467-JPG (S.D. Ill.). On December 20, 2005, petitioner's habeas action under § 2241 was dismissed with prejudice in the Southern District of Illinois.

9. *Jones* v. *Castillo*, No. 2:09-CV-02455 (W.D. Tenn.). On July 9, 2009, petitioner filed a petition for habeas relief under § 2241 in the Western District of Tennessee. The petition was denied on September 29, 2009. On October 8, 2009, petitioner filed a motion for reconsideration, which was denied by the district court on December 1, 2009. On January 11, 2010, petitioner filed a second motion to alter or amend the judgment, or in the alternative, motion for reconsideration. This motion was denied by the district court on May 13, 2013.

10. *Jones* v. *Castillo*, No. 10-CV-02570 (W.D. Tenn.). On August 4, 2010, petitioner filed a petition for habeas relief under § 2241 in the Western District of Tennessee. On July 15, 2011, the district court denied petitioner's § 2241 motion.

11. *Jones* v. *Castillo*, No. 10-5376 (6th Cir.). On July 20, 2012, the Sixth Circuit affirmed the district court's dismissal of petitioner's § 2241 petition.

12. *In re Marcus D. Jones*, No. 13-9543 (U.S.). On March 13, 2014, petitioner filed a motion for leave to proceed *in forma pauperis*, as well as a petition for a writ of habeas corpus. On April 8, 2014, the Supreme Court denied petitioner's motion and dismissed the petition for a writ of habeas corpus.

13. *Jones* v. *Stephens*, No. 2:12-CV-02398 (W.D. Tenn.). On May 24, 2012, petitioner filed a petition for habeas relief under § 2241 in the Western District of Tennessee. The district court denied petitioner's motion on October 14, 2015.

14. *Jones* v. *United States*, No. 17-CV-4137 (W.D. Mo.). On June 28, 2017, petitioner filed a new § 2255 motion in the Western District of Missouri. On July 28, 2017, the district court denied relief.

15. *United States* v. *Jones*, No. 17-3022 (8th Cir.). On February 6, 2018, the Eighth Circuit affirmed the district court's decision.

16. *Jones* v. *English*, No. 18-3110-JWL (D. Kan.). On April 26, 2018, petitioner filed a petition for writ of habeas corpus in the District of Kansas. The district court dismissed without prejudice for lack of statutory jurisdiction on May 21, 2018.

17. *Jones* v. *English*, No. 18-3128 (10th Cir.). On October 22, 2018, the Tenth Circuit affirmed the district court's decision.

18. *Jones* v. *United States*, No. 18-1904 (8th Cir.). On April 27, 2018, petitioner filed a petition for a successive habeas petition. The Eighth Circuit denied the petition on November 5, 2018.

19. *Jones* v. *Hendrix*, No. 2:19-CV-00096 (E.D. Ark.). On July 29, 2019, petitioner filed for a writ of habeas corpus in the Eastern District of Arkansas. On January 24, 2020, the district court granted respondent's motion to dismiss petitioner's habeas petition.

V

20. *Jones* v. *Hendrix*, No. 20-1286 (8th Cir.). On August 6, 2021, the Court of Appeals affirmed the district court's dismissal of petitioner's habeas petition.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 8 F.4th 683. The memorandum opinion of the district court (App., *infra*, 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. App., *infra*, 1a. On October 29, 2021, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including Thursday, December 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set forth at App., *infra*, 30a-33a.

STATEMENT

1. In 1948, Congress largely replaced the petition for habeas corpus, see 28 U.S.C. § 2241, with the motion to vacate, see 28 U.S.C. § 2255, as the means for federal inmates to collaterally attack the legality of their convictions or sentences. See Pub. L. No. 80-773, 62 Stat. 869, 967-968. A motion to vacate under § 2255 allows inmates to contest their sentences or convictions "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." 28 U.S.C. § 2255(a). Traditional habeas relief became available only as allowed by § 2255's "safety valve":

> 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.

Id. § 2255(e).

In 1996, Congress reformed the system of collateral review when it passed the Antiterrorism and Effective Death Penalty Act. See Pub. L. No. 104-132, 110 Stat. 1214. The Act bars second or successive § 2255 motions unless a "panel of the appropriate court of appeals" certifies that they 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.

28 U.S.C. § 2255(h).

But the Act did not alter the safety valve. It still allowed inmates to file habeas petitions if they show that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [their] detention." 28 U.S.C. § 2255(e). The question presented concerns whether § 2255(e)'s safety valve applies here.

2. In 2000, petitioner was convicted of two counts of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(e), and one count of making false statements to acquire a firearm in violation of 18 U.S.C. § 922(a)(6) and § 924(a)(1)(B). See *United States* v. *Jones*, 266 F.3d 804, 807-808 (8th Cir. 2001). He was sentenced to 327 months imprisonment on each of the felon in possession counts and 60 months on the false statement count, the sentences to run concurrently. *Id.* at 808. His conviction and sentence were affirmed on appeal. *Id.* at 807.

Petitioner later filed a motion to vacate his sentence under 28 U.S.C. § 2255, which the district court dismissed. The court of appeals reversed, however, holding that his counsel was ineffective for not objecting to Jones's two felon-in-possession counts as duplicative. See *United States* v. *Jones*, 403 F.3d 604, 605 (8th Cir. 2005). On remand, the district court vacated one of Jones's felon-in-possession convictions and re-sentenced Jones. But the trial court denied his requests for a new sentencing hearing, for appointed counsel, and to let him appear in court. Jones appealed and the court of appeals affirmed. *United States* v. *Jones*, 185 Fed. Appx. 541, 542 (8th Cir. 2006) (per curiam).

Over a decade after petitioner completed his initial § 2255 proceeding, this Court held that to convict under 18 U.S.C. § 922(g) the government must prove that the defendant knew both that he had a prohibited status and that he possessed a firearm. *Rehaif* v. *United States*, 139 S. Ct. 2191, 2194 (2019). Because *Rehaif* involved the interpretation of a statute and not a "new rule of constitutional law," petitioner could not challenge his conviction under § 922(g) in a new § 2255 motion. See 28 U.S.C. § 2255(h)(2). Petitioner instead petitioned for habeas corpus under 28 U.S.C. § 2241. Believing that § 2255(e)'s safety valve did not apply to new rules of statutory law, the district court held it had no jurisdiction and dismissed the petition. See App., *infra*, 28a-29a.

Petitioner appealed, arguing "that he can use the [safety valve] and, if not, Congress has unconstitutionally suspended the writ of habeas corpus." App., *infra*, 4a. Believing him "wrong on both counts," *ibid*., the Eighth Circuit affirmed.

The Eighth Circuit noted that when "Jones filed his first § 2255 motion, our precedent had already rejected a *Rehaif*-type argument. Now, although *Rehaif* might vindicate [Jones's claim], he cannot file a successive § 2255 motion in which to raise it. Caught in this Catch-22, Jones argues that § 2255's remedy is inadequate or ineffective." App., *infra*, 5a. Acknowledging that eight circuits "would allow a petitioner to invoke the [safety valve] in a case like Jones's," *ibid*. (listing circuits it believed in majority on "split"), while only two, the Tenth and Eleventh, "would not," *id*. at 6a, it sided "with the Tenth and Eleventh Circuits,"

ibid., in holding that § 2255(e) does not permit habeas relief based on a retroactively applicable statutory interpretation decision, even if the new interpretation by this Court renders the applicant's conviction invalid, see *id.* at 4a-10a.

"[F]irst," it noted, under prior circuit precedent "§ 2255 is not inadequate or ineffective where a petitioner had *any opportunity* to present his claim beforehand." App., *infra*, 4a-5a (quoting *Lee* v. *Sanders*, 943 F.3d 1145, 1147 (8th Cir. 2019) (emphasis added)). To the court, this was "because the [safety valve] asks whether § 2255's remedy is 'inadequate or ineffective to *test* the legality of [an inmate's] detention.' And 'to test' means 'to try.' Simply, the safety valve is interested in opportunity, not outcome." App., *infra*, 6a (quoting 18 U.S.C. § 2255 and *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1086 (11th Cir. 2017) (en banc), and citing *Prost* v. *Anderson*, 636 F.3d 578, 584 (10th Cir. 2011)).

"Here," the court held, "Jones could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion. Although our precedent was at that time against him, he nonetheless could have succeeded before the *en banc* court or before the Supreme Court. And, regardless, the question is whether Jones could have raised the argument, not whether he would have succeeded." App., *infra*, 6a-7a (citing *Bousley* v. *United States*, 523 U.S. 614, 621-623 (1998)).

Second, it noted that "the [safety valve] is triggered only if § 2255's 'remedy' is inadequate or ineffective. § 2255(e). 'Remedy' means '[t]he means of enforcing a right or preventing or redressing a wrong.'" App., *infra*, 8a (quoting Black's Law Dictionary (11th ed. 2019)). "Thus, [i]t is the infirmity of the § 2255 remedy itself, not the failure to use it or prevail under it, that is determinative." *Ibid.* (quoting *Lee*, 943 F.3d at 1147).

In light of this interpretation, the Eighth Circuit held,

> § 2255's remedy was itself perfectly capable of facilitating Jones's argument. Jones argues that his conviction, and thus his sentence, is illegal under federal law. Section 2255 authorizes a motion challenging a sentence "upon the ground that the sentence was imposed in violation of the . . . laws of the United States." "[I]t may very well" have been the case that "circuit law [was] inadequate or deficient" when Jones filed his first § 2255 motion. "But that does not mean the § 2255 remedial vehicle is inadequate or ineffective to the task of testing the argument."

App, *infra*, 8a (quoting 18 U.S.C. § 2255(e) and *Prost*, 636 F.3d at 591). In other words, although substantive circuit law at the time was wrong, the remedy applying it was nonetheless adequate and effective to test the legality of Jones's detention. As the Eighth Circuit put it, "Jones's identified problem is our now-defunct precedent, not § 2255's remedy." *Ibid.*

Third, the court noted that "§ 2255(h)(2) authorizes successive motions raising 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" App., *infra*, 9a (quoting 18 U.S.C. § 2255(h)(2)). It believed, however, that "Jones's proposed interpretation of the [safety valve] would work an end run around this limitation by rewriting § 2255(h)(2) to remove the word 'constitutional.'" *Ibid.* Even if that reading "'aimed to fix a 'glitch' in § 2255(h)(2),'" *ibid.* (quoting *Chazen* v. *Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring)), it held, "it is not our place to adopt a test that replaces the balance Congress reached with one of our own liking." *Ibid.* (quoting *Prost*, 636 F.3d at 592).

The court next turned to Jones's other argument: that "[not being able to file] a habeas petition * * * would have the effect of suspending the right of habeas corpus as to him." App., *infra*, 10a. "Looking to the writ as it existed in 1789," *id.* at 11a, the court held that "the writ of habeas corpus would not have been available at all to prisoners like Jones [who had been] convicted of crime by a court of competent jurisdiction," *id.* at 12a (quoting *McCarthan*, 851 F.3d at 1094, and *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1563 (2021) (Thomas, J., concurring)). "Because Jones's argument would not have warranted habeas relief as the writ was understood in 1789, we cannot agree that his inability to raise it now violates the Suspension Clause." *Ibid.*

The court rejected his Suspension Clause arguments for another reason too. Because he could

have made a *Rehaif*-argument to the earlier court of appeals en banc and sought review of any negative decision there in this Court, "he did," it held, have "a meaningful opportunity to raise his [claim]." App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

I. There Is A "Deep And Mature Circuit Split" On The Scope Of The Safety Valve

This case springs from the "deep and important circuit conflict" over the meaning of the safety valve. U.S. Reply Br. at 1, *United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (mem.) (No. 18-420). Courts of appeals have noted the split and called for this Court to resolve it. As early as 2013, for example, the Eleventh Circuit noted the existence of the "deep and mature circuit split on the reach of the [safety valve]," *Bryant* v. *Warden*, 738 F.3d 1253, 1279 (11th Cir. 2013), *overruled on other grounds by McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc), and the court below noted that "the circuits have split over this question," App., *infra*, 5a.

So pressing is the conflict that many individual circuit judges have called for this Court's speedy intervention. See, *e.g.*, *Wright* v. *Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar, J., concurring) ("the Court should step in * * * sooner [rather] than later"). *United States* v. *Wheeler*, 734 Fed. Appx. 892, 893 (4th Cir. 2018) (statement of Agee, J., respecting denial of petition for rehearing en banc) ("The issues in this case are of significant national importance and are best

considered by the Supreme Court at the earliest possible date."). And in the Ninth Circuit alone, thirteen judges have called for this Court to resolve the split. See *Allen* v. *Ives*, 976 F.3d 863, 868 (2020) (Fletcher, J., joined by Christen, J., concurring in the denial of the petition for rehearing en banc) ("We also agree * * * that the Supreme Court should grant certiorari—in this or in some other case—to resolve the circuit split."); *id.* at 869 (Nelson, J., joined by Callahan, M. Smith., Ikuta, Bennett, Bade, Collins, Lee, Bress, Bumatay, and Vandyke, JJ., dissenting from denial of petition for rehearing en banc) (noting that "[e]ven our concurring colleagues agree that this case warrants Supreme Court review").

Commentators have also remarked on the "kaleidoscopic chaos" of the circuits' interpretations. Jennifer L. Case, *Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause*, 45 U. Mem. L. Rev. 1, 4 (2014) (noting "the deep and fractured circuit split in [safety valve] jurisprudence"); see also Ethan D. Beck, Note, *Adequate and Effective: Postconviction Relief Through Section 2255 and Intervening Changes in Law,* 95 Notre Dame L. Rev. 2063, 2068-2069 (2020) (outlining split); Lauren Casale, Note, *Back to the Future: Permitting Habeas Petitions Based on Intervening Retroactive Case Law to Alter Convictions and Sentences*, 87 Fordham L. Rev. 1577, 1588-1597 (2019) (same); *Current Circuit Splits,* 14 Seton Hall Cir. Rev. 91, 118 (2017) (same).

And the government itself has repeatedly noted the "deep and important circuit conflict" over the meaning

of the safety valve. Br. in Opp. at 1, *United States.* v. *Wheeler*, 139 S. Ct. 1318 (2019) (mem.) (No. 18-420). In 2017, the government conceded that "a circuit conflict exists on the question," Br. in Opp. at 11, *McCarthan* v. *Collins*, 138 S. Ct. 502 (2017) (mem.) (No. 17-85), and the very next year, the government petitioned this Court for certiorari on this very issue, again citing the "entrenched conflict * * * in the court of appeals."[1] Pet. at 23, *Wheeler*, *supra.* Confusion runs so deep, in fact, that the government has changed its own position

[1] With two exceptions, the government has described the split exactly as petitioner does here. See Br. in Opp. at 25-27 & n.2, *McCarthan* (describing split). First, as the government previously noted, prior to the present case, the Eighth Circuit had "discussed the majority rule without expressly adopting it." *Id.* at 26 n.2. Now it has rejected that rule. Second, the government has described the D.C. Circuit as having adopted the majority position. *Ibid.* (placing *In re Smith*, 285 F.3d 6 (D.C. Cir. 2002), on the majority-side of the split). For purposes of gauging the depth of the split, petitioner is happy to accept this description. Under petitioner's view, however, *In re Smith* did not address this issue. Rather, the D.C. Circuit decided not to reach the issue actually presented, whether "there is an 'actual innocence' exception under AEDPA," *In re Smith*. 285 F.3d at 9, which would have allowed the prisoner in that case to file a successive § 2255 motion, because, the government conceded, the Seventh Circuit, where the prisoner was incarcerated, would allow him to file a habeas petition under § 2255's safety valve, see *ibid.* ("The court takes at face value the government's representation [of Seventh Circuit law], for the government will be bound to argue in support of relief for Smith in the Seventh Circuit. Should the government's interpretation of Seventh Circuit law prove to be mistaken, Smith then may renew his contention in this court that there is an 'actual innocence' exception under AEDPA."). The D.C. Circuit, in other words, was describing the Seventh Circuit's view of the safety valve, not its own.

twice. "Prior to 1998, the Department of Justice took the view that relief under the [safety valve] is unavailable for statutory claims [but then] reconsidered its views, taking the position * * * that an inmate can seek relief for a statutory-based claim of error under Section 2255(e)." Pet. at 13, *Wheeler*, *supra*. And now the government reverts to its earlier position. As the government has also acknowledged, "[o]nly this Court's intervention can ensure nationwide uniformity as to the [safety valve's] scope," *id*. at 25-26, and that "[o]nly this Court's intervention can provide the necessary clarity," *id*. at 13.

A. This Petition Addresses A Situation In Which This Court, After Prisoners Can No Longer Seek Relief Directly Under § 2255, Overrules The Prior Circuit Precedent Under Which They Were Convicted. Three Circuits Refuse To Allow Federal Prisoners Convicted In These Circumstances To Petition For Habeas Relief Under § 2255(e)'s Safety Valve Even Though, Under This Court's Retroactively Effective Ruling, They Are Legally Innocent

The Eighth, Tenth, and Eleventh Circuits refuse habeas relief under § 2255's safety valve to people imprisoned for conduct that is later declared no crime. See App., *infra*, 10a ("In sum, Jones has not shown that § 2255's remedy is inadequate or ineffective, so he cannot proceed with a habeas petition."); *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc) (holding "that a

change in caselaw does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention'"); *Prost* v. *Anderson*, 636 F.3d 578, 580 (10th Cir. 2011) (Gorsuch, J.) ("The fact that § 2255 bars Mr. Prost from bringing his statutory interpretation argument *now*, in a *second* § 2255 motion almost a decade after his conviction, doesn't mean the § 2255 remedial process was ineffective or inadequate to test his argument. It just means he waited too long to raise it."). All three have found that the safety valve does not apply if the argument could have been raised in an earlier § 2255 motion, no matter how foreclosed by circuit precedent.

B. Eight Circuits, By Contrast, Allow An Inmate To Petition For Habeas Relief In Such Circumstances

The First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits all hold the reverse. See *United States* v. *Barrett*, 178 F.3d 34, 52 (1st Cir. 1999) ("We agree with [other circuits] that habeas corpus relief under § 2241 remains available for federal prisoners in limited circumstances."); *id.* at 50-53 (describing contours of safety valve relief); *Triestman* v. *United States*, 124 F.3d 361, 363 (2d Cir. 1997) (holding that when "a federal prisoner is actually innocent of the crime of which he was convicted, but the AEDPA would appear to bar the prisoner's petition for collateral relief pursuant to § 2255," he may seek § 2241 relief); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997) (holding "a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate"

may seek habeas relief through § 2255's safety valve); *In re Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000) ("§ 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law"); *Reyes-Requena* v. *United States*, 243 F.3d 893, 904 (5th Cir. 2001) (similar); *Wooten* v. *Cauley*, 677 F.3d 303, 307-308 (6th Cir. 2012) (similar); *In re Davenport,* 147 F.3d 605, 611-612 (7th Cir. 1998) (similar); *Stephens* v. *Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (similar). In these situations, these circuits hold, the remedy provided by § 2255 is "inadequate and ineffective" and the inmate may petition for habeas relief.

II. The Eighth Circuit Erred In Holding That Federal Inmates Whom The Supreme Court Has Determined Are Legally Innocent Cannot Challenge Their Convictions Through Habeas When Prior § 2255 Motions Making That Argument Would Have Been Firmly Foreclosed By Established Circuit Precedent

A. In These Circumstances, A § 2255 Motion Is "Inadequate Or Ineffective To Test The Legality Of [An Inmate's] Detention"

28 U.S.C. § 2255(e) allows inmates to pursue § 2241 relief whenever the § 2255 remedy itself "is inadequate or ineffective to test the legality of [their] detention[s]." 28 U.S.C. § 2255(e). This includes the situation where a retroactive change in the interpretation of statutory law means that an inmate is legally innocent of the crime for which he was convicted.

First, the § 2255 remedy cannot "test" the legality of a detention at all, let alone adequately and effectively, if the court applies the wrong substantive law. That is like a schoolteacher "testing" a student's understanding with a good test but a wrong answer key. Even if the exam asks the relevant questions, if the right answers are marked as wrong and the wrong answers as right, the student fails. In such a situation, we would not say that the exam "tests" the student's skills but that it was arbitrary. So too, as here, when a court applies the wrong legal standards in analyzing the legality of one's detention. When the remedy applies the wrong substantive law, it may "score," but it does not "test."

This is especially true when the student cannot correct the error by simply bringing the mistake to the teacher's attention. By analogy with the judicial system, teachers, like a panel of a court of appeals, would be barred from changing their own answer keys, even if they agreed it was wrong. *E.g.*, *Doscher* v. *Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) ("[A] three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting *en banc* or by the Supreme Court."). The

student must instead try appealing to the whole active faculty, which, if like the courts of appeals, will only consider overruling an individual teacher in 0.19 percent of requests, Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 Vand. L. Rev. 605, 608 (2020) ("The [federal courts of appeals] now review a mere 0.19 percent of decisions en banc."), and would, if like the courts of appeals, agree to replace the answer key only thirteen percent of the time it actually debated the issue.[2] In other words, the student, like someone petitioning for en banc review, is likely to succeed in reversing the teacher's (or panel's) decision less than .025 percent of the time.[3]

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[2] According to a report produced by the Seventh Circuit, during calendar year 2019, the federal courts of appeals "terminated on the merits" 36 cases en banc. See U.S. Ct. of Apps. For the Seventh Circuit, *The Judicial Business of the United States Courts of the Seventh Circuit, 2019*, U.S.C.A. tbl. 2, available online at http://www.ca7.uscourts.gov/annual-report/annual-report.html (providing this information) in Table 2). That data, however, failed to include 5 cases from the Sixth Circuit. See Michael R. Williams, *2019 Sixth Circuit En Banc Opinions*, Mich. B.J., July 2020, at 38. Thus, a total of 41 cases went en banc and were terminated on the merits. Of those 41 cases, in only 5 did the en banc court vote to overturn prior circuit precedent. See *Brown* v. *Sage*, 941 F.3d 655 (3d Cir. 2019) (en banc); *Yarbrough* v. *Decatur Hous. Auth*., 931 F.3d 1322, 1325 (11th Cir. 2019) (en banc); *United States* v. *Havis*, 927 F.3d 382, 384 (6th Cir. 2019) (en banc); *Hulbert* v. *Black*, 925 F.3d 154 (4th Cir. 2019) (en banc); *United States* v. *Burris*, 912 F.3d 386, 390 (6th Cir. 2019) (en banc).

[3] This figure represents the compound probability of the granting of the petition for rehearing en banc and of reversal. Mathematically, that is 0.0019 multiplied by 0.13, which equals 0.00024 or 0.0247 percent.

And, if that fails, the student must appeal to the school principal, who, like this Court, accepts less than one percent of requests for review, see *A Rep's. Guide to Applications Pending Before The Sup. Ct. of the U.S.* 15, https://www.supremecourt.gov/publicinfo/reporterguide.pdf (noting that the Supreme Court grants cert in roughly one percent of cases), and even then usually only when an unrelated criterion is met—that different classroom teachers are shown to be using different answer keys, see S. Ct. R. 10(a)-(b) (noting "[a] petition for a writ of certiorari will be granted only for compelling reasons," most notably when a "court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter [or] has decided an important federal question in a way that conflicts with a decision of a state court of last resort" or vice versa). How could such a process "test" the student's knowledge when the answer key is wrong?

Even if such a mechanism could be thought in some odd way to "test" its object by arbitrarily "addressing" it, it would "test" it "inadequately or ineffectively." The first of these words has a specific legal meaning, which the Eighth Circuit ignored. Remedial "inadequacy," a central concept of equity, has always been understood broadly. Inadequacy of legal remedies first emerged as a concept limiting the equitable jurisdiction of the English Chancellor. See 3 William Blackstone, *Commentaries* 1787 (10th ed. 1787). At Chancery, legal remedies might be inadequate if, among other reasons, (1) they were too expensive, J.H. Baker, *An Introduction to English Legal History* 120 (3d ed.

1990), (2) the opposing party was too strong, S.F.C. Milsom, *Historical Foundations of the Common Law* 83 (2d ed. 1981) (describing how equity could be granted "because [a party's] adversary [is] so powerful that sheriffs will not do their duty or jurors tell the truth"), (3) the substantive law provided no remedy at all, A.H. Manchester, *A Modern Legal History of England and Wales 1750-1950* 136 (1980), or (4) the procedure for obtaining legal remedies was unlikely to produce the correct result, F.W. Maitland, *Equity: A Course of Lectures* 7 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936). And because procedure and substance were intertwined at common law, Baker, *supra*, at 118, equity might intervene where either procedure or substance made a remedy inadequate. See Joseph Story, 1 *Commentaries on Equity Jurisprudence* 26-29 (4th ed. 1846) (describing how equity could intervene where either the procedure or the substance of the common law cause of action was deficient). As one leading equity scholar has noted, moreover, traditionally "the legal remedy almost never meets th[e adequacy] standard." Douglas Laycock, *The Death of the Irreparable Injury Rule* 22-23 (1991). At best, the adequacy test is

> a tiebreaker. If two remedies are equally complete, practical, and efficient, then the legal remedy will be used. That is true as far as it goes, and a far better approximation of reality than the usual statement that equitable remedies are unavailable if legal remedies are adequate. But to call the rule a tiebreaker puts the emphasis on the wrong point, because ties are so rare. One remedy is usually

> better than the other, and specific relief is granted or denied because of the difference.

Ibid. In other words, in traditional practice, a legal remedy was inadequate whenever the alternative, equitable remedy was better. "Inadequate" just meant "less good than."

This broad understanding of "inadequate" would have been familiar to the drafters of § 2255(e). Even at the time of drafting, this view of remedial inadequacy remained potent. So, for example, this Court held legal remedies inadequate where they did not address all the claims for relief in a complaint, *Hillsborough Twp.* v. *Cromwell*, 326 U.S. 620, 629 (1946), or where an insolvent judgment debtor was unable to pay a prevailing plaintiff. *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940); see also *Coffman* v. *Breeze Corps.*, 323 U.S. 316, 323 (1945). This Court also held remedies inadequate when they were unavailable *in practice*, if not in theory. *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (holding federal habeas remedy available when "the remedy afforded by state law proves in practice unavailable or seriously inadequate"). It was against these centuries-old background principles that Congress used the word "inadequate" in § 2255(e).

Unlike "inadequate," "ineffective" is not a legal term of art. As a disjunctive term, see *Loughrin* v. *United States*, 573 U.S. 351, 357 (2014) (holding that the word "or" is "almost always disjunctive" in statutory interpretation), however, it can only broaden

this understanding of the safety valve further. It cannot contract it.

Finally, the Eighth Circuit's opinion ignores "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). Indeed, "Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 299. Most recently, the Court reaffirmed this holding in *Hamdan* v. *Rumsfeld*, finding that "Congress should 'not be presumed to have effected such denial of habeas relief absent an unmistakably clear statement to the contrary.'" 548 U.S. 557, 575 (2006). Even accepting the government's questionable reading of terms like "to test," "remedy," and "inadequate and ineffective," it cannot be said that its view of § 2255(e) is "unmistakably clear" and "specific and unambiguous."

B. The Eighth Circuit's Rule Puts Defense Counsel In An Untenable Position

The Eighth Circuit's rule makes it difficult for counsel to navigate their ethical obligation to avoid making frivolous arguments and their ethical obligation to zealously advocate for their client. See *McCoy* v. *Court of App. of Wis., Dist. 1*, 486 U.S. 429, 435 (1988) ("Ethical considerations and rules of court prevent counsel from * * * advancing frivolous or improper arguments."); *Model Rules of Pro. Conduct* r. 3.1 (Am. Bar Ass'n 2021). The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure likewise prohibit frivolous arguments. See, *e.g.*, Fed. R. Civ. P. 11(b)(2); Fed. R. App. P. 38.

Although these ethical obligations allow defense counsel to present arguments that in "good faith" advocate for changes in existing law, the Eighth Circuit's reading of the safety valve would compel counsel to dangerously stretch their interpretation of "good faith" in the interest of protecting their clients' rights. If they did not, for example, argue against long-settled precedent about what activities a statute made criminal, their clients might forever lose any ability to challenge their convictions—even if this Court were to later hold that the statute did not criminalize their behavior. And although criminal defense counsel ostensibly have more leeway, courts are still willing to impose sanctions, including in circumstances when criminal defense counsel have "reassert[ed] an argument in a petition for rehearing which was summarily rejected on direct appeal, and which flies in the face of unambiguous, firmly established law." *In re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989); *Wisconsin* v. *Glick*, 782 F.2d 670, 673 (7th Cir. 1986) (Easterbrook, J.) (imposing sanctions under Fed. R. App. P. 38 for making frivolous arguments).

In addition to raising ethical landmines, the Eighth Circuit's rule creates much unnecessary work for courts and litigants alike. Not only must the criminal defense attorney brief and argue unavailing arguments, but the prosecutors must address them and the courts consider and reject them, wasting the time and resources of both. "An argument in the teeth of the law is vexatious[.] * * * The time of prosecutors is valuable. If a defendant multiplies the proceedings, this takes time that could more usefully be devoted to

other prosecutions." *Glick*, 782 F.2d at 673. And "[i]t would just clog the judicial pipes to require defendants, on pain of forfeiting all right to benefit from future changes in the law, to include challenges to settled law in their briefs on appeal and in postconviction filings." *In re Davenport*, 147 F.3d 605, 610 (7th Cir. 1997).

The Eighth Circuit's approach also complicates the appellate process. It forces counsel to violate the cardinal "principle that appellate counsel must concentrate attention on the best issues." *Pierce* v. *Visteon Corp.*, 791 F.3d 782, 788 (7th Cir. 2015) (Easterbrook, J.). Briefing "more than three or four issues not only diverts the judges' attention but also means that none of the issues will be addressed in the necessary depth; an appellate brief covering 13 issues can spend only a few pages on each." *Ibid.* Importantly, it also tends to distract courts from litigants' strongest arguments by suggesting that none of them are very good. See, *e.g.*, *Fifth Third Mortg. Co.* v. *Chicago Title Ins. Co.,* 692 F.3d 507, 509 (6th Cir. 2012) (Kethledge, J.) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none.").

C. Under The Government's Reading, § 2255(e)'s Safety Valve Serves No Real Purpose

The safety valve of § 2255 must have some meaning. *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979) ("[A] statute should be interpreted so as not to render one part inoperative."). The Eighth Circuit's

rule would functionally eliminate the safety valve, thereby contravening Congress's will.

The government suggests that the safety valve allows resort to § 2241 in two instances: (1) where dissolution of the sentencing court makes § 2255 relief impossible and (2) where the government has denied good time credits or parole release. Pet. at 20, *Wheeler*, *supra*. The quintessential example of the first situation cited by the government is a court martial, which dissolves after sentencing. *Ibid.* But defendants can directly invoke § 2241 from a court martial without the safety valve. *United States* v. *Augenblick*, 393 U.S. 348, 349-350 (1969). And prisoners challenging denial of good time credits and parole release can likewise resort directly to § 2241. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 487-488 (1973) (good-time credits); *Morrisey* v. *Brewer*, 408 U.S. 471, 488-489 (1972) (parole). Section 2255(e) is surplusage if it simply allows recourse to § 2241 when it is directly available.

That leaves the government only the rare circumstance when Congress dissolves a federal court (other than a court martial) that has previously rendered a sentence. But Congress rarely dissolves such courts and, when it does, it generally provides specific direction for the transfer of cases and authority to a new tribunal. *E.g.*, An Act to Implement the Recommendations of the Federal Courts Study Committee, and for Other Purposes, Pub. L. No. 102-572, § 102(d)-(e), 106 Stat. 4506, 4507 (1992) (abolishing the Temporary Emergency Court of

Appeals). Just as Congress does not hide elephants in mouseholes, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), neither does it hide mice in elephant dens. The dissolution of federal (non-courts martial) courts would be just such a mouse.

D. The Government's Reading Of The Safety Valve Raises Serious Constitutional Questions

"[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark* v. *Suarez Martinez*, 543 U.S. 371, 380-381 (2005). This canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 381-382 (internal citations omitted). Since the Eighth Circuit's narrow interpretation of § 2255 raises three serious constitutional issues, this Court should give effect to the broader reading in order to respect Congress's work.

First, the Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII. This Court has repeatedly held that the Eighth Amendment bars convictions for innocent conduct. See *Robinson* v. *California*, 370 U.S. 660, 666 (1962) ("[A] law which made a criminal offense of [being mentally

or physically ill] would doubtless be universally thought to be an infliction of cruel and unusual punishment."); *Powell* v. *Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) ("[C]riminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing."). And since proportionality is the touchstone under the Eighth Amendment, *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977), *a fortiori* "dividing by zero" is prohibited. That is, if a disproportionate punishment violates the Eighth Amendment, then so does punishment where there is no crime at all. Barring collateral relief to a petitioner like Jones thus may well violate the Eighth Amendment. See *Herrera* v. *Collins*, 506 U.S. 390, 432 n.2 (1993) (Blackmun, J., dissenting) ("It also may violate the Eighth Amendment to imprison someone who is actually innocent.").

Second, denying a remedy to an innocent individual may violate the Due Process Clause, U.S. Const. Amend V, because doing so "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992). Since "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system," *Schlup* v. *Delo*, 513 U.S. 298, 325 (1995), the conviction of an innocent person presses hard against a "fundamental" principle of justice and may thus contravene the Due Process Clause. As this Court has recognized, § 2255 motions are meant to prevent any "fundamental defect which

inherently results in a complete miscarriage of justice." *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (internal quotation marks omitted).

Third, the Suspension Clause guarantees access to habeas corpus unless Congress has suspended the writ. U.S. Const. Art. I, § 9, Cl. 2. Habeas corpus "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008) (citation omitted). But for a remedy to provide a "meaningful opportunity," prisoners must be able to make their claims at a meaningful *time*—that is, once this Court has made clear that the offense for which they are being imprisoned was never a criminal act. See *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) ("[I]t would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on [an intervening decision.]").

The Eighth Circuit held that denying Jones recourse to traditional habeas did not violate the Suspension Clause because "the Suspension Clause refers to [the] specific legal instrument that existed [in 1789]." App., *infra*, 11a. In its view, "the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." *Id.* at 12a. But even if one accepts that the Suspension Clause applies only as the writ existed in 1789 and that it then applied only when the original court lacked jurisdiction, it would still have been available to Jones because the court that convicted him lacked jurisdiction.

The Eighth Circuit is partly right. At English common law and at the founding, the success of habeas petitions often did rest upon a finding of lack of jurisdiction of the convicting or imprisoning body. See *Wright* v. *West*, 505 U.S. 277, 285 (1992) (plurality opinion) ("For much of our history, we interpreted [habeas's] bare guidelines and their predecessors to reflect the common-law principle that a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody."); see also Paul D. Halliday, *Habeas Corpus: From England to Empire* 166 (2012). And even as this Court recognized additional grounds for habeas relief in the twentieth century, the original rule remained in force: a prisoner could use the writ to attack a sentence [or conviction] on the ground "that the court was without jurisdiction to impose such sentence" or conviction. 18 U.S.C. § 2255(a); see also *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1567-1569, 1573 (2021) (Gorsuch, J., concurring).

Here, Jones raises such a jurisdictional claim, premised upon this Court's long-standing recognition that when a federal court convicts and sentences a defendant whose conduct Congress has not made criminal it acts without jurisdiction. See *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (finding that federal courts lack jurisdiction to recognize crimes not defined by statute); *United States* v. *New Bedford Bridge*, 27 F.Cas. 91, 103 (D. Mass. Cir. 1847) (Woodbridge, J., in chambers) (stating "it is considered that no acts done against [the government] can usually be punished as crimes without specific

legislation" for in those cases the court does not "have jurisdiction of the offence") (cleaned up); *United States* v. *Hall*, 98 U.S. 343, 345 (1878) ("[C]ourts possess no jurisdiction over crimes and offences committed against the authority of the United States, except what is given to them by the power that created them."); *Pettibone* v. *United States*, 148 U.S. 197, 203 (1893) ("The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States."); *United States* v. *Davis*, 139 S. Ct. 2319, 2325 (2019) ("Only the people's elected representatives in Congress have the power to write new federal criminal laws.") (internal citation omitted). This Court's decision in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), made apparent that the district court lacked jurisdiction to convict and sentence Jones for his non-criminal conduct: possession of a firearm under a lower mens rea standard than that required by 18 U.S.C. § 924(a)(2), as articulated in *Rehaif*. Thus, habeas relief in a case like this is indeed being used to "attack convictions and sentences entered by a court without jurisdiction," *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). In order to vindicate the most traditional understanding of the Suspension Clause, Jones must be allowed to petition for habeas relief.

The Eighth Circuit rejected this reasoning, believing that *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), held that whenever a convicting court had "general criminal jurisdiction" the writ could not issue. App., *infra*, 12a. But *Ex parte Watkins* does not reach so far. It held merely that a habeas court had to

presumptively credit jurisdiction in a specific case when the convicting court enjoyed "general criminal jurisdiction," not that it had to credit such jurisdiction when, as here, the Supreme Court itself had held that no jurisdiction existed over a particular charge because it was not a crime. The two situations are very different.

This Court has, in fact, expressly rejected the Eighth Circuit's overly broad view of "general criminal jurisdiction" in *Watkins*. In *Ex parte Yarbrough*, this Court explained the law:

> That this court has no general authority to review on error or appeal the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement.

110 U.S. 651, 653 (1884) (The Ku Klux Cases) (citations omitted). It then held that claims that indictments were insufficient "must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction [even if erroneously decided,] which cannot be looked into on a

writ of *habeas corpus*[.] * * * This principle is decided in *Ex parte Tobias Watkins*." *Id.* at 654. It then distinguished those claims from "the more important question * * * whether the law of Congress * * * under which the prisoners are held, is warranted by the Constitution, or being without such warrant, is null and void." *Ibid.* That question, it believed, was not decided by *Watkins*, and it held that "[i]f the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged." *Ibid.* In other words, a court is without jurisdiction to convict under an unconstitutional statute and the habeas court must discharge the prisoner.

That principle applies *a fortiori* to convictions for non-existent crimes. It even applies to sentences. In *Ex parte Lange*, for example, this Court held that a lower "court [that] had jurisdiction of the person of the prisoner, and of the offence under the statute," 85 U.S. (18 Wall.) 163, 176 (1873), could not vacate an illegal sentence and impose a legal one once the prisoner had satisfied that part of the original sentence that was legal, *id.* at 178. It reasoned that the Double Jeopardy Clause deprived it of jurisdiction to do so. As it explained, "[i]f a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment." *Id.* at 176; see also *Ex parte Page*, 49 Mo. 291, 294 (1872) ("The record proper shows that the judgment of the court in passing sentence was illegal;

that it was not simply erroneous or irregular, but absolutely void, as exceeding the jurisdiction of the court and not being the exercise of an authority prescribed by law.").

Congress included the "inadequate or ineffective" language to ensure that § 2255's new form of collateral review was constitutional. See *United States* v. *Hayman*, 342 U.S. 205, 223 (1952). The Eighth Circuit's narrow interpretation of the safety valve contravenes this legislative mandate by raising difficult constitutional questions under the Eighth Amendment, the Due Process Clause, and the Suspension Clause. By adopting a broader reading, this Court can avoid these concerns and ensure the constitutionality of § 2255, thus comporting with the intent of Congress.

III. This Recurring Issue Is One Of National Importance That Only This Court Can Resolve

All twelve geographic circuits (except perhaps the D.C. Circuit, see *supra*, p.10 & n.1) have decided this issue, yet "the federal courts, Congress, the Bar, and the public" still do not "have the benefit of clear guidance and consistent results in this important area of law." *United States* v. *Wheeler*, 734 Fed. Appx. 892, 893 (4th Cir. 2018) (statement of Agee, J.). The government itself, moreover, has conceded that even though the issue "arises relatively infrequently[,] given the significance of the issue in the small set of cases in which it does arise, this Court's review would be warranted in an appropriate case." Br. in Opp. at

25, *McCarthan* v. *Collins*, 138 S. Ct. 502 (2017) (mem.) (No. 17-85). "[T]he [safety valve] is an important lynchpin in our constitutional structure: it ensures that there must be an adequate substitute procedure for habeas corpus" so prisoners may challenge allegedly "erroneous application or interpretation of relevant law." Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 Geo. L.J. 287, 290 (2019). At present, the scope of the safety valve, an issue that "goes to the heart of the integrity, fairness, and credibility of our criminal justice system," means very different things in different circuits. *Ibid.*

Habeas petitions are filed in a prisoner's district of confinement, which may be in a different circuit from the district in which he was sentenced. See 28 U.S.C. § 2241(a). As a result, a prisoner's ability to challenge the legality of his detention depends upon where the Bureau of Prisons decides to imprison him or subsequently transfer him. Had Jones been imprisoned in any other circuit except the Eighth, Tenth, Eleventh, and possibly the D.C. Circuit, he would be able to challenge his conviction for a nonexistent crime. See *supra*, pp. 8-13 & n.1 (mapping circuit conflict). As the government itself has argued, this "important circuit conflict regarding the availability of [safety valve relief] to prisoners who raise statutory claims," U.S. Reply Br.. at 1, *Wheeler*, *supra*, has resulted in "particularly problematic" "disparate treatment of identical claims," *id.* at 10. "Like cases are not treated alike." *Wright* v. *Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar,

J., concurring). That "conviction and punishment * * * for an act that the law does not make criminal * * * inherently results in a complete miscarriage of justice," *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (cleaned up), heightens the issue's importance.

"Only this Court's intervention," the government has argued, "can ensure nationwide uniformity of the [safety valve's] scope." Pet. at 25-26, *Wheeler*, *supra*; see also *id.* at 13 ("Only this Court's intervention can provide the necessary clarity."). And now is the time to ensure it. As Judge Thapar has argued,

> If this circuit and others fail to course-correct on our own, then the Court should step in. And I would respectfully submit that sooner may be better than later. The circuits are already split. The rift is unlikely to close on its own. What's more, so long as it lasts, the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets.

Wright, 939 F.3d at 710 (concurring).

Numerous other judges on the courts of appeals have also called for this Court's speedy intervention. See, *e.g.*, *United States* v. *Wheeler*, 734 Fed. Appx. 892, 893 (4th Cir. 2018) (Agee, J., statement respecting denial of petition for rehearing en banc) ("The issues in this case are of significant national importance and are best considered by the Supreme Court at the earliest possible date in order to resolve an existing circuit split that the panel decision broadens even farther."); *Allen* v. *Ives*, 976 F.3d 863, 868 (9th Cir. 2020) (W. Fletcher, J., concurring in denial of petition

for rehearing en banc) ("We * * * agree with our dissenting colleague's implicit argument that the Supreme Court should grant certiorari—in this or in some other case—to resolve the circuit split.").

IV. This Case Is An Opportune Vehicle For Resolving The Circuit Split

This case presents an ideal vehicle for deciding this important issue. First, the circuit split is ripe. The issue has percolated in nearly every circuit, resulting in a "messy field" that calls for this Court's review. *Prost* v. *Anderson*, 636 F.3d 578, 594 (10th Cir. 2011) (Gorsuch, J.). Second, Jones's wrongfully deprived freedom is at issue. He is imprisoned for a nonexistent crime, which some lower courts created by misconstruing Congress's meaning. Third, there are no issues of fact, only pure questions of law. Whether or not § 2255(e)'s safety valve applies depends only on what that clause's text, purpose, and structure mean within § 2255 more generally. Fourth, Jones's case does not pose any danger of mootness. Unlike the prisoner in *Wheeler*, Jones's sentence runs well into 2023 and he will be subject to supervised release after that. Order Denying Def. Mots. for Sentence Reduction, *United States* v. *Jones*, Case Nos. 99-cr-4041-01-SRB, 00-cr-4010-01-SRB (W.D. Mo. Sept. 21, 2021) (Doc. #407). Fifth, neither party has waived any argument that would require the Supreme Court to decide the issue on any non-substantive ground. Cf., *e.g.*, Br. in Opp. at 1, 14, *Wheeler*, *supra* (explaining that because the government had previously waived its argument about the scope of the safety valve the Court might not properly reach it).

Finally, the case's facts present the Court with the opportunity to decide the issue as narrowly or broadly as it deems appropriate. Mr. Jones, unlike prisoners who have previously petitioned for review, wishes to challenge his conviction, not the length of his sentence. See, *e.g.*, Pet. at 25-26, *Wheeler*, *supra*; Pet., *Hueso* v. *Barnhart*, 141 S. Ct. 872 (2020) (mem.) (No. 19-1365); Pet., *McCarthan*, *supra*. His claim would allow this Court to limit its holding to these most troubling cases, if it so wished. Several circuits, for example, allow relief under a claim of legal innocence but not in circumstances where a prisoner is simply challenging the applicability of a statutory sentence enhancement. See, *e.g.*, *Gardner* v. *Warden Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017); *In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011) (per curiam).

The case would also allow this Court to distinguish, if it wished, between changes of law coming from this Court and changes in law coming from the lower courts themselves. As then-Judge Barrett has noted, this distinction may be important. See, *e.g.*, *Chazen* v. *Marske*, 938 F.3d 851, 864 (7th Cir. 2019) (Barrett, J., concurring) ("Under our circuit's law, therefore, a prisoner with a second or successive *statutory* claim can secure relief based on a court of appeals case, while a prisoner with a second or successive *constitutional* claim can secure relief only when the Supreme Court acts. That is an odd state of affairs.").

This case provides a vehicle far better than any case previously before this court to determine the scope of the safety valve under 28 U.S.C. § 2255(e). Jones's imprisonment for conduct that Congress has

not criminalized challenges deep-rooted conceptions of justice and provides this Court the opportunity to articulate the scope of the safety valve with great precision. Further, it is unclear when the Court will have another opportunity to resolve this important question. This Court should grant Jones's petition and provide much-needed clarity on the safety valve's scope.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2021

APPENDIX

APPENDIX TABLE OF CONTENTS

United States Court of Appeals
For the Eighth Circuit

No. 20-1286

Marcus Deangelo Jones

Plaintiff - Appellant

v.

Dewayne Hendrix, Warden

Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Arkansas – Helena

Submitted: April 16, 2021
Filed: August 6, 2021

Before GRUENDER, BENTON, and SHEPHERD,
Circuit Judges.

Gruender, Circuit Judge.

Marcus DeAngelo Jones filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, challenging his 2000 felon-in-possession conviction under *Rehaif v. United States*, 588 U.S. ---, 139 S. Ct. 2191 (2019). The district court[1] dismissed Jones's petition, concluding that Jones had not shown that 28 U.S.C. § 2255's remedy was ineffective or inadequate to test the legality of his detention - a prerequisite in his case to habeas relief. *See* § 2255(e). Jones appeals; we affirm.

I.

A jury convicted Jones of one count of making false statements to acquire a firearm and two counts of possessing a firearm as a felon. *See* 18 U.S.C. § 922(a)(6), (g)(1). Jones appealed; we affirmed. *United States v. Jones*, 266 F.3d 804, 807 (8th Cir. 2001).

Jones later filed a motion to vacate his sentence under § 2255. The district court denied his motion, but we reversed, concluding that his counsel was ineffective for not objecting to Jones's two felon-in-possession counts as duplicative. *United States v. Jones*, 403 F.3d 604, 605 (8th Cir. 2005). On remand, the district court vacated one of Jones's felon-in-possession convictions and resentenced Jones. But the court denied his requests for a new sentencing hearing, for appointed counsel, and to let him appear in court. Jones appealed; we affirmed. *United States v.*

[1] The Honorable J. Thomas Ray, United States Magistrate Judge for the Eastern District of Arkansas, whose jurisdiction the parties consented to pursuant to 28 U.S.C. § 636(c).

Jones, 185 F. App'x 541, 542 (8th Cir. 2006) (per curiam).

Jones has since flooded the federal dockets with unsuccessful postconviction challenges, including numerous § 2255 motions and repeated petitions to the Supreme Court for review. *See*, e.g., *Jones v. Castillo*, 569 U.S. 991 (2013) (mem.), denying rehearing, 568 U.S. 1258 (2013) (mem.), denying cert., 489 F. App'x 864 (6th Cir. 2012) (per curiam). Indeed, Jones's two-decade campaign has led courts to restrict his ability to make further filings. *See,* e.g., *In re Jones*, 572 U.S. 1086, 1086 (2014) (mem.) (noting that "[Jones] has repeatedly abused this Court's process").

Then, in 2019, the Supreme Court held that, to convict someone under § 922(g), the government must prove that the defendant knew both that he had a prohibited status and that he possessed a firearm. *Rehaif*, 139 S. Ct. at 2194. *Rehaif* overturned our prior approach, which had not required the government to prove that the defendant knew he had a prohibited status. *United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020); *see also Jones*, 266 F.3d at 810 n.5.

Seizing on this change, Jones sought to challenge his conviction under *Rehaif*. The problem is that § 2255 is the preferred mechanism for Jones to do so. But Jones can file a "second or successive motion" under § 2255 only if it contains (i) certain "newly discovered evidence" or (ii) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(1)-(2). Jones concedes that *Rehaif*—a new rule of statutory interpretation—does not qualify for either exception, so he cannot raise his *Rehaif* argument in a § 2255

motion. Instead, Jones filed a habeas petition under § 2241. The district court dismissed Jones's petition. Jones appeals.

II.

We review *de novo* a district court's decision dismissing a habeas petition filed under § 2241. *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003).

Typically, a federal inmate "must challenge a conviction or sentence through a § 2255 motion" to vacate. *Lopez-Lopez v. Sanders*, 590 F.3d 905, 907 (8th Cir. 2010). But § 2255's saving clause creates "a narrowly-circumscribed 'safety valve.'" *United States ex. rel. Perez v. Warden, FMC Rochester*, 286 F.3d 1059, 1061 (8th Cir. 2002); *see generally* "Saving Clause," *Garner's Dictionary of Legal Usage* 797 (3d ed. 2011) (noting that "saving" clause is better than "savings" clause). Under the saving clause, an inmate may file a habeas petition if he shows that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." § 2255(e). If he fails to carry this burden, a court must dismiss his habeas petition for lack of subject-matter jurisdiction. *Lee v. Sanders*, 943 F.3d 1145, 1147 (8th Cir. 2019). Jones argues that he can use the saving clause and, if not, Congress has unconstitutionally suspended the writ of habeas corpus. Jones is wrong on both counts.

A.

We first consider Jones's saving-clause argument. We have explained that it is "difficult" for a petitioner to show that § 2255's remedy is inadequate or ineffective. *Lee*, 943 F.3d at 1147; *see also Perez*, 286 F.3d at 1061-62. For example, the saving clause is unavailable "where a petitioner had any opportunity

to present his claim beforehand." *Lee*, 943 F.3d at 1147. Further, a petitioner must show "more than a procedural barrier to bringing a § 2255 petition." *Hill*, 349 F.3d at 1091.

When Jones filed his first § 2255 motion, our precedent had already rejected a *Rehaif*-type argument. Now, although *Rehaif* might vindicate such an argument,[2] he cannot file a successive § 2255 motion in which to raise it. Caught in this Catch-22, Jones argues that § 2255's remedy is inadequate or ineffective.

At the outset, we have already held that being precluded from filing a successive § 2255 motion—along with other procedural barriers—does not make § 2255's remedy inadequate or ineffective. *See Hill*, 349 F.3d at 1091. Thus, without more, Jones's inability to raise his *Rehaif* argument via § 2255 now does not trigger the saving clause. The question is whether the change in caselaw, combined with the successive-motions bar, makes § 2255's remedy inadequate or ineffective.

The circuits have split over this question. Most circuits would allow a petitioner to invoke the saving clause in a case like Jones's. *See*, e.g., *Bourgeois v. Watson*, 977 F.3d 620, 637 (7th Cir. 2020); *Hueso v. Barnhart*, 948 F.3d 324, 332-33 (6th Cir. 2020); *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *Jiminian v. Nash*, 245 F.3d 144, 147 (2d Cir. 2001); *Reyes-Requena*

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[2] Because we resolve this case on jurisdictional grounds, we do not address the merits of Jones's argument that he did not know he was a felon. *But see Jones*, 266 F.3d at 811 ("[Jones] admitted during trial that he knew he had been convicted of multiple felonies.").

v. United Sates, 243 F.3d 893, 903-04 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997). The Tenth Circuit and Eleventh Circuit would not. *McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc); *Prost v. Anderson*, 636 F.3d 578, 580 (10th Cir. 2011) (Gorsuch, J.). As the parties agree, we have yet to weight in.[3] Reviewing the statutory text and our precedent, we agree with the Tenth and Eleventh Circuits.

First, "§ 2255 is not adequate or ineffective where a petitioner had any opportunity to present his claim beforehand." *Lee*, 943 F.3d at 1147. This is because the saving clause asks whether § 2255's remedy is "inadequate or ineffective to *test* the legality of [a prisoner's] detention." § 2255(e) (emphasis added). And "to test" means "to try." *McCarthan*, 851 F.3d at 1086 (quoting 11 *Oxford English Dictionary* 220 (1st ed. 1933)). Simply, the saving clause is interested in opportunity, not outcome. *See id.* at 1086-87; *Prost*, 636 F.3d at 584.

Here, Jones could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion. Although our precedent was at that

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[3] Reports that we previously adopted the majority approach have been greatly exaggerated. *Cf.* 2 A. Paine, *Mark Twain, A Biography* (1912). In *Abdullah v. Hedrick*, we merely surveyed the majority approach and then held that it was inapposite to the petitioner's case. 392 F.3d 957, 960-63 (8th Cir. 2004). *But see Wright v. Spaulding*, 939 F.3d 695, 699 (6th Cir. 2019) (placing us on the majority side of the split); *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179-80 (3d Cir. 2017) (same); *McCarthan*, 851 F.3d at 1085 (same); *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (same).

time against him, he nonetheless could have succeeded before the *en banc* court or before the Supreme Court. And, regardless, the question is whether Jones could have raised the argument, not whether he would have succeeded. *Cf. Bousley v. United States*, 523 U.S. 614, 621-23 (1998) (holding that adverse circuit precedent did not excuse a movant's obligation to raise a challenge to his guilty plea's knowingness and voluntariness on direct appeal in order to raise it under § 2255 and noting that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time" (internal quotation marks omitted)).

For example, in *Hill*, a petitioner filed a § 2241 petition in the Eighth Circuit challenging a conviction from within the Tenth Circuit. 349 F.3d at 1090-91. A district court in the Tenth Circuit had considered drugs Hill had possessed for personal consumption when sentencing him in a drug distribution case. *Id.* at 1090. Hill did not challenge this in his appeal or initial § 2255 motion. *Id.* Subsequently, in *United States v. Asch*, 207 F.3d 1238 (10th Cir. 2000), the Tenth Circuit decided for the first time that courts could not consider such drugs when determining the statutory sentencing range. *Hill*, 349 F.3d at 1092. Citing to circuits who have adopted the majority approach, Hill argued that this subsequent change in caselaw triggered the saving clause. Brief at 9-16, *Hill v. Morrison*, 349 F.3d 1089 (8th Cir. 2003) (No. 02-2128). We "squarely reject[ed] Hill's argument," concluding that Hill could have made his claim in his first § 2255 motion and thus § 2255's remedy was not inadequate or ineffective. *Hill*, 349 F.3d at 1092. This was true even though, presumably, Hill's argument was less likely to succeed pre-*Asch* than post-*Asch*. So

too here, Jones could have made his argument in his first § 2255 motion, even though it was less likely to succeed pre-*Rehaif* than post-*Rehaif*.

Second, the saving clause is triggered only if § 2255's "remedy" is inadequate or ineffective. § 2255(e). "Remedy" means '[t]he means of enforcing a right or preventing or redressing a wrong." *Black's Law Dictionary* (11th ed. 2019). Thus, "[i]t is the infirmity of the § 2255 remedy itself, not the failure to use it or prevail under it, that is determinative." *Lee*, 943 F.3d at 1147 (quoting *Prost*, 636 F.3d at 589).

Here, § 2255's remedy was itself perfectly capable of facilitating Jones's argument. Jones argues that his conviction, and thus his sentence, is illegal under federal law. Section 2255 authorizes a motion challenging a sentence "upon the ground that the sentence was imposed in violation of the . . . laws of the United States." § 2255(a). "[I]t may very well" have been that "*circuit law* [was] inadequate or deficient" when Jones filed his first § 2255 motion. *Prost*, 636 F.3d at 591. "But that does not mean the § 2255 remedial vehicle is inadequate or ineffective to the task of *testing* the argument." *Id.*

Consider a more concrete example. Supposed John wants to attend a party sixty miles away that begins in one hour. His car can travel at sixty miles per hour. But the road on which he must travel has speed limit of fifty miles per hour. Is John's car adequate and effective to get John to the party on time? Yes. Presuming John is a law-abiding citizen, will John nonetheless be late? Probably. But the problem is the law, not the car. So too here, Jones's identified problem is our now-defunct precedent, not § 2255's remedy.

We made the same point in *Perez*. There, two petitioners sought to challenge their convictions under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Perez*, 286 F.3d at 1060-61. But our precedent held that prisoners could not raise *Apprendi* claims in either initial or successive § 2255 motions. *Id.* Thus, we conceded that "a federal prisoner may never ventilate an *Apprendi* issue in a § 2255 motion." *Id.* at 1062. Still, we rejected the petitioners' argument that this made § 2255's remedy inadequate or ineffective, explaining that "it attribute[d] blame to the wrong source." *Id.* The "true impediment" was existing caselaw, "not the remedy by § 2255 motion." *Id.*

Finally, § 2255(h)(2) authorizes successive motions raising "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Jones's proposed interpretation of the saving clause would work an end run around this limitation by rewriting § 2255(h)(2) to remove the word "constitutional." *See McCarthan*, 851 F.3d at 1091; *Prost*, 636 F.3d at 591; *cf. Chazen v. Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring) explaining that the Seventh Circuit's contrary approach "aim[ed] to fix a 'glitch' in § 2255(h)(2)"). "[I]t is not our place to adopt a test that replaces the balance Congress reached with one of our own liking." *Prost*, 636 F.3d at 592; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

In sum, Jones has not shown that § 2255's remedy is inadequate or ineffective, so he cannot proceed with a habeas petition.

B.

Jones argues that because he did not have a "meaningful opportunity" to test his *Rehaif* claim and because this claim falls within "the core purposes of habeas corpus," if he cannot file a habeas petition, it "would have the effect of suspending the right of habeas corpus as to [him]."

The Constitution states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, cl. 2. Because "[t]he writ of habeas corpus known to the Framers was quite different from that which exists today," we must first consider whether the Suspension Clause protects the writ as it stood in 1789, or as it stands today. *See Felker v. Turpin*, 518 U.S. 651, 663 (1996).

The Supreme Court has not yet decided this question. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. ---, 140 S. Ct. 1959, 1969 n.12 (2020). That said, its precedent indicates a preference for considering the writ as it existed in 1789. It has repeatedly said that the Suspension Clause, "at a minimum, protects the writ as it existed in 1789, when the Constitution was adopted." *Id.* at 1969 (internal quotation marks omitted); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001). And, although the Supreme Court has "been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that

define the present scope of the writ," it has consistently said that "the analysis may begin with precedents as of 1789." *Boumediene v. Bush*, 553 U.S. 723, 746 (2008). Further, considering that the Suspension Clause refers to a specific legal instrument that existed at the time, we think there is good reason to adhere closely to the 1789 meaning. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("The term ['habeas corpus'] is used in the constitution, as one which was well understood.").

Looking to the writ as it existed in 1789, contrary to Jones's argument, his *Rehaif* claim is not within the "core purposes of habeas." At common law, the writ's "most basic purpose" was to avoid "serious abuses of power by the government, say a king's imprisonment of an individual without referring the matter to a court." *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996). For example, five knights sought habeas relief after they had been imprisoned without a trial for refusing to lend the king money. *Darnel's Case* (1627), 3 How. St. Tr. 1, 1-2 (KB). Jurors did the same after they were imprisoned for returning a verdict with which the court disagreed. *Bushell's Case* (1670), 124 Eng. Rep. 1006, 1006-10 (CP).

The writ did not arise as some sort of super appeal, but to address the sort of Star Chamber shenanigans rampant before the English Civil War. *See Edwards v. Vannoy*, 593 U.S. ---, 141 S. Ct. 1547, 1566-67 (2021) (Gorsuch, J., concurring); Habeas Corpus Act of 1641, 16 Car. 1, c. 10 (Eng.) (abolishing the Star Chamber); *cf. Clark v. United States*, 289 U.S. 1, 17 (1933) ("*Bushell's Case* was born of the fear of the Star Chamber and of the tyranny of the Stuarts.")

Indeed, "at common law, the writ of habeas corpus would not have been available at all to prisoners like [Jones]." *See McCarthan*, 851 F.3d at 1094. "[T]he black-letter principle of the common law was that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." *Edwards*, 141 S. Ct. at 1563 (Thomas, J., concurring) (brackets omitted); *see also Felker*, 518 U.S. at 663; *Ex parte Siebold*, 100 U.S. 371, 375 (1879).

For example, in *Ex parte Watkins*, a prisoner argued that he had been convicted of something that was not a crime and filed a habeas petition. 28 U.S. at 201. The Court turned to the common law to determine the scope of habeas relief. *Id.* at 201-02. It noted that the purpose of the writ was to "inquir[e] into the cause of commitment." *Id.* at 201. "[B]ut," the Court asked rhetorically, "if the cause of commitment be the judgment of a court of competent jurisdiction, . . . is not that judgment in itself sufficient cause?" *Id.* at 202. "A judgment, in its nature, concludes the subject," "pronounces the law of the case," and puts an end to the inquiry concerning the fact." *Id.* at 202-03. Accordingly, the Supreme Court rejected the habeas petition, finding the judgment itself sufficient cause. *Id.* at 209 ("[W]e are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded."). Because Jones's argument would not have warranted habeas relief as the writ was understood in 1789, we cannot agree that his inability to raise it now violates the Suspension Clause.

Further, Jones's Suspension Clause claims fails on its own terms. He rests his argument on the premise

that he has not had a meaningful opportunity to raise his *Rehaif* argument. But, as discussed in Section I.A., he did. And, to the extent he is arguing that the bar on filing a successive § 2255 motion is the real problem, the Supreme Court has already rejected this argument in the analogous § 2244 context. *Felker*, 518 U.S. at 664. We see no reason to treat § 2255 differently.

In sum, Jones has not shown that his inability to seek habeas relief here violates the Suspension Clause.

III.

For the foregoing reasons, we affirm the district court's decision dismissing Jones's habeas petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
DELTA DIVISION

MARCUS DEANGELO JONES — **PETITIONER**

VS. — **No. 2:19-CV-00096-JTR**

DEWAYNE HENDRIX, Warden, FCI-Forrest City Low — **RESPONDENT**

MEMORANDUM OPINION[1]

I. Introduction

Pending before the Court is Respondent's Motion to Dismiss (*Doc. 11*) the § 2241 Petition for a Writ of Habeas Corpus and Affidavit (*Docs. 1 & 2*) filed by Petitioner, Marcus DeAngelo Jones ("Jones"), a prisoner at the Federal Correctional Institution in Forrest City, Arkansas. Jones has filed a Response (*Doc. 15*) and Supplemental Authority (*Doc. 19-1*) opposing Respondent's argument the Court lacks

[1] On October 16, 2019, United States District Judge Kristine G. Baker signed a Reference Order, based on both parties' written consent, to allow a United States Magistrate Judge to exercise jurisdiction over this case. *Doc. 17*.

subject matter jurisdiction over his habeas claim. Thus, the issues are joined and ready for disposition.

Before addressing the merits of Respondent's Motion to Dismiss, the Court will review the procedural history of Jones's underlying federal conviction and sentence.

In July of 2000, a jury in Missouri found Jones guilty of two counts of felony possession of a firearm and one count of making false statements to acquire a firearm. He was sentenced to 327 months of imprisonment on each of the felon in possession counts and 60 months on the false statement count, all to run concurrently. *United States v. Jones*, Western District of Missouri Case No. 2:00-cr-04010-SRB-1 ("*Jones I*"), *Doc. 36* (Minute Entry of Trial), *Doc. 49* (Judgment and Commitment).[2]

Jones appealed to the Eighth Circuit, which affirmed his convictions. *United States v. Jones*, 266 F.3d 804, 808 (8th Cir. 2001) ("*Jones II*").

On August 12, 2002, Jones filed his first Motion to Vacate Sentence under 28 U.S.C. § 2255. *Jones v. United States*, Western District of Missouri Case No. 4:02-cv-00775 ("*Jones III*"). On January 29, 2003, the district court denied Jones's Motion. *Jones III*, *Doc. 13*. Jones appealed.

On April 12, 2005, the Eighth Circuit granted Jones a certificate of appealability and reversed the

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[2] The Court takes judicial notice of the docket entries and pleadings filed in *Jones I*, as well as in subsequent related cases, including filings seeking post-conviction relief under § 2255 in the Western District of Missouri and the Eighth Circuit Court of Appeals. Respondent lists some of these cases in his Response, *Doc. 11 at 3, n. 4.*

trial court's denial of his Motion to Vacate Sentence. Specifically, the Court found that: (1) Jones's continuous possession of *the same firearm* supported only one felon in possession count; (2) the indictment charging him with two felon in possession counts was multiplicitous; and (3) his trial counsel's representation fell below minimum constitutional standards because he failed to seek the dismissal of one of the two felon in possession counts. *United States v. Jones*, 403 F.3d 604 (8th Cir. 2005) ("*Jones IV*").[3]

On remand, the district court corrected Jones's sentence, without conducting the new sentencing hearing that he requested. *Jones III*, *Doc. 27*. Jones appealed the denial of his request for a new sentencing hearing. On June 29, 2006, the Eighth Circuit denied relief. *United States v. Jones*, 185 Fed. App. 541 (8th Cir. 2006) (unpublished decision).

In respondent's Motion to Dismiss (*Doc. 11*), he accurately describes Jones as "a prolific *pro se* litigant," based on his documented history of filing: (1) multiple motions seeking to vacate his sentence under § 2255 in the Western District of Missouri; (2) appeals of the denials of those motions; (3) requests to file successive § 2255 motions; (4) unauthorized successive § 2255 motions; (5) certificate of appealability requests in the Eighth Circuit related to those motions; and (6) various habeas actions. *Id at p. 3, n.4* (listing some of

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[3] The additional conviction did not increase the length of Jones's aggregate sentence because the sentences for all three convictions ran concurrently. The Eighth Circuit held that Jones was still prejudiced because: (1) the additional conviction could increase future sentences; (2) it could be used to impeach his credibility in the future; and (3) he had to pay a $100 statutory special assessment for the additional conviction. *Jones IV*, 403 F.3d at 607.

Jones's cases); *see also Jones I*, *Doc. 217* (Order directing that any *pro se* filings by Jones be returned to him unfiled).

On July 29, 2019, Jones filed this § 2241 habeas action. *Docs. 1 & 2*. In his Petition and supporting Affidavit, he asserts that, at the time he possessed the firearm giving rise to his conviction, he did not know he was a convicted felon or that his possession of a firearm was unlawful. In the Court's recent decision in *Rehaif v. United States*, 139 S.Ct. 2191 (June 21, 2019), it interpreted 18 U.S.C. § 922(g) and § 924(a)(2), as imposing a new and greater burden of proof on the Government to support convictions under those statutes.[4] Jones argues that, if the government had been required to meet the new *Rehaif* burden of proof in his case, he would have been acquitted because no reasonable juror could have found that he knew he was a felon at the time he possessed the firearm. *Doc. 1 at 3.* Accordingly, he contends he is "actually innocent" of his conviction for being a "felon in possession of a firearm."

Finally, to support his claim that he should be allowed to proceed under § 2241, he claims that his remedy under §2255 was "inadequate or ineffective to test the legality of his detention" because *Rehaif* was decided *after* his § 2255 motion had been fully adjudicated. *See* 28 U.S.C. § 2255(e).

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[4] Specifically, the Court held that, in a prosecution under 18 U.S.C. § 922(g) and 924(a)(2), the government must prove that the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S.Ct. at 2200.

II. Discussion

On September 11, 2019, Respondent filed a Motion to Dismiss arguing that: (1) Jones cannot demonstrate that his remedy under § 2255 was "inadequate or ineffective to test the legality of his detention;" and (2) even if he could meet that exception and proceed under § 2241, Jones's claim fails on the merits because he cannot demonstrate "actual innocence." *Doc. 11*.

In his Response, Jones contends that the Court should exercise subject matter jurisdiction over his § 2241 habeas claim and urges me to side with Second, Third, Fourth, Fifth and Seventh Circuit opinions holding that, if a new decision of statutory interpretation calls into question a criminal conviction *after* a prisoner's § 2255 motion has been finally adjudicated, the "available" remedies under that statute should be deemed inadequate or ineffective. *Doc. 15 at 5*; *See* Respondent's Motion, *Doc. 11* at 6 (identifying the following "permissive" cases: *United States v. Barrett*, 178 F.3d 34, 52 (1st Cir. 1999); *Triestman v. United States*, 124 F.3d 361, 371-72 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997); *In re Jones*, 226 F.3d 328, 334 (4th Cir. 2000); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Montana v. Cross*, 829 F.3d 775, 783 (7th Cir. 206 [sic]); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); and *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002)).

Generally, a prisoner challenging a final federal conviction or sentence must proceed under § 2255(a), by filing a motion "to vacate, set aside or correct" in the sentencing court. 28 U.S.C. § 2255; *Lopez-Lopez v. Sanders*, 590 F.3d 905, 907 (8th Cir. 2010); *Abdullah v. Hedrick*, 392 F.3d 957, 959 (8th Cir. 2004). However,

if a prisoner can establish that the remedy under § 2255 is "inadequate or ineffective to test the legality of his detention," § 2255(e) creates a narrow exception which authorizes a federal court, in the district of incarceration, to exercise jurisdiction and reach the merits of a prisoner's habeas claim under § 2241. *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003). The petitioner bears the burden of demonstrating that he is entitled to the benefit of § 2255(e), commonly referred to as the "savings clause."[5] *Lopez-Lopez*, 590 F.3d at 907; *Hill*, 349 F.3d at 1091.

For the "savings clause" to apply, "more is required than demonstrating that there is a procedural barrier to bringing a § 2255 motion." *United States v. Lurie*, 207 F.3d 1075, 1077 (8th Cir. 2000). Such a motion is *not* "inadequate or ineffective" merely because: (1) "§ 2255 relief has already been denied;" (2) the "petitioner has been died permission to file a second or successive § 2255 motion;" (3) "a second or successive § 2255 motion has been dismissed;" or (4) the "petitioner has allowed the one year statute of limitations and/or grace period to expire." *Id.*

According to Jones, at the time his § 2255 motions were finally adjudicated, controlling case law did not support a challenge to his conviction on the ground that the government had failed to prove he "knew" he was a convicted felon at the time he possessed the

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[5] "Saving clause" is a term preferred by at least one court and a leading commentator. *See, e.g., McCarthan v. Director of Goodwill Industries-Suncoast, Inc.,* 851 F.3d 1076, 1081-82 (11th Cir. 2018) ("[S]aving[, not savings,] is the precise word" for "a statutory provisions exempting from coverage something that would otherwise be included.") (quoting Bryan A. Garner, *Garner's Dictionary of Legal Usage* 797 (ed. 2011)). I will follow the Eighth Circuit on this point and adopt its usage of the term "savings."

firearm, making his remedy under § 2255 "inadequate or ineffective." Thus, he argues he should be allowed to pursue his § 2241 action, which raises an actual innocence claim based on *Rehaif's* new interpretation of § 922(g).

The defendant in *Rehaif* was a former college student who overstayed his student visa. While it was legal for him to possess a firearm and ammunition while his visa was current, once it expired the government believed his continued possession of that firearm and ammunition was illegal, and he was indicted on the charge of illegally possessing a firearm and ammunition under § 922(g)(5).[6] *Rehaif*, 139 S.Ct. at 2194.

Rehaif appealed his conviction, on the ground that the trial judge erroneously instructed the jury that "it did not need to find that he knew he was in the country unlawfully." *Rehaif*, 139 S.Ct. at 2194. The Eleventh Circuit affirmed his conviction. *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018). He then appealed to the United States Supreme Court, which granted cert.

The Supreme Court reversed his conviction and remanded the case for a new trial. In doing so, it construed § 924(a)(2) and § 922(g) to require the government to prove both that Rehaif "knew he belonged to the relevant category of persons [identified

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[6] Section 922(g) lists nine categories of persons prohibited from firearms transactions involving interstate commerce. Section 9229g)(5) makes it a crime for an "alien . . . unlawfully in the United States" to possess a firearm.

in § 922(g)] as barred from possessing a firearm."[7] *Id.* at 2200.

The parties agree that, because *Rehaif* narrows "the class of persons that the law punishes" under § § 922(g) and 924(a), it is a substantive decision that applies *retroactively* to cases on *initial* collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1267 (2016) (quoting *Shiro v. Summerline*, 542 U.S. 348, 353 (2004). The parties further agree that: (1) *Rehaif* clarified the proper statutory construction of § 922(g), but did *not* announce a new rule of constitutional law; and (2) *Rehaif* does not provide Jones with a legal basis for obtaining permission from the Eighth Circuit Court of Appeals to file a second or successive § 2255 motion under § 2255(h)(2).[8] However, beyond these points, the parties are in sharp disagreement.

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[7] Before the decision in *Rehaif*, the government was only required to prove the convicted felon knowingly "possess the firearm." *See United States v. Miller*, 646 F.3d 1128, 1132 (8th Cir. 2011) ("The penalty provisions of § 924(a)(2) thus require the government to prove that the defendant knew of the facts that constituted the offense under § 922(g), not that the defendant knew that his possession of a firearm was illegal.); *United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir. 2000) (The government was not required to prove the defendant "knew that it was illegal for him to possess a gun.").

The Court in *Rehaif* expressed "no view . . . about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here." *Id.* at 2200.

[8] Section 2255(h) authorizes the filing of a "second or successive motion" in only two circumstances: new evidence establishing that movant's innocence; or a new retroactive application of a new rule of *constitutional law*. Nothing in the language of that statute authorizes a "second or successive" motion based a [sic]

According to Jones, under controlling case law in effect at the time he sought § 2255 relief, he was "foreclosed" from arguing that part of the government's burden of proof was establishing that he *knew* he was a felon at the time he possessed the firearm. Thus, only after the *Rehaif* decision did that new avenue of relief become "available" to him.

Respondent counters that, both on direct appeal *and* in seeking § 2255 relief, Jones was free to make the *same argument* that Rehaif later successfully made before the Supreme Court. While acknowledging that Jones may not have prevailed on the argument, Respondent contends that it unquestionably *was available* to him. Accordingly, Respondent argues that Jones's § 2255 remedy was *not* "inadequate or ineffective to test the legality of his detention" under § 2255(e).

Federal circuit courts of appeal are split on whether a new statutory interpretation by the Supreme Court can be effectively elevated to a "third exception" to go along with the two congressionally created exceptions contained in § 2255(h): "Speaking broadly, nine circuits agree, 'though based on widely divergent rationales, that the saving clause permits a prisoner to challenge his detention when a change in statutory interpretation raises the potential that he was

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retroactive application of a new "statutory interpretation" of a statute.

I agree with the parties that Jones would not be able, based on *Rehaif*, to obtain permission from the Eighth Circuit to file a successive § 2255 motion. *See In re Palacios*, 931 F.3d 1314, 1315 (11th Cir. 2019) (declining to authorize a second or successive § 2255 because *Rehaif* decision was not a "new rule of constitutional law" but instead clarified the government's burden of proof in prosecutions under 18 U.S.C. §§ 922(g) and 924(a)(2)).

convicted of conduct that the law does not make criminal.'" Means, B., *Postconviction Remedies*, § 5:7 (July 2019) (quoting *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179-80 (3d Cir. 2017)). While Professor Means initially includes the Eighth Circuit among those "nine circuits" (based solely on the Third Circuit's overly broad construction of the holding in *Abdullah v. Hedrick*, 392 F.3d 957, 963-64 (8th Cir. 2004)), he later correctly observes that the Eighth Circuit "has neither affirmed nor rejected the Savings Clause's availability for actual-innocence or sentencing-errors claims." Postconviction Remedies, § 5:7.

In *Abdullah*, a § 2241 habeas petitioner, Abdullah, argued his § 2255 remedy was "inadequate or ineffective" to challenge his conviction based on a new statutory interpretation of § 924(c)(1) in *Bailey v. United States*, 516 U.S. 137 (1995). In *Bailey*, the Court held that the "use" element in § 924(c)(1) "required evidence sufficient to show active employment of the firearm." *Id.* at 143. In his § 2241 Petition, Abdullah claimed he was actually innocent because the government failed to prove his "employment of the firearm." For unknown reasons, Abdullah's retained counsel in the § 2255 action did *not* amend the § 2255 motion to raise the *Bailey* issue as a new ground for asserting Abdullah's actual innocence.

In the § 2255 proceeding, Abdullah himself unsuccessfully tried to raise the *Bailey* issue in a *pro se* filing, which the district court refused to consider because he was represented by counsel. *Abdullah*, 392 F.3d at 958. After the trial court denied § 2255 relief, Abdullah appealed.

Even though the government conceded on appeal that Abdullah's firearm conviction was invalid under *Bailey*, the Court denied § 2255 relief because: (1) Abdullah procedurally defaulted the *Bailey* claim by failing to properly present it in his initial § 2255 motion; (2) Abdullah's *pro se* motion filed with the trial court failed to preserve the issue; (3) Abdullah's effort to assert the claim on appeal was, in essence, an attempt to file a second or successive § 2255 motion; and (4) any new request to file a second or successive § 2255 motion would be time-barred. *Abdullah v. United States*, 240 F.3d 683 (8th Cir. 2001).

Abdullah filed a § 2241 habeas Petition that challenged his conviction on the ground that he was actually innocent claim under *Bailey*. The trial court dismissed Abdullah's habeas Petition for lack of subject matter jurisdiction. *Abdullah v. Hedrick*, No. 6:02-cv-03391-RED, *Docs. 4, 19, 20* (W.D. Mo [sic] February 11, 2003). Abdullah appealed.

In a narrow holding, the Eighth Circuit affirmed the trial court's dismissal of Abdullah's habeas Petition because, "regardless of his ability to demonstrate actual innocence, Abdullah *did have* an unobstructed procedural authority to raise his [*Bailey*] claim [by amending his § 2255 motion.]" *Abdullah*, 392 F.3d at 960 (emphasis added).

Because Abdullah *unquestionably* had an "unobstructed procedural opportunity" to amend his § 2255 motion pending before the trial court when *Bailey* was decided, the Eighth Circuit was *not* required to reach and decide the *much different issue* addressed by the Court in *Bruce*: Did a new statutory interpretation by the Supreme Court, announced over a decade after Bruce's § 2255 motion to vacate his

conviction became final, render his § 2255 remedy "inadequate or ineffective" within the meaning of the savings clause, and allow him to pursue a § 2241 action asserting his actual innocence? *Bruce, supra*, 866 F.3d at 174, 181-83.

In this case, *Rehaif* was *not* announced until years *after* Jones's § 2255 motions became final adjudications. Thus, Jones is now raising the same savings clause argument that the Court in *Bruce* (and seven other circuit courts of appeal) resolved in favor of creating a "judicial exception" which allows federal habeas petitioners to pursue actual innocence claims, without those actions being deemed "second or successive" under § 2255.

The Tenth and Eleventh Circuits have rejected the notion that a new statutory interpretation by the Supreme Court creates a "third exception" under § 2255(e) which can invest federal courts with subject matter jurisdiction to decide "actual innocence" claims under § 2241. *See Prost v. Anderson*, 636 F.3d 578, 585 (10th Cir. 2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012); *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.* 851 F.3d 1076, 1086-87, 90 (11th Cir. 2017) (*en banc*), cert. denied, 565 U.S. 1111 (2017) ("The savings clause does not create a third exception.").

In *Prost*, Judge Gorsuch rejected a prisoner's argument that the language in the savings clause should be construed to allow him to challenge his "long-final" conviction for conspiracy to launder drug proceeds, based on a new statutory interpretation by the Supreme Court requiring the government to prove that "'profits,' and not just 'gross receipts'" were laundered. *Prost*, 636 F.3d at 579-580. Under Judge

Gorsuch's construction of the savings clause, "a prisoner can proceed to § 2241 only if his initial § 2255 motion was *itself* inadequate or ineffective to the task of providing the petitioner with a *chance to test* the sentence or conviction." *Id.* at 587 (emphasis in original). Even though a petitioner's statutory argument might be "novel" or even "foreclosed" under existing Tenth Circuit precedent, it was still an *available remedy* that was not "inadequate or ineffective to test the legality of his detention." *Id.* at 590. As Judge Gorsuch succinctly put it, "[t]he savings clause doesn't guarantee results, only process." *Id.*

The Eleventh Circuit's *en banc* decision in *McCarthan* followed *Prost* and held that a "change in case law does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention.'" *Id.*, 851 F.3d at 1080. This ruling reversed eighteen years of contrary precedent, which had "ignored" the plain language of § 2255. *Id.* ("We join the Tenth Circuit in applying the law as Congress wrote it."). The Court placed heavy emphasis on the language of the savings clause, which requires a petitioner to demonstrate that the "remedy" is "inadequate or ineffective." Because McCarthan *could* have "presented his claim [under § 2255] and won relief in the Supreme Court" despite "[a]dverse [Eleventh] [C]ircuit precedent," the Court reasoned the remedy was not "inadequate of ineffective." *Id.* at 1086-87.

Section 2255(h) provides only two narrow grounds to support a federal prisoner's claim that he should be allowed to pursue a "second or successive" § 2255 motion: (1) "newly discovered evidence" sufficient to prove actual 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). Nothing in that statute authorizes a federal prisoner to bring a successive § 2255 motion based on a "new rule of statutory construction," even one that gives rise to a claim of actual innocence.

On its face, allowing federal prisoners to use "an intervening change in statutory interpretation," as a basis for invoking the savings clause to authorize an actual innocence claim under § 2241, is a *broader remedy* than the two Congress explicitly created in § 2255(h). *McCarthan*, 851 F.3d at 1091 (emphasis in original). Furthermore, because this third "judicially created exception" does not require a prisoner to satisfy either the gatekeeping requirements of § 2255(h) or the one-year limitations period found in § 2255(f), it allows prisoners, *as applied*, even more leeway to pursue claims that would otherwise be foreclosed under the two narrow exceptions stated in § 2255(h). *McCarthan*, 851 F.3d at 1091 ("Congress did not create any exception as to section 2255(h) for non-constitutional changes in law, so we may not craft one."); *Prost*, 636 F.3d at 591 (When enacting § 2255(h), "Congress didn't consider Mr. Prost's excuse strong enough to overcome the finality interests attaching to a conviction already tested through trial, appeal, and one round of collateral review. Neither can we see how we might permit Mr. Prost to proceed with his claim through the § 2255(e)'s savings clause without nullifying (or at least doing much violence to) the restrictions on second and successive motions Congress has imposed in § 2255(h).").

The analysis by the Courts in *Prost* and *McCarthan* is compelling and consistent with prior Eighth Circuit case law interpreting the savings clause. *See Lee v. Sanders*, 943 F.3d 1145, 1147 (8th Cir. 2019) (citing with approval, albeit for a different point, the Tenth Circuit's opinion in *Prost v. Anderson, supra*). The Eighth Circuit has consistently held that the "savings clause" may *not* be invoked to raise an issue under § 2241 which *could have been raised* in a direct appeal or a § 2255 motion in the sentencing district. *Abdullah*, 392 F.3d at 963; *Lopez-Lopez*, 590 F.3d at 907; *Hill*, 349 F.3d at 1092. While the Eighth Circuit has not yet directly spoken on this issue, I believe its decision in analogous cases strongly suggest that it will follow the reasoning of the Tenth and Eleventh Circuits and reject the far broader approach followed by the eight other circuits that have decided this issue differently.

Accordingly, because Jones has failed to demonstrate that he is entitled to the benefit of § 2255(e)'s savings clause, the Court lacks subject matter jurisdiction over the habeas action.[9] *Lee v.*

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[9] The Court's jurisdictional ruling prevents it from reaching Respondent's alternative argument that Jones, on the merits, cannot prove his claim of actual innocence. *See Flittle v. Solem*, 882 F.2d 325 (8th Cir. 1989) ("A want of subject matter jurisdiction prohibits a court from considering any substantive aspects of a case or controversy."); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Nevertheless, it is worth noting that Jones, *who spent almost two years in prison on felony charges*, is in a weak position to argue he is "actually innocent" of unlawfully possessing a gun

Sanders, 943 F.3d at 147 (court lacks "jurisdiction to entertain a § 2241 petition unless and until" the petitioner demonstrates that he is entitled to the benefit of § 2255(e)'s "savings clause").

III. Conclusion

IT IS THEREFORE ORDERED THAT Respondent Dewayne Hendrix's Motion to Dismiss, *Doc. 11*, be GRANTED, and Petitioner Marcus DeAngelo Jones's § 2241 habeas Petition, *Doc. 1*, is DISMISSED.

DATED this 24th day of January, 2020.

/s/ J. Thomas Ray
United States Magistrate Judge

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because he "did not know" he was a convicted felon. *See* Presentence Investigation Report, *Doc. 18* (sealed) (indicating Jones was in prison on felony charges from December 11, 1995 through October 22, 1998); *see also United States v. Hollingshed*, 940 F.3d 410, 2019 WL 4864969, *3 (8th Cir. October 3, 2019) (applying *Rehaif*, on direct review, and holding that the defendant could not establish plain error where he had served two different stints in prison and "knew he had been convicted of a 'crime punishable by imprisonment for a term exceeding one year.").

U.S. Const. Art. I, § 9, Cl. 2 states, in relevant part: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

U.S. Const. Amend. V states, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

U.S. Const. Amend. VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

28 U.S.C. § 2241 states, in relevant part:

(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 * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. * * *

28 U.S.C. § 2255 states, in relevant 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.

(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. * * *

(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.
* * *

(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.