FORFEITED FREEDOM: *JONES V. HENDRIX* AND THE EROSION OF AMERICAN HABEAS CORPUS

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In the past five years, the Supreme Court has chipped away at the ability of prisoners to have their habeas corpus claims properly heard in federal court. Jones v. Hendrix dealt one of the biggest blows to federal postconviction rights. The case held that certain prisoners who are actually innocent based on a retroactive change in statutory law have no mechanism to challenge their illegal detention.

This Article examines the majority and dissenting opinions in Jones and posits two reasons why the case was wrongly decided. First, the Supreme Court improperly rejected the clear-statement rule, a canon of statutory construction that has been used in habeas corpus cases since the 1800s and requires that any restrictions or limitations on habeas corpus be supported by crystal clear statutory language. Instead, it applied the ill-suited negative inference canon, which it used to draw illogical meaning from absent language. Second, the majority in Jones blindly relied on the concept of "finality" at the expense of fairness. But the concept of finality espoused by the majority is illusory. Jones held that prisoners who have already filed one postconviction motion are precluded from filing another one based on a change in statutory law, but prisoners who sat on their rights and failed to file a motion in the first instance can file a postconviction motion based on that same change in statutory law. This is not true "finality."

This Article also posits that Jones fits into Lee Kovarsky's theory that the Court is enmeshed in a period of "new negative habeas equity" where judge-made limits are severely restricting what is meant to be a broad, equitable doctrine. When one reads Jones alongside two 2022 Supreme Court decisions—Brown v. Davenport, which requires federal habeas courts to apply two stringent tests when evaluating state court convictions, even if the state court found a constitutional violation, and Shinn v. Ramirez, which precludes state prisoners who raise ineffective assistance of counsel claims in federal court from producing new evidence, even if counsel was deficient in failing to develop the record in state court—it becomes clear that the Court is engaged in a "habeas revolution," as Kovarsky puts it, severely undermining traditional habeas protections. Jones is the next stop on this revolutionary road. I propose a solution to the quagmire created by Jones, which would require a two-word statutory amendment. But it is inevitable that the current Supreme Court majority is

poised to continue eroding a bulwark for the actually innocent and wrongfully imprisoned.

INTRODUCTION

The Supreme Court's 2023 decision in *Jones v. Hendrix*[1] curtailed the rights of thousands of prisoners being held in federal prisons pursuant to potentially invalid convictions.[2] In that case, Marcus DeAngelo Jones was serving a lengthy sentence based on his 2000 conviction for being a felon in possession of a firearm. While he was in prison, the Supreme Court decided *Rehaif v. United States*,[3] which held that for felon-in-possession cases, the Government must prove that a defendant has knowledge of his prohibitive status at the time of the firearm possession. The Government did not—and, Jones argued, could not—prove that element in his case.

However, Jones was hamstrung in his options. Having already filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, he was unable to file a second post-conviction motion based on a change in *statutory* law under § 2255(h), which only allows second or successive motions based on changes in *constitutional* law or newly discovered facts. Thus, he turned to what is colloquially known as the "saving clause"[4] in § 2255(e), a safety valve that allows for a prisoner to file traditional habeas corpus petition when the relief he seeks by a § 2255 motion is "inadequate or ineffective to test the legality of his detention."[5] Even though the majority of the Circuits were allowing use of the saving clause in this way, and the Government itself argued that the saving clause allows for relief for prisoners based on change in statutory law,[6] the Supreme Court nonetheless

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[1] 599 U.S. 465 (2023).

[2] *See* Eve Brensike Primus & Mark Rucci, *Constitutional Losses and (Some) Statutory Wins for Criminal Defendants: Select Criminal Law and Procedure Cases from the Supreme Court's 2022-23 Term*, 59 Court Review 172, 172 (2023) (in discussing notable decisions of the 2022-23 court term, explaining that in *Jones v. Hendrix*, "the Court issued a decision that effectively prevents many federal prisoners who are legally innocent—meaning that their conduct does not satisfy the elements of the crimes they were convicted of—from ever having their innocence considered in federal post-conviction proceedings").

[3] 588 U.S. 225 (2019).

[4] *See Jones*, 599 U.S. at 466 (Some decisions use the phrase "saving clause" and some use "saving**s** clause." Because the *Jones* decision uses "saving clause," I do the same here).

[5] 28 U.S.C. § 2255(e).

[6] *See* Jones, No. 21-857 Gov't Br. at 7, 2022 WL 3327457, at *7 (Aug. 2022) ("The saving-clause exception to 28 U.S.C. 2255(e)'s bar on habeas corpus petitions by federal prisoners preserves a narrow but important category of claims based on intervening statutory-construction decisions of this Court that establish that a prisoner's conduct was noncriminal."). The Government, however,

held that prisoners like Jones were out of luck. It limited the saving clause relief to a narrow class of cases, in which a sentencing court has been dissolved, or when it is impossible for a prisoner to get to that court.

This Article posits that the *Jones* decision was wrongly decided for two important and interrelated reasons. First, *Jones* rejected a traditional statutory construction canon, the "clear-statement rule," which has been used in habeas corpus cases since the 1800s. This canon ensures that for a statutory provision to be read to limit or restrict habeas corpus, the language must be crystal clear. Here, the Court rejected the application of the clear statement rule in favor of the negative inference canon. But the circumstances in the *Jones* case do not allow for a proper application of that canon.

Second, the *Jones* Court rejected its own statutory interpretation tradition in favor of a blind reliance on "finality," which rewards prisoners who fail to file a postconviction motion within a year of their conviction. Under the Court's decision, a dilatory prisoner who did not file an initial postconviction motion is rewarded by being able to file a § 2255 motion upon a retroactive change in statutory law, while a diligent prisoner who filed an initial postconviction motion has unwittingly forfeited his ability to do so.

But more troubling, *Jones* is a part of a "significant analytical shift" toward the erosion of the habeas corpus remedy in general.[7] When read alongside the Supreme Court's recent decisions *Brown v. Davenport*[8] and *Shinn v. Ramirez*,[9] it becomes clear that the long-standing constitutional guarantee of habeas is becoming more tenuous with each Supreme Court term.[10] For example, *Brown* gives district courts discretion that the Court

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contended that Jones "cannot satisfy the strict prerequisites for such a claim." *Id.* The Court appointed amicus counsel to defend the reasoning of the lower court, i.e., changes in statutory law are not sufficient to support a second or successive petition filed pursuant to § 2255(e)'s savings clause.

[7] Lee Kovarsky, *The New Negative Habeas Equity*, 137 Harv. L. Rev. 2222, 2227–28 (2024) (positing that recent cases by the Supreme Court show a pattern of "negative" equity in habeas, that is, "[i]nstead of invoking equity as a source of *its own authority* to develop new habeas restrictions, the Supreme Court has started to describe equity as a *license for district courts* to discretionarily deny relief").

[8] 596 U.S. 118 (2022) (holding that a federal habeas court must apply both the substantive standard of AEDPA *and* the test for assessing prejudicial effect of a trial court error before granting habeas relief).

[9] 596 U.S. 366 (2022) (holding that a federal habeas court may not conduct an evidentiary hearing or consider evidence beyond a state-court record in a claim based on ineffective assistance of postconviction counsel).

[10] *See* Francesca Procaccini, The Wages of Constitutional Interpretation, 69 St. Louis U. L.J. 727, 735 (2025) (explaining that the current Court "has narrowed or nullified [disfavored] rights," including habeas corpus, "in ways that

had never recognized before, that is, the ability to deny habeas relief to prisoners who may otherwise be entitled to it.[11] And *Ramirez* suggests that district courts can fashion their own unbounded requirements for entitlement to habeas relief.[12]

Against this disturbing backdrop, Congress has a duty to step in and fix the *Jones* problem. It can preserve habeas protections by amending § 2255(h) to allow prisoners, held in detention pursuant to crimes that have been rendered invalid due to a change in statutory law, to file a postconviction request for relief from that conviction. This would restore deep-seated constitutional and equitable rights to federal prisoners across the country and prevent diligent prisoners from unwittingly forfeiting their freedom.

Part I of this Article provides the history and roots of American habeas corpus and how postconviction rights have changed over time, leading to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Part II discusses the resulting Circuit split regarding the scope of the saving clause, and then, the majority and dissenting opinions in *Jones v. Hendrix*. Part III argues that *Jones* was wrongly decided as a matter of fairness and statutory interpretation. Part IV demonstrates how the *Jones* decision is part of a significant analytical shift away from preserving habeas rights, and how Congress can fix the *Jones* problem. Part V concludes.

I. THE ROOTS OF AMERICAN HABEAS CORPUS

In the simplest of terms, habeas corpus is "the legal process by which a prisoner contests the legality of his detention."[13] The roots of American habeas corpus—which in Latin, means roughly "you shall have the body"[14]— begin with the Constitution itself. After enumerating congressional powers, the Framers added the Suspension Clause, providing that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[15]

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drastically lower the level of protection they afford by making them far less impactful and accessible to the communities most in need of their protections").

[11] 596 U.S. at 134.

[12] 596 U.S. at 225.

[13] Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 Denv. U. L. Rev. 961, 966 (2009).

[14] *Id.*

[15] U.S. Const. art. I, sec. 9, cl. 2. As Kovarsky explains, during the American Revolution, the habeas privilege was "suspended" six times, which allowed England to hold former colonists "without judicial review"—the Framers included the Suspension Clause in the Constitution in response, as this was "a defining grievance" against England. Kovarsky, supra note 7, at 2227–28 (citing Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 585 (2008)).

With the ratification of the Constitution, habeas corpus became "a fundamental principle of access to the courts to allow for challenges to arbitrary exertions of executive authority."[16] Habeas corpus has evolved from a mechanism to literally transport someone to court to a means by which the government must state a reason why it is holding someone in confinement. Consequently, the means by which federal prisoners have been able to attack the legality of their detention has changed substantially over time.

The First Judiciary Act of 1789 gave authority to "all the . . . courts of the United States . . . to issue writs of . . . habeas corpus, . . . which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[17] The Act further provided that writs of habeas corpus "shall in no case" extend to prisoners unless they were "in custody, under or by colour of the authority of the United States," "committed for trial before some court of the same," or "necessary to be brought into court to testify."[18] Thus, at the time of the Founding, the writ "served a different purpose than it most often does today."[19] The writ was a way for prisoners to obtain release from illegal custody, which typically meant those being held in executive detention without or before trial.[20] Today, federal habeas corpus is more commonly sought "*after trial* by state and federal prisoners detained pursuant to a criminal conviction and sentence."[21]

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[16] Falkoff, supra note 13, at 978.

[17] Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82; see Carbo v. United States, 364 U.S. 611, 614 (1961).

[18] *Id.*

[19] Taylor A.R. Meehan, Postconviction Remedies, Retroactivity, and Montgomery v. Louisiana's Other New Rule, 88 Mo. L. Rev. 1077, 1088 (2023).

[20] Meehan, supra note 19, at 1088 (citing Amanda L. Tyler, The Forgotten Core Meaning of the Suspension Clause, 125 Harv. L. Rev. 901 (2012); Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020); Boumediene v. Bush, 553 U.S. 723, 739-46 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 554-63 (2004) (Scalia, J., dissenting)).

[21] Meehan, *supra* note 19, at 1088 (citing Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts (2023), https://nij.ojp.gov/library/publications/final-technical-report-habeas-litigation-us-district-courts [https://perma.cc/DL9C-QU6E]; John Scalia, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 1 (Bureau of Just. Stats. 2002), https://bjs.ojp.gov/content/pub/pdf/ppfusd00.pdf [https://perma.cc/CR84-96ZD]; Roger A. Hanson & Henry W.K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, Bureau of Just. Stats. (Sept. 1995), https://bjs.ojp.gov/content/pub/pdf/FHCRCSCC.PDF [https://perma.cc/W8J5-34PK]; Federal Review of State Prisoner Petitions: Habeas Corpus, Bureau of Just. Stats. (March 1984), https://bjs.ojp.gov/content/pub/pdf/hc-frspp.pdf [https://perma.cc/6BQV-N4H5].).

From 1789 to 1867, the only instances in which a federal court could issue a habeas writ to produce a state prisoner were if the prisoner (1) was "necessary to be brought into court to testify"; (2) was "committed . . . for any act done . . . in pursuance of a law of the United States," or (3) was a "subjec[t] or citize[n] of a foreign State, and domiciled therein," and held under state law.[22] But in 1867, Congress expanded the federal courts' authority to relieve prisoners of confinement pursuant to a conviction, rather than just those confined before trial, providing that "the several justices and judges of such courts . . . shall have power to grant writs of habeas corpus *in all cases* where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[23] This was also the first Act that "empower[ed] federal courts to issue a writ of habeas corpus for persons in state custody."[24]

Then, in 1948, Congress enacted Title 28 of the United States Code (Judiciary and Judicial Procedure)[25] and therein, codified the traditional writ of habeas corpus in 28 U.S.C. § 2241 and codified the motion to vacate, set aside, or correct a sentence in 28 U.S.C. § 2255. This change "provided a new cause of action for federal prisoners to request postconviction relief by motion" under § 2255 while "maintain[ing] the traditional writ of habeas corpus" under § 2241.[26] At this point, "any person incarcerated in federal prison could file a habeas corpus petition once his conviction became final."[27] Section 2241 became the source of the federal courts' general power to grant the writ of habeas corpus and provided that the writ should not be extended unless the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States."[28] Petitions filed pursuant to § 2241 were required to be filed in the district of confinement, leading to an overly burdensome number of petitions being filed in districts heavily concentrated with detention facilities.[29] Section 2255 was meant to alleviate the heavy burden of § 2241 petitions by requiring

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[22] Felker v. Turpin, 518 U.S. 651, 659–60 (1996) (citing Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634–635; Act of Aug. 29, 1842, ch. 257, 5 Stat. 539–540).

[23] Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

[24] Barefoot v. Estelle, 463 U.S. 880, 892 n.3 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c).

[25] Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992.

[26] Alex Kleinjan, *Saving the Savings Clause in Federal Habeas Jurisprudence*, 102 Neb. L. Rev. 877, 880 (2024).

[27] 28 U.S.C. § 2255—Collateral Review—Habeas Corpus—*Jones v. Hendrix*, 137 Harv. L. Rev. 370, 373 & n.41 (Nov. 2023).

[28] 28 U.S.C. § 2241(a), (c)(3).

[29] *See generally* United States v. Hayman, 342 U.S. 205, 215-19 (1952) (discussing legislative history of the 1948 habeas amendments).

motions to vacate to be filed in the sentencing court, not the district of confinement.[30]

There were two main purposes for this change. Congress meant to limit a prisoner's ability to file continuous successive habeas petitions, so § 2255 provided that a § 2241 application "shall not be entertained" if a prisoner's § 2255 motion had already been denied, and the sentencing court was not required to entertain a second or successive § 2255 motion[31] "for similar relief on behalf of the same prisoner."[32] It also meant to funnel challenges to the legality of one's detention to the sentencing court, rather than the court in the district where the prisoner was being incarcerated.[33] Notably for this discussion, Congress also added § 2255(e)—the saving clause—which provided a safety valve for a prisoner to bring postconviction claims if the § 2255 motion was "inadequate or ineffective to test the legality of his detention."[34]

In 1996, a seismic shift occurred with the enactment of AEDPA.[35] AEDPA was enacted in response to the 1995 Oklahoma City bombings and was based on a congressional push to pass antiterrorism legislation.[36] Congress provided distinct statutes that govern the postconviction rights of state prisoners[37] versus federal prisoners.[38] In the policy side, scholars believe that by enacting AEDPA, Congress "dramatically constricted federal habeas remedies," resulting in statutes that "arguably preclude habeas relief for claims based on new Supreme Court decisions."[39] But on the courtroom side, AEDPA was seen as a panacea for what was perceived as a "flood" of "worthless" habeas petitions filed in federal court and the

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30 See id.

31 The phrase "second or successive" is "a term of art," referring to an application for relief that follows an earlier application concerning the "same judgment." Magwood v. Patterson, 561 U.S. 320, 332 (2010).

32 Kleinjan, supra note 26, at 881.

33 See Hayman, 342 U.S. 205, 219 (1952).

34 28 U.S.C. § 2255(e).

35 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 34 and 40 U.S.C.).

36 Madison Gosch, Shinn v. Ramirez: Creating A Catch-22 to Habeas Corpus Relief, 68 S.D. L. Rev. 546, 571 n.21 (2023) (citing 142 Cong. Rec. H3652 (daily ed. Apr. 19, 1996) (statement of Rep. Gephardt) (detailing the movement toward passage of antiterrorism legislation in response to Oklahoma bombings)).

37 28 U.S.C. § 2254.

38 28 U.S.C. § 2255.

39 Meehan, supra note 19, at 1086.

"strain on judicial resources."[40] Along these lines, AEDPA codifies numerous restrictions on both state and federal prisoners' ability to challenge the lawfulness of their conviction or detention.[41]

Relevant to this Article, AEPDA also barred repetitious habeas petitions by federal prisoners.[42] Specifically, § 2244(a) provides that no federal circuit or district judge "shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person" pursuant to a federal court judgment "if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255."[43] In turn, § 2255(h) provides that a "second or successive motion" for relief must be certified by a court of appeals panel 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."[44] Notably, the § 2255(e) saving clause remain unchanged:

> 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.[45]

The intent of this clause, the breadth of the phrase "inadequate and ineffective," and §2255(e)'s relationship to § 2241 prompted a deep circuit split ultimately resolved by *Jones*. How the changes in AEDPA affected the saving clause was subject to considerable debate and a deep and complex circuit split for nearly 30 years, until the Court decided *Jones*.

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40 Nicholas Beekhuizen, Post-AEDPA Compromise: Increased Habeas Corpus Relief for Capital Cases and Tighter Restrictions for Noncapital Cases, 10 Ind. J.L. & Soc. Equal. 321, 331 (2022)).

41 Gosch, supra note 36, at 550.

42 Federal Habeas Corpus: An Abridged Sketch, Congressional Research Serv., RS22432 (Jan. 8, 2010); see also Kovarsky, supra note 7, at 2228-29 (explaining that codification of judge-made restrictions on habeas relief, such as certain restrictions found in AEDPA, comprise what is known as "negative equity" in federal habeas jurisprudence).

43 28 U.S.C. § 2244(a).

44 28 U.S.C. § 2255(h).

45 28 U.S.C. § 2255(e).

However, this background demonstrates that through all the changes in federal habeas law, one thing has not changed: the enactment of § 2255, including the saving clause, "was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus [§ 2241]"; it was never meant to constrain traditional habeas relief.[46]

II. THE *JONES V. HENDRIX* DECISION

In the decades after AEDPA's enactment, the federal courts' interpretation of § 2255(e)'s saving clause and its relationship to § 2241 created a "deep and important circuit conflict."[47] One scholar noted that the courts' interpretations of the language of these provisions resulted in a "kaleidoscopic chaos."[48] As of 2020, three circuits—the Eighth, Tenth, and Eleventh—held that the saving clause did not provide an avenue for relief for a prisoner if the statutory argument raised in his successive petition *could have* been raised in an earlier § 2255 motion, even if the argument was foreclosed by circuit precedent.[49] In contrast, nine circuits—the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and D.C. Circuits—held (to varying degrees)[50] that § 2241 habeas relief remained available via the saving clause for federal prisoners whose convictions were rendered

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46 Jones, 599 U.S. at 473 (quoting Davis v. United States, 417 U.S. 333, 343 (1974)); *see also id.* at 489 ("[I]t is true that § 2255, as enacted, afforded the same rights federal prisoners previously enjoyed under the general habeas statutes . . . .").

47 Pet. for Cert. at 8, Jones v. Hendrix, 2021 WL 5864561 (quoting U.S. Reply Br. at 1, United States v. Wheeler, 139 S. Ct. 1318 (2019) (mem.) (No. 18-420)).

48 *See generally* Jennifer L. Case, *Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause*, 45 U. Mem. L. Rev. 1, (2014); *see also* Ethan D. Beck, *Adequate and Effective: Postconviction Relief Through Section 2255 and Intervening Changes in Law*, 95 Notre Dame L. Rev. 2063, 2068-2069 (2020) (discussing pre-*Jones* circuit split); Lauren Casale, *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).

49 *See* Jones v. Hendrix, 8 F.4th 683, 688 (8th Cir. 2021); McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc); Prost v. Anderson, 636 F.3d 578, 580 (10th Cir. 2011).

50 For an in-depth look at each Circuit's saving clause jurisprudence, approach, and tests (as of 2014), see generally Case, *supra* note 48. After that article was published, the Eleventh Circuit changed course in an *en banc* decision from holding that the saving clause applies to claims of actual innocence to severely limiting the saving clause scope to limited instances where a prisoner was challenging the execution of his sentence, or if the sentencing court was unavailable. *See infra* notes 48.

invalid by a change in statutory law.[51] The split became so deep, varied, and pressing that numerous circuit judges began calling for the Supreme Court to take up the issue, which it ultimately did in *Jones*.[52] Commentators highlighted the absurd result of this split, which was that "a federal prisoner's place of confinement dictate[d] whether they [could] seek a second chance at a habeas appeal based on a statutory change in circuit law."[53]

A. Circuit Split: A "Kaleidoscopic Chaos"

Leading up to the *Jones* decision, the view of the saving clause shared by the Eighth, Tenth, and Eleventh Circuits was a narrow one. Under that minority view, "the savings clause only guarantees prisoners an *opportunity* to test the legality of their conviction; the scope of the savings clause is identical to the scope of what a generic § 2255 motion is capable of doing."[54]

For example, in *McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc.*,[55] an *en banc* decision, the Eleventh Circuit reasoned that when a prisoner's argument regarding the legality of his sentence "conflicts with circuit precedent," a § 2255 motion is neither "inadequate nor ineffective to test his argument"; therefore, the saving clause does not allow the prisoner to lodge this argument via a § 2241 petition.[56] The court explained that the § 2255 remedy is not ineffective unless "the *procedure* it provides is

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[51] *See* United States v. Barrett, 178 F.3d 34, 52 (1st Cir. 1999); Triestman v. United States, 124 F.3d 361, 363 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997); In re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001); Wooten v. Cauley, 677 F.3d 303, 307-308 (6th Cir. 2012); In re Davenport, 147 F.3d 605, 611-612 (7th Cir. 1998); Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006).

[52] *See, e.g.*, Allen v. Ives, 976 F.3d 863, 868 (9th Cir. 2020) (Fletcher, 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., dissenting from denial of petition for rehearing en banc) (noting that "[e]ven our concurring colleagues agree that this case warrants Supreme Court review."); 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 F. App'x. 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. . .").

[53] Joe Luzadder, *Should Second Chances Be Tied to Place of Confinement? An Analysis of Successive Habeas Petitions After Wheeler and Hueso*, 2022 U. Ill. L. Rev. 1575, 1593 (2022).

[54] Beck, *supra* note 48, at 2068 (emphasis added).

[55] 851 F.3d 1076 (11th Cir. 2017) (en banc).

[56] *Id.* at 1088.

incapable of adjudicating the claim."[57] It noted that in other areas of the law, the notions of adequacy and effectiveness "focus on process" and not the likelihood of success on the merits.[58] So the Eleventh Circuit would allow the saving clause to permit challenges to the "execution" of one's sentence, such as a petition alleging deprivation of good time credits or parole decisions, or in "limited circumstances" such as if the sentencing court is unavailable.[59]

Likewise, the Tenth Circuit—in *Prost v. Anderson*, an opinion written by then-Judge Gorsuch—focused on the plain language: "inadequate or ineffective to test the legality of [a prisoner's] detention."[60] It explained that the court should ask "whether a petitioner's argument challenging the legality of his detention could have been *tested*" in an initial § 2255 motion, not whether it would have succeeded.[61] In other words, and similar to *McCarthan*, if the prisoner merely has an opportunity to bring a certain statutory argument in a § 2255(a) motion, then the § 2255 process is not inadequate or ineffective to "test" the legality of his sentence, even if such an argument would be fruitless.[62] And *Prost* relied heavily on the notion of finality—unsurprisingly, the same way the Supreme Court did in adopting a similar interpretation of the saving clause in the *Jones* decision. The Tenth Circuit focused on "the idea that at some point a criminal conviction reaches an end, a conclusion, a termination."[63]

And of course, in 2021, the Eighth Circuit in the lower court decision in *Jones* sided with the Tenth and Eleventh Circuits—its first opportunity to weigh in on the split.[64] *Jones* relied on *McCarthan* and *Prost*'s emphasis on the word "test," and concluded that the saving clause "is interested in opportunity, not outcome."[65] *Jones* explained that Mr. Jones could have raised his "*Rehaif*-type" argument on direct appeal or in an initial § 2255 motion, even though "our precedent was at that time against him," because he "could have succeeded before the *en* banc court or before the Supreme Court.[66]

By contrast, the majority of Circuits adopted the broader view that § 2255 "did not constrain the ability of federal prisoners to obtain collateral review"; instead, it "redirected that view away from § 2241 and channeled

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[57] *Id.* (emphasis added).

[58] *Id.*

[59] *Id.* at 1093–94.

[60] Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011).

[61] *Id.* (emphasis added).

[62] *Id*. at 585.

[63] *Id.* at 582.

[64] Jones, 8 F.4th at 687 (8th Cir. 2021).

[65] *Id*.

[66] *Id.*

it through § 2255."[67] Thus, the rationale of the majority position is that "when an argument is foreclosed by binding precedent, a first § 2255 motion did not provide a reasonable opportunity to test the legality of conviction," thereby satisfying the "inadequate and ineffective" requirement of the saving clause.[68] However, the rules and contours of the relief available in these circuits varied wildly.

For example, the Fourth Circuit created a test for prisoners challenging convictions rendered invalid based on changes in statutory law,.[69] *In re Jones* was one of the earliest post-AEDPA saving clause cases and held for the first time in the Fourth Circuit that the inability to file a second or successive § 2255 motion—coupled with a viable claim of actual innocence—was enough to invoke the saving clause. The court recognized the conundrum that circuits later grappled with for nearly 30 years: that § 2255 could not be inadequate or ineffective "merely because an individual is unable to obtain relief" under that provision, as such a rule "would effectively nullify the gatekeeping provisions" of § 2255(h).[70] However, it also recognized "there must exist some circumstance in which resort to § 2241 would be permissible; otherwise, the savings clause itself would be meaningless."[71] It landed in the middle, holding that a prisoner who was held pursuant to a conviction that was rendered null by a retroactive change in Supreme Court could pass through the saving clause if the prisoner could satisfy a three-part test:

> [Section] 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.[72]

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[67] Beck, *supra* note 48, at 2076.

[68] *Id*. at 2078.

[69] In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000).

[70] *Id.* at 333.

[71] *Id.*

[72] *Id.* at 333-34. Interestingly, nearly two decades later, the Fourth Circuit created perhaps the broadest savings clause test by extending the *In re Jones* test to *sentencing* challenges and holding that a retroactive change in *circuit-level law*—not just Supreme Court law—would suffice to support passage through the saving clause:
[W]e conclude that § 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the

The Seventh Circuit created a slightly different and narrower test. It interpreted the phrase "inadequate and ineffective" to mean that the prisoner could pass through the saving clause only if he had not had a "reasonable opportunity" to obtain judicial review of a "fundamental defect" in his conviction or sentence because the law changed and was after his first postconviction motion and was made retroactive by the Supreme Court; section 2255(h) would not allow a second or successive motion; and the "change" in law was not "merely a difference between the law in the circuit [of sentencing] and the circuit [of incarceration]."[73] On this last point, the court recognized that "[w]hen there is a circuit split, there is no presumption that the law in the circuit that favors the prisoner is correct, and hence there is no basis for supposing him unjustly convicted merely because he happens to have been convicted in the other circuit."[74] Similarly, the Ninth Circuit held that a § 2241 petition is available under the saving clause "when a petitioner (1) makes a claim of actual innocence, and (2) has not had an 'unobstructed procedural shot' at presenting that claim."[75]

While there may be nuances and variations in the tests, the takeaway from the majority view of the saving clause was that a prisoner should be able to pass through the saving clause and have his habeas corpus petition addressed on the merits when there was some claim of fundamental defect (e.g., actual innocence) in a conviction or sentence due to a change in Supreme Court or circuit-level law, and the prisoner did not have a sufficient opportunity to litigate his claim in earlier proceedings due to the state of the law at the time of the first habeas petition.

B. Lower Court Proceedings

While the circuit split was continuing to deepen in the federal courts, in 2000, Marcus DeAngelo Jones was convicted in the Western District of Michigan of two counts of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and sentenced to 327 months (over twenty-seven years) in prison on each count, to run concurrently.[76] At that

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prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect. United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018).

[73] In re Davenport, 147 F.3d 605, 611-12 (7th Cir. 1998).

[74] *Id.*

[75] Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006).

[76] Jones v. Hendrix, 599 U.S. at 470. Jones was also convicted of making false statements to acquire a firearm, in violation of 18 U.S.C. § 922(a)(6) and § 924(a)(1)(B), and was sentenced to a concurrent 60 months in prison for that conviction. This conviction is not relevant to the legal issue discussed here.

time, Eighth Circuit precedent dictated that to prove a violation of § 922(g)(1), the prosecution had to prove that on each occasion, the defendant (1) possessed a firearm, and (2) was a felon.[77] At trial, the prosecution introduced evidence that Jones possessed the same firearm on two occasions in 1999.[78] However, Jones refused to stipulate as to his status as a felon.[79] Jones testified that he served jail time, but "thought that it was possible that his convictions might be wiped clean after five years."[80] Therefore, the prosecution also introduced evidence of Jones's five prior felony convictions; however, the testimony "was limited to the fact that Jones had been confined for more than one year on each conviction and that it was, in fact, Jones who was convicted."[81] The prosecution was not required to—and did not—prove that Jones knew of his prohibitive status.

The Eighth Circuit affirmed Jones's convictions and sentence, and within the one-year statute of limitations set forth in AEDPA, Jones filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255.[82] The motion was based on the argument that Jones's trial attorney provided ineffective assistance by failing to challenge the indictment as multiplicitous, that is, Jones could not be indicted twice for continuous possession of the same firearm.[83] The district court denied the motion, but the Eighth Circuit reversed, explaining that "the continuous possession of the same firearm constitutes a single offense," and Jones's trial counsel was deficient for not lodging this argument, resulting in prejudice to Jones.[84] It remanded with instructions to grant the motion, which resulted in the vacatur of one of Jones's concurrent § 922(g)(1) sentences.[85]

In 2019—over a decade after Jones filed his first § 2255 motion and while Jones had already served more than half of his 327-month sentence of imprisonment on the single § 922(g) count—the Supreme Court

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[77] Jones, 8 F.4th at 685 .

[78] United States v. Jones, 266 F.3d 804, 808 (8th Cir. 2001).

[79] *Id.* at 811.

[80] *Id.* at 810.

[81] *Id.* at 811.

[82] Jones, 599 U.S. at 470; Jones, 266 F.3d 804.

[83] United States v. Jones, 403 F.3d 604, 605 (8th Cir. 2005).

[84] *Id.* at 606. 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. *See id.* at 607.

[85] *See id.* at 604, 607. On remand, Jones asked the district court to conduct a new sentencing hearing, to appoint him counsel, and to let him appear before the court. The district court denied these requests, and the Eighth Circuit affirmed. *See* United States v. Jones, No. 05-3435, 2006 WL 1766713, at *1 (8th Cir. 2006) (per curiam).

decided the landmark case of *Rehaif v. United States*,[86] which held that a defendant's knowledge of the status that disqualifies him from owning a firearm is an element of a § 922(g) offense.[87] *Rehaif* made clear that "[t]o convict a defendant, the Government . . . must show that the defendant knew he possessed a firearm and also that *he knew he had the relevant status when he possessed it*."[88] This change "abrogated the Eighth Circuit's contrary precedent," which governed the Western District of Missouri and the Eighth Circuit's legal rulings in Jones's trial and direct appeal.[89] By the time the *Jones* case was decided by the Supreme Court, the Government had conceded—and at least four circuits had independently concluded—that *Rehaif* applied retroactively on collateral review.[90]

Within six weeks of the Court's decision in *Rehaif*, Jones filed a petition in the Eastern District of Arkansas, the district where he was confined, for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.[91] His petition stated, "I have been convicted and am serving a sentence for a non-existing [o]ffense."[92] Recognizing that a change in statutory law would not allow him to file a second or successive § 2255 motion under § 2255(h), Jones invoked the saving clause of § 2255(e), stating that § 2255 was "inadequate or ineffective to allow [him] to assert [his] innocence of the crime," and that he "did not violate an act of Congress" in light of

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[86] 588 U.S. 225 (2019). The defendant in *Rehaif* was a former college student who overstayed his student visa. It was legal for him to possess a firearm and ammunition while his visa was current, but the government argued that once it expired, his continued possession of that firearm and ammunition was illegal. He was indicted on the charge of illegally possessing a firearm and ammunition under § 922(g)(5) and convicted. 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*, 588 U.S. at 228. The Eleventh Circuit affirmed his conviction. United States v. Rehaif, 888 F.3d 1138 (11th Cir. 2018). However, 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 possessed a firearm and that Rehaif "knew he belonged to the relevant category of persons [identified in § 922(g)] as barred from possessing a firearm." *Id*. at 237.

[87] *Id.* at 237.

[88] *Id.* at 227 (emphasis added).

[89] Jones, 599 U.S. at 470.

[90] *See, e.g.*, United States v. Waters, 64 F.4th 199, 203–04 (4th Cir. 2023) ("We therefore accept the government's concession that Rehaif applies retroactively and join our sister circuits that have held the same." (citing Seabrooks v. United States, 32 F.4th 1375, 1382–83 (11th Cir. 2022) (per curiam); United States v. Kelley, 40 F.4th 250, 252–53 (5th Cir. 2022); Baker v. United States, 848 F. App'x 188, 189–90 (6th Cir. 2021)).

[91] *Id.* at 471.

[92] *Petition for a Writ Habeas Corpus Under 28 U.S.C. § 2241*, 2:19-cv-96-JTR (E.D. Ark. July 29, 2019), ECF No. 1-1 at 2.

Rehaif, a "new interpretation of statutory law."[93] He submitted an affidavit explaining that he did not have knowledge of his status as a felon because he "believed that his record was automatically expunged upon the completion of [his] sentence and probation."[94]

The district court dismissed the petition, explaining that it lacked subject matter jurisdiction over it, explaining, "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."[95] Thus, because Jones technically *could have* raised the argument that he was not aware that his status precluded him from possessing a firearm (even though the controlling case law at the time would have dictated outright rejection of such an argument), the § 2255 motion was not "inadequate or ineffective," and he could not take advantage of the savings clause.[96] The Eighth Circuit affirmed,[97] and the Supreme Court granted certiorari.[98]

C. A Preference for "Finality Over Error-Correction": The Majority Opinion in Jones

The majority opinion in *Jones* began by recounting the "historic habeas corpus powers of the federal courts."[99] It emphasized that § 2255 was created "as a separate remedial vehicle specifically designed for federal prisoners' collateral attacks on their sentences,"[100] because processing federal prisoner collateral attacks on their sentences through traditional habeas—that is, via 28 U.S.C. § 2241—"resulted in 'serious administrative problems.'"[101] Thus, § 2255 was meant to "rerout[e]" federal prisoners' collateral attacks on their sentences to the court that had sentenced them."[102] Nonetheless, the majority reiterated the Court's earlier

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93 *Id.* at 5.

94 *Id.* at ECF No. 11-1 at 9.

95 Jones v. Hendrix, No. 2:19-CV-00096-JTR, 2020 WL 10669427, at *6 (E.D. Ark. Jan. 24, 2020) (emphasis omitted).

96 *Id.*

97 Jones, 8 F.4th 683 (8th Cir. 2021).

98 Jones v. Hendrix, 142 S. Ct. 2706 (2022) (Mem.).

99 Jones, 599 U.S. at 472.

100 *Id.* (citing 62 Stat. 869, 967–68) (footnote omitted).

101 *Id.* at 474 (quoting United States v. Hayman, 342 U.S. 205, 212 (1952)). Some of these problems were that the district of confinement was often far removed from the records of the sentencing court," and there were a concentration of federal prisoners in a "handful of judicial districts, which forced those District Courts to process an 'inordinate number of habeas corpus actions.'"

102 *Id.*

declaration that § 2255 "was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus."[103]

The majority opinion then noted—without citation to anything beyond the language of § 2255(e)—that Congress "generally" barred federal prisoners who were authorized to apply for § 2255 relief from applying for traditional habeas corpus pursuant to § 2241, unless they could satisfy the saving clause.[104] But the majority viewed the saving clause's "inadequate or ineffective" language extremely narrowly, reasoning that it should only cover "unusual circumstances" when it is "impossible or impracticable" for a prisoner to seek relief from the court that sentenced him.[105] It provided only two specific, though nonexclusive, examples of such impossibilities: when the sentencing court has been dissolved, or when the prisoner is unable to be present at the hearing.[106]

In justifying its narrow reading of the savings clause, the majority turned to AEDPA's § 2255(h) for support. It explained that in that provision, "Congress enumerated two—and only two—conditions in which a second or successive § 2255 motion may proceed": a new and previously unavailable retroactive rule of *constitutional* law, or newly discovered evidence sufficient to undermine the conviction.[107] It then made this leap of logic: because § 2255 is the "ordinary vehicle" for collateral attack on a federal sentence, the "straightforward negative inference" from § 2255(h) is that a second or successive attack on a federal sentence "is not authorized unless one of those two conditions [in § 2255(h)] is satisfied."[108] The majority also rejected the Government's "clear-statement rule" argument that the Court requires "the clearest command" before "clos[ing] the courthouse doors on a strong equitable claim for relief."[109] The Court reasoned that demanding a "heightened standard of clarity" from Congress would mean "adopting a presumption against finality as a substantive value."[110] Moreover, it concluded that Congress "chose[] finality over error correction" by enacting the language in § 2255(h).[111] Ultimately, it concluded that AEDPA's new restrictions on second or successive

[103] *Id.* at 473 (quoting Davis v. United States, 417 U.S. 333, 343 (1974)); *see also id.* at 489 ("[I]t is true that § 2255, as enacted, afforded the same rights federal prisoners previously enjoyed under the general habeas statutes . . . .").

[104] *Jones*, 599 U.S. at 474.

[105] *Id*.

[106] *Id.* at 474–75. To the latter point, the majority noted that when the savings clause was enacted, travel by highway was nonexistent, and it sometimes took weeks to transport a prisoner by rail to the sentencing court's location. *See id*. at 475 n.2.

[107] *Id.* at 477 (citing 28 U.S.C. § 2255(h)).

[108] *Id*. at 477–78.

[109] *Jones*, 599 U.S. at 491.

[110] *Id.* (alterations and internal quotation marks omitted).

[111] *Id*. at 480.

petitions were restrictions on § 2255 itself, and "not expansions of § 2241's applicability."[112]

D. Forfeited Freedom: The Dissenting Opinions in Jones

The majority opinion drew two dissents: the first from Justices Sotomayor and Kagan, and the second from Justice Jackson.[113]

Justice Sotomayor's brief dissent begins with the statement that a prisoner who is actually innocent, that is, one who is "imprisoned for conduct that Congress did not criminalize," is "forever barred by 28 U.S.C. § 2255(h) from raising that claim, merely because he previously sought postconviction relief."[114] In other words, "[b]y challenging his conviction once before, he forfeited his freedom."[115] In contrast to Justice Jackson's dissenting opinion, Justice Sotomayor would have remanded the case to the Court of Appeals to assess the jurisdiction over Jones's statutory innocence claim under a reading of § 2255(h) that would not bar statutory innocence claims.[116]

Justice Jackson's dissent echoed Justice Sotomayor's theme of forfeited freedom.[117] However, she would have gone a step further than Justice Sotomayor and would have instructed the district court to consider Jones's petition on the merits.[118] She explained that the history of § 2255

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[112] *Id.* at 478.

[113] The effect of the *Jones* decision on Suspension Clause jurisprudence is beyond the scope of this Article, but for an interesting analysis of the Suspension Clause problems created by the *Jones* decision, see Tom Jordan, *What's Left of the Suspension Clause After Jones v. Hendrix?* Wash. Univ. L. Rev. Online, vol. 120 (2024).

[114] Jones, 599 U.S. at 492–93 (Sotomayor, J., dissenting).

[115] *Id.* at 493.

[116] *Id*.

[117] *Id*. at 494–532 (Jackson, J., dissenting).

[118] *Id.* at 495. The difference between these two dissents hinges on whether the lower court should have a first stab at assessing whether the prisoner's claim legitimately alleges a statutory innocence claim. Both dissents appear to treat the analysis as a *jurisdictional* prerequisite that would allow a prisoner to pass through the saving clause portal and have the § 2241 petition heard on the merits. The issue of whether the saving clause is a jurisdictional provision has not been settled by the Supreme Court and is beyond the scope of this Article. However, read in tandem, the dissenting opinions in this case signal that the saving clause is a subject matter jurisdictional threshold, and once a prisoner passes through it, a court possesses jurisdiction to hear the postconviction claim on the merits. Indeed, many courts addressing saving clause arguments pre-*Jones* have referred to the clause in jurisdictional terms. *See, e.g.*, Hernandez v. Campbell, 204 F.3d 861, 866 (9th Cir. 2000) ("[I]t is imperative, as a matter of the initial determination of jurisdiction, that district courts first determine whether the savings clause permits the filing of a § 2241 habeas corpus petition."); Williams v. Warden, Fed. Bureau of Prisons, 713 F.3d 1332, 1337 (11th Cir. 2013) ("The

demonstrates that Congress wanted to ensure that a prisoner's claim was "saved" by the saving clause "[w]here the prisoner would have been able to bring such a claim prior to the enactment of § 2255 . . . but somehow cannot bring the claim after a change to the statutory framework."[119] This, she explained, is precisely Mr. Jones's situation.[120]

Justice Jackson first stressed that the creation of § 2255 was not meant to restrict the rights of prisoners to bring claims that were traditionally cognizable in habeas.[121] It follows that the enactment of § 2255 could not properly be interpreted as disadvantaging federal prisoners with such traditionally cognizable claims, but rather, allowing them to file habeas petitions that were rendered ineffective and inadequate by the enactment of § 2255 itself.[122] As Justice Jackson explained, "the saving clause operates (at the very least, and as it was enacted in 1948) to preserve from inadvertent extinguishment postconviction claims that would have been previously cognizable for federal prisoners but cannot be brought by operation of § 2255."[123]

Justice Jackson also claimed that the majority should not jump to the conclusion that § 2255(h) should *limit* statutory innocence claims simply because the text of § 2255(h) speaks about new-evidence and new-constitutional claims.[124] She also took issue with the majority's grafting the atextual phrase "impossible or impracticable" onto the statute, when

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applicability of the savings clause is a threshold jurisdictional issue . . . ."). At least one court has firmly held the same. United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018) ("[T]he savings clause requirements are jurisdictional[.]"). For an interesting discussion of the historical emphasis on jurisdictional defects as a prerequisite of postconviction error correction, see William M. M. Kamin, *A More Luminous Beacon*, 59 U.C. Davis L. Rev. 1 (2025).

119 *Id*. at 495–96.

120 *Id.* at 496.

121 *Id.* at 498 (citing Hayman, 342 U. S. at 219 (the "sole purpose" of § 2255 "was to minimize the difficulties encountered in habeas corpus hearings" while still "affording the *same rights* in another and more convenient forum"); Davis, 417 U. S. at 343 ("Th[e] history makes clear that § 2255 was intended to afford federal prisoners a remedy *identical in scope* to federal habeas corpus" (emphasis added)); Sanders v. United States, 373 U.S. 1, 14 (1963) ("[I]t conclusively appears from the historic context in which § 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy *exactly commensurate* with that which had previously been available by habeas corpus" (emphasis added; internal quotation marks omitted)).

122 Jones, 599 U.S. at 498–99.

123 *Id.* at 499.

124 *Id.* at 503–04 ("Congress knows how to speak clearly when it wants to disrupt the continuity of claims that are available to prisoners before and after it enacts legislation that addresses postconviction review procedures. And rather than providing any such clear statement as to how an intervening claim of statutory innocence should be treated vis-à-vis § 2255(h)'s second or successive bar, Congress was conspicuously silent.").

the true language is "inadequate or ineffective."[125] She likewise pushed back on the majority's rejection of the "clear-statement" argument advanced by the Government, explaining, "The clear-statement rule is plainly applicable here, and the majority offers the flimsiest of explanations for its decision to deviate from its application . . . ."[126] Relying on the Court's decision in *Ex Parte Yerger*, Justice Jackson explained the Court should not "read a statute to displace access to 'the great writ' unless Congress has been clear about its intention to accomplish this result."[127]

Perhaps the most compelling part of Justice Jackson's dissent is her attack on the majority's reliance on finality. The majority's decision means that § 2255(h) bars legal innocence claims that are based on retroactive Supreme Court statutory decisions *only if* they are brought in a second or successive petition.[128] Such a holding produces this absurd result:

> Consider two individuals who have been convicted of the same federal crime—perhaps two codefendants who were tried and sentenced together. Both complete their direct appeals, but only one files a § 2255 motion within AEDPA's statute of limitations, while the other one decides not to or misses the deadline. If § 2255(h) bars a successive petition raising a legal innocence claim, then when Rehaif is handed down—altering the elements of the crime of conviction such that both prisoners have a colorable claim of legal innocence—only the one who did not previously file a § 2255 petition can raise this retroactive statutory innocence claim.129

This, clearly, "produces stunningly disparate results that bear no relationship to Congress's purported finality goals."[130]

III. The *Jones* Majority Incorrectly Interpreted The Saving Clause and Related AEDPA Provisions

To be sure, AEDPA is not the clearest of legislative acts.[131] But Justice Jackson aptly observed that there are "so many contextual indicators that

[125] *Id*. at 504.

[126] *Id*. at 508.

[127] *Id*. (citing *Ex Parte Yerger,* 8 Wall. 85, 95 (1869)).

[128] Jones, 599 U.S. at 516.

[129] *Id*.

[130] *Id*.

[131] *See* James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L Rev 411, 426 (2001) ("AEDPA's opaque language has proliferated conflicting interpretations, requiring the Supreme Court to grant certiorari to resolve a conflict in interpretation at least fourteen times since AEDPA's adoption in 1996."); *see also* Lindh v. Murphy,

Congress did not really mean for § 2255(h) to be read to preclude new claims of statutory innocence," that the Court should have allowed Jones's petition to proceed.[132] Although the dissenting opinions highlight a myriad of reasons why the majority opinion is wrongly decided, this Part will dig deeper into two reasons mentioned in the dissenting opinions to demonstrate that the majority took an aberrant view of the provisions at issue, a view which contravenes the Court's statutory interpretation and post-conviction jurisprudence, and which further erodes the constitutional guarantee of habeas corpus. First, the majority's rejection of the clear-statement rule in favor of the negative inference canon betrays well-accepted statutory construction conventions. Second, the opinion's reliance on finality eschews traditional notions of fairness that should be a hallmark of an equitable, constitutional doctrine such as habeas corpus. These missteps by the majority lead to the inescapable conclusion that the Court interpreted the statute incorrectly. Therefore, Part IV will discuss the only avenue for relief for prisoners still sitting in prisoners pursuant to invalid convictions: amending AEDPA to allow for second or successive petitions based on retroactive changes in statutory law.

A. The Majority Wrongfully Invoked the Negative Inference Canon Over the Clear-Statement Rule

The debate over the interaction of § 2255(e) and the gatekeeping provisions of § 2255(h) "necessarily draws upon statutory interpretation principles. . . . [T]he primary debate is over the extent to which legislative purpose in enacting § 2255 and then amending it through AEDPA informs application of the text."[133] In addressing this question, the majority opinion chose to invoke the negative inference canon over the clear-statement rule, which contravenes traditional notions of statutory interpretation. To begin, an overview of both canons is necessary.

1. The Negative Inference Canon

The negative inference canon,[134] as it has generally been utilized in federal case law, is the idea that the absence of a certain word or phrase

521 U.S. 320, 336 (1997) (Souter, J.) ("All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting.").

132 Jones*,* 599 U.S. at 517.

133 Ethan D. Beck, *Adequate and Effective: Postconviction Relief Through Section 2255 and Intervening Changes in Law*, 95 Notre Dame L. Rev. 2063, 2071 (2020).

134 This canon is also referred to in case law and scholarship as the "negative implication doctrine" or the "negative implication inference doctrine." Courts also refer to the Latin title *expressio unius est exclusio alterius*, or, the expression of one thing implies the exclusion of another. While this is "a key canon of statutory interpretation that has been regularly used to divine legislative intent," it should be used only when appropriate. *See* Marielle Paloma Greenblatt, *In*

implies that Congress meant to leave it out.[135] This canon has most commonly been used by the Supreme Court in cases where two provisions in the same act are disparate—that is, a phrase is included in one place but not included in another place, so Congress *meant* for the phrase to be excluded from the second place.[136]

The Supreme Court has further recognized the "familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."[137] For example, the Court rejected the application of such a canon in *Gomez-Perez v. Potter*, an Age Discrimination in Employment Act ("ADEA") claim, where one party attempted to rely on the presence of a provision in the ADEA "specifically prohibiting retaliation against individuals who complain about age discrimination in the *private sector*," and the absence of a similar provision "specifically prohibiting retaliation against individuals who complain about age discrimination in *federal employment*."[138] The Court reiterated that "[n]egative implications raised by disparate provisions are strongest" in situations when the relevant statutory provisions were enacted together,[139] and in that case, the two relevant provisions were *not* considered or

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Search of Judicial Compassion: The Cantu-Lynn Divide over Compassionate Release for Federal Prisoners, 52 Colum. Hum. Rts. L. Rev. 140, 202 (2020) (discussing statutory canons in analysis of the First Step Act). In fact, the Court has explicitly stated that the negative implication doctrine does not apply to every statute. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) "[T]he canon *expressio unius est exclusio alterius* . . . has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." (citing U.S. v. Vonn, 535 U.S. 55, 65 (2002)); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002) (stating that the canon requires a series of terms within a statute that can be understood to go hand in hand); *see also* Darci Deltorto, *Pole Position: National Cable & Telecommunications Ass'n v. Gulf Power Co. and the Implications of the Fcc's Pole Attachments Act Reaching Higher Ground*, 37 Akron L. Rev. 87, 129 (2004) (discussing the canon).

[135] Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006) (noting that "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute").

[136] *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[137] Lindh v. Murphy, 521 U.S. 320, 330 (1997); *see also* Field v. Mans, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects . . . .").

[138] Gomez-Perez v. Potter, 553 U.S. 474, 486 (2008) (emphasis added).

[139] *Id*. (citing Lindh, 521 U.S. at 330)

enacted together.[140] As one scholar has explained, "the more doubt there is that the compared provisions were drafted in cognizance of each other, the less likely it is that the drafters' exclusion or inclusion of the pertinent text was deliberate, rather than simply an oversight."[141]

There is another strain of the negative inference canon that has arisen in Supreme Court case law that is less grounded in legislative history and instead, based on a textualist reading of statutory amendment history. Scholars have observed that members of the Roberts Court will sometimes employ "revision" and "reenactment" negative inferences that "involve at least some judicial speculation about the scope of the change Congress intended to effectuate" when it revised a particular statute.[142] For example, some cases draw negative inferences by making statements such as, "[W]e doubt that Congress meant for the amended language to alter the statute's longstanding thrust."[143] One scholar has noted that this reasoning "reflects the leaps of logic" the Court makes in such analyses: "it could very well be the case that Congress amended a statute precisely in order to change its longstanding thrust, rather than to simply clarify the meaning the statute had all along, but the Court in these cases is making a negative implication inference in the opposite direction."[144] Such inferences based on the mere fact of statutory revision (that is, the extra-textual conclusion that an amendment to a statute clarifies what Congress meant all along, or conversely, that Congress meant to effect an extra-textual change) allows for "substantial judicial discretion"; that is, "[j]udges determine whether particular statutory changes reflect minor or technical updates or, conversely, signal fundamental policy change—often based on their own intuitions."[145]

In the end, inferring exclusion from what statutory language *does not say*—or phrased differently, what Congress *did not do*—has drawn its critics.[146] In fact, the Supreme Court itself has expressed that "Congress's

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140 *Id.*

141 Terrell J. Iandiorio, *Federal Postconviction Relief and 28 USC 2255(4): Are State Court Decisions "Facts"?*, 71 U. Chi. L. Rev. 1141, 1159 (2004).

142 Anita S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 305 (2022).

143 *Id*.

144 *Id.* at 305–06.

145 *Id*. at 314.

146 *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985) "[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."); Herman & MacLean v. Huddleston, 459 U.S. 375, 387 n.23 (1983) (noting that negative inference canons "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose"); Note, Statutory Interpretation, 43 Harv. L. Rev. 863, 873 (1930) (describing the canon as "in direct contradiction to the habits of speech of most persons"); Robert A. Prentice, *Section 12 of the 1933 Act: Establishing the Statutory Seller*, 40 Ala. L. Rev. 417, 473 n.120 (1989) (explaining that such canons "must be scrutinized carefully").

'inlkings' are best determined by the statutory language that it chooses," and not by negative inferences about what was left out.[147]

2. The Clear-Statement Rule

The clear-statement rule is a canon of statutory interpretation that presumes that "a statute does not infringe on a particular value unless the legislature has affirmatively and clearly stated that it intends to do so."[148] The rule recognizes that Congress must "speak unambiguously when it seeks to effect a result that, although constitutional, would undermine a constitutionally derived value."[149] This rule has been explained as neither purely textualist or purely purposivist, but rather, it "create[s] a substantive bias in favor of a particular interpretive outcome—a bias that can be overcome only if the legislature includes an affirmative, unambiguous statement indicating that it intended the opposite result."[150]

Notably, the Supreme Court has traditionally applied the clear-statement rule in habeas corpus cases, declaring that there is a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."[151] It has also explained that before interpreting a congressional enactment as "clos[ing the Court's] doors to a class of habeas petitioners,'" the Court must search for a "'clear indication that such was Congress' intent.'"[152] As far back as 1869, the Court relied on the clear-

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[147] *Sedima*, 473 U.S. at 495 n.13.

[148] Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 Wash. U.L. Rev. 351, 376 (2019).

[149] John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 121–122 (2001).

[150] Hessick & Kennedy, *supra* note 148, at 378. The Supreme Court has used clear-statement rules in many contexts, especially protection of federalism. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1614 (2000) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985) (refusing to find that Congress has abrogated the state's sovereign immunity absent clear statutory language); Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (affirming that legislation will not be read to alter the federal-state balance absent a clear statement of Congress's intent); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (insisting that federal conditions on grants of money to states must be stated clearly)). See also Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 Wm. & Mary L. Rev. 2027, 2027 (2015) ("For courts to find a statutory requirement jurisdictional, Congress must have clearly said so.").

[151] I.N.S. v. St. Cyr, 533 U.S. 289, 298 (2001). In his dissenting opinion in *St. Cyr*, Justice Scalia explained his view that the majority had created a "super clear statement, 'magic words' requirement for the congressional expression" of intent to foreclose habeas jurisdiction. *Id*. at 327 (Scalia, J., dissenting).

[152] Panetti v. Quarterman, 551 U.S. 930, 946 (2007) (quoting Castro v. United States, 540 U.S. 375, 380, 381 (2003)).

statement rule to conclude that the Court had jurisdiction over a habeas corpus petition because a contrary holding would "greatly weaken the efficacy of the writ" and "deprive the citizen in many cases of [the writ's] benefits."[153] The Court explained, "We are not at liberty to except from [habeas corpus jurisdiction] any cases not *plainly* excepted by law."[154]

One of the first decisions construing AEDPA was *Felker v. Turpin*, and this decision too applied a clear-statement rule.[155] In that case, the Court addressed some of the AEDPA gatekeeping provisions Congress added to cut down on abusive requests for relief, including limitations on second or successive applications from state prisoners.[156] The Court specifically addressed whether § 2244(b)(3)—which provides that a claim in a successive petition that was not raised in a prior petition must rely on a new rule of constitutional law made retroactive by the Supreme Court "that was previously unavailable," or must rely on a factual predicate that could not have been discovered through due diligence—constituted an "unconstitutional restriction" of the Court's jurisdiction.[157] The Court held that it did not: while AEDPA did impose new restrictions on the Court's "authority to grant relief," it did not "deprive th[e] Court of jurisdiction to entertain *original* habeas petitions."[158] It reasoned that there was no clear statement in Title I of AEDPA that would "repeal [the Court's] authority to entertain a petition for habeas corpus jurisdiction" pursuant to § 2241.[159]

Later decisions followed suit and went even further than *Felker*. In *Demore v. Kim*, the Court proclaimed that "where a provision precluding review is claimed to bar habeas review," the Court has "required a *particularly* clear statement."[160] In that case, a legal permanent resident Hyung Joon Kim, who was imprisoned pursuant to the Immigration and Nationality Act (INA), filed a § 2241 petition challenging the constitutionality of the INA provision under which he was being held.[161] That INA statute contained a judicial review provision, which stated:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the

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153 Ex parte Yerger, 8 Wall. 85, 102, 19 L.Ed. 332 (1869)
154 *Id*. (emphasis added).
155 *See generally* Felker v. Turpin, 518 U.S. 651 (1996).
156 *Id.* at 657 (discussing 28 U.S.C. §§ 2244(b)(3)(A)–(E)).
157 *Id*. at 658.
158 *Id.* (emphasis added).
159 *Id.* at 661–62.
160 538 U.S. 510, 517 (2003) (citing *St. Cyr*, 533 U.S. at 308–09) (emphasis added).
161 *Id*. at 513.

> detention or release of any alien or the grant, revocation, or denial of bond or parole.162

An amicus party argued that because Kim was challenging a "discretionary judgment" by the Attorney General to detain him, the court did not have jurisdiction to entertain the § 2241 petition.[163] The Court rejected that argument because Kim had filed a habeas petition, the Court required a "particularly clear statement" to preclude habeas review, and the statute under which Kim was being detained "contains no explicit provision barring habeas review."[164]

Again in 2007 and 2010, the Court upheld federal habeas jurisdiction in the absence of a clear statement precluding it.

First, in *Panetti v. Quarterman*, the Court addressed a challenge to the federal court's jurisdiction to entertain a § 2254 petition that was technically "second or successive," but was filed to raise an incompetent-to-be-executed claim as soon as it was ripe—in other words, the claim was not made in the first petition, at a time and in a legal landscape when it would not have been "colorable."[165] The Court considered the purpose of AEDPA: to "further the principles of comity, finality, and federalism."[166] These purposes, the Court explained, should be scrutinized when petitioners may "'run the risk' . . . of 'forever losing their opportunity for any federal review of unexhausted claims.'"[167] Therefore, it concluded that the petitioner's incompetency claim was not barred; the Court refused to adopt an interpretation of AEDPA that would "'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'"[168]

Finally, in *Holland v. Florida*, the Court concluded that AEDPA's one-year statute of limitations for state prisoners, set forth in 28 U.S.C. § 2244(d), is subject to equitable tolling in certain circumstances.[169] Central to the Court's ruling was the idea that "equitable principles have traditionally governed the substantive law of habeas corpus" and the Court "will not construe a statute to displace courts' traditional equitable authority absent the clearest command."[170] The statute of limitations did not "contain language that is unusually emphatic" or "reiterat[ive]" and most

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[162] *Id*. at 516 (quoting 8 U.S.C. § 1226(e)).
[163] *Id*.
[164] *Id.* at 517.
[165] 551 U.S. at 945, 946.
[166] *Id.* (quoting Miller-El v. Cockrell, 537 U.S. 322, 337 (2003)).
[167] *Id.* at 945–46 (quoting Rhines v. Weber, 544 U.S. 269, 275 (2005)).
[168] *Id.* at 946 (quoting Castro v. United States, 540 U.S. 375, 381 (2003)).
[169] 560 U.S. 631, 645 (2010).
[170] *Id.* at 646 (internal quotation marks omitted).

importantly, "AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home."[171]

3. The Majority's Use of Negative Inference and Rejection of the Clear-Statement Rule was Inappropriate

Based on this history of statutory interpretation jurisprudence, it is easy to see that the majority decision in *Jones* is an outlier based on its rejection of the clear-statement rule in favor of application of the negative inference canon. Two misapplications of this doctrine warrant explanation.

First, the majority improperly applied a "negative inference" from the plain language of § 2255(h)—which, again, speaks only to new claims of retroactive constitutional law and newly discovered evidence—to conclude that Congress meant to exclude petitioners from filing second or successive petitions based on a retroactive change in *statutory* law. The majority reasoned, "Because § 2255 is the ordinary vehicle for a collateral attack on a federal sentence, the straightforward negative inference from § 2255(h) is that a second or successive collateral attack on a federal sentence is not authorized unless one of those two conditions is satisfied."[172] It then stated that § 2255(h)(2)'s authorization of a successive collateral attack based on new rules of '*constitutional* law' implies that Congress did not authorize successive collateral attacks based on new rules of *nonconstitutional* law."[173] It continued, "The saving clause does not undermine this strong negative inference" because § 2255(h) presumes that collateral attacks by federal prisoners "are governed by § 2255," and it "proceeds to specify when a *second or successive* collateral attack is permitted," while the saving clause "has nothing to say about that question."[174]

Justice Thomas's application of the negative inference canon finds no home in the Court's traditional approach to statutory interpretation. To begin, the majority's application does not purport to employ the common use of the canon; that is, it does not compare two provisions in § 2255 that were enacted or considered together, and it is not the case that the phrase "a new rule of [retroactive] *statutory* law" was included elsewhere in AEDPA but left out of § 2255(h). In fact, it does not point to any AEDPA provision whatsoever that mentions claims of statutory law. It likewise does not demonstrate a traditional application of *expressio unius est exclusio alterius*, which "has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[175]

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[171] *Id.* at 647 (internal quotation marks omitted).
[172] *Jones*, 599 U.S. at 477–78.
[173] *Id.* at 478 (emphasis added).
[174] *Id.*
[175] Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

Moreover, the saving clause was enacted almost fifty years before the provisions in § 2255(h) and remained unchanged through the enactment of AEDPA. The negative inference canon simply cannot support the notion that the language of § 2255(h) has any effect on the meaning and operation of § 2255(e).

To the extent the majority opinion utilizes the iteration of the negative inference canon mentioned above—whereby the Court will use the fact and perceived purpose of a statutory amendment to bestow extra-textual meaning to language of that amendment—this approach is likewise ineffective. The majority reasoned that "[b]ecause AEDPA did not alter the text of [the saving clause], there is little reason to think that it altered the pre-existing division of labor between §§ 2241 and 2255."[176] The problem with this analysis is that it relies on the notion that

§ 2255 is the "ordinary vehicle" for a collateral attack of a federal sentence[177] without recognizing, as explained in *infra* Part III.B., that traditional habeas—codified in § 2241—has always remained an avenue for relief for those who are being held in violation of federal statutory law, and the enactment of § 2255 did not disrupt the broad equitable remedy of traditional habeas. Moreover, as Justice Jackson points out, the negative inference canon "must be applied with great caution" and "its application depends so much on context."[178] In actuality, the bar on second or successive petitions in § 2255(h) was added to "ensure that all available claims a prisoner has are brought in a single postconviction petition," and where a petitioner wanted to assert a claim that was previously unavailable to him, Congress meant to allow for successive petitions.[179] There is no indication—textual or otherwise—that by enacting § 2255(h), Congress meant to undercut decades of habeas jurisprudence and shut the courthouse doors on prisoners with viable claims that they are being held in violation of statutory law.

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[176] Jones, 599 U.S. at 478.

[177] *Id.* at 477–78.

[178] *Id.* at 508 (Jackson, J., dissenting) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012)).

[179] *Id.*; *see also id.* at 510 (noting that in debating AEDPA, Senator Orrin Hatch explained, "We have provided for protection of Federal habeas corpus, but we do it one time and that is it—unless, of course, they can truly come up with evidence of innocence that could not have been presented at trial. There we allow successive petitions." (quoting 141 Cong. Rec. 15042 (1995)); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N. Y. U. L. Rev. 699, 772 (2002) (explaining that with the enactment of AEDPA, Congress wanted to "preven[t] manipulation of the system through relitigation of previously presented claims or strategic withholding of claims for later presentation," while still creating "a mechanism that would allow prisoners to have one full, fair chance to present their meritorious ... claims to the federal courts").

Second, the shaky application of the negative inference canon is only exacerbated by the flat and unjustified rejection of the clear-statement rule. The Supreme Court has "historically refused to read longstanding statutory language to bear broad, newly asserted authority lacking historical precedent—at least in the absence of exceptionally clear statutory meaning."[180] But here, while the majority admits that the Court "find[s] clear-statement rules appropriate when a statute implicates historically or constitutionally grounded norms that we would not expect Congress to unsettle lightly," it nonetheless reasoned that in Jones's case, there was "no historical or constitutional norm of permitting one convicted of a crime by a court of competent jurisdiction to collaterally attack his sentence based on an alleged error of substantive statutory law."[181]

This reasoning for rejection of the clear-statement rule is deeply troubling and wholly unsupported. In fact, there are clearly both historical and constitutional norms that support a collateral attack of a prisoner's sentence that is based on an error in statutory law. One needs only to look at the language of § 2255(a) itself to begin. That provision states that one is authorized to file a § 2255 motion if he is in custody in federal court and "claiming the right to be released upon the ground that [his] sentence was imposed in violation of the Constitution *or laws of the United States*."[182] Furthermore, traditional habeas corpus was grounded in the same notion: prisoners could not attain the writ unless they were "in custody in violation of the Constitution *or laws . . . of the United States*."[183] These provisions hearken back to Congress's 1948 adoption of Title 28 and its recognition and codification of constitutional notions of fairness and equity in habeas corpus law.

In the end, the Supreme Court has proclaimed that its early habeas cases involving executive detention "contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error."[184] In addition, the Court recognized more than half a century ago that there was "no support" in Supreme Court jurisprudence that a claim "is not cognizable under § 2255 merely because it is grounded in the 'laws of the United States' rather than the Constitution."[185]

B. The Majority's Reliance on Finality is Hollow and Leads to Absurd Results

As Justice Jackson's dissent points out, the majority's reliance on finality has caused it to read the AEDPA provisions in an absurd manner. The majority and the cases on the minority side of the split relied on the

[180] Kovarsky, *supra* note 7, at 2232.
[181] Jones, 599 U.S. at 492.
[182] 28 U.S.C. § 2255(a) (emphasis added).
[183] 28 U.S.C. § 2241(c)(3) (emphasis added).
[184] I.N.S. v. St. Cyr, 533 U.S. 289, 302–03 (2001).
[185] Davis, 417 U.S. at 345.

notion that at some point, litigation over one's conviction should be over. Then-Judge Gorsuch's opinion in *Prost* makes this sentiment clear: "In every case there comes a time for the litigation to stop, for a line to be drawn, and the parties encouraged to move forward rather than look back."[186] However, under the majority's reading of AEDPA and the saving clause, the concept of finality is warped. It only applies to diligent prisoners who have already filed a § 2255 motion within the appropriate statute of limitations and allows prisoners who have not yet filed a § 2255 motion to move forward with a collateral challenge.

To demonstrate, AEDPA offers a one-year statute of limitations for filing § 2255 motions, which provides that the limitation period begins to run, *inter alia*, from "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."[187] Theoretically, then, a prisoner who was incarcerated pursuant to a § 922(g) conviction could have filed a § 2255 petition within one year of the decision in *Rehaif* and—if he had not yet filed a first § 2255—he would be able to have his motion heard on the merits. But the prisoner who had already filed a first § 2255, like Jones, would not be able to, due to the constraints of § 2255(h). This absurd result does nothing to promote finality if prisoners are still able to take advantage of the one-year grace period to file claims based on new statutory law. Instead, as Justice Jackson points out, this is "odd unequal treatment."[188]

In rejecting the clear statement rule in favor of finality, the majority erroneously posits that this is not the type of case in which the clear statement rule has traditionally applied. It explains, "we find clear-statement rules appropriate when a statute implicates historically or constitutionally grounded norms that we would not expect Congress to unsettle lightly," and in Jones's case, there was "no historical or constitutional norm of permitting one convicted of a crime by a court of competent jurisdiction to collaterally attack his sentence based on an alleged error of substantive statutory law."[189] But this reasoning blatantly ignores the language of § 2255 and prior Supreme Court decisions.

To begin, the language of § 2255(a) itself, which was enacted in 1948, provides that a federal prisoner desiring to challenge the illegality of his sentence may do so on the grounds that it was "imposed in violation of the Constitution *or laws* of the United States."[190] In addition, in 1974 the Supreme Court held that "there is no support in the prior holdings of this Court for the proposition that a claim is not cognizable under § 2255 merely because it is grounded in the 'laws of the United States' rather than

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186 Prost, 636 F.3d at 583 .

187 28 U.S.C. § 2255(f)(3).

188 Jones, 599 U.S. at 516 (Jackson, J., dissenting).

189 *Id.* at 492.

190 28 U.S.C. § 2255(a) (emphasis added).

the Constitution."[191] This decision was based on the idea that § 2255 meant to maintain a right to habeas corpus that was "identical in scope" to traditional habeas corpus.[192]

Further, the majority's conclusion—only allowing saving clause relief when a prisoner has satisfied the requirements and limitations of § 2255—has the effect of rendering the saving clause meaningless "because a prisoner who satisfies the limitations provision can simply file a successive § 2255 motion and would never need to resort to the savings clause."[193] This is underscored by the idea that the plain language of the saving clause itself subjects the "inadequate or ineffective" standard to traditional habeas petitions under § 2241, not § 2255 motions. The saving clause appears in subsection (e), which comes before subsection (h), and "distinguishes between 'an application for a writ of habeas corpus'"—codified in § 2241—and "'relief by motion"—codified in § 2255. The limitations provision in § 2255(h) restricts "[a] second or successive motion" and makes no mention of a habeas corpus application.[194]

As scholars have recognized, courts entertaining saving clause challenges under colorable statutory innocence claims have fallen back upon the illusory safety net of finality. But this practice has a detrimental effect: "it not only incentivizes but *requires* prisoners to raise arguments to courts that are squarely foreclosed by binding precedent, to the detriment of judicial efficiency."[195] Allegra McLeod has examined more generally this emphasis on finality at the absurd and counterintuitive expense of inefficiency and unfairness, calling it a "fetish of finality."[196] According to McLeod, this emphasis on finality has "confine[d] the courts' and legislatures' capacities to address gross injustice in the criminal process."[197] The "fetish" is grounded in a narrative and norms that "complacently treat[] the conventional criminal process followed by conviction and prison-based punishment (or killing by the state) as basically moral and just."[198] If AEDPA itself is a codification of this "fetish of finality" as

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[191] Davis, 417 U.S. at 345.

[192] *Id.* at 343.

[193] Kleinjan, *supra* note 26, at 889.

[194] *See id.* at 888–89.

[195] Hueso v. Barnhart, 948 F.3d 324, 353–54 (6th Cir. 2020) (Moore, J., dissenting); *see also* Ashley Alexander, Note, *One Strike, You're Out: The Post-Hueso State of Habeas Corpus Petitions Under the Savings Clause*, 57 Am. Crim. L. Rev. Online 84, 96 (2020); Kleinjan, *supra* note 26, at 890 ("'[I]n [allegedly] protecting finality, *Hueso* and similar cases. . .may actually sanction frivolous attacks on existing law.'").

[196] Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1211 (2015).

[197] *Id.*

[198] *Id.*

McLeod contends,[199] the *Jones* decision turns this fetish into an all-out obsession.

IV. THE MAJORITY'S DECISION IN *JONES* FURTHER ERODES AMERICAN HABEAS CORPUS, AND CONGRESS MUST "FIX THIS PROBLEM"

A "habeas revolution" has begun in the Supreme Court.[200] Lee Kovarsky has coined the phrase "negative habeas equity" to refer to the Supreme Court's asserted equity-like discretion to limit opportunity for habeas relief.[201] Examples include application of the harmless-error standard, the procedural default doctrine, and rules against retroactivity of new Supreme Court decisions.[202] But Kovarsky explains that in the last five years, the Court has moved to a "new" and more troubling "negative habeas equity," which is even more damaging to postconviction rights. In *Brown v. Davenport*[203] and *Shinn v. Ramirez*,[204] both decided in the year before *Jones*, the Court asserted its perceived power to not only "formulate judge-made limits on the habeas remedy," but also enhanced discretionary authority for lower courts to deny relief, even if a prisoner is otherwise entitled to it.[205] I propose that *Jones* is the next stop on this revolutionary road.

A. Erosion of Habeas Corpus: From Davenport to Ramirez to Jones

The *Davenport* and *Ramirez* decisions presented different procedural postures and issues than *Jones*, but all three of these cases have one thing in common: they demonstrate the Supreme Court's willingness to perform a less-than-stringent statutory analysis to arrive at a result that weakens federal habeas protections. For *Davenport* and *Ramirez*, the Court denied relief to state habeas petitioners based on a broad reading of two isolated phrases: "Writs of habeas corpus *may* be granted by [the federal courts],"[206] and "The court shall . . . dispose of the [habeas corpus] matter *as law and justice require*."[207]

In *Brown v. Davenport*, Ervine Davenport was convicted of murder in Michigan state court following a trial in which he sat shackled before the

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[199] *Id.* at 1214.

[200] Kovarsky, *supra* note 7, at 2224.

[201] Kovarsky, *supra* note 7, at 2224. Positive equity, by contrast, "would be the exercise of discretionary power to award more complete relief upon a finding of unlawful custody." *Id.* at 2224 n.3.

[202] *Id.* at 2229.

[203] Brown v. Davenport, 596 U.S. 118 (2022).

[204] Shinn v. Ramirez, 596 U.S. 366 (2022).

[205] Kovarsky, *supra* note 7, at 2224.

[206] 28 U.S.C. § 2241(a) (2025) (emphasis added).

[207] 28 U.S.C. § 2243 (2025) (emphasis added).

jury.[208] He filed a state postconviction petition, and the court concluded that Davenport's due process rights were violated pursuant to *Deck v. Missouri*, in which the Supreme Court held that the Fourteenth Amendment forbids shackling a criminal defendant at trial, absent "a special need."[209] The postconviction court then remanded the case to the trial court to determine whether the error was harmless beyond a reasonable doubt pursuant to *Chapman v. California*.[210] The trial court determined the error was harmless, and Davenport exhausted state remedies and filed a federal habeas petition.[211] Ultimately, the Sixth Circuit granted federal habeas relief after analyzing the case not under AEDPA, but rather, on *Brecht v. Abrahamson*, which held that a state prisoner seeking to challenge his conviction on the basis of a state court's *Chapman* error must show that the error had a "'substantial and injurious effect or influence' on the outcome of [the] trial."[212] This was not out of line; in fact, in two prior decisions the Supreme Court explained that a federal habeas court need only apply the *Brecht* test to evaluate whether state trial error was harmless.[213] The Sixth Circuit held that Davenport had made this showing.

However, the Supreme Court reversed and explained that because the state court had ruled on the merits of the *Chapman* question, the federal habeas court must perform AEDPA review and determine whether the state court's decision was "'contrary to or an 'unreasonable application of' clearly established federal law" before looking to the substantial and injurious effect under *Brecht*.[214] Because the Court believed the state court's decision was not contrary to or an unreasonable application of *Chapman*, habeas relief was not proper.[215] Notably, the Court explained that although AEDPA "announced certain new conditions to relief," it "did not guarantee relief upon their satisfaction."[216] Instead, the Court reasoned that Congress left intact the "equitable discretion traditionally invested in federal courts" by § 2241(a) and § 2243.[217] So even a petitioner who prevails under AEDPA *must also* prove that "'law and justice require' relief."[218]

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208 Davenport, 596 U.S. at 123–24.

209 *Id.* at 123 (citing Deck v. Missouri, 544 U.S. 622 (2005)).

210 *Id.* (citing Chapman v. California, 386 U.S. 18 (1967)).

211 *Id.* at 124-25.

212 *Id*. at 126.

213 *See* Fry v. Pliler, 551 U.S. 112, 119–20 (2007); Davis v. Ayala, 576 U.S. 257, 267–70 (2015).

214 Davenport, 596 U.S. at 125 (quoting 28 U.S.C. § 2254(d)).

215 *Id*. at 134.

216 *Id*.

217 *Id*.

218 *Id.* (quoting 28 U.S.C. § 2243).

This break from precedent is astonishing.[219] *Davenport* "observ[es] that habeas courts had the power (not the duty) to issue habeas relief" and more concerning, habeas courts had "the discretion to deny otherwise warranted habeas relief"[220] by operation of the provisions "writs of habeas corpus *may* be granted"[221] and habeas should be granted "as law and justice require."[222] These phrases, Kovarsky rightly contends, are interpreted too broadly and evince a new breed of *negative* equitable court-created power.[223]

One month later, *Ramirez* took *Davenport* and ran with it. *Ramirez*, however, seems to bestow upon district courts unfettered discretion in not only fashioning habeas relief, but also deciding whether to grant relief in the first place. The *Ramirez* Court also relies on a familiar trope of finality over error correction, which we see in *Jones* as well.

Ramirez involved two separate cases, but both defendants, Ramirez and Jones, were sentenced to death, and, after losing direct appeals, sought postconviction relief in Arizona state court.[224] They were denied postconviction relief but filed federal habeas corpus petitions, contending that both trial and postconviction counsel were ineffective.[225] Both Ramirez and Jones were allowed to present evidence and witness testimony in district court, and those courts ultimately concluded that trial counsel in both cases were ineffective and the procedural default should be excused.[226] But the Supreme Court held that neither Ramirez nor Jones should have been able to present new evidence of ineffective assistance in the district court.[227]

While the outcome at first blush seems to restrict the discretion of district courts hearing habeas cases from state court, in the end, the reasoning upon which the decision was based trends far in the other direction. Relying on *Davenport*, *Ramirez* claimed that "even if a prisoner

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[219] Justice Kagan explained in dissent, "Twice in recent years, this Court has addressed how a federal habeas court is to evaluate whether a state trial error was harmless. And twice, we have made clear that the habeas court need apply only the standard prescribed in *Brecht v. Abrahamson*; it need not also run through the test set out in [AEDPA]." Davenport, 596 U.S. at 145–46 (Kagan, J., dissenting) (citations omitted) (citing Fry v. Pliler, 551 U.S. 112, 119–20 (2007); Davis, 576 U.S. at 267–70).

[220] Kovarsky, *supra* note 7, at 2230 (internal quotation marks omitted).

[221] 28 U.S.C. § 2241(a).

[222] 28 U.S.C. § 2243.

[223] Kovarsky provides a compelling argument that the Court's reliance on "law and justice" and the word "may" in §§ 2243 and 2241 is improper as a matter of statutory intent and construction. *See supra* note 7, at 2233–34.

[224] Ramirez, 596 U.S. at 372–75.

[225] *Id*.

[226] *Id*.

[227] *Id*. at 390–91.

overcomes all of the[] [AEDPA and judge-made] limits [on habeas relief], he is never entitled to habeas relief. He must still 'persuade a federal habeas court that law and justice require [it].'"[228] The breadth of this statement allows for the interpretation that federal habeas courts can dictate what "law and justice" means in each individual case. Kovarsky notes that "*Ramirez* recited the negative equity proposition from *Davenport*, but with a potentially crucial difference . . . . It alluded to the judge-made limits, and it invoked § 2243's law-and-justice language as license for lower courts to impose *additional* limits on habeas relief."[229] In addition, *Ramirez*'s "single-minded focus on finality" attempts to make up for its flimsy statutory analysis.[230] The majority explains that it is the Court's "overarching responsibility 'to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism.'"[231] Ironically, the majority cites to *Martinez v. Ryan* for this proposition, while at the same time essentially eviscerating *Martinez*'s reasoning that a petitioner should not be held responsible for his counsel's failure to raise ineffective assistance claims in state court.

"*Davenport* and *Ramirez* don't perform serious analysis of statutory text"; "The opinions attempt to justify the rule in other ways,"[232] and the same is true with *Jones*. The *Jones* majority rejects traditional canons of construction and long-standing habeas jurisprudence to read into statutory language limitations that are decidedly absent. By rejecting the clear statement rule in *Jones* in favor of an illusory "finality," even when the Court has applied that rule in habeas cases dating back to the 1800s, the Court is giving district courts not just "license . . . to discretionarily deny relief," but also a misguided statutory basis for doing so.[233]

B. Support for Amendment

In closing her dissenting opinion, Justice Jackson stated, "It seems to me that today's opinion—which unjustifiably closes off all avenues for certain defendants to secure meaningful consideration of their innocence claims—creates an opening for Congress to step in and fix this problem."[234] For the reasons mentioned above (at least), the Court's view of the applicable sections of AEDPA in *Jones* were contrary to Supreme Court norms and notions of fairness. In this Section, I will discuss two

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[228] *Id.* at 377 (quoting *Davenport*, 596 U.S. at 134).
[229] Kovarsky, *supra* note 7, at 2230–31.
[230] Ramirez, 596 U.S. at 407 (Sotomayor, J., dissenting).
[231] *Id*. at 387 (quoting *Martinez v. Ryan*, 566 U.S. 1, 9 (2012)).
[232] Kovarsky, *supra* note 7, at 2250.
[233] *Id*. at 2229 (emphasis omitted)
[234] Jones, 599 U.S. at 532 (Jackson, J., dissenting).

options for amendment to AEDPA that would override[235] the Court's decision in *Jones* and restore traditional habeas rights to prisoners across the country.

Judges and scholars have recognized the unfairness of the *Jones* decision (and before *Jones*, the unreasonableness of those decisions reading the saving clause too narrowly). While the Circuit split was deepening, majority and dissenting opinions addressed the unfairness of the constriction of the saving clause to shut out prisoners whose convictions were arguably invalid based on a change in statutory law. For example, Judge Thapar in the Sixth Circuit noted that "[i]t seemed unfair to apply § 2255(h) to close the procedural door on prisoners whose *Bailey* arguments might be winners," and it "bothered courts" to allow these post-statutory-change claims to go unaddressed.[236] Courts like the Seventh Circuit began their analyses of such claims with the premise that "adequacy" within the meaning of the saving clause "requires determining what the essential function of habeas corpus is," and that essential function is "to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence."[237]

Scholars have called for a congressional amendment to fix the problem *Jones* has created. Daniel Medwed of Northeastern College of Law explained, "Perhaps Congress could add a third route [for second or successive petitions], and even tailor it narrowly to gain bipartisan support."[238] He mused, "This would address Justice Jackson's core concern about 'slamming the courtroom doors to a possibly innocent person,' while simultaneously avoiding any reference to the saving clause, let alone making that provision the 'license for unbounded error correction' that Justice Thomas feared."[239] Tom Jordan has opined that to protect AEDPA from violating the Suspension Clause, the Court should have adopted the broad reading of the saving clause; the fact that it did not do so shows that it "has gone out of its way to gut the Suspension Clause and

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[235] For an intriguing discussion of congressional overrides of Supreme Court case law, see Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, *1967-2011*, 92 TEX. L. REV. 1317, 1336 (2014).
[236] Wright v. Spaulding, 939 F.3d 695, 699 (6th Cir. 2019); *see also* Ethan D. Beck, *Adequate and Effective: Postconviction Relief Through Section 2255 and Intervening Changes in Law*, 95 NOTRE DAME L. REV. 2063, 2070 (2020).
[237] In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998), *abrogated by* Jones v. Hendrix, 599 U.S. 465 (2023); *see also id.* at 608 ("The retention of the old language opens the way to the argument that when the new limitations prevent the prisoner from obtaining relief under 2255, his remedy under that section is inadequate and he may turn to 2241.").
[238] Daniel Medwed, *Justices' Habeas Ruling Further Saps Writ Of Its Strength*, LAW360 (July 7, 2023, 3:10 PM), https://www.law360.com/articles/1696665/justices-habeas-ruling-further-saps-writ-of-its-strength.
[239] *Id.*

leave the innocent without recourse."[240] And Paige Skousen Nelson has recently noted the problem with differing shades of "innocence" in habeas jurisprudence and presented her own amendments to AEDPA, which are discussed in tandem with mine below.[241]

C. What an Amendment Could Look Like

There are two viable options for amendments to § 2255 that would fix the problem created by the *Jones* decision: changing the language of § 2255(h) or changing the language of the saving clause.[242] The former is easier, cleaner, and resolves more of the issues inherent in *Jones*, including the idea that constitutional claims of innocence are treated differently than statutory ones. This Article presents these options as a starting point, but certainly not a panacea. For example, it is beyond the scope of this Article how other AEDPA provisions may need to be amended, and cross-references shored up, or how courts and public defenders might handle court filings pursuant to such an amendment logistically. But for now, these options present a viable starting point in remedying the legal quagmire *Jones* has created.

Option #1

The first and most obvious approach would be to amend § 2255(h) to allow for second or successive petitions that are based on new rules of *statutory* law, made retroactive by the Supreme Court, that were previously unavailable. Such an amendment could be made by adding merely two words to the statute below:

> (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

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240 Tom Jordan, *What's Left of the Suspension Clause After Jones v. Hendrix?*, 120 WASH. UNIV. L. REV. ONLINE 23-39 (2024). While the effect of the *Jones* decision on Suspension Clause jurisprudence is beyond the scope of this Article, Jordan engages in a thoughtful discussion of its application (or lack thereof) in *Jones*.

241 Paige Skousen Nelson, *Innocence and Habeas Corpus: A Call for Equitable Reforms*, 50 B.Y.U. L. Rev. 863, 891–95 (2025).

242 *See id*. at 887-94. Nelson also grappled with this idea and presented two similar options for revision. There are differences in our approaches, explained below, but the idea is the same: revision to either § 2255(h) or the saving clause is the main way to solve the problem created by *Jones*.

> (2) a new rule of constitutional or statutory law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.243

While circuits like the Fourth Circuit also included retroactive changes in *circuit-level* law in their tests for saving clause relief, codifying this in § 2255(h) could lead to other problems. For example, prisoners could be subject to different standards of statutory interpretation based on the place of their incarceration. In addition, this change may require clarification for the use and scope of the saving clause. If Congress decides to allow second or successive § 2255 motions based on retroactive changes in statutory law—as it should—it could also clarify parameters for the saving clause "inadequate or ineffective" language.

Nelson proposes adding a third option to § 2255(h): "(3) a change in statutory interpretation occurring after a previous petition that impacts the validity of the movant's conviction or sentence."[244] But this language goes both too far and not far enough. First, requiring petitioners to prove that a change in statutory law "impacts the validity" of one's conviction or sentence at the certification stage is vague and perpetuates the very problem a revision would aim to solve: treating statutory innocence claims differently from constitutional innocence claims. There is no similar requirement in § 2255(h) that petitioners prove up front that a constitutional change in the law impacts the validity of the detention—this is left to the merits of a § 2255(a) inquiry. On the flip side, Nelson's revision purports to absolve statutory innocence claims of the retroactivity requirement. Therefore, adding two simple words "or statutory" would not only be a streamlined revision, but it would also place statutory innocence claims on par with constitutional ones.

Option #2

The other option is to clarify the language of the saving clause regarding the meaning of "inadequate and ineffective." Congress could clarify that a prisoner could file a traditional habeas petition if he could satisfy certain criteria, borrowed from the tests of the Circuits holding the majority view before *Jones.* Of these tests, the most common requirements were that (1) the prisoner make a showing of a fundamental defect or manifest injustice, such as actual innocence[245] based on a retroactive change in the

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[243] 28 U.S.C. § 2255(h) (modification added).

[244] Nelson, *supra* note 241 at 890.

[245] The "actual innocence" standard applicable here is found in Bousley v. United States, 523 U.S. 614, 623 (1998): "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." (internal quotation marks omitted). In Stephens v. Herrera, the Ninth Circuit applied this standard and recognized that it could support a prisoner passing through the saving

law, and (2) the prisoner is barred from filing a second or successive motion under § 2255(h). The language has also created confusion in use of the phrases "remedy by motion" and "test the legality," so those terms should be clarified to reflect that a prisoner should have at least one reasonable opportunity to challenge an invalid conviction. Such an amendment would be more involved and would look something like this:

> 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~~
>
> ***I.*** ***a motion brought pursuant to this section would be barred by subsection (h);***
>
> ***II.*** ***the prisoner successfully demonstrates a fundamental defect or manifest injustice in his conviction or sentence; and***
>
> ***III.*** ***the prisoner has had no reasonable opportunity to challenge this fundamental defect in prior proceedings***.

The main drawback from this proposed change becomes whether habeas corpus petitions passing through the savings clause would then be addressed by the district court in the place of confinement, as traditional § 2241 petitions always were,[246] or whether petitions would be addressed by the district court that sentenced the prisoner. This amendment is also less ideal if the language in § 2255(h) would remain as is, and as explained, this language unfairly demarcates a line between constitutional claims and statutory innocence claims, indicating that the former can challenge a purported illegal detention, but the latter may not, at least the second time around.

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clause, but in that case, it determined the prisoner did not meet the standard. 464 F.3d 895.

[246] *See, e.g.*, Reyes-Requena v. United States, 243 F.3d 893, 906 (5th Cir. 2001) ("As a § 2241 petition may be filed only in the district of the prisoner's incarceration, the Southern District acted properly in transferring Reyes's motion to the Eastern District. The Eastern District must now rule on the merits of Reyes's § 2241 petition."); In re Jones, 226 F.3d 328, 334 (4th Cir. 2000) ("[W]e conclude that he is entitled to file a habeas petition in the district of his confinement pursuant to § 2241."); In re Dorsainvil, 119 F.3d 245, 252 (3d Cir. 1997) ("Our denial is without prejudice to Dorsainvil's right to file a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in a district court in the district of his confinement.").

Nelson proposes adding the following language to the end of the saving clause: "or unless there has been a change in statutory interpretation that impacts the validity of the prisoner's conviction or sentence."[247] My proposed revision takes this notion a step further and delineates how broadly "inadequate and ineffective" should be read, as well as offers more specifics regarding how the validity of a prisoner's conviction or sentence might be impacted.

In the end, the most logical, cleanest, and efficient revision would be to add a mere two words to the language of § 2255(h) in order to memorialize what the Supreme Court (until *Jones*) and Congress have long understood: a prisoner must be able to challenge the illegality of his sentence on the grounds that it was "imposed in violation of the . . . *laws* of the United States," regardless of his diligence in filing earlier petitions and regardless of whether the "law" is constitutional or statutory.[248]

CONCLUSION

After the Supreme Court's decision in *Jones v. Hendrix*, thousands of prisoners who were diligent in their efforts to challenge the legality of their detention within AEDPA's one-year statute of limitations are now being punished for their diligence. That singular challenge has now precluded them from ever again challenging their conviction or sentence based on a change in statutory law that could render them actually innocent of committing a crime. The majority's decision in *Jones* rejects longstanding statutory interpretations in favor of an obsession with finality (or the illusion thereof) at the expense of core ideals that have always been a part of this country's habeas corpus jurisprudence. It also takes another step toward erosion of equitable protections for prisoners, in a habeas revolution begun by *Brown v. Davenport* and *Shinn v. Ramirez*. A simple two-word amendment could enable prisoners to have that one crucial chance to test the legality of their detention after a change in statutory law. Congress must fix this problem, restore deep-seated notions of fairness to our justice system, and serve as a bulwark to the erosion of American habeas corpus.

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[247] Nelson, *supra* note 241, at 889.
[248] 28 U.S.C. § 2255(a).