

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS DEANGELO JONES,)
)
 Petitioner,)
)
 v.) No. 21-857
)
 DEWAYNE HENDRIX, WARDEN,)
)
 Respondent.)

Pages: 1 through 80

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6 DEWAYNE HENDRIX, WARDEN,)

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10 Washington, D.C.

11 Tuesday, November 1, 2022

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:02 a.m.

16

17 APPEARANCES:

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22 of the Respondent in support of affirmance.

23 MORGAN L. RATNER, ESQUIRE, Washington, D.C.;
24 Court-appointed amicus curiae in support of the
25 judgment below.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-857, Jones versus Hendrix.

Mr. Ortiz.

ORAL ARGUMENT OF DANIEL R. ORTIZ

ON BEHALF OF THE PETITIONER

MR. ORTIZ: Mr. Chief Justice, and may it please the Court:

The Eighth Circuit ruled in this case that someone in prison for something the court later determines has never been a crime has no means to challenge his continued detention once his opportunity to file a 2255 motion runs out. He must remain in prison despite having done nothing wrong. But, as this Court held in Davis, conviction and punishment for an act that the law does not make criminal inherently results in a complete miscarriage of justice.

The Eighth Circuit's ruling is wrong for four separate reasons. First, it violates the text of 2255(e). Its key terms all indicate that traditional habeas relief should be available, that a prisoner should have one

1 opportunity to have the correct law applied to
2 his case. The Eighth Circuit held, however,
3 that so long as 2255 provides a purely formal
4 opportunity to raise an issue, it doesn't matter
5 whether the law applied is correct or wrong.
6 Prisoners in this situation, moreover, do not
7 even have that purely formal opportunity. They
8 will almost always be barred from raising the
9 issue in their initial 2255 motion.

10 Second, the Eighth Circuit made the
11 savings clause almost completely superfluous.
12 It identified two categories of cases where it
13 believed the saving clause applies. But the
14 savings clause actually applies to neither. In
15 both situations, the prisoner petitions under
16 2241 directly.

17 Third, the Eighth Circuit created four
18 independent constitutional difficulties. It
19 effectively suspended an important use of the
20 writ as originally understood, and it raised
21 substantial due process, separation of powers,
22 and Eighth Amendment concerns. It denied Jones
23 any opportunity to ever test his claim under
24 what has always been the correct law.

25 Finally, the Eighth Circuit wrongly

1 concluded that allowing savings clause relief
2 would undermine Section 2255(h). It does not.
3 The saving clause and 2255(h) are independent,
4 congressionally authorized routes to collateral
5 review, and nothing suggests that in enacting
6 Section 2255(h) in 1996 Congress intended to
7 repeal the savings clause. The Eighth Circuit's
8 repeal by implication isn't justified.

9 Your Honors, the Eighth Circuit here
10 moved that because the prisoner had a
11 theoretical right to raise an opportunity -- had
12 the right to raise an opportunity in his initial
13 2255 motion, which was for -- which
14 substantively was foreclosed under existing
15 circuit precedent, which this Court later
16 declared wrong, the possibility of en banc
17 review or a cert petition to this Court made his
18 quest to have the correct law applied real.

19 That's in effect -- that represents in
20 effect an ineffective or inadequate remedy to
21 test the -- the legality of the prisoner's
22 detention. There are three different problems
23 with this, Your Honors, with the --

24 CHIEF JUSTICE ROBERTS: Before you get
25 to those, counsel, it seems to me that you've

1 got a basic -- and your friend has the same type
2 of conundrum. I mean, your problem, of course,
3 is that you're sort of undermining AEDPA.
4 You're allowing to be revived the sort of claims
5 that AEDPA wanted to preclude. And I think it's
6 a challenge to explain why that type of result
7 would prevail.

8 On the other hand, your friends have
9 the problem that you've already identified,
10 well, what's the savings clause for if there's
11 really nothing -- nothing to save.

12 And I guess, as an abstract matter
13 between those two types of problems, it seems to
14 me that you have the more -- more serious one
15 because it's really express. You know, these
16 claims you can't bring. And then there's an
17 exit and you say, well, you can bring them over
18 here. That -- that seems pretty -- that's a
19 hard reading to prevail on.

20 Your friends, on the other hand, it's
21 sort of a less extravagant argument to have to
22 make. You've got a savings clause and, you
23 know, it doesn't save anything. It's just there
24 in case it's needed. I mean, it -- it's sort of
25 not that -- it doesn't strike me as -- as

1 serious a conundrum.

2 MR. ORTIZ: Well, Your Honor, I think
3 that mistakes a bit the structure of 2255 and
4 the text and structure and purpose of 2255(h) in
5 particular. As I said in the opening, there's
6 no real indication, let alone by the clear
7 statement that this Court has required in cases
8 like McQuiggin and St. Cyr, that Congress
9 actually meant to constrict habe -- traditional
10 habeas jurisdiction in this way.

11 For sure, 2255(h)(1) and (2) limit the
12 reasons for which someone can pursue a
13 successive 2255 remedy. There's no indication
14 that they meant to foreclose recourse to
15 traditional habeas through 2255(e).

16 2255(a), Your Honor, sets up the 2255
17 process. 2255(e) serves as a gatekeeper,
18 determining what causes come into that process,
19 what kinds of cases come into that process, and
20 what ones go through 2241, the traditional
21 habeas route.

22 And 2255(h) says, once you're in the
23 traditional 20 -- motion to vacate process, when
24 and under what circumstances you're allowed a
25 second bite at that particular process. It

1 doesn't really affect the availability of
2 2255(e) relief which sends you to 2241 at all.

3 But, certainly, Your Honor, there is
4 no -- there is no -- there is not the clear
5 statement in 2255(h) that is -- that it is meant
6 to repeal 20 -- parts of 2255(e) --

7 JUSTICE SOTOMAYOR: Counsel --

8 MR. ORTIZ: -- and this requires --

9 JUSTICE SOTOMAYOR: -- I'd like you to
10 go -- the Chief makes it an either/or. Most of
11 the court of appeals who have sided more with
12 you than with amici recognize that the savings
13 clause cannot be invoked every time 2255(e) --
14 (h) applies without blowing it up. So you --
15 you have to have some limiting principle.

16 And the limiting principle that most
17 of the court of appeals have found is the one
18 proposed by the Government, which is that they
19 thread the needle by saying that innocence
20 claims should be one of the rare cases where the
21 savings clause is triggered because, otherwise,
22 there would be a fundamental miscarriage of
23 justice.

24 Now your brief did not go as far as
25 the Government in saying that. Are you

1 eschewing the Government's position, or are you
2 accepting it?

3 MR. ORTIZ: No, for purposes of this
4 case, Your Honor, we accept the Government's
5 position. We believe that there's not much
6 daylight between its position and ours on purely
7 statutory claims.

8 We do not necessarily agree with it
9 across the board, for example, their
10 interpretation of when 2255(h)(2), for example,
11 does restrict habe -- traditional habeas relief
12 for, say, constitutional claims. But, in the
13 universe of statutory claims, there's really not
14 much daylight between -- on the ground between
15 their position and ours.

16 JUSTICE BARRETT: Counsel, did I
17 misunderstand your argument? I thought one of
18 the areas of daylight was that you thought it
19 would apply even when circuit precedent changed
20 as opposed to just when Supreme Court precedent
21 changed. Did I misunderstand that?

22 MR. ORTIZ: Sorry, Your Honor. I was
23 just referring to the comparator of -- in the
24 Government -- the Government's proposing to the
25 traditional habeas relief and the bench line.

1 There are two disagreements between us
2 and the Government, Your Honor, which are very
3 important. One is that under our view, a change
4 in circuit precedent, as you've identified,
5 Justice Barrett, should count for these
6 purposes. We believe they've misconstrued Davis
7 versus United States.

8 In that case, Your Honor, the change
9 by -- of law by this Court, the Gutknecht case,
10 happened while the Davis case was on direct
11 appeal in the Ninth Circuit, and then the Ninth
12 Circuit remanded the case to the district court
13 and the case came back up again.

14 And it was impossible for Gutknecht to
15 have represented the change in law that was
16 relevant there because it changed before the
17 direct proceedings were concluded. The change
18 in law that this Court itself identified was a
19 change in law of the Ninth Circuit in the Fox
20 case, which later interpreted Gutma -- Gut --
21 Gutknecht, Your Honor.

22 JUSTICE BARRETT: How do you propose
23 to handle some of the choice of law problems
24 that changes your theory that circuit precedent
25 changes count create?

1 MR. ORTIZ: In -- there are arguments
2 on both sides, Your Honor, which you identified
3 in your Chazen opinion while you were sitting on
4 the Seventh Circuit. In our view, the -- the
5 view that you gestured at is actually the
6 correct one, that a court should apply the law
7 of the sentencing circuit rather than its own.

8 And I know that is in some sense an
9 anomaly, but it's not a complete anomaly in our
10 system. For example, the Federal Circuit, I
11 believe, now applies the law of the circuit to
12 supplemental nonpatent claims in cases that are
13 before it, so this would be no stranger than
14 that kind of thing.

15 And, certainly, each -- and it's
16 not -- the Federal Circuit has not been
17 authorized by Congress to do that. It's a rule
18 that it has developed under Federal Circuit
19 common law.

20 The other big difference between the
21 Government's view, Your Honor, and ours concerns
22 the actual innocence test. The Government says
23 that actual innocence should be a gateway
24 doctrine regulating all -- every -- everything
25 that goes through 2255(e).

1 Interestingly, though, all the support
2 the Government has cited for that -- Schlup,
3 McQuiggin, Bousley, and Kuhlmann -- all concern
4 abuse of the writ doctrine. And it's our
5 contention that the actual innocence test is one
6 way of getting over the abuse of the writ
7 doctrine in a 2241 proceeding or 2255 proceeding
8 when it is raised by the government.

9 But it is not the only way and should
10 not be created at or placed at the 2255 gateway
11 to 2241 as an absolute and singular requirement.
12 We believe that the traditional other gateways,
13 like cause and prejudice for procedural default,
14 should be available too.

15 And we believe that our client
16 actually would satisfy the procedural default
17 standard here and, if not, would actually --
18 could actually establish actual innocence, but
19 that should be a matter on remand from this
20 Court.

21 JUSTICE GORSUCH: So, counsel, I
22 understand --

23 JUSTICE KAGAN: I --

24 JUSTICE GORSUCH: I'm sorry. Go
25 ahead.

1 All right. If I understand, I just
2 want to make sure I -- I've got the points of
3 difference between you and the Government.

4 One is circuit foreclosure in your
5 view as opposed to Supreme Court foreclosure on
6 the Government's view.

7 MR. ORTIZ: Yes, Your Honor.

8 JUSTICE GORSUCH: Second is actual
9 innocence versus maybe something more than
10 actual innocence required.

11 And third is, I think, that you take
12 the position that absent adopting some form of
13 relief here, there would be serious
14 constitutional questions raised by the statute,
15 and the Government doesn't believe so.

16 Is that -- is that a fair summary?

17 MR. ORTIZ: That's a fair summary,
18 Your Honor.

19 JUSTICE GORSUCH: Okay. And -- and --
20 and then, with respect to what the savings
21 clause would do on -- on the amicus's reading,
22 you argue it would do too little work. But it
23 was adopted first in 1948, and it was done so
24 when habeas was shifted primarily from the
25 sentencing court to the court of confinement.

1 And -- and for -- for at least 50
2 years, the only purpose of that statute was to
3 ensure that if the sentencing court was
4 unavailable, court martials, the sentencing
5 court, you couldn't transfer the prisoner for
6 whatever reason, natural disasters or other --
7 COVID problems perhaps, that there would be some
8 court available.

9 And -- and -- and so I guess I'm
10 unclear why after 50 years we would expect the
11 savings clause to do a great deal new work.

12 MR. ORTIZ: Well, first, Your Honor,
13 it wasn't doing some of the work that you've --
14 you and the court amici -- the Court-appointed
15 amicus have identified. It does not cover --

16 JUSTICE GORSUCH: It did in the Tenth
17 Circuit. I know -- I know that. I remember
18 that.

19 MR. ORTIZ: Well, Your Honor, this
20 Court itself in the Ortiz case very recently
21 declared that court martials preexisted the
22 Constitution let alone an act of Congress. They
23 are not established by an act of Congress. They
24 were recognized by Congress.

25 JUSTICE GORSUCH: Right. The

1 court martial is evanescent. It disappears.
2 There is no court to go back to. And so, at
3 least in Tenth Circuit and I believe in a lot of
4 other courts, in those cases, the court of
5 confinement was made available because there was
6 no sentencing court to go back to. That was one
7 example. And natural disasters was another
8 example.

9 Are you aware of any others during the
10 50-year period between 1948 -- well, not 50
11 years, but almost 50 years, between 1948 and
12 1995?

13 MR. ORTIZ: Well, if I may just for a
14 moment push back a little bit on that?

15 JUSTICE GORSUCH: Of course.

16 MR. ORTIZ: I'm sorry, but, of course,
17 court martial -- habe -- traditional habeas
18 relief was available for court martials, but it
19 was not made available through 2255(e).

20 JUSTICE GORSUCH: No, of course, but
21 it --

22 MR. ORTIZ: Oh, okay.

23 JUSTICE GORSUCH: -- that did make
24 it -- 2255(e) was cited as an authority to send
25 those cases to the 2241 court.

1 MR. ORTIZ: Usually not, Your Honor.
2 Maybe in the Tenth Circuit it mistakenly was,
3 but they're not authorized --

4 JUSTICE GORSUCH: Mistakenly?

5 MR. ORTIZ: Well, they're not -- court
6 martial -- 2255 only authorizes people to pursue
7 2255 -- sorry, 2255(a) authorizes people to
8 pursue motions to vacate under 2255 only when
9 they're under sentence by a court established by
10 an act of Congress.

11 JUSTICE GORSUCH: I see.

12 MR. ORTIZ: And court martials are not
13 established --

14 JUSTICE GORSUCH: I follow you.

15 MR. ORTIZ: So 2255 was not a
16 question.

17 JUSTICE GORSUCH: Okay. So you're
18 saying that wasn't even available during the 50
19 years.

20 MR. ORTIZ: Right.

21 JUSTICE GORSUCH: Okay. So what was
22 it used for during those 50 years?

23 MR. ORTIZ: Well, there are two cases
24 we've been able to identify. One was where a
25 case was transferred from the -- sorry,

1 when some -- there's a conviction from the Court
2 of Appeals for the Panama -- sorry, from
3 the District -- the Court of Panama Canal, and
4 another was when some courts were transferred to
5 the state courts of Alaska after Alaska became a
6 state, and the --

7 JUSTICE GORSUCH: Okay. Fine.

8 MR. ORTIZ: -- state courts refused --

9 JUSTICE GORSUCH: Whatever the
10 examples are, they were very limited, you'd
11 agree?

12 MR. ORTIZ: For sure, but that's
13 not -- but that doesn't indicate, Your Honor,
14 what Congress intended the scope of the savings
15 clause to be.

16 The savings clause, as this Court
17 itself described in Haymond and a decade --
18 two -- no, a decade and a half later in Pressley
19 was meant to serve as a kind of constitutional
20 backstop so that there would never be any
21 constitutional doubt about the adequacy of 2255.
22 And so, as Congress -- Congress originally
23 intended in 1948 that as the contours of Section
24 2255 changed, it would never be placed under
25 constitutional pressure because 2255 would

1 always allow this out. So it's so --

2 JUSTICE GORSUCH: All right. That
3 takes us back to the constitutional disagreement
4 you have with the Government, though, right?

5 MR. ORTIZ: About whether only the --

6 JUSTICE GORSUCH: Whether -- whether
7 --

8 MR. ORTIZ: -- about the
9 constitutional doubt --

10 JUSTICE GORSUCH: -- whether this
11 scheme is required for constitutional purposes
12 that you're advocating.

13 MR. ORTIZ: Well, that was only one
14 purpose for the saving clause, Your Honor. The
15 other purpose that this Court identified in
16 Haymond and I believe in Pressley as well was to
17 prove that it was -- to make sure that habeas
18 overall, either through 2255 or 2241, provided
19 an adequate remedy.

20 JUSTICE GORSUCH: Can I -- can I test
21 that proposition --

22 MR. ORTIZ: Yes.

23 JUSTICE GORSUCH: -- just for a
24 moment? So -- so you speak of the necessity for
25 an adequate and effective alternative, and you

1 suggest, if there's circuit foreclosure, then it
2 isn't an adequate or effective alternative.
3 But, when we speak of adequacy and effectiveness
4 in, for example, ineffective assistance claims,
5 we use those very terms, and we often find, and
6 these are often habeas cases, that counsel was
7 effective even if he lost. So why should a
8 victory be equivalent to effectiveness?

9 MR. ORTIZ: I'm sorry. I'm sorry,
10 Your Honor, we -- I must have mis-explained or
11 inadequately explained things in our briefing.
12 We do not claim that an adequate remedy
13 guarantees a prisoner's victory. We believe
14 that it guarantees that the correct law be
15 applied to his case at least once. And that has
16 not been the case here.

17 JUSTICE GORSUCH: Okay. Thank you.

18 MR. ORTIZ: It has not been possible.
19 In fact --

20 JUSTICE SOTOMAYOR: Counsel, you do
21 mention -- in -- in response to Justice Gorsuch,
22 you talk about a couple of cases, but in your
23 reply brief, you said that you had reviewed all
24 353 saving clause cases prior to AEDPA, and you
25 only found the two. Could you please tell me

1 what the others involved?

2 MR. ORTIZ: Sorry. We -- we looked
3 for cases, Your Honor, that -- we did -- we did
4 a search for ones that used the term so we could
5 try to catch anything where the term came up.

6 JUSTICE SOTOMAYOR: Right.

7 MR. ORTIZ: And then we went through
8 all those cases and we looked for ones where it
9 was actually used. And we -- the other -- we
10 found all these --

11 JUSTICE SOTOMAYOR: Which term were
12 you using? Were you using the 2255(e), the
13 savings clause?

14 MR. ORTIZ: Yes, we were using the
15 search that is described in that footnote.

16 JUSTICE SOTOMAYOR: Oh, okay.

17 MR. ORTIZ: So there were lots --
18 there were two -- there were 253 or whatever it
19 was examples of where it was sort of invoked.

20 JUSTICE SOTOMAYOR: Right.

21 MR. ORTIZ: But there were only two
22 where it appeared that it was actually used.

23 JUSTICE SOTOMAYOR: I see. So the
24 others, it wasn't used?

25 MR. ORTIZ: Right.

1 JUSTICE SOTOMAYOR: Okay.

2 MR. ORTIZ: Yeah. Yeah.

3 JUSTICE SOTOMAYOR: That's what I
4 meant.

5 MR. ORTIZ: But, in -- in this case,
6 Your Honor, people in Mr. Jones's position don't
7 even get the formal opportunity often to raise
8 their claim in the initial habeas proceeding
9 even in the hope that later on they might be
10 able to petition the court which has -- has --
11 has foreclosed their -- them on the substance.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. ORTIZ: It changes the --

15 CHIEF JUSTICE ROBERTS: I'm sorry.
16 Finish your sentence.

17 MR. ORTIZ: It changes the view en
18 banc. Sorry. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 Justice Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Is it odd that
23 2255(h)(2) mentions only new rules of
24 constitutional law rather than new
25 interpretations of the statute?

1 MR. ORTIZ: Your Honor, Congress in
2 that took the -- we believe that what Congress
3 did there is it took the language from this --
4 this Court had developed in McCleskey versus
5 Zant on actual innocence and basically codified
6 it. So it was taking that one item, that one
7 piece of doctrine, and just writing it into the
8 statute, with some -- some changes, of course.
9 But that's basically what it did, and it didn't
10 mean to actually address all the other types of
11 claims available.

12 But, certainly, Your Honor, there
13 isn't a clear statement that this Court requires
14 before constricting habeas jurisdiction that
15 Congress meant to repeal 2255(e) in enacting
16 2255(h).

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: No, thank you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?
21 Justice Jackson?

22 JUSTICE JACKSON: Yes, I have a
23 question that just arises out of something you
24 said at the beginning that I thought was very
25 interesting. I have been focusing in on the

1 interaction between (e) and (h) because I think
2 the sort of questions presented in this case
3 teed up that way in a certain way. And, you
4 know, there's the savings clause, what does
5 ineffective mean as it relates to what's
6 happening in (h), and what -- who has the better
7 interpretation about that.

8 What you said at the beginning that I
9 found very interesting was this interpretation
10 exercise needs to be taken in the light of the
11 entirety of 2255 and what is going on in each
12 provision. You know, please interpret it
13 related to the structure of this statute. You
14 said that (a) sets up the process, it gives us
15 the motion, it creates the whole scheme. Then
16 sort of, I guess -- I'm just trying to do it
17 right here on -- on the stand -- (b), (c), (d),
18 it looks like, is talking about procedural
19 matters when the motion is properly entertained.
20 And if you were a court and you were sort of
21 going through in order, I think this is maybe
22 how you would approach it in actual application.
23 When you get to (e), the question is, okay, so
24 what about habeas? Can people still be, you
25 know, filing a habeas motion while this is going

1 on? And you find the answer there about that.
2 And then you keep moving on. You know, statute
3 of limitations is in (f), and then you get to
4 (h). It's the gatekeeper, you said. Can -- is
5 this a successive motion, the court is asking at
6 this point, and if so, can I proceed?

7 If we think about it in that way, then
8 it's sort of like (e) is not really interacting
9 with (h) and -- and saying anything about
10 whether habeas rights would still exist for the
11 purpose of this case. Am I right in sort of how
12 I'm starting to -- to --

13 MR. ORTIZ: No, you --

14 JUSTICE JACKSON: -- to view this?

15 MR. ORTIZ: -- you are right, Your
16 Honor, with one -- I would --

17 JUSTICE JACKSON: Yes.

18 MR. ORTIZ: -- qualify one thing you
19 said --

20 JUSTICE JACKSON: Please.

21 MR. ORTIZ: -- which is that 2255(h)
22 is the gatekeeper for a particular thing,
23 successive 2255 motions. 2255(e), on the other
24 hand, is a different type of gatekeeper. In
25 some ways, it's the most important provision in

1 2255 because it determines whether you get into
2 2255 at all or you start over at 2241 or you
3 maybe, you know, come -- what we've been talking
4 about is you come in through the 2255(e)
5 gateway. But, actually, 2255(e) is the traffic
6 cop here directing --

7 JUSTICE JACKSON: I see. So, at the
8 beginning, we just sort of have these claims and
9 we're like which is the right world that we need
10 to be in, the 2255 world or the 2241 world? And
11 (e) is doing that work?

12 MR. ORTIZ: Yes, Your Honor.

13 JUSTICE JACKSON: And then, once we're
14 in the right world, we keep on going with
15 respect to the application of statute of
16 limitations or is this a successive motion or
17 whatever?

18 MR. ORTIZ: Yes, Your Honor.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Feigin.

23

24

25

1 ORAL ARGUMENT OF ERIC J. FEIGIN
2 ON BEHALF OF THE RESPONDENT
3 IN SUPPORT OF AFFIRMANCE

4 MR. FEIGIN: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 As you point out, Mr. Chief Justice,
7 this case presents something of a conundrum, and
8 it's no secret that it's one that we've
9 struggled with. And what makes this case
10 difficult is the -- the key phrase, "inadequate
11 or ineffective to test the legality" of his
12 detention, obviously requires some comparator
13 benchmark, and it can be a little bit difficult
14 to identify what the proper benchmark is.

15 And for a long time, we and the lower
16 courts were operating under the assumption that
17 the choices were between kind of indeterminate
18 notions of fairness, which is I still think what
19 Petitioner is offering, and kind of an unhelpful
20 self comparison where what you see is what you
21 get with 2255, which is I think what the court
22 of appeals did and what amicus is defending.

23 But I think this Court's cases, when
24 we took a fresh look at this, in Haymond and
25 Sanders, read the text in a third and much

1 better way that makes federal habeas corpus the
2 comparator. The saving clause quite literally
3 saves those lingering applications of habeas
4 corpus that Congress has never withdrawn and
5 that Section 25's motions remedy doesn't itself
6 cover. And one of those is statutory claims of
7 actual innocence by a prisoner who can rely on
8 an intervening decision of this Court.

9 Now I think the critical interpretive
10 question in this case is the negative
11 implication of Section 2255(h), which doesn't
12 actually mention habeas. To what degree did
13 Section 2255(h) not only restrict the motion
14 remedy to which it expressly refers but also
15 provide the kind of clear statement that's
16 necessary to withdraw the habeas remedy as well?

17 And I think a couple of things that
18 might be useful to explain why we think it
19 doesn't withdraw the habeas remedy for the
20 statutory claims would be to discuss a little
21 bit how you figure out what the current scope of
22 federal habeas is and what -- the kinds of
23 statutory claims we're talking about here. But
24 I realize the Court has already indulged me, and
25 I, of course, defer to the --

1 JUSTICE JACKSON: Can I ask a --

2 MR. FEIGIN: -- Court's questions.

3 JUSTICE JACKSON: Sorry. Does anybody
4 else have a question?

5 Can -- can I ask you, Mr. Feigin,
6 about whether or not the ordering question that
7 I just spoke with Petitioner's counsel about
8 also helps a little bit with the negative
9 implication?

10 In other words, if we review (e) in
11 the order of things as a court applying these
12 principles or this statute as doing work to tell
13 us should we be in 2241 or should we be in 2255,
14 does that help in terms of what we can later
15 draw from (h)?

16 MR. FEIGIN: Well, Your Honor, I don't
17 know that it -- I mean, I think that it is one
18 helpful way to think about it, but I think the
19 critical question is just the operation of
20 2255(e) in itself and how it answers that
21 question.

22 And I think what it says is that for
23 constitutional purposes and because Congress
24 wasn't trying to withdraw the habeas remedy
25 insofar as it might disadvantage federal

1 prisoners when it was setting up this new system
2 in 1948, what it's telling us is that it keeps
3 the contours of the federal habeas remedy.

4 JUSTICE JACKSON: And -- and -- and
5 before -- before, that remedy would have allowed
6 for a person in Mr. Jones's situation to claim
7 miscarriage of justice and bring this claim?

8 MR. FEIGIN: Yes, and I think we see
9 that from Davis, which, you know, essentially is
10 this situation. It came up under 2255, but it
11 referred back to traditional habeas principles,
12 and I don't know that there's really any dispute
13 about statutory claims like this being covered.
14 And I --

15 JUSTICE GORSUCH: Mr. Feigin --

16 JUSTICE ALITO: Well, you mentioned
17 that --

18 JUSTICE GORSUCH: I'm sorry. Go
19 ahead, please.

20 JUSTICE ALITO: You mentioned that one
21 of the situations in which your interpretation
22 would apply is where this Court has
23 reinterpreted the meaning of a substantive
24 criminal provision.

25 Where else would it apply?

1 MR. FEIGIN: Well, Your Honor, I think
2 it could potentially cover some of the
3 situations the amicus has identified, although
4 some of them I think, frankly, wouldn't even
5 fall into 2255 in the first place.

6 Federal habeas corpus is really
7 divided into three parts. The first one is like
8 challenges to conditions of confinement or good
9 time credits, things that challenge the
10 execution of the sentence rather than its
11 imposition. Those don't even come into 2255 in
12 the first place, and there's really no need for
13 any -- anything to exclude them.

14 JUSTICE ALITO: Well, when you --

15 MR. FEIGIN: They just automatically
16 go to habeas.

17 JUSTICE ALITO: -- when you speak
18 about -- when you speak about the traditional
19 scope of federal habeas corpus, at what point in
20 time are we supposed to look?

21 MR. FEIGIN: So, Your Honor, you look
22 at federal habeas corpus now, and the body of
23 federal habeas corpus now can be informed by
24 Section 2255 itself and its limits and the
25 limits that Congress has imposed on state

1 prisoners through 2244. And if I could just
2 take a second to explain why that is.

3 I think there are certain
4 circumstances in which we can draw negative
5 implications from 2255, particularly when
6 they're reinforced by 2244, which the explicit
7 limitations on constitutional and factual claims
8 in 2255(h) definitely are because they are
9 mirrored in 2244(b).

10 And, in fact, which is -- and 2244 is
11 expressly cross-referenced in 2255(h), and then,
12 if you look at 2244, it has a provision,
13 2244(a). 2244(a) literally only applies to a
14 second or further habeas petition that a federal
15 prisoner might file, so it doesn't literally
16 apply to a 2255 motion followed by a habeas
17 petition.

18 But one thing that it does is it
19 points back at 2255 for the relevant
20 limitations. Those relevant limitations include
21 -- this gets back to Justice Jackson's point --
22 2255(h), which limits successive or abusive
23 constitutional and factual claims but doesn't
24 say anything about statutory claims --

25 JUSTICE KAGAN: Suppose it did, Mr.

1 Feigin.

2 MR. FEIGIN: -- and it includes (e).

3 I'm sorry --

4 JUSTICE KAGAN: I'm sorry.

5 MR. FEIGIN: -- Justice Kagan. I'm
6 sorry. And it includes --

7 JUSTICE KAGAN: Finish your sentence.

8 MR. FEIGIN: -- and it includes (e),
9 which is the critical provision that we're
10 interpreting here. I'm sorry, Justice Kagan.

11 JUSTICE KAGAN: No, no, no. You know,
12 suppose 2255(h) did include a specific provision
13 that said you can't bring a successive 2255
14 motion based on an intervening statutory change.

15 Would then there be a strong negative
16 implication?

17 MR. FEIGIN: Yes, I think there would
18 because then we'd be in this third category.
19 Like I mentioned two of the three categories of
20 federal habeas claims. One is these -- one is
21 about execution of the sentence. We're not
22 really talking about that here. One is federal
23 prisoner claims that have analogues to state
24 claims, and I just described a little bit about
25 how those might shake out.

1 And then we're talking about a kind of
2 claim -- a statutory claim that's really unique
3 to federal prisoners, and I think where Congress
4 has expressly precluded it and clearly focused
5 on it, then --

6 JUSTICE KAGAN: Right. I mean, I
7 guess --

8 MR. FEIGIN: -- that would be a much
9 more difficult case today.

10 JUSTICE KAGAN: It's much more
11 difficult.

12 MR. FEIGIN: Yes.

13 JUSTICE KAGAN: And you would -- you
14 -- let me make sure I understand your answer.
15 You would answer it the reverse way.

16 MR. FEIGIN: I think we probably
17 would, yeah, Justice Kagan.

18 JUSTICE KAGAN: Yeah. And that's so
19 even though it would refer only to 2255 motions
20 and not to habeas, right?

21 MR. FEIGIN: Yeah, I think our
22 critical point here, Your Honor, isn't that 2255
23 can say nothing about the withdrawal of the
24 federal habeas remedy. It's just that as this
25 Court has stated in multiple recent cases, like

1 McQuiggin and Holland, it requires something of
2 a -- a clear statement or a bright light
3 indicator to withdraw the federal habeas remedy.

4 And I think you have that for the
5 stuff that Congress clearly focused on, but we
6 don't have that for the kinds of claims -- the
7 kinds of statutory claims that we're talking
8 about here.

9 Those are actually quite different
10 from what Congress might have been thinking
11 about even in 2255(f)(3), for example, which
12 imposes a statute of limitations that doesn't
13 include the word "constitutional" like 2244's
14 does, where you can often have a claim based on
15 a statutory right that is framed in
16 constitutional terms.

17 The kinds of Rehaif claims we see on
18 first 2255s aren't these kinds of statutory
19 claims which essentially are claims of actual
20 innocence in merits form. What they are are
21 claims of an unknowing plea, mirroring what
22 happened in Bousley, and they're claims about
23 the jury instructions which sound in the Sixth
24 Amendment.

25 So you've got Fifth and Sixth

1 Amendment claims that can be based on a
2 statutory right, and that might have been what
3 Congress was thinking about.

4 JUSTICE GORSUCH: Mr. -- Mr. Feigin --

5 MR. FEIGIN: Yeah.

6 JUSTICE GORSUCH: -- how are we --
7 what are we supposed to make of the fact that
8 the Government's position before 1998 appeared
9 to be that of the Petitioner's, that either
10 circuit foreclosure test was sufficient to
11 invoke the savings clause or that there were
12 constitutional problems with interpreting the
13 savings clause otherwise.

14 Then, from 1998 to 2017, I think, if
15 I've got it right, the Government took the
16 opposite view, the view of the amicus, that the
17 circuit foreclosure test, neither of those tests
18 work and that the savings clause should be
19 measured about whether it's effective and
20 adequate to raise the argument, that the
21 baseline would be implicit in the text or
22 explicit in the test -- text.

23 And now, for the first time, the
24 Government's coming up with a completely new
25 theory that no circuit courts adopted and

1 neither side in this litigation pursues.

2 What are we supposed to make of that?

3 MR. FEIGIN: Well, Justice Gorsuch,
4 just --

5 JUSTICE GORSUCH: I mean, it's a
6 clever argument, but the -- the brief discusses
7 it as the natural reading of the statute, but --
8 but no circuit court over the last 50 years has
9 read it that way.

10 MR. FEIGIN: Well, Your Honor, I -- I
11 -- I -- I think the -- you're correct that we
12 shifted positions. There's a -- I think your
13 chronology, in candor, we've shifted around a
14 little bit more.

15 JUSTICE GORSUCH: Even more than I
16 described?

17 MR. FEIGIN: Yeah.

18 JUSTICE GORSUCH: I've been generous.
19 (Laughter.)

20 MR. FEIGIN: I -- I just --

21 JUSTICE GORSUCH: Okay. Just --

22 MR. FEIGIN: -- to -- to be completely
23 candid --

24 JUSTICE GORSUCH: -- just as I was
25 generous to Petitioners about -- about court

1 martial, and, apparently, those are not
2 permitted either, but okay.

3 MR. FEIGIN: I just want to be
4 completely up front with the Court about that.

5 But I think the bottom line, Your
6 Honor, is the way we're interpreting it now is
7 the way that the Court actually interpreted it
8 itself in Haymond and Sanders, and I think it's
9 mirrored in Swain against Pressley, which
10 interpreted the analogous D.C. provision, and in
11 Boumediene, which is that the saving clause
12 essentially makes sure that federal prisoners
13 weren't disadvantaged by the adoption of this
14 new remedy, they weren't substantively
15 disadvantaged or procedurally disadvantaged.

16 And in doing so, it ensures that there
17 aren't going to be any constitutional problems.
18 We don't think there would be any constitutional
19 problems in these particular circumstances under
20 Felker against Turpin, but even if there were,
21 the easiest way to make sure there's no
22 constitutional problems with the withdrawal of
23 habeas is to keep a residue of habeas where they
24 might inadvertently have missed something --

25 JUSTICE GORSUCH: Then I'd like to

1 return to --

2 MR. FEIGIN: -- that's -- yeah.

3 JUSTICE GORSUCH: -- Justice Alito's
4 question, which is you asked us to use the
5 baseline of habeas as it existed between about
6 1948 and 1995 and ignore what happened after
7 1995 and before Brown -- well, I guess 1953,
8 though you do pluck a couple of cases before
9 Brown. It seems a bit of a -- a bespoke reading
10 of habeas.

11 MR. FEIGIN: It -- it would be, Your
12 Honor, but let me clarify that is not actually
13 our reading of habeas. We think that the -- you
14 look to the federal habeas remedy now. And as I
15 was trying to describe in response to Justice
16 Alito, figuring out the contours of the federal
17 habeas remedy now, you would look at traditional
18 habeas, so things like Davis would tell you
19 something.

20 JUSTICE GORSUCH: Should we look at
21 before Brown, in which it was mostly
22 jurisdictional, that habeas was limited to
23 jurisdictional questions?

24 MR. FEIGIN: Well, Your Honor, I
25 don't --

1 JUSTICE GORSUCH: Does that inform our
2 analysis --

3 MR. FEIGIN: -- I don't think --

4 JUSTICE GORSUCH: -- or should we
5 ignore that?

6 MR. FEIGIN: I think you would look at
7 federal habeas as it exists today, which would
8 -- which -- to the extent the before Brown cases
9 aren't kind of superseded by some of the later
10 ones, that would be the -- you could potentially
11 look at them.

12 But we do think -- and I just want to
13 be very clear on this. We do think that it is
14 informed, as this Court has said, by the
15 statutes that this Court has enacted. And it
16 can be informed by Section 2255, particularly in
17 its provisions like 2255(h) or its statutes of
18 -- statute of limitations that are also mirrored
19 in state habeas, because that gives us a very
20 clear indication that habeas, as it stands
21 today, does not allow those kinds of claims, the
22 kinds of constitutional and factual claims that
23 I still think my friend the Petitioner's
24 approach might in theory allow.

25 But one thing Congress did not speak

1 to were the kind of statutory claims that you
2 see in Davis, that everyone agrees were
3 available in traditional habeas. We don't have
4 that kind of clear statement. And the kinds of
5 claims we're talking about here are claims that
6 someone is in prison, potentially for the rest
7 of his life, for conduct that Congress itself,
8 according to this Court, never wanted to make
9 criminal in the first place.

10 JUSTICE ALITO: Do you -- do you have
11 any concern about the complexity of the rule
12 that you are advocating? If it were limited
13 strictly to a situation like Rehaif, fine,
14 everybody could understand that. But are -- are
15 you concerned that every federal prisoner who
16 wants to bring a successive or -- a successive
17 motion is going to claim that this falls within
18 the traditional scope of habeas, and this would
19 be an escape clause that will be invoked again
20 and again and again, and all the district judges
21 are going to have to analyze the traditional
22 scope of -- of habeas and see whether the claim
23 actually falls within that?

24 MR. FEIGIN: No, Your Honor, we're not
25 worried about that for two reasons. Number one

1 is, as I've described the -- the world of -- of
2 habeas, there -- the condition of confinement
3 claims are already dealt with in 2241, and then,
4 on merits claims, we have the constitutional and
5 factual claims that are like state habeas.
6 Those are already addressed. We've dealt with
7 those. And then we're just left with these
8 kinds of statutory claims. The only kinds of
9 statutory claims that you could possibly ever
10 bring under successive and abuse of the writ
11 doctrine are going to be claims based on
12 intervening decision of this Court, and that's
13 going to be a set of claims, but that gets to my
14 second reason, which is, under both successive
15 habeas petition doctrine under Coleman or abuse
16 of the writ doctrine under McCleskey, for
17 example, you will see that that requires -- is
18 going to require a showing of actual innocence
19 that's going to be very hard to make and can get
20 knocked out pretty easily at the threshold.

21 JUSTICE ALITO: Well, let's say I'm a
22 -- I'm a district judge and I -- I haven't dealt
23 with this problem before. Give me your best
24 summary of the rule that I should apply when I
25 get a -- when I get an effort to -- to file a

1 second or successive habeas petition.

2 MR. FEIGIN: Well, Your Honor,
3 honestly, I can't tell you that it's impossible
4 that there's some implication we haven't
5 foreseen, but we really think this is, as far as
6 merits claims go, essentially a category --
7 probably a category of one.

8 So you look to see whether it is the
9 type of claim that we're dealing with here, a
10 purely statutory claim that asserts that
11 somebody is in prison for something that
12 Congress never made a crime. If so, can that
13 person make a -- make the threshold necessary
14 showing of actual factual innocence under
15 Bousley, which can take into account not just
16 the evidence that was presented at trial but all
17 the evidence that could have been presented.
18 And we state in our brief, and I'm happy to
19 restate here, all the reasons why Petitioner
20 can't even get a toe in the door.

21 JUSTICE JACKSON: Could I just clarify
22 what you mean by "actual factual innocence"?
23 So, when you have such a person and they're in
24 jail for conduct that Congress, we now know,
25 says was not criminal, what is the factual

1 showing that -- that they didn't do the thing
2 that Congress says is not criminal? What --

3 MR. FEIGIN: Well --

4 JUSTICE JACKSON: -- factual showing
5 do they have to make?

6 MR. FEIGIN: -- it's the question of
7 the conduct, Your Honor. So it's different from
8 a sufficiency review, for example, because,
9 under Rehaif, we were never required to
10 introduce evidence of someone's knowledge of
11 their prior felon status. Before Rehaif, we --
12 the circuits weren't requiring us to do that, so
13 there will be a lot of cases where we didn't
14 actually introduce that evidence. We'll have
15 plenty of evidence if that's true, and, here, we
16 actually have both trial evidence and extraneous
17 evidence. But this is going to include like
18 kinds of things, like stuff that came up at plea
19 negotiations, which the sentencing court never
20 saw, which is actually a reason why Congress
21 wouldn't have found it particularly important in
22 the --

23 JUSTICE JACKSON: I see. So it's just
24 an opportunity for the government to introduce
25 the evidence on whatever the new legal standard

1 is?

2 MR. FEIGIN: Yes, Your Honor, and I
3 think Bousley is incredibly clear on -- on that
4 particular point.

5 JUSTICE BARRETT: What about --

6 JUSTICE SOTOMAYOR: Mister --

7 JUSTICE BARRETT: -- ACCA claims? I
8 mean, I think Rehaif claims, sure, it seems like
9 that would be pretty narrow under view -- under
10 review, but, I mean, we have a lot of ACCA
11 cases, so when you think about Mathis, I mean --
12 all of the cases that apply the categorical
13 approach then kind of can lead to these problems
14 in the district courts under the Government's
15 view, it seems to me. That would be much
16 harder, kind of to Justice Alito's point, for
17 district courts to unwind.

18 MR. FEIGIN: Well, a couple points on
19 that, Your Honor. Number one is that, you know,
20 you may or may not agree with us on this
21 extending to statutory maxima, but that's not
22 squarely presented in this case. Number two,
23 Mathis in particular is an old rule. Number
24 three, this Court, in the death penalty context
25 in Sawyer, suggested an even higher actual

1 innocence showing may be necessary for
2 sentencing-type claims.

3 And the -- I'd further -- I'd further
4 add to this that we've already been dealing with
5 a lot of ACCA claims under the circuits'
6 somewhat more amorphous approach, and it's
7 generally not -- hasn't proven that difficult to
8 apply because it's a purely legal inquiry as to
9 the qualification of various ACCA predicates.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Sotomayor?

14 JUSTICE SOTOMAYOR: I am a little bit
15 concerned with your answer to Justice Kagan.
16 You seem to suggest that a congressional clear
17 statement rule could include something very --
18 plain statement rule could include something
19 indirect like 2255(h) says you can't have a
20 successive petition on this issue, that that
21 would eliminate 2241 and that that wouldn't
22 create a constitutional problem.

23 And by that, I mean, is someone who's
24 completely innocent of the charge, given your
25 wide definition of innocence, okay, there is no

1 way to look at what they did as fitting the
2 statutory terms that have now been described by
3 this Court. There's no inference that could be
4 drawn from the evidence that they did it.
5 They're completely innocent. You're suggesting
6 that that wouldn't create a Fifth and Eighth
7 Amendment problem.

8 MR. FEIGIN: Well, first of all, Your
9 Honor, I wouldn't say that that's a wide
10 definition of innocence. But the other thing I
11 would say is --

12 JUSTICE SOTOMAYOR: I'm -- I'm spot --

13 MR. FEIGIN: Yes. Sorry.

14 JUSTICE SOTOMAYOR: -- I'm, using the
15 words of my colleague, Justice Gorsuch, I'm
16 spotting you that. So I spot it for you and --
17 and accept that, all right? But totally
18 innocent under any definition you use?

19 MR. FEIGIN: Well, Your Honor, I don't
20 think there's a problem with that here because
21 what we're talking about is whether Congress is
22 required to give a further shot at collateral
23 review in these circumstances. I think Felker
24 against Turpin is quite clear that when it
25 looked at the parallel limitations in 2244(b),

1 that Congress is free to statutorily alter the
2 abuse of the writ and I think, by analogy, the
3 successive writ doctrines to preclude relief in
4 these circumstances. I mean, these cases do
5 have to reach conclusion at some point, and if
6 Congress decides and where it's evident that it
7 has decided that, look, you know, you're just
8 not going to be able to bring these kinds of
9 claims anymore, then I think Congress's judgment
10 is within its constitutional authority.

11 Our point here is that Congress just
12 hasn't made that judgment, and, in fact, it's
13 got the saving clause specifically just to make
14 sure that whatever the federal habeas remedy
15 would allow is still there, and that's the kind
16 of claim that we're talking about here today.

17 JUSTICE SOTOMAYOR: Okay.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: So just going on on
20 this question of what to draw from 2255(h), one
21 of amicus's points is that your argument creates
22 a kind of weird situation where the statutory
23 claims, because they're in habeas, are -- face
24 fewer procedural obstacles than the
25 constitutional and factual claims under 2255.

1 And there's a difference between you
2 on the exact scope of the differences, but I
3 think it's at least true that in habeas you
4 don't have the certificate of appealability and
5 you don't have that pre-filing certification.

6 And so the question becomes, like, why
7 would we think that Congress created a world
8 where the statutory claims are actually easier
9 to bring or face fewer procedural obstacles than
10 the constitutional and factual claims.

11 MR. FEIGIN: Well, Your Honor, I'm not
12 quite sure it's correct to think that there are
13 fewer obstacles, but if we're asking what
14 Congress thought, I mean, I would first
15 emphasize we're just proceeding from the text
16 here, but -- and this Court's precedents.

17 JUSTICE KAGAN: Well, but the -- I
18 mean, the text --

19 MR. FEIGIN: But --

20 JUSTICE KAGAN: -- the question in the
21 text I think is what the negative implication of
22 2255 is, and that's the kind of critical issue.

23 MR. FEIGIN: So, Your Honor, let me
24 pose a couple of different answers to your
25 question, because, like, obviously, I can't tell

1 you exactly what Congress might have been
2 thinking.

3 One thing it might have been thinking,
4 as Justice Barrett pointed out in her separate
5 writing in Chazen, is perhaps it overlooked
6 this, which is fairly realistic because this
7 language was drafted before Bailey against
8 United States, which was kind of a watershed of
9 a statutory interpretation case that applied to
10 a large number of criminal convictions.

11 It wasn't until a couple years later
12 in Bousley that it was clear how a case like
13 that would shake out retroactively, and even
14 then, Congress was probably thinking about Fifth
15 and Sixth Amendment claims, not pure statutory
16 claims.

17 But, if Congress was thinking about
18 this, I think it might have been thinking a few
19 different things. Number one is, first of all,
20 actually, these kinds of claims are
21 disadvantaged to some degree because what
22 2255(h) does is just removes all the successive
23 and abuse of the writ doctrine problems, so you
24 don't actually have to make a showing of actual
25 innocence just as a gateway under 2255(h).

1 And then you've got the point that I
2 was discussing with Justice Jackson, which is
3 that these kinds of claims aren't really the
4 kinds of claims where you care very much whether
5 they go to the sentencing court or not because,
6 as this Court made clear in Bousley and House
7 and Schlup, they involve a lot of extra-record
8 evidence that, you know, under Rule 11, for
9 example, with plea negotiations, the sentencing
10 courts never see.

11 And that in turn would have forced
12 Congress, if it were trying to include these
13 claims under (3) -- under (h), like a new
14 (h)(3), to kind of grapple with some difficult
15 issues and maybe rejigger its structure of
16 habeas, which is kind of unwieldy as it is, even
17 more because, first of all, it's a little hard
18 to get a court of appeals to figure out how to
19 certify that in the 30 days that the 2244
20 procedures require.

21 And then, when we're talking about the
22 certificate of appealability problem, if we're
23 talking about a first 2255, every Rehaif
24 claimant is going to pair a statutory claim with
25 a Fifth Amendment claim or a Sixth Amendment

1 claim.

2 You can't do that on a successive
3 motion because you're not going -- because those
4 are going to be old constitutional rules. The
5 Fifth Amendment knowing plea rule and the right
6 to jury instructions, those aren't new. They've
7 been there since time immemorial.

8 So they're just bringing a raw
9 statutory claim. You'd have to make some kind
10 of adjustment to the certificate of
11 appealability, and I think Congress probably
12 wasn't troubled by this because, for the same
13 reason it might have overlooked it, it just
14 didn't think that this was a huge -- going to be
15 a huge class of claims.

16 It may have been wrong about that.
17 The class may have been larger than it thought,
18 but I don't think it was being unreasonable,
19 particularly because I think everyone is in
20 agreement that if Hannibal Lecter is too
21 dangerous to move, he gets -- he can avoid 2255
22 as well.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Jackson?

1 Okay. Thank you, counsel.

2 MR. FEIGIN: Thank you.

3 CHIEF JUSTICE ROBERTS: Ms. Ratner.

4 ORAL ARGUMENT OF MORGAN L. RATNER

5 COURT-APPOINTED AMICUS CURIAE

6 IN SUPPORT OF THE JUDGMENT BELOW

7 MS. RATNER: Mr. Chief Justice, and
8 may it please the Court:

9 The simplest reading of the saving
10 clause is the best one. The 2255 remedy is
11 adequate and effective to test a claim when the
12 sentencing court can fairly adjudicate that
13 claim. That means the inmate can get to
14 sentencing court, the court can hear the
15 relevant kind of claim, and the court has the
16 basic procedures it needs to decide the claim.

17 That's the commonsense approach that
18 this Court took in Haymond and Swain, and that's
19 how the saving clause applied for nearly 50
20 years from 1948 to 1996.

21 Petitioner and the Government want the
22 saving clause to mean something dramatically
23 different after 1996, but their theories run
24 head long not just into history but into Section
25 2255(h).

1 In (h), Congress said exactly when it
2 wanted to allow repeat collateral attacks and
3 not just that, (h)(2) was even more specific and
4 shows that Congress thought about when to allow
5 new claims after intervening decisions of this
6 Court. It chose constitutional decisions and
7 not statutory ones.

8 On top of all that, this Court
9 generally assumes that Congress acts rationally,
10 and neither Petitioner nor the Government has
11 any answer to a few really basic questions about
12 why Congress would have acted the way they think
13 it did.

14 One, why would Congress specify when
15 to allow repeat factual or constitutional claims
16 but would silently handle statutory claims by
17 sending them on a detour through the saving
18 clause?

19 Two, why would Congress send first
20 statutory claims to sentencing court but second
21 statutory claims to habeas court?

22 And three, as Justice Kagan's question
23 just alluded to and I don't think the Government
24 gave any real answer to, why would Congress give
25 better procedural treatment to repeat statutory

1 claims than to the constitutional claims it
2 elsewhere favored?

3 JUSTICE JACKSON: But don't those
4 questions all assume that Congress was thinking
5 about this problem?

6 I mean, I think one of the things that
7 Justice Barrett pointed out in her prior opinion
8 and that others have commented on is that there
9 could be the implication that they were copying
10 language from another framework dealing with
11 prisoners who don't have statutory claims and
12 that they overlooked the particular questions
13 that you pose in this case.

14 MS. RATNER: So, Justice Jackson, and
15 with all due respect to that suggestion in your
16 opinion, Justice Barrett, I think that every
17 indication is to the contrary.

18 If we look to the text, there are
19 specific areas in 2255 where Congress talked
20 about rules more generally, like in the statute
21 of limitations. And then, in 2255(h), it
22 narrows that to rules of constitutional law.

23 I think that's a pretty good
24 indication that it knew there would be some
25 claims that weren't constitutional ones, but it

1 just talked about constitutional ones in (h).

2 I think, generally, this Court assumes
3 that Congress is aware of its precedents. I
4 would think Congress would be aware of an
5 important precedent like Davis.

6 JUSTICE JACKSON: But let me ask you
7 this then. Why isn't -- isn't there another why
8 question then that comes from your reading,
9 which is, in a situation in which we have (h)
10 and (h) is surely saving some things from
11 elimination as successive petitions, the things
12 it's saving seem to be situations that are very
13 much like this one.

14 They -- they're -- they're saying you
15 can bring a second and successive petition if
16 there's newly discovered evidence or if there's
17 a new rule of constitutional law that's made
18 retroactive and therefore would apply to you.

19 Those two kinds of scenarios in which
20 Congress is making very clear that they wanted
21 people to be able to get past the second or
22 successive bar seem to me to be substantively
23 very similar to what is happening here to Mr.
24 Jones.

25 So my question is, why would Congress

1 have drawn the line to keep Mr. Jones out of the
2 second and successive passthrough but -- but
3 allowed for these other people to keep going?

4 MS. RATNER: So, first, as a matter of
5 statutory interpretation, I -- I do think you
6 should be drawing the inference that when
7 Congress has talked about similar things with
8 specificity and then left this one out, that
9 should be given some meaning.

10 You know, in terms of why, I think the
11 best explanation is -- is really twofold. I
12 mean, first, these are really the claims of the
13 most recent vintage. They were not recognized
14 as a basis for post-conviction relief until
15 Davis in 1974. So I could imagine Congress
16 taking a little bit of a last-in-first-out
17 approach when it cut down on claims in AEDPA.

18 I think, relatedly, we see throughout
19 AEDPA that Congress just thought that
20 constitutional claims were more important than
21 statutory ones. We see that in certificates of
22 appealability. It allows for appeals of
23 constitutional claims but not statutory ones.

24 JUSTICE JACKSON: But who's --

25 JUSTICE KAGAN: Why wouldn't Congress

1 have just said, and -- and -- and these
2 statutory claims are precluded? I mean,
3 Congress did not say that. It knows that it has
4 a savings clause. It knows that the statutory
5 claims under the savings clause are going into
6 the habeas court. Why not just say it?

7 MS. RATNER: So I -- you know, I --
8 let me take the saving clause part separate.
9 Why not say it? I -- I think they probably
10 would think it's pretty obvious. When -- when I
11 tell my kids they can have a second snack but
12 only if it's fruits or vegetables, I don't
13 usually feel the need to say, but definitely not
14 ice cream. I feel like --

15 JUSTICE KAGAN: Yeah, a --

16 MS. RATNER: -- that's pretty well
17 intended.

18 JUSTICE KAGAN: -- different
19 situation --

20 MS. RATNER: And --

21 (Laughter.)

22 JUSTICE KAGAN: -- I mean, because
23 whatever --

24 MS. RATNER: I agree with that.

25 JUSTICE JACKSON: What if they had ice

1 cream before?

2 MS. RATNER: I agree with that.

3 JUSTICE JACKSON: But what if they had
4 ice cream before? What --

5 JUSTICE KAGAN: Whatever (h) means, I
6 mean, it's -- it's referring to -- it's
7 referring to 2255 motions, and -- and so you
8 have to make the jump to habeas, and the savings
9 clause tells you when and where to make the
10 jump. And without 2255(h), that jump would have
11 been made for statutory claims. So why not say
12 in 2255, and we mean statutory claims too?

13 MS. RATNER: So here are two things
14 that I think are really important historically.
15 These claims had never been brought in habeas.
16 They were not recognized again until 1974 in
17 Davis, and so they had only been brought in 2255
18 motions. And so I -- I think that maybe there
19 wasn't the natural thought then, oh, well,
20 they're just going to get circum- -- they're
21 going to get sort of circumvented around, sent
22 on a detour into this habeas area where they had
23 never been. I -- I think that's part of it.

24 I mean, I do think the other part is
25 how the saving clause itself had applied

1 historically. I think Congress would have been
2 very surprised to learn that, after 1996, courts
3 would take the saving clause which had been a
4 true backstop in circumstances like a dissolving
5 sentencing court. In Haymond, the government
6 gave examples that it was probably there in case
7 there was war cutting off certain courts or in
8 case there was an execution where someone
9 couldn't get to a sentencing court fast enough.
10 It was a true backstop. And that was the
11 landscape that Congress was operating --

12 JUSTICE SOTOMAYOR: Counsel --

13 MS. RATNER: -- against.

14 JUSTICE SOTOMAYOR: -- I guess what
15 the Government would say and I think is the most
16 compelling argument is that the savings clause
17 specifically contemplates that a district court
18 would have denied relief in an initial 2255
19 petition. And so the question is, having
20 accepted that, what are the situations in which
21 it would believe 2241 would come into play? And
22 that is when traditional habeas relief would
23 have been granted. Putting aside the
24 Petitioner's belief that it's the same as cause
25 and effect, because I don't think so. I think

1 miscarriage of justice stood on its own.

2 I look at the words of the statute and
3 see that it explicitly does not preclude
4 traditional 2241 relief. That includes cases
5 that are defined as miscarriage of justices. I
6 don't know that I need to find a reason why
7 Congress didn't include statutory claims. It
8 didn't. And so I look at what the words of the
9 two sections are, and I say traditional habeas
10 relief applies.

11 MS. RATNER: So --

12 JUSTICE SOTOMAYOR: If there's a
13 miscarriage of justice here -- the Government
14 says there's not. It's agreeing with you on the
15 outcome of this case, and that's it.

16 MS. RATNER: So --

17 JUSTICE SOTOMAYOR: Why isn't that
18 enough? Why do I have to care about whether or
19 not why Congress didn't do it? It just didn't
20 do it.

21 MS. RATNER: Well, Justice Sotomayor,
22 I think the question then is just circling back
23 to what negative implications are we reading
24 from 2255(h) there? And --

25 JUSTICE SOTOMAYOR: No, I'm reading

1 the positive implications. 2241 does not
2 preclude and has always included miscarriage of
3 justice cases. Whether that's something that's
4 come up in Davis or Bailey or after Congress
5 wrote the words or didn't write the words, it
6 just didn't preclude that explicitly.

7 MS. RATNER: So maybe this is a
8 helpful way to frame this: The rules for second
9 or successive 2255 motions used to be evaluated
10 by, is this a miscarriage of justice or would
11 this violate the ends of justice exception? And
12 what 2255(h) did was cut back on that by
13 essentially codifying what Congress thought
14 counted as sufficient miscarriages of justice.
15 And so I do think that it --

16 JUSTICE SOTOMAYOR: But it didn't say
17 that. It gave two examples and didn't preclude
18 all the others that fell under traditional
19 habeas.

20 MS. RATNER: And so then the question
21 is, should the Court read 2255's limits as just
22 all being self-defeating to the extent that
23 something would have been --

24 JUSTICE SOTOMAYOR: No, but you're --

25 MS. RATNER: -- available previously

1 --

2 JUSTICE SOTOMAYOR: -- reading right
3 now --

4 MS. RATNER: -- and --

5 JUSTICE SOTOMAYOR: -- in a way that
6 gives no meaning to it at all because I don't
7 think -- you say it applies to cases that
8 wouldn't be 2255 situations.

9 MS. RATNER: I want to make sure I
10 understand your question. I -- I think maybe
11 you're saying a circumstance in which the saving
12 clause would apply for a second filing --

13 JUSTICE SOTOMAYOR: Yes, exactly.

14 MS. RATNER: -- if that's what you
15 mean, I think the circumstances would be just
16 the same as when it would apply for a
17 first filing.

18 JUSTICE SOTOMAYOR: Well, but --

19 MS. RATNER: But --

20 JUSTICE SOTOMAYOR: -- the problem is
21 that those circumstances today would mean you
22 wouldn't be in 2255 at all. You'd be in 2244.

23 MS. RATNER: So let me give an
24 example that maybe will make clear --

25 JUSTICE SOTOMAYOR: I'm sorry. 2241.

1 MS. RATNER: -- you know, there could
2 be someone who filed a first 2255 motion, and
3 then they are authorized under 2255(h) to file a
4 second, but now it is difficult or impossible to
5 get to a sentencing court for whatever reason.
6 The saving clause would apply in that context,
7 just as it would apply initially.

8 And, again, that's the way that it
9 applied historically. There's a much more
10 concerning type of superfluity on the other
11 side, which is that the saving clause really
12 didn't do anything for 50 years except to lie in
13 wait to spring into action and nullify a future
14 congressional amendment. And -- and that's
15 really what the vision of the saving clause
16 under both Petitioner and the Government's
17 theory here is. I mean, I -- I fully take the
18 point --

19 JUSTICE SOTOMAYOR: Thank you,
20 counsel.

21 MS. RATNER: I --

22 JUSTICE JACKSON: Can I ask, does the
23 rule of lenity have any role to play here? I
24 mean, it seems like we're asking a lot of
25 questions about what it is that the Government

1 or Congress wanted in this particular situation,
2 and what I don't know is why our confusion about
3 that should be interpreted in such a way as to
4 weigh against the criminal defendant who'd be
5 sitting in jail for conduct that Congress says
6 is not a crime. So, if we don't know -- if we
7 don't know, like, the situation exactly what
8 Congress is doing, why wouldn't we set up the
9 interpretive scheme to say, as many courts have,
10 as you -- as you pointed out, we're going to
11 read this to allow this person to bring another
12 habeas petition, and if Congress thinks that's
13 wrong, they can change it, clearly?

14 MS. RATNER: So the rule of lenity is
15 a principle of construction of penal statutes.
16 This Court has never applied it in circumstances
17 sort of assessing the general availability of
18 review here. So I don't -- I don't think that
19 that has any formal applicability.

20 And I think, generally, the sort of
21 clear statement rule that both sides are -- are
22 pushing on here doesn't really apply here where
23 what we're talking about is Congress shaping an
24 existing equitable doctrine. What the Court was
25 concerned about in cases like McQuiggin and

1 Holland is sort of that Congress had forgotten
2 about this equitable doctrine -- doctrine. But,
3 as I alluded to before in my conversation with
4 Justice Sotomayor, what 2255(h) represents is
5 the congressional codification of an evolving
6 abuse of the writ doctrine. That's how this
7 Court described it in cases like Felker. And so
8 this isn't a circumstance where there's sort of
9 a body of law Congress forgot about. They've
10 sort of codified the specific rules that they
11 want to apply.

12 JUSTICE JACKSON: But Mr. Feigin says
13 and they included the savings clause to make
14 sure that in that codification they didn't
15 forget anything. And so, when you then enter
16 into this new world and there's confusion about
17 whether this thing is actually in there, why
18 shouldn't we interpret it to, consistent with
19 the savings clause, allow it to proceed? They
20 didn't speak to it and they were trying to
21 codify, and when we get there, we don't see a
22 clear statement that says this is either in or
23 out, so then why wouldn't our position be,
24 Congress, you have to tell us clearly that you
25 meant to keep this out, especially when we see

1 other provisions that look very similar that you
2 are allowing to go forward?

3 MS. RATNER: Because Congress acted
4 against a backdrop of a saving clause that
5 didn't look like that, right, they wouldn't have
6 expected the saving clause to swoop in and
7 provide a remedy here. It had never applied in
8 those circumstances for almost half a century.
9 And so to treat the saving clause as doing
10 something new as a way of kind of wedging an
11 actual innocence exception into a statute I -- I
12 think is not consistent with the framing there.

13 JUSTICE SOTOMAYOR: But I'm just
14 wondering whether, you know, Congress wanted to
15 enact the savings clause, rather than having
16 particular applications in mind, actually
17 thought exactly what the savings clause says.

18 Whenever, this is ineffective as
19 compared to the traditional habeas remedy. So
20 your interpretation, which is, you know, is it
21 practically available and is it practically
22 accessible and what's the other one you used, is
23 it --

24 MS. RATNER: Do you have the
25 procedures you need?

1 JUSTICE SOTOMAYOR: You know, legally
2 cognizable, as I think, it feels very
3 jerry-rigged. It feels as though you're sort of
4 taking these out of thin air when the text
5 doesn't say anything about them.

6 And, you know, you're -- you're trying
7 to give some substance to the savings clause,
8 but the savings clause just expresses a very
9 simple principle, which is when, you know, the
10 2255 motion isn't working, the habeas court
11 takes over.

12 MS. RATNER: I think I don't really
13 quibble with that principle, but the question of
14 when it's not really working I think relates to
15 is there a problem with the sentencing court.

16 That's what Congress changed in 1948,
17 the venue. It put things in the sentencing
18 court. It didn't change the scope. So it was
19 worried about problems with that venue, and I
20 think the idea that what it actually does is
21 counteract any limitations that a future
22 Congress would put on 2255 is not really a
23 sensible way to read that.

24 I mean, I think if we thought of
25 the -- the statute of limitations, for example,

1 as a different provision, in 2255, there's a
2 one-year statute of limitations. There's no
3 statute of limitations for federal habeas.

4 It would be quite surprising to
5 Congress, I think, to learn that when it put
6 that one-year statute of limitations, that was
7 really just a venue-shifting provision. If you
8 file within one year, you stay in 2255, but
9 after a year, you're going to get circled around
10 to habeas instead because now 2255 is inadequate
11 or ineffective.

12 And if that's true for a statute of
13 limitations principle, I think the same should
14 be true for (h), which is really just a
15 statutory res judicata principle.

16 You know, I do understand the general
17 concern by the Court here about harshness. This
18 Court looked at 2255(h) and said Dodd is
19 harsh -- excuse me, said in Dodd it looked at
20 2255(h) and said AEDPA and 2255(h) are harsh,
21 but they are not absurd, and so it had to apply
22 them as is.

23 And I think it's important to recall
24 that there is a backstop here and it's executive
25 clemency. I know that the Government says, you

1 know, look, it's too easy to cry clemency in
2 every case, but this is a very unusual set of
3 cases that the Government handled exclusively by
4 executive clemency until 1974, and after AEDPA
5 in 1996, the first thing the Government told
6 courts was, if courts step back, we're ready to
7 step up again.

8 This has been our prerogative for most
9 of the nation's history. And I do think that
10 should give the Court some comfort here, even if
11 it wouldn't make the same judgment calls that
12 Congress made in 2255.

13 JUSTICE JACKSON: Can I just ask one
14 more thing? You said 2255 -- you sort of agreed
15 with Justice Kagan's premise that maybe the
16 savings clause is generally about when is 2255
17 not working, and you suggested a couple of
18 situations in which that wouldn't be -- when it
19 wouldn't work because the court is not there or
20 because the nature of the relief is such that
21 you couldn't get it or some sort of technical
22 situations like that.

23 What I'm still not so clear on is why
24 2555 could not be working if, because of one of
25 its provisions, it's, you know, unconstitutional

1 or it doesn't allow you or doesn't allow for
2 actually innocent people to have one clear shot
3 at relief.

4 Like why isn't that a species of 2255
5 is not working and, therefore, you need to be in
6 the habeas lane?

7 MS. RATNER: So let me for just a
8 moment put aside the constitutional point as
9 I -- I think there's really no argument that
10 we're even in a realm of unconstitutionality
11 here and just focus on the rest.

12 The problem is that what we are
13 talking about in 2255(h) or with a statute of
14 limitations are really ordinary procedural
15 limits. 2255(h) is effectively a res judicata
16 provision. And I think it would be very
17 surprising for this Court to say that when an
18 ordinary res judicata provision is applied, when
19 an ordinary statute of limitations is applied,
20 those render a procedure inadequate
21 or ineffective.

22 JUSTICE JACKSON: But, in those
23 situations, isn't there a previous time in which
24 you've had the chance to make your case? I
25 understand what you're saying if it was actually

1 operating like an ordinary res judicata
2 provision, you know, an ordinary statute of
3 limitations where the person had an opportunity
4 because the claim existed and they didn't bring
5 it, so too bad, so sad.

6 But what I'm worried about is 2255
7 being read to operate to preclude people who
8 never had the chance to make this claim to be
9 able to make it. You're putting those same
10 limits on it. And I'm wondering, isn't that a
11 situation in which 2255 is not working such that
12 we need the savings clause?

13 MS. RATNER: So, no, Justice Jackson,
14 and this is an ordinary res judicata provision.
15 This Court said I believe in the '80s or '90s in
16 Federated Department Stores against Moitie that
17 res judicata operates even if there has been a
18 subsequent claim, a subsequent change in the law
19 that shows that a prior decision is wrong, that
20 res judicata -- there's no exception to res
21 judicata in those circumstances. So the fact
22 that 2255(h) would apply a similar approach and
23 then allow certain very specific exceptions I --
24 I don't think is inconsistent with that
25 tradition or enough to say that this is an

1 inadequate procedure.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Yes, counsel, could
6 you take a step back and before Davis and before
7 AEDPA? I think we spent a lot of time spinning
8 a little -- a lot of different parts. What was
9 2255 designed to address, what problems, and how
10 did it work?

11 MS. RATNER: Sure. So I -- I think
12 everyone is on the same page that 2255 was
13 designed to address kind of an influx in claims
14 in habeas court as a result of some expansions
15 of habeas both congressional and judicial. And
16 so what -- I think the key in understanding the
17 -- the savings clause is what Congress did was
18 not to attempt to change the scope of habeas as
19 it existed in 1948. It wanted to change the
20 venue. It wanted to make things more convenient
21 and move them to sentencing court.

22 And so, if you think of it that way,
23 the saving clause is sort of a natural pair,
24 that it comes and saves the circumstances in
25 which there's a problem with the sentencing

1 court as opposed to the habeas court. And I
2 don't think that that -- that sort of analogy
3 extends to future procedural limits that
4 Congress may put on it.

5 CHIEF JUSTICE ROBERTS: Justice Alito?
6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: Except that
8 Congress didn't choose practical problems.
9 Those were -- was a proposal and they rejected
10 that proposal. They had broader language than
11 that proposal. So it wasn't just practical
12 problems. I thought we have said that in 1948
13 Congress was thinking about the venue issue but
14 that it wanted to preserve all traditional
15 habeas remedies. It wasn't looking to limit
16 them at that time.

17 MS. RATNER: So let me just take the
18 two parts of that question. The first is I -- I
19 wouldn't give too much meaning to the different
20 language here because this wasn't sort of a
21 direct amendment of the Judicial Conference's
22 proposal. If anything, there were
23 contemporaneous suggestions that Congress chose
24 inadequate or ineffective because the Judicial
25 Conference's proposal was a little bit too

1 loose. It said practicable or for other
2 reasons, and there were concerns that courts
3 might engage in almost a balancing test similar
4 to forum non conveniens of is this convenient to
5 be in sentencing court versus habeas court. So
6 Congress wanted to make sure it was true in
7 feasibility and for that reason chose inadequate
8 or ineffective. I think that's probably the
9 most consistent with the textual and historical
10 narrative here.

11 As for what this Court has said, I --
12 I totally agree that in Haymond it suggested
13 that at the time as of 1948, these -- the remedy
14 in sentencing court was contemporaneous -- was
15 more or less identical to the remedy in habeas,
16 but that wasn't its benchmark for inadequacy.
17 When the Court later in the opinion went to
18 decide whether this was inadequate, it did
19 something much more like what I did at the start
20 of my argument and said, well, you kind of need
21 a hearing here, you can get a hearing, so it
22 seems adequate to us.

23 The same is true in Swain. In fact, I
24 don't even think Swain would survive the
25 Government's theory because there was a

1 difference between habeas and sentencing court
2 there, but the analysis was the same.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Yeah. Just along the
5 same lines, I -- I -- I mean, Congress did
6 reject language that more fits your argument
7 here. And you're saying, well, we're taking
8 this general language, which basically says, if
9 it's not working here, go there. We're taking
10 this general language and we're saying -- and
11 you're saying that that is true when it's not
12 practically accessible; that is true when it's
13 not legally cognizable in the 2255 forum.

14 Why not also when it's
15 jurisdictionally barred in the 2255 forum? I
16 mean, how is that any less it's not working over
17 here, so you should go over there and get the
18 traditional benefit of the habeas court?

19 MS. RATNER: Yeah. So I think that
20 it's jurisdictionally barred just sort of
21 overlooks what the full question here is, which
22 is, is a remedy that offers you a prior full and
23 fair opportunity but now bars you because of an
24 ordinary application of res judicata, is that
25 remedy inadequate or ineffective?

1 And I really do think courts around
2 the country would be quite surprised to hear
3 that whenever they apply Wright and Miller on
4 res judicata that they are becoming inadequate
5 and infective. And that's why there is a basic
6 difference between procedural limits in 2255,
7 which can't be the source of inadequacy without
8 just nullifying everything that Congress has
9 done and the more fundamental question of can
10 you get to this Court, can this Court hear these
11 types of claims.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 Justice Kavanaugh?

15 Justice Barrett?

16 JUSTICE JACKSON: Just one final
17 thing. I think the confusion that I'm having is
18 that there appears to be common ground between
19 you and the other side that Congress -- what
20 Congress was trying to do was not change the
21 scope of habeas. And there also seems to be
22 common ground, I think, that if you apply these
23 procedural limits, you are changing the scope of
24 habeas because you're cutting off claims that
25 you could have previously brought.

1 So that brings me to the question of
2 don't we need a clear statement from Congress
3 that, given its original intentions and the
4 effect of the application of what you say is
5 just an ordinary procedural rule, don't we need
6 a clear statement that that's what they
7 intended? And why not?

8 MS. RATNER: So, Justice Jackson, with
9 respect to your first point, I think there is
10 common ground that in 1948 Congress wanted these
11 to be effectively the same. I guess we differ
12 in that I don't believe that Congress in 1948
13 handcuffed a future Congress from preventing any
14 limits on 2255 without going back and revising
15 an essentially defunct habeas remedy at that
16 point, although I should flag, if the Court is
17 considering going down that path, it is going to
18 grapple -- have to grapple with the provision
19 2244(a) that the Government mentioned, and, in
20 fact, it did in AEDPA revise the availability of
21 second or successive habeas applications.

22 But, you know, putting that to the
23 side and asking your -- your more general --
24 answering your more general question, there is a
25 clear statement here in 2255(h), it could not be

1 clearer, that Congress set forth precisely the
2 circumstances in which it wanted to allow a
3 second claim. And, ordinarily, this Court would
4 draw a clear negative implication, as I think
5 the Government does, for the conditions of
6 (h)(1) and (h)(2) but just not for (h) overall.

7 I think, beyond that, there's no kind
8 of overarching clear statement rule that would
9 apply here, and, certainly, if -- if the
10 provision was clear enough in Dodd, I think it's
11 clear enough here as well.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Ortiz, rebuttal.

15 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ
16 ON BEHALF OF THE PETITIONER

17 MR. ORTIZ: Your Honors, I just have
18 three basic quick points. The first is that
19 it's -- one of the reasons for a savings clause
20 of this type is that Congress doesn't have to
21 actually think of everything. If, for example,
22 Congress in 1996 had added (h)(1) but not
23 (h)(2), I doubt that anyone would believe that
24 it categorically excluded review of all new
25 constitutional claims of innocence.

1 Also, discrepancies between
2 traditional habeas procedure and standards under
3 those of 2255 are a feature, not a bug, of a
4 savings clause like this, and Congress can
5 always change things subject to constitutional
6 constraints.

7 Second, Your Honor, I just want to
8 point out that a petitioner in Mr. Jones's
9 situation cannot actually raise, as the Eighth
10 Circuit believed, his claim of statutory
11 innocence in his initial 2255 motion. If he had
12 raised it on direct appeal, as Mr. Jones had, it
13 would be foreclosed by the law of the case
14 doctrine. If he had not raised it in his
15 initial 2255 motion, it would be barred by
16 procedural default. So there's no way really to
17 get the claim into district court in the first
18 place.

19 But, if somehow he had actually gotten
20 into district court in the first place, it would
21 be barred by 2253(c)(2), which allows the court
22 of appeals to certify only constitutional
23 questions, not statutory questions. So the hope
24 of actually asking for an en banc to overturn
25 the foreclosing circuit precedent is pretty

1 hopeless, as is the hope for a cert grant.

2 Also, finally, Your Honors, I'd like
3 to point out that there's no real prospect of
4 opening up the floodgates here. This is a very
5 narrow -- under anyone's standards, this a very
6 narrow category of cases but also a
7 fundamentally very important one.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Ms. Ratner, this Court appointed you
12 to brief and argue this case as an amicus curiae
13 in support of the judgment below. You have ably
14 discharged that responsibility, for which we are
15 grateful.

16 The case is submitted.

17 (Whereupon, at 11:22 a.m., the case
18 was submitted.)

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