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Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)

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Notwithstanding the extent to which scholars, lawyers, and community organizers are broadening their contestations of the criminal justice system, they have paid insufficient attention to federal sentencing regimes. Part of the reason for this is that sentencing is a "back-end" criminal justice problem and much of our nation's focus on criminal justice issues privileges "front-end" problems like policing. Another explanation might be that the rules governing sentencing are complex and cannot be easily rearticulated in the form of political soundbites. Yet sentencing regimes are a criminal justice domain in which inequalities abound—and in ways that raise profound questions about fairness, due process, and justice. This is particularly true regarding the draconian conditions placed on federal prisoners' abilities to challenge their unlawful sentences under 28 U.S.C. § 2255.

A federal prisoner's sentence is unlawful when courts—the Supreme Court or a controlling circuit court—wrongly interpret a statute that significantly enhanced the prisoner's sentencing range. After the person is sentenced and files a direct appeal and initial 28 U.S.C. § 2255 motion, the court corrects its errors and determines that correction to be retroactive. The federal prisoner returns to the sentencing court and requests to be sentenced under the correct, unenhanced sentencing range, as the original sentence is no longer authorized by law. There is a deep circuit split regarding whether federal prisoners may seek post-conviction relief for these sentencing claims under the savings clause, 28 U.S.C. § 2255(e)—the procedural vehicle that allows federal prisoners access to the court to challenge an unlawful sentence under the general habeas statute, 28 U.S.C. § 2241.

This Article's significance is twofold. First, because courts have struggled to discern the meaning of the savings clause, this Article provides a text-based interpretation of section 2255(e) that is grounded in the statute's text and is consistent with its structure and purpose. Second, this Article proposes a doctrinal test that courts should adopt in analyzing sentencing claims brought under the savings clause. Specifically, this Article proposes that relief under the savings clause is appropriate when

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the claim relies on a retroactively applicable decision of statutory interpretation, the claim was foreclosed by binding precedent at the time of the initial section 2255 motion, and the claim involves a fundamental defect in the sentence. This Article contends that any error that alters the statutory range Congress prescribed for punishment—the ceiling or the floor—raises separation of powers and due process concerns and is thus a fundamental defect in criminal proceedings. In short, federal prisoners should be able to access courts to raise their sentencing claims consistent with this Article's proposal.

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> "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[1]

INTRODUCTION

Inmates are sitting in federal prisons serving unlawful sentences.[2] Many will die in those prisons serving "unjust" sentences.[3] Nonetheless, some courts have held, *wrongly*, that these federal prisoners are foreclosed from any avenue of post-conviction relief under the habeas savings clause, 28 U.S.C. § 2255(e), thus depriving "the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."[4] In so doing, these courts arguably render the savings clause a nullity in violation of the Suspension Clause of the United States Constitution—the constitutional provision that guarantees that the writ of habeas corpus cannot be suspended absent narrow circumstances.[5]

Section 2255 includes the congressionally created statutory remedy for federal prisoners to challenge the validity of their convictions and sentences after their convictions become final.[6] Because Congress imposed "a litany of draconian conditions on prisoners' ability to challenge their convictions" through a successive section 2255 motion, federal prisoners turn to the general habeas statute, 28 U.S.C. § 2241, to seek relief from their conviction and, in some cases, their subsequent sentence.[7] "Congress explicitly allowed some prisoners

1. Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part).

2. The Department of Justice estimated that in 2015 (the latest year for which it has published statistics), there were 328,500 people in federal correctional custody. *See* Danielle Kaeble & Lauren Glaze, BUREAU of JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 12 (2016), https://www.bjs.gov/content/pub/pdf/cpus15.pdf [https://perma.cc/8DPZ-9NH7].

3. *See, e.g.*, United States v. Surratt, 797 F.3d 240, 269 (4th Cir. 2015) (Gregory, J., dissenting), *reh'g granted*, No. 14-6851 (4th Cir. Dec. 2, 2015) (explaining that the district court was "required to impose a life sentence" even though "it was [] unjust") .

4. Graham v. Florida, 560 U.S. 48, 70 (2010) (citing Solem v. Helm, 463 U.S. 277, 300–01 (1983)).

5. The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

6. *See* 28 U.S.C. § 2255 (2012); *see also* Leah M. Litman, *Judge Gorsuch and* Johnson *Resentencing (This Is Not a Joke)*, 115 MICH. L. REV. ONLINE 67, 67 (2017) (explaining that section 2255 "is the congressionally-created post-conviction remedy for federal prisoners").

7. Litman, *supra* note 6, at 68–70.

to do just that"[8] in federal cases with the savings clause, section 2255(e).[9] Specifically, this provision allows a federal prisoner to file a petition for federal habeas corpus pursuant to section 2241, when the "remedy" provided by section 2255 is "inadequate or ineffective to test the legality of his detention."[10] Thus, in essence, the savings clause is an important lynchpin in our constitutional structure: it ensures that there must be an adequate substitute procedure for habeas corpus—the principle that prisoners must have a meaningful opportunity to demonstrate that they are being held pursuant to an erroneous application or interpretation of relevant law—to be in compliance with the Suspension Clause.[11]

The question presented in this Article—whether sentencing errors can be pursued under the savings clause, section 2255(e)—goes to the heart of the integrity, fairness, and credibility of our criminal justice system.[12] The answer, which finds support in the text, purpose, and history of the savings clause, must be yes. Yet, as demonstrated by two recent cases, courts have struggled to interpret the savings clause.

Raymond Surratt Jr. pleaded guilty to conspiracy to distribute cocaine when he was thirty-one years old.[13] Surratt was sentenced to a mandatory minimum life term.[14] Everyone agreed Surratt's sentence was unjust—the government, the district court, and the public[15]—because the Fourth Circuit wrongly interpreted the requirements for a predicate felony for an enhanced sentence under the Controlled Substances Act (CSA).[16] That correction came after Surratt was sentenced and filed his direct appeal and first section 2255 motion.[17] Under the correct interpretation, Surratt's sentencing range was twenty years to life imprisonment, not a mandatory life term.[18] The district court made clear during Surratt's sentencing that if the court had discretion, the court would have likely sentenced Surratt to *twenty years* because a life sentence was "undeserved and

8. *Id.* at 70.

9. *See* Prousalis v. Moore, 751 F.3d 272, 275 (4th Cir. 2014) (stating that a prisoner "may file a habeas petition under § 2241 only if the collateral relief typically available under § 2255 'is inadequate or ineffective to test the legality of his detention'" (quoting 28 U.S.C. § 2255(e))).

10. 28 U.S.C. § 2255(e).

11. *See* Boumediene v. Bush, 553 U.S. 723, 779 (2008).

12. I share Justice Sonia Sotomayor's deep concern that many people already, including myself, lack confidence in the criminal justice system. *See* Utah v. Strieff, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting) ("Until . . . voices [of people of color] matter too, our justice system will continue to be anything but.").

13. United States v. Surratt, 797 F.3d 240, 270 (4th Cir. 2015) (Gregory, J., dissenting), *reh'g granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

14. *Id.* at 244 (majority opinion).

15. *See, e.g.*, Ann E. Marimow, *All Agree His Sentence Was Too Harsh, but He May Still Stay Locked up Forever*, WASH. POST (Mar. 22, 2016), https://www.washingtonpost.com/local/public-safety/all-agree-his-sentence-was-too-harsh-but-he-may-still-stay-locked-up-forever/2016/03/22/0d34aea2-ed3e-11e5-bc08-3e03a5b41910_story.html?utm_term=.ae57c2646c83.

16. 21 U.S.C. §§ 841, 846 (2012).

17. *Surratt*, 797 F.3d at 244–46.

18. *Id.* at 269 (Gregory, J., dissenting) (citing 21 U.S.C. § 841(b)(1)(A)).

unjust."[19] Surratt pursued habeas relief via the savings clause in the form of resentencing.[20] A divided panel on the Fourth Circuit said that "its hands [were] tied because Surratt received 'only' a life sentence, and not more than the statutory maximum."[21] A stinging dissent followed by Judge Roger L. Gregory, contending that "[b]y foreclosing any avenue for post-conviction relief, the majority essentially punishes Surratt for not having received the death penalty."[22] Before the Fourth Circuit could address this issue en banc, President Barack Obama commuted Surratt's sentence, mooting the appeal.[23]

In *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, the maximum sentence that Dan Carmichael McCarthan could serve—based on his conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g)—was ten years.[24] The district court, however, sentenced him to seventeen years and seven months, concluding that he was eligible for an enhanced sentence under the Armed Career Criminal Act (ACCA).[25] The court based its conclusion, in part, on the district court's determination—supported by then-existing precedent[26]—that McCarthan's previous conviction for walk-away escape was a "crime of violence" under the ACCA, and thus qualified as one of the three predicate convictions that justified the sentencing enhancement.[27] After the district court adjudicated McCarthan's section 2255 motion, the Supreme Court held in *Chambers v. United States* that walk-away escape is not a crime of violence.[28] *Chambers* therefore confirmed that there was never a legal basis for the sentence—seven years and seven months *above* the statutory maximum—the district court imposed on McCarthan. At this point, the only procedural vehicle available to McCarthan to have his sentence corrected by the district court was the savings clause, § 2255(e).

Federal circuit courts are split on whether these sentencing-error claims can be pursued under the savings clause. In particular, the circuits are divided on

19. *Id.*

20. *See id.* at 244 (majority opinion).

21. *Id.* at 269–70 (Gregory, J., dissenting).

22. *Id.* at 270.

23. *See* United States v. Surratt, 855 F.3d 218, 219 (4th Cir. 2017).

24. 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 502 (2017).

25. *Id.*

26. *See id.*; United States v. Gay, 251 F.3d 950, 954 (11th Cir. 2001) ("We agree with the reasoning of these courts and now hold that a prior escape conviction qualifies as a 'crime of violence' under the career offender guideline." (citation omitted)), *abrogated by* United States v. Chambers, 473 F.3d 724 (7th Cir. 2007).

27. *See McCarthan*, 851 F.3d at 1080. McCarthan had three prior felony convictions: "(1) a 1987 conviction in Florida for possession of cocaine with intent to sell or deliver; (2) a 1992 conviction in Florida for escape; and (3) a 1994 conviction in Florida for third-degree murder." *Id.* at 1120. At the time of sentencing, there was a mandatory-minimum sentence of fifteen years of imprisonment if the defendant "ha[d] three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." *See* 18 U.S.C. 924(e)(1) (2012). Had the escape conviction not counted as a "crime of violence," the mandatory minimum sentence would not have been triggered.

28. 555 U.S. 122, 130 (2009) (holding that some forms of the crime of escape do not qualify as a "violent felony" under ACCA (quoting 18 U.S.C. § 924(e)(2)(B)(ii))).

whether, and under what circumstances, federal prisoners can resort to the savings clause when they are serving an enhanced sentence that is no longer authorized by law. The Third, Fifth, Tenth, and Eleventh Circuits routinely deny relief to federal prisoners seeking habeas relief in the form of resentencing.[29] Those courts have interpreted section 2255(e) to provide relief—if at all—*only* in rare cases, such that a person can show that they are actually innocent of the underlying crime.[30] Consequently, habeas petitions that claim only sentencing errors—no matter how egregious those errors are—often fail because courts lack jurisdiction to consider them. The Sixth and Seventh Circuits have concluded that some sentencing errors can be addressed under the savings clause. Even still, this review only occurs in those instances in which the current sentence falls outside of the maximum sentence allowable under law or "shares similarities with serving a sentence imposed above the statutory maximum."[31] Additionally, the Fourth Circuit recently held that a sentencing claim can be addressed if the sentence presents an "error sufficiently grave to be deemed a fundamental defect."[32]

Because McCarthan was sentenced in the Eleventh Circuit rather than, for example, the Seventh Circuit, he was denied any relief.[33] There is little doubt that he would have been released from prison long ago had he been sentenced in the Seventh Circuit. Instead, McCarthan was imprisoned for seven years and seven months *longer* than Congress authorized. Whether McCarthan was entitled to any remedy for this injustice should not have been determined based on the circuit in which he was sentenced. Moreover, it appears that only the Fourth Circuit would consider Surratt's claim because, although there was a significant mistake in the mandatory minimum baseline—life imprisonment instead of twenty years—his sentence remains *within* the statutory guidelines range Congress authorized: twenty years to life imprisonment.

In an effort to resolve this deep circuit split, this Article does two important things. First, this Article provides a text-based interpretation of section 2255(e) that is grounded in the statute's text and consistent with its structure and purpose.[34] To date, courts have struggled to interpret or give any substantive

29. *See* Gardner v. Warden Lewisburg USP, 845 F.3d 99, 102–03 (3d Cir. 2017); *McCarthan*, 851 F.3d at 1079–80; Bradford v. Tamez, 660 F.3d 226, 230 (5th Cir. 2011) (per curiam); Prost v. Anderson, 636 F.3d 578, 584–86 (10th Cir. 2011).

30. *See, e.g.*, Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001) ("We therefore hold that the savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a *nonexistent offense* and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." (emphasis added)).

31. Hill v. Masters, 836 F.3d 591, 599 (6th Cir. 2016); *see also* Brown v. Caraway, 719 F.3d 583, 587–88 (7th Cir. 2013) (holding that a miscarriage of justice occurs when a federal prisoner's sentence "exceed[s] that permitted by law").

32. United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018).

33. *See McCarthan*, 851 F.3d at 1100.

34. Textualism is a method of statutory interpretation that aims to construe statutes according to the plain or ordinary meaning of the text. *See, e.g.*, Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 204 (2018). Although there is debate amongst jurists and scholars on what the best method of statutory interpretation is or should be, the Supreme Court has repeatedly made

meaning to the savings clause.[35] Second, based on that interpretation, this Article proposes a workable doctrinal test that courts should adopt in analyzing sentencing claims brought under the savings clause. Specifically, this Article proposes that relief under the savings clause is appropriate when the claim relies on a retroactively applicable decision of statutory interpretation, the claim was foreclosed by binding precedent at the time of the initial section 2255 motion, and the claim involves a fundamental defect in the sentence. This Article contends that any error that alters the statutory range Congress prescribed for punishment—the ceiling or the floor—raises separation of powers and due process concerns and is thus a fundamental defect in the criminal proceedings. In these instances, federal prisoners—like McCarthan *and* Surratt—should have the ability to seek relief under the habeas savings clause, as that clause is a tool meant to be available to any persons who find themselves in prison when they ought not to be there.[36]

Ultimately, although this Article takes the position that its interpretive framework is workable, I predict that courts will continue to take a case-by-case approach to this issue, unless and until the Supreme Court addresses the current circuit split. In other words, courts prefer to resolve the cases before them as narrowly as possible instead of creating broad rules. Courts are concerned with the finality of judgments and judicial expediency; a broad rule may open the proverbial floodgates to collateral attack on sentences.[37] Those concerns are

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clear that "[s]tatutory interpretation [always] begins with the text." Ross v. Blake, 136 S. Ct. 1850, 1856 (2016) (citing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)). In any event, the interpretive outcome advanced in this Article is likely under any method of statutory interpretation because the statute's text, structure, and purpose all support this Article's interpretation of the savings clause.

35. *Compare* Prost v. Anderson, 636 F.3d 578, 584–86 (10th Cir. 2011) (interpreting the savings clause to not allow any relief for actual innocence claims or sentencing claims), *with* Gardner v. Warden Lewisburg USP, 845 F.3d 99, 102–03 (3d Cir. 2017) (interpreting the savings clause to conclude that only actual innocence claims are cognizable), *and Wheeler*, 886 F.3d at 429 (interpreting the savings clause to allow both actual innocence and sentencing claims).

36. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 731 (2016) ("A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." (citation omitted)).

37. *See, e.g.*, Gilbert v. United States, 640 F.3d 1293, 1334 (11th Cir. 2011) (Martin, J., dissenting) ("Finality is valued in our system insofar as it promotes certain principles: (1) to build confidence in the integrity of the judicial system; (2) to minimize administrative costs and delay; (3) to avoid spoilation of evidence; and (4) to honor comity." (citing United States v. Addonizio, 442 U.S. 178, 184 n.11 (1979))); *Prost*, 636 F.3d at 582–83 ("The principle of finality, the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, 'is essential to the operation of our criminal justice system.'" (quoting Teague v. Lane, 489 U.S. 288, 309 (1989))); *see also Addonizio*, 442 U.S. at 184 n.11 (1979) ("[I]ncreased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful." (citation omitted)); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451–53 (1963) (discussing the benefits of finality, including the "conservation of resources," efficiency, and deterrence credibility in

real.[38] But, such concerns should not take precedence over justice. And, justice requires resorting to the savings clause to correct fundamental sentencing errors. Any other interpretations of the habeas savings clause, this Article argues, likely violate the Suspension Clause of the United States Constitution.

After all, the fairness, integrity, and legitimacy of the judicial system is seriously undermined—if not permanently damaged—when courts deny federal prisoners the right to pursue meritorious challenges to their unlawful detention. Therefore, unless and until the Supreme Court resolves the current circuit split in favor of allowing sentencing claims to proceed through the habeas savings clause, we must ask: "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?"[39]

The discussion below proceeds as follows. Part I of this Article discusses the statutory background of the savings clause. There, this Article reviews the development of section 2255 and discusses how the provisions of section 2255 interact. Though other scholars have broadly described this statutory framework, my account will put these dimensions of this area of law into sharp relief. Part II provides an overview of the current circuit split. As I will explain, central to this split is the question over the meaning of the savings clause. Part III provides a text-based interpretation of section 2255(e) that is grounded in the statute's text and consistent with its purpose and structure. Based on this interpretation, I propose a doctrinal test to address sentencing claims. Part IV argues that there are serious constitutional concerns when courts wrongly interpret a federal statute that results in a sentencing ceiling or floor increase, such as an increased mandatory-minimum sentence. Finally, Part V discusses *United States v. Surratt* and applies this Article's proposal to those facts. *Surratt* deserves more discussion for two

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criminal law). None of these principles are advanced, in my view, in denying federal prisoners' relief from unlawful sentences. Consider Judge Martin's dissent in *Gilbert*:

> First, denying relief does not build confidence in our court system because this looks to the world like a court refusing to acknowledge or make amends for its own mistake. Second, to the extent that there have been administrative costs and delay in considering [the federal prisoner's] request for relief, they have already been incurred and [the court] need only grant him that relief to end [the federal prisoner's] very expensive incarceration.

640 F.3d at 1334 (Martin, J., dissenting); *see also* Sun Bear v. United States, 644 F.3d 700, 712 (8th Cir. 2011) (Melloy, J., dissenting) ("I find the sole justification for the majority's holding today to be an uncompelling and unjust denial of process resting on hollow claims of a need to promote finality."). "Third, because the only issue before [the court] is a purely legal one, there is no evidence that [courts] must consult." *Gilbert*, 640 F.3d at 1334 (Martin, J., dissenting). "And finally," these cases present "no comity concerns insofar as [federal prisoners seek] to correct a sentence imposed in federal court and not by the state." *Id.*

38. *See Gilbert*, 640 F.3d at 1337 (Hill, J., dissenting) ("I recognize that without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement.").

39. *See* Rosales-Mireles v. United States, 138 S. Ct. 1897, 1908 (2018) (internal quotation marks omitted) (quoting United States v. Sabillon-Umana, 772 F.3d 1328, 1333–34 (10th Cir. 2014)).

reasons. First, the case highlights that not only does a sentence above the statutory maximum present a fundamental defect—any error that alters the statutory range Congress prescribed for punishment is a fundamental defect, as explained below. Second, and equally as important, is that people with claims similar to Surratt's are still sitting in prison serving unlawful sentences.

I. THE "SAVINGS CLAUSE"

"The writ of habeas corpus is of such fundamental importance to this nation's legal system that it is known as the Great Writ."[40] In the Framers' view, "freedom from unlawful restraint [i]s a fundamental precept of liberty."[41] The "vital instrument to secure that freedom" was the writ of habeas corpus.[42] For this reason, contained in the very blueprint of our nation—the Constitution—is the prohibition on suspension of the writ.[43] Specifically, at the constitutional convention, the Framers decided not to include an affirmative guarantee of the writ of habeas corpus, but instead a provision that prohibited the writ's suspension.[44] A few years later in its first session, Congress passed the Judiciary Act of 1789, section 14 of which granted federal courts the power to issue habeas writs and is codified as amended at 28 U.S.C § 2241.[45] Congress bestowed on "the courts broad remedial powers to secure the historic office of the writ."[46]

Congress amended section 2241 several times, including in 1948.[47] The 1948 recodification added section 2255 to the statutory scheme, which provided a new motion by which federal prisoners could seek post-conviction relief, separate and apart from an application for a writ of habeas corpus under section 2241.[48] The main impetus for section 2255 was to address concerns that federal courts located near prisons were flooded by petitions from prisoners who, until that point, were

40. McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1113 (11th Cir. 2017) (en banc) (Martin, J., dissenting) (citing *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807)), *cert. denied*, 138 S. Ct. 502 (2017).

41. *See* Boumediene v. Bush, 553 U.S. 723, 739 (2008).

42. *See id.*

43. U.S. CONST. art. I, § 9, cl. 2.

44. *See id.*; Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process, and the Suspension Clause: A Study in the Foundations of American* Constitutionalism, 96 VA. L. REV. 1361, 1370–72 (2010) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1987, at 438 (Max Farrand ed., rev. ed. 1966) (discussing the debate over habeas corpus and the Suspension Clause at the Constitutional Convention)).

45. *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C § 2241 (2012)). The "[p]ower to issue the writ of habeas corpus, the most celebrated writ in the English law, was granted to the federal courts in the Judiciary Act of 1789." United States v. Hayman, 342 U.S. 205, 210 (1952) (internal quotation marks and footnote omitted). In *Hayman*, the Supreme Court reviewed the reasons for passage of § 2255. *Id.* The Court recognized the role of section 2241 for those cases in which section 2255 cannot provide relief, stating that "[i]n a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy [in § 2241] shall remain open to afford the necessary hearing." *Id.* at 223.

46. *Boumediene*, 553 U.S. at 776.

47. *See* Medberry v. Crosby, 351 F.3d 1049, 1056–58 (11th Cir. 2003) (providing the legislative history of post-conviction relief statutes).

48. *See id.* at 1056.

required by section 2241 to apply for writs in the district of their confinement.[49] In this way, section 2255 "replaced traditional habeas corpus for federal prisoners . . . with a process that allowed the prisoner to file a motion with the sentencing court."[50] Importantly, the Supreme Court has confirmed on several occasions that section 2255 was never meant to abridge the writ, but was simply crafted to address practical concerns of habeas administration.[51]

The 1948 amendments also gave birth to the so-called "savings clause" found in section 2255(e). This section provides that a federal prisoner may not apply for the traditional writ of habeas corpus under section 2241 unless the remedy under section 2255 is "inadequate or ineffective to test the legality of [] detention."[52] The full text reads as follows:

> 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.[53]

Legislative history provides hardly any explanation for the inclusion of this language.[54] In recent years, however, the Supreme Court has described the savings clause as ensuring that subsequently enacted limitations in section 2255, described below, do not run afoul of the Suspension Clause.[55] As a result of these

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49. *See Hayman*, 342 U.S. at 210–13 ("These practical problems have been greatly aggravated by the fact that the few District Courts in whose territorial jurisdiction major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions . . . .").

50. *Boumediene*, 553 U.S. at 774.

51. *See* Davis v. United States, 417 U.S. 333, 343 (1974) ("Th[e] [legislative] history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus."); *id*. at 344 ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions."); Hill v. United States, 368 U.S. 424, 427 (1962) ("[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 in the court of the district where the prisoner was confined." (footnote omitted)); *Hayman*, 342 U.S. at 219 ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions."); s*ee also In re* Jones, 226 F.3d 328, 332–33 (4th Cir. 2000) (discussing the practical problems, including "the large number of habeas petitions filed in districts containing federal correctional facilities" (citing *Hyman*, 342 U.S. at 212–14)). Congress's "purpose and effect" in enacting section 2255, therefore, "was not to restrict access to the writ but to make postconviction proceedings more efficient." *Boumediene*, 553 U.S. at 775.

52. 28 U.S.C. § 2255(e) (2012).

53. *Id*.

54. *See* Wofford v. Scott, 177 F.3d 1236, 1240–42 (11th Cir. 1999) ("Unfortunately, we have found nothing in the legislative history explaining why the relevant language was changed or what the new language means."), *overruled by* McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017) (en banc).

55. *See Boumediene*, 553 U.S. at 776 ("The Court placed explicit reliance upon [the savings clause] in upholding [section 2255] against constitutional challenges." (citation omitted)); *see also Hayman*,

collective 1948 amendments, "the § 2255 motion has displaced the writ of habeas corpus under § 2241 as the basic collateral remedy for persons confined pursuant to a federal criminal conviction."[56]

The next significant statutory habeas amendments occurred with the 1996 passage of the Antiterrorism and Effective Death Penalty Act (AEDPA). Congress accomplished two important things in AEDPA. First, although AEDPA imposed new restrictions on federal prisoners' ability to file multiple section 2255 motions challenging their convictions and sentences,[57] those restrictions merely "statutorily codified the abuse of writ doctrine," a common law doctrine designed to prevent the abuse of habeas corpus.[58] Specifically, as the Supreme Court has told us, AEDPA was concerned with preventing "habeas-by-sandbagging" and repeated re-litigation of the same claims.[59] Indeed, in section 2255(h), Congress expressly permitted federal prisoners to file successive petitions to challenge the legality of their convictions or sentences in either of the following circumstances: through new evidence of factual innocence or through a new, retroactive rule of constitutional law.[60]

Second, and paramount, Congress, re-codified the saving clause as a new statutory subsection in AEDPA, "leaving open a safety valve for federal prisoners 'to test the legality of [their] detention' where Section 2255, as revised, proved 'inadequate or ineffective'—including where they had been 'denied . . . relief' on an earlier Section 2255 motion."[61] In other words, Congress left intact the habeas savings clause in section 2255(e) as a residual source of authority for federal post-conviction relief, which "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[62] Thus, section 2255 continues to preserve the core function of habeas review, which is to provide prisoners a meaningful opportunity to challenge illegal convictions or sentences.[63]

In sum, sections 2255(e), 2255(h), and 2241 interact in the following way: A federal prisoner may challenge his sentence by filing a motion under section 2255.[64] After this first section 2255 motion, the prisoner must seek leave to file a

342 U.S. at 223 (declining to "reach constitutional questions" regarding section 2255 based on the presence of the savings clause).

56. 7 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 28.9(a) (3d ed. 2007).

57. *See* 28 U.S.C. § 2255(h) (2012).

58. Muniz v. United States, 236 F.3d 122, 126 (2d Cir. 2001).

59. *See* Cullen v. Pinholster, 563 U.S. 170, 180–86 (2011) (citation and internal quotation marks omitted) (stating that AEDPA promotes comity between state and federal courts by ensuring that the state's consideration of a petitioner's claims are the "main event" rather than a "tryout on the road" to federal court (citing Wainwright v. Sykes, 433 U.S. 72, 90 (1977))); *see also* Felker v. Turpin, 518 U.S. 651, 664 (1996) ("The Act also codifies some of the pre-existing limits on successive petitions . . . .").

60. *See* 28 U.S.C. § 2255(h)(1)–(2).

61. *See* Brief for Amicus Curiae the Constitution Project in Support of Petitioner at 4, McCarthan v. Collins, 138 S. Ct. 502 (2017) (No. 17-85), 2017 WL 3531410 (quoting 28 U.S.C. § 2255(e)).

62. Boumediene v. Bush, 553 U.S. 723, 779 (2008) (quoting Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 302 (2001)).

63. *See* Trevino v. Thaler, 569 U.S. 413, 421 (2013).

64. *See* 28 U.S.C. § 2255(a).

second one under section 2255(h), by the procedures set forth in § 2244.[65] Relief via the traditional writ of habeas corpus, authorized by section 2241, is not available unless the mechanism provided under section 2255 proves to be "inadequate or ineffective to test the legality of [the prisoner's] detention."[66]

Although the history, purpose, and text of the savings clause is relatively clear, federal circuit courts are divided on whether sentencing errors fall under the savings clause.

II. THE SPLIT: CIRCUIT COURTS DISAGREE ON WHETHER SENTENCING ERRORS ARE COGNIZABLE UNDER THE SAVINGS CLAUSE

Most federal circuits agree—with the exception of the Tenth and Eleventh Circuits—that actual innocence claims[67] are cognizable under the savings clause, assuming specific procedural requirements are met.[68] However, there is a solid split between circuits on whether any sentencing error can pass through the habeas savings clause.[69] The Third, Fifth, Tenth, and Eleventh Circuits have

65. *See* 28 U.S.C. § 2255(h) (referring to section 2244).

66. 28 U.S.C. § 2255(e).

67. For an excellent discussion concerning actual innocence and habeas law, see generally Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018) (distinguishing legal innocence from factual innocence and explaining "how the existing federal habeas system can provide relief to legally innocent defendants").

68. *Compare* Wooten v. Cauley, 677 F.3d 303, 307 (6th Cir. 2012) (holding that actual innocence claims may be pursed under the savings clause), Marrero v. Ives, 682 F.3d 1190, 1192 (9th Cir. 2012) (same), Christopher v. Miles, 342 F.3d 378, 382–83 (5th Cir. 2003) (same), *In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000) (same), *In re* Davenport, 147 F.3d 605, 611–12 (7th Cir. 1998) (same), Triestman v. United States, 124 F.3d 361, 377, 380 (2d Cir. 1997) (same), *and In re* Dorsainvil, 119 F.3d 245, 248 (3d Cir. 1997) (same), *with* McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1079–80 (11th Cir. 2017) (en banc) (same), *cert. denied*, 138 S. Ct. 502 (2017), *and* Prost v. Anderson, 636 F.3d 578, 584–86 (10th Cir. 2011) (holding that actual innocence claims are not cognizable under the savings clause).

69. Although the Second and Eighth Circuits have not directly weighed in on whether sentencing errors are cognizable under the savings clause, it appears that some courts in those circuits would limit relief to actual innocence claims based on existing precedent. In other words, those courts have not had occasion to have that issue briefed, argued, and decided. *See, e.g.*, Dhinsa v. Krueger, 917 F.3d 70, 81 (2d Cir. 2019) ("We have interpreted the savings clause of subsection (e) to authorize a § 2241 petition only when § 2255 is unavailable *and* the petition is filed by an individual who (1) can prove actual innocence on the existing record, and (2) could not have effectively raised [his] claim[] of innocence at an earlier time, perhaps due to an intervening change in the governing interpretation of the statute of conviction." (alterations in original) (internal quotation marks and citation omitted)); Figueroa v. Fernandez, No. 9:19-CV-0373-GLS, 2019 WL 1762584, at *6 (N.D.N.Y. Apr. 22, 2019) ("Petitioner has provided no allegations or evidence of actual innocence; therefore, he has failed to establish that this exception applies."); Aubin v. Beasley, No. 2:18-cv-00051-DPM/PSH, 2018 WL 5724450, at *5 (E.D. Ark. Oct. 12, 2018) ("Aubin is not imprisoned for an offense that is no longer a crime. . . . The savings clause does not apply to such a claim.").

The Ninth Circuit has expressly stated that they "have not yet resolved the question whether a petitioner may ever be actually innocent of a noncapital *sentence* for the purpose of qualifying for the escape hatch." Marrero v. Ives, 682 F.3d 1190, 1193 (9th Cir. 2012). Further, some courts in the First Circuit have assumed, without deciding, that sentencing claims are cognizable under the savings clause. *See, e.g.*, Williams v. Spaulding, No. 18-cv-11554-KAR, 2019 WL 2107275, at *4 (D. Mass. May 14, 2019). The D.C. Circuit has yet to weigh in.

unequivocally closed this door to federal prisoners.[70] The Sixth and Seventh Circuits have cracked the door open enough for prisoners to seek relief when they are serving a sentence that exceeds the statutory maximum or "shares similarities with serving a sentence imposed above the statutory maximum."[71] And recently, the Fourth Circuit significantly opened the door to relief that is mostly consistent with the doctrinal test that this Article proposes.[72]

Although each of these courts grappled with the savings clause language—some more exhaustively and intentionally than others—none fully recognized that the plain meaning of the savings clause allows relief for sentencing errors and that any other interpretation raises profound constitutional questions.

A. THE DOOR IS CLOSED

The Third,[73] Fifth,[74] Tenth,[75] and Eleventh[76] Circuits have had occasion to consider whether a sentencing claim is cognizable under the savings clause. These courts, citing concerns of finality of judgments and judicial economy, have concluded that prisoners cannot resort to relief under the savings clause.[77]

In *Gilbert v. United States*, a case involving a collateral *Begay* claim,[78] the Eleventh Circuit, sitting en banc, addressed the question of whether "the savings

70. *See McCarthan*, 851 F.3d at 1079–80; Gardner v. Warden Lewisburg USP, 845 F.3d 99, 102–03 (3d Cir. 2017); Bradford v. Tamez, 660 F.3d 226, 230 (5th Cir. 2011) (per curiam); *Prost*, 636 F.3d at 584–86.

71. *See* Hill v. Masters, 836 F.3d 591, 599 (6th Cir. 2016); *see also* Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013).

72. *See* United States v. Wheeler, 886 F.3d 415, 419, 429 (4th Cir. 2018) (holding that a federal prisoner may file a successive claim for relief under section 2241 following change in substantive law that is retroactively applicable on collateral review, when the sentence "presents an error sufficiently grave to be deemed a fundamental defect" (citing 28 U.S.C. §§ 2241, 2255(e), 2255(h)(2) (2012))).

73. *See Gardner*, 845 F.3d at 103 ("[W]e [previously] recognized that § 2255's savings clause provides a safety valve for actual innocence, but without short-circuiting § 2255's gatekeeping requirements. Adopting Gardner's approach—under which all sentencing issues based on new Supreme Court decisions could be raised via § 2241 petitions—would accomplish just that." (citation omitted)).

74. *See Bradford*, 660 F.3d at 230 ("[A]ctual innocence of a career offender enhancement is not a claim of actual innocence of the crime of conviction and, thus, not the type of claim that warrants review under § 2241.").

75. The Tenth Circuit, undoubtedly, has the most restrictive savings clause jurisprudence. *See Prost*, 636 F.3d at 584–88 (concluding that actual innocence claims and sentencing claims are not cognizable under the savings clause). However, the Eleventh Circuit recently entered the race for that title. In *McCarthan*, the Eleventh Circuit explicitly relied on *Prost*'s reasoning to overturn its existing precedent that allowed actual innocence and sentencing claims to pass through the savings clause. *See* 851 F.3d at 1080, 1095–1100 ("We join the Tenth Circuit in applying the law as Congress wrote it and hold that a change in caselaw does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention.'" (citation omitted) (quoting 28 U.S.C. § 2255(e))), *cert. denied*, 138 S. Ct. 502 (2017).

76. *McCarthan*, 851 F.3d at 1080.

77. *See, e.g.*, *Prost*, 636 F.3d at 583 (discussing the finality principle).

78. A *Begay* claim is one in which a petitioner claims an error in the application of the violent felony enhancement, as defined in 18 U.S.C. § 924(e)(2)(B), which results in a higher statutory minimum and maximum sentence under section 924(e). *See* Begay v. United States, 553 U.S. 137, 145 (2008) (holding that driving under the influence, while posing a serious risk of injury to others, is not an ACCA predicate because the "conduct for which the drunk driver is convicted . . . need not be purposeful or deliberate").

clause of § 2255(e) appl[ies] to claims that the sentencing guidelines were misapplied in the pre-*Booker* mandatory guidelines era in a way that resulted in a substantially longer sentence that does not exceed the statutory maximum."[79] Before the Supreme Court held in *Booker* that the sentencing guidelines were only advisory, not mandatory, district courts had no discretion to sentence a defendant outside of the guidelines range.[80] The Eleventh Circuit determined that savings clause relief is unavailable to pre-*Booker* sentences, noting that the clause's text "does not indicate that it authorizes the filing of a § 2241 petition to remedy a miscalculation of the sentencing guidelines that already has been, or may no longer be, raised in a § 2255 motion,"[81] and citing the "finality-busting effects of permitting prisoners to use the savings clause as a means of evading the second or successive motions bar."[82] These policy interests prompted the court to "decline Gilbert's invitation to undermine finality of judgment principles by using § 2255(e) to knock down the second or successive motions bar that Congress constructed in § 2255(h)" and conclude that sentencing claims cannot be brought under section 2241 via section 2255(e).[83]

Several vigorous dissents followed. The dissenters argued that not allowing relief from a sentencing error that resulted in an *additional eight and one-half years of prison time* for Gilbert was not only an extraordinary miscarriage of justice, but also violated the Suspension Clause.[84] In particular, they argued that "where the application of the statutory bar in § 2255(h) would deny [] federal prisoner[s] such a meaningful opportunity" to demonstrate that they are being held pursuant to the erroneous application or interpretation of relevant law, "the savings clause must apply in order to avoid an unconstitutional suspension of the writ of habeas corpus."[85] The dissenters contended that the majority adopted a "Catch-22" approach to sentencing claims by not allowing federal prisoners to seek relief under the habeas savings clause because those prisoners previously

79. 640 F.3d 1293, 1306 (11th Cir. 2011). For an excellent account discussing Gilbert's journey through this case, see Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J. F. 848, 869–70 (2019).

80. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

81. *Gilbert*, 640 F.3d at 1307.

82. *Id.* at 1309.

83. *Id.* at 1312; *see also* McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1079–80 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 502 (2017). In *McCarthan*, the Eleventh Circuit held that claims challenging the legality of a sentence cannot be brought under the savings clause. *See id.* at 1085–90. The court reasoned that the savings clause is limited to claims challenging the "execution of [a] sentence, such as the deprivation of good-time credits or parole determinations." *Id.* at 1092–93. A claim attacking the legality of a sentence can be brought only in two "limited circumstances": first, if "the sentencing court is unavailable" (for example, because the sentencing court itself has been dissolved); or second, when some other "practical consideration[]" prevents the petitioner from filing a section 2255 motion. *Id.* at 1093.

84. *See Gilbert*, 640 F.3d at 1329–30 & n.3 (Barkett, J., dissenting).

85. *Id.* at 1329–30 (footnote omitted).

filed a timely section 2255 motion that the court "erroneously rejected."[86] This "judicial 'gotcha,'" tethered to the pursuit of finality, "cast a pall of unconstitutionality over the otherwise beneficial provisions of § 2255."[87] The dissenters concluded by noting that many others are in Gilbert's position—sitting in prison serving sentences that were illegally imposed: "We used to call such systems 'gulags.' Now, apparently, we call them the United States."[88]

Similar to the Eleventh Circuit's en banc decision in *Gilbert*, the Third and Fifth Circuits, in cursory opinions, held that federal prisoners cannot pursue relief under the savings clause to challenge their statuses as career offenders or their mandatory minimum sentences. They reasoned that the savings clause is available only to prisoners asserting actual innocence claims—meaning that they were convicted of a nonexistent crime.[89] In both cases, the court failed to engage in any meaningful interpretation of the text of the savings clause or provide any rationale as to why actual innocence claims are constitutionally different than sentencing error claims.

The Tenth Circuit in *Prost v. Anderson* addressed whether, and under what circumstances, the savings clause allows a federal prisoner to file a habeas petition under the general habeas corpus statute, section 2241.[90] In an opinion authored by then-Judge Gorsuch (now Justice Gorsuch), *Prost* held that section 2255(e) *only* permits prisoners to challenge their convictions or sentences under the general habeas statute, section 2241, if the prisoner's detention could not "have been tested in an initial § 2255 motion."[91] Meaning, "section 2241 [habeas relief] is available *only* when a prisoner *literally* could not get to court to file an initial section 2255 motion, such as where 'the defendant's sentencing court had been abolished' when the prisoner sought to file the initial section 2255 motion."[92]

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86. *Id*. at 1336 (Hill, J., dissenting). Chief Judge (then Circuit Judge) Roger L. Gregory of the Fourth Circuit better explained this "Catch-22" in *United States v. Surratt*:

> I suppose we just have fundamentally different views on the role of habeas corpus, as well as the role of the judiciary in granting the writ. I see it as our solemn responsibility to guard against a morbid encroachment upon that which is so precious our Framers ensured its continued vitality in our Constitution. Instead we guard the Great Writ itself, and so closely that Surratt must spend the rest of his life in prison—against the will of the government and the district court. Our abdication of this responsibility begs the question: quis custodiet ipsos custodies? Who will guard the guards themselves?
>
> It is within our power to do more than simply leave Surratt to the mercy of the executive branch. To hope for the right outcome in another's hands perhaps is noble. But only when we actually do the right thing can we be just.

797 F.3d 240, 276 (4th Cir. 2015) (Gregory, J., dissenting), *reh'g granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

87. *Gilbert*, 640 F.3d at 1336 (Hill, J., dissenting).

88. *Id*. at 1337.

89. *See* Gardner v. Warden Lewisburg USP, 845 F.3d 99, 103 (3d Cir. 2017); Bradford v. Tamez, 660 F.3d 226, 230 (5th Cir. 2011) (per curiam).

90. *See* 636 F.3d 578, 584 (10th Cir. 2011).

91. *Id*. at 584, 588.

92. Litman, *supra* note 6, at 72 (emphasis added) (quoting *Prost*, 636 F.3d at 588).

Judge Gorsuch provided several reasons to support his interpretation of section 2255(e). First, the "remedy" described in the statute's text is concerned with the process—not substance—of section 2255 proceedings, which only included the "*opportunity* to bring [an] argument," rather than to "win" it.[93] Second, Congress, when it enacted section 2255, "was surely aware that prisoners might seek to pursue second or successive motions based on newly issued statutory interpretation decisions, but Congress did not allow those kinds of claims to be raised in successive motions."[94] Third, "several surrounding provisions emphasize 'providing a single opportunity to test arguments, rather than any guarantee of relief or results.'"[95] Finally, "section 2255 was enacted to allow federal prisoners to challenge their convictions and sentences in the district where they were sentenced, rather than only in the district where they were incarcerated."[96] Section 2255, according to Judge Gorsuch, "was not adopted to expand or impinge upon prisoners rights of collateral attack upon their convictions, but only to address the 'difficulties that had arisen in administering habeas corpus.'"[97]

Significantly, Judge Gorsuch did not have to address any of these issues. As Judge Seymour recognized in a separate opinion, *Prost* should have been decided on a much narrower ground.[98] Specifically, Prost had an "adequate and effective opportunity to test the legality of his conviction [in his first section 2255 motion] because he was not foreclosed by [any] precedent" to raise his actual innocent claim of money laundering.[99] Because Prost failed to raise this issue, Prost's habeas petition could have been dismissed on that ground. Instead, Judge Gorsuch, who on many occasions excoriated the Tenth Circuit for not exercising judicial restraint,[100] showed no restraint. In a sharp rebuke, Judge Seymour pointed out that Judge Gorsuch's opinion interpreting the savings clause "creat[ed] an unnecessary circuit split on an issue that was neither raised by the parties nor implicated by the facts of this case."[101] Before *Prost*, all circuits that addressed claims of actual innocence agreed that, at a minimum, those claims were cognizable under the savings clause.[102] But Judge Gorsuch would only allow claims when a prisoner could not have filed an initial section 2255 motion because the

93. *Prost*, 636 F.3d at 584, 588.

94. *See* Litman, *supra* note 6, at 72–73 (quoting *Prost*, 636 F.3d at 585).

95. *Id.* at 73 (quoting *Prost*, 636 F.3d at 587).

96. *Id.* (quoting *Prost*, 636 F.3d at 587–88).

97. *Id.* (internal quotation marks omitted) (quoting *Prost*, 636 F.3d at 587–88).

98. *See Prost*, 636 F.3d at 598–99 (Seymour, J., concurring in part and dissenting in part).

99. *Id.* at 599.

100. *See, e.g.*, Hooks v. Workman, 689 F.3d 1148, 1208 (10th Cir. 2012) (Gorsuch, J., concurring in part and dissenting in part) (cautioning courts to "avoid reaching constitutional questions in advance of the necessity of deciding them" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988))); *id.* ("Caution is always warranted when venturing down the road of deciding a weighty question of first impression . . . ."); Williams v. Jones, 583 F.3d 1254, 1256 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc) ("It's not every day we exacerbate a split of authority over the recognition of a new constitutional right . . . .").

101. *Prost*, 636 F.3d at 599 (Seymour, J., concurring in part and dissenting in part).

102. *Id.* at 604–05 (collecting cases).

sentencing court had been abolished.[103] Judge Seymour would have interpreted the savings clause consistently with all other circuits at the time to allow actual innocence claims to pass through.[104]

Crucially, as Professor Leah Litman correctly argues, Judge Gorsuch's interpretation of the savings clause would not allow any of the following federal prisoners to challenge their convictions or sentences under section 2241: "prisoners who were convicted of acts the law did not make criminal; prisoners who were sentenced above the statutory maximum for their offense; or prisoners whose convictions or sentences violated some substantive rule of constitutional law."[105] In other words, not only does Justice Gorsuch believe that no sentencing claims are cognizable under the habeas savings clause, but he also believes that this clause provides no relief for federal prisoners who are *actually innocent* of the underlying offense. Troubling.[106] Even more troubling is that the Eleventh Circuit reached the same conclusion relying principally on Justice Gorsuch's reasoning in *Prost*.[107]

In sum, none of these courts would allow a person to raise a sentencing claim, yet there is significant disagreement in these courts' interpretations of the savings clause. For example, the Tenth and Eleventh Circuits would allow relief only when the sentencing court had been abolished or when a prisoner had been deprived of good-time credits or parole determinations. The Third and Fifth Circuits would allow claims that a person is actually innocent of the underling offense, but not sentencing claims. The rationale behind all of these opinions appears to be that courts have to draw the line somewhere. Animated by finality, those courts decided to draw a line—a line unsupported by the text of the savings clause—that strips habeas of liberty and keeps people in chains. Perhaps, as Justice Brennan observed, these courts are just afraid "of too much justice."[108]

B. HOLD THE DOOR

Whereas the door to habeas relief for sentencing errors has been closed in the Third, Fifth, Tenth, and Eleventh Circuits, the Sixth and Seventh Circuits have cracked the door open in a slight, yet significant way. These courts make it clear that *some* sentencing errors are cognizable under the savings clause.

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103. *Id*. at 588 (majority opinion).

104. *Id*. at 603–06 (Seymour, J., concurring in part and dissenting in part).

105. Litman, *supra* note 6, at 72 (citing *Prost*, 636 F.3d at 588–94).

106. Or, as Professor Litman, put it: "Ooph." *Id*.

107. *See* McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1092–93 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 502 (2017).

108. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting). Judge William Pryor articulated the same fear: "The law will forever be in a state of flux, and Congress in a state of legislation. A federal prisoner's sentence cannot always be vulnerable to collateral attack, lest the finality of convictions ceases to exist." Samak v. Warden, FCC Coleman-Medium, 766 F.3d 1271, 1293 (11th Cir. 2014) (Pryor, J., concurring). Judge Pryor subsequently authored the en banc majority in *McCarthan*, which held that neither actual innocence claims nor sentencing claims are cognizable under the savings clause. 851 F.3d at 1076.

In *Brown v. Caraway*, the sentencing court applied a career offender enhancement, U.S.S.G. § 4B1.1, to Brown's sentence for drugs and firearm possession in light of prior convictions of second-degree assault and third-degree arson in Delaware.[109] Brown's designation as a career offender resulted in an offense-guidelines range of 360 months to life imprisonment.[110] Because Brown was sentenced pre-*Booker*, when guidelines ranges were mandatory, Brown was sentenced to 360 months.[111] Absent the career offender enhancement, Brown's guidelines range would have been 262 to 327 months.[112] Brown's subsequent section 2255 petition was unsuccessful.[113]

Brown later filed a section 2241 petition challenging the enhancement because his prior offense for third-degree arson no longer constituted a crime of violence under *Begay*; thus, Brown should not have been sentenced under the career offender enhancement.[114] The district court dismissed the petition.[115] The Seventh Circuit reversed, holding that Brown's petition had satisfied the court's three-part test to fall within the savings clause exception and was, therefore, properly heard under section 2241.[116] First, Brown relied on a case of statutory interpretation, rather than a "constitutional case," which would have satisfied one of the conditions for a successive challenge under section 2255(h).[117] Second, Brown relied on a case determined retroactive by the Supreme Court that he could not have invoked in his original section 2255 motion.[118] Finally, the sentencing error Brown complained of was sufficiently grave to be "deemed a miscarriage of justice," or, put another way, a "fundamental defect" in the criminal process capable of being corrected in a habeas corpus proceeding.[119] Specifically, because Brown was sentenced *above* his sentencing range, that error was a "fundamental defect."[120]

Importantly, in response to the argument that the savings clause requires "a claim of actual innocence directed to the underlying conviction, not merely the sentence,"[121] the Seventh Circuit stood on the language of the savings clause, section 2255(e).[122] The court noted that the savings clause makes no reference to "convictions" but instead makes relief available where the "§ 2255 remedy is 'inadequate or ineffective to test the legality of his *detention*.'"[123] Under this

109. 719 F.3d 583, 584–85 (7th Cir. 2013).
110. *Id.* at 585.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 586.
115. *Id.*
116. *See id.* at 586–89.
117. *Id.* at 586–87.
118. *Id.* at 586.
119. *Id.* (first quoting Brown v. Rios, 696 F.3d 638, 640 (7th Cir. 2012); then quoting *In re* Davenport, 147 F.3d 605, 611 (7th Cir. 1998)).
120. *Id.* at 587–88.
121. *Id.* at 586.
122. *Id.* at 588.
123. *Id.* (quoting 28 U.S.C. § 2255(e) (2012)).

interpretation, the court reasoned that if a prisoner was sentenced when the guidelines were mandatory by law, then "a § 2241 habeas petition raising a guidelines error 'tests the legality of his detention.'"[124] The Seventh Circuit thus found Brown entitled to relief under section 2241.[125]

The Sixth Circuit addressed a similar issue in *Hill v. Masters*.[126] Like the defendant in *Brown*, Hill was sentenced as a career offender under the pre-*Booker* mandatory guidelines because he "had two prior felony convictions in Maryland—a controlled-substance offense and second-degree assault."[127] With the career offender enhancement, "Hill was sentenced to 300 months of imprisonment based on a [mandatory] guideline range of 292 to 365 months."[128] Had he not been sentenced as a career offender, Hill's guideline range would have been 235 to 293 months.[129] More importantly, because Hill was sentenced as a career offender, he was not eligible for "subsequent retroactive amendments to the guidelines that [would have] place[d] his guidelines range as low as 188 to 235 months."[130]

Hill later filed a section 2241 petition challenging the enhancement because his prior Maryland conviction for second-degree assault no longer constituted a crime of violence under *Descamps v. United States*[131] and the Fourth Circuit's decision in *United States v. Royal*;[132] thus, under those decisions, Hill should not have been sentenced under the career offender enhancement.[133] The Sixth Circuit agreed, adopting *Brown*'s interpretation of the savings clause—that sentencing claims are cognizable under the plain reading of section 2255.[134] However, the court's decision applied to a "narrow subset" of section 2241 petitions:

> (1) prisoners who were sentenced under the mandatory guidelines regime pre-[*Booker*], (2) who are foreclosed from filing a successive petition under §

124. *Id.*
125. *Id.* at 596.
126. 836 F.3d 591 (6th Cir. 2016).
127. *Id.* at 593.
128. *Id.*
129. *Id.*
130. *Id.*
131. 570 U.S. 254 (2013). In *Descamps*, the defendant was convicted of being a felon in possession of a firearm. *Id.* at 258. Because Descamps had a prior conviction for burglary, the district court imposed a sentencing enhancement under the ACCA. *Id.* at 259. The Ninth Circuit affirmed. *Id.* The Supreme Court reversed, holding that Descamps's prior conviction for burglary under California law was not a violent felony within the meaning of the ACCA. *Id.* at 260. The elements of California burglary were broader and therefore encompassed more potential conduct than did those of the generic burglary offense. *Id.* at 274. Thus, the Ninth Circuit erred in applying the sentencing enhancement. *Id.* at 277–78.
132. 731 F.3d 333 (4th Cir. 2013). The Fourth Circuit applied *Descamps* to Maryland's second-degree assault statute, one of Hill's predicate felonies. Because Maryland's second-degree assault statute defined assault more broadly than the generic crime, the Fourth Circuit concluded it was not a "violent felony" under the ACCA. *Id.* at 342. Specifically, "Maryland's second-degree assault statute reaches any unlawful touching, whether violent or nonviolent and no matter how slight"; thus, "convictions under the statute . . . cannot categorically be crimes of violence." *Id.* (quoting Karimi v. Holder, 715 F.3d 561, 568 (4th Cir. 2013)).
133. *See Hill*, 836 F.3d at 593.
134. *Id.* at 599–600.

> 2255, and (3) when a subsequent, retroactive change in statutory interpretation by the Supreme Court reveals that a previous conviction is not a predicate offense for a career-offender enhancement.[135]

The Sixth Circuit held that Hill satisfied its test because he "was sentenced under the mandatory guidelines," was "barred from filing a successive § 2255 petition; and received the [unlawful career offender] enhancement based on a prior conviction that a subsequent, retroactive change in Supreme Court jurisprudence [*Descamps*] reveal[ed was] not a predicate offense."[136] The court concluded, "[t]o require that Hill serve an enhanced sentence as a career offender, bearing the stigma of a 'repeat violent offender' and all its accompanying disadvantages, is a miscarriage of justice where he lacks the predicate felonies to justify such a characterization."[137]

C. THE DOOR IS OPEN

Recently, the Fourth Circuit pushed the door open to federal prisoners to raise sentencing errors that result in a fundamental defect in the criminal justice system. In *United States v. Wheeler*, the Fourth Circuit addressed whether a prisoner can challenge his sentence under the savings clause when the sentence was enhanced by a court under a mistaken understanding of the Controlled Substances Act ("CSA").[138] That mistake resulted in a mandatory minimum sentence for Wheeler that doubled what it should have been under the correct interpretation of the CSA.[139] The Fourth Circuit held that "[a]n increase in the congressionally mandated minimum sentencing floor" is "an error sufficiently grave to be deemed a 'fundamental defect.'"[140] Specifically, the court reasoned that "when [a federal prisoner] never should have been subject to an increase[d sentence] in the first place, the error is grave."[141] Why? "An increase in the congressionally mandated sentencing floor implicates separation of powers principles and due process rights fundamental to our justice system."[142] Therefore, Wheeler was allowed to bring his claim under the habeas savings clause.[143]

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All of these cases turned on the courts' interpretation of the statutory language found in the savings clause, section 2255(e), which this Article now addresses.

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135. *Id.* (citation omitted)
136. *Id.* at 600.
137. *Id.*
138. 886 F.3d 415, 419–22 (4th Cir. 2018).
139. *See id.* at 431.
140. *Id.* at 430.
141. *Id.*
142. *Id.*
143. It appears that the Fourth Circuit will continue to take a case-by-case approach to sentencing errors. *See id.* at 433 n.11 ("We make no decision regarding whether an erroneous sentence above the statutory maximum is a fundamental defect for purposes of the savings clause. . . .").

III. THE SAVINGS CLAUSE TEXT SPEAKS FOR ITSELF

In all cases of statutory construction, the starting point to any analysis is to examine the language of the statute for a "plain and unambiguous meaning with regard to the particular dispute in the case."[144] The inquiry typically ends here for courts if the statutory language is "unambiguous and the statutory scheme is coherent and consistent."[145] The answer to whether the savings clause allows for consideration of second or successive claims of at least some sentencing species is determined by close examination of the statutory language. Paramount to this analysis is the Supreme Court's command that habeas corpus is governed by "equitable principles,"[146] including the "principles of fundamental fairness underl[ying] the writ."[147]

Turning to the statutory language, the savings clause of section 2255(e) allows a federal prisoner to seek a writ of habeas corpus pursuant to section 2241 when the "remedy" provided by section 2255 proves "inadequate or ineffective to test the legality of . . . detention."[148] So, what does this mean?[149]

A. "REMEDY"

Courts that have concluded that sentencing claims fall outside of the habeas savings clause contend that "remedy" refers to the process of challenging the prisoner's conviction, not the outcome of that process.[150] In other words, because section 2255(e) is concerned with process, not substance, so long as a federal prisoner had the opportunity to bring an argument—never mind if Supreme Court or circuit precedent foreclosed that argument—the remedy in section 2255 is adequate and effective.

This interpretation is not only unpersuasive but is also inconsistent with Supreme Court precedent. The Supreme Court has made clear that the correct inquiry is whether the process afforded by section 2255 can fairly be described as providing "a *meaningful* opportunity" for relief—a nominal opportunity, as discussed in Part IV, is constitutionally insufficient.[151] Moreover, the Court has

144. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citation and internal quotation marks omitted) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

145. *Id.* (internal quotation marks omitted).

146. Duckworth v. Eagan, 492 U.S. 195, 213 (1989) (O'Connor, J., concurring) (internal quotation marks omitted).

147. Sawyer v. Whitley, 505 U.S. 333, 351 (1992) (Blackmun, J., concurring).

148. 28 U.S.C. § 2255(e) (2012); *In re* Jones, 226 F.3d 328, 333 (4th Cir. 2000).

149. For a great historical account of the Suspension Clause, see Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537 (2010). In his account, Professor Neuman states that the Supreme Court in "*Boumediene* and *St. Cyr* reiterated that what matters is the substance, not the form, of the Great Writ. Congress can rename or reconfigure the procedure by which courts examine the lawfulness of detention, so long as the new structure provides an 'adequate and effective substitute for habeas corpus.'" *Id.* at 542 (footnote omitted).

150. *See, e.g.*, Prost v. Anderson, 636 F.3d 578, 584–85 (10th Cir. 2011).

151. Boumediene v. Bush, 553 U.S. 723, 779 (2008) (emphasis added) ("We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." (quoting Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 302 (2001))).

stated that "a theoretically available procedural alternative . . . does not offer most defendants a meaningful opportunity."[152]

In addition, the Supreme Court has used "'remedy' to refer to the *result* a plaintiff obtained by filing suit, not just the process applicable to different kinds of lawsuits."[153] This makes sense. "[A]s a verb, 'remedy' means to set something right; as a noun, it can mean the fix for that something (e.g., the result)."[154] Importantly, Congress, in other statutes, often "uses relief to signify the result of a remedy; the two terms are not so distinct."[155]

Despite this clear guidance—from precedent, plain meaning, and interpretive canons—courts have denied relief when the effects of the criminal statute no longer authorize the federal prisoner's detention.

B. "LEGALITY OF DETENTION"

Congress's use of the terms "legality" and "detention" is highly significant to the scope of the savings clause. The word "detention" by definition includes challenges to a conviction, but it equally applies to challenges to a sentence.[156] Indeed, "detention" is commonly defined as "[k]eeping in custody."[157] And, as the Supreme Court has previously stated, detention certainly implies imprisonment.[158] "Legality" means "[t]he quality, state, or condition *of being allowed by law*."[159] Thus, the plain language of this phrase appears to invite claims where the prisoner's success on his claim could result in a reduced period of detention. Based on this understanding, the *Wheeler*, *Brown*, and *Hill* courts concluded that "detention" includes some sentencing claims.[160]

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152. Trevino v. Thaler, 569 U.S. 413, 427–28 (2013) (discussing procedural alternatives in the context of the opportunity to bring an ineffective assistance of counsel claim).

153. Litman, *supra* note 6, at 74 (emphasis added) (footnote omitted); *see also* Carlson v. Green, 446 U.S. 14, 20–21 (1980) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States."); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case.").

154. Litman, *supra* note 6, at 74 (footnote omitted); *see also Remedy*, LEXICO, https://www.lexico.com/en/definition/remedy [https://perma.cc/FMU3-S6FS] (last visited Oct. 10, 2019) (defining "remedy" as "a means of counteracting or eliminating something undesirable").

155. Litman, *supra* note 67, at 488 (footnote omitted); *see also* 12 U.S.C. § 3755(b)(2) (2012) ("[O]ther remed[ies] . . . includ[e] . . . relief under an assignment of rents."); 22 U.S.C. § 1631f(c) (2012) ("The sole relief and remedy . . . shall be that provided by . . . this section . . . ."); 22 U.S.C. § 1631g(i) (2012) (similar); 22 U.S.C. § 1642b (2012) ("No judicial relief or remedy shall be available . . . .").

156. *Detention*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "detention" to include "[t]he act or an instance of holding a person in custody").

157. *See Detention*, IV OXFORD ENGLISH DICTIONARY 545 (J. A. Simpson & E. S. C. Weiner eds., 2d ed. 1989); *see also Detention*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 616 (1966) (defining "detention" as "a holding in custody").

158. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("*Freedom from imprisonment* [is freedom] from government custody, *detention*, or other forms of physical restraint . . . ." (emphasis added)).

159. *Legality*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

160. Hill v. Masters, 836 F.3d 591, 598 (6th Cir. 2016) (noting that "the savings clause makes no reference to 'convictions' and instead makes relief available when the '§ 2255 remedy is inadequate or ineffective to test the legality of his *detention*'" (internal quotation marks omitted) (quoting Brown v.

This interpretation finds support in section 2255's structure. Other provisions of section 2255 expressly impose a conviction-only limitation, underscoring that no such implicit limitation was intended in section 2255(e).[161] For example, in section 2255(h), Congress provided an avenue for a successive collateral attack based on newly discovered evidence sufficient to establish "that no reasonable factfinder would have found the movant guilty of the *offense*."[162] If Congress had intended to limit savings clause relief to claims challenging only the offense or conviction, rather than the sentence, it could have easily done so by simply using the word "conviction" or "offense" in section 2255(e)—just as it did in section 2255(h)(1)—instead of "detention."[163] It did not, and "[i]t is accepted lore that when Congress uses certain words in one part of a statute, but omits them in another, an inquiring court should presume that this differential draftsmanship was deliberate."[164] For these reasons, this Article contends that there can be no dispute that "detention" includes being able to test the legality of a sentence.[165]

C. "INADEQUATE OR INEFFECTIVE"

The dispositive inquiry for courts that have denied habeas relief for sentencing errors is whether the prisoner had a mere opportunity to raise the sentencing claim at an earlier proceeding.[166] Under those courts' rationales, so long as the prisoner

Caraway, 719 F.3d 583, 585 (7th Cir. 2013))); *Brown*, 719 F.3d at 588 ("The text of the clause focuses on the legality of the prisoner's detention; [§ 2255(e)] does not limit its scope to testing the legality of the underlying criminal conviction." (citation omitted)).

161. *See* Dean v. United States, 556 U.S. 568, 573 (2009) ("Where 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." (quoting Russello v. United States, 464 U.S. 16, 23 (1983))). Further, the doctrine of *expressio unius est exclusio alterius* counsels against judicial recognition of such a significant limitation. *See* Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 865 (4th Cir. 2001) (explaining that the *expressio unius* doctrine "instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded").

162. 28 U.S.C. § 2255(h)(1) (2012) (emphasis added); *see also* 28 U.S.C. § 2255(f)(1) (establishing a period of limitation based on the date of *conviction*).

163. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013) ("Congress' choice of words is presumed to be deliberate . . . .").

164. United States v. Ahlers, 305 F.3d 54, 59–60 (1st Cir. 2002).

165. Some courts and scholars disagree with this Article on this point, arguing instead that detention should be defined as keeping someone in confinement. *See* McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1089 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 502 (2017); Jennifer L. Case, *Text Me: A Text-Based Interpretation of 28 U.S.C. § 2255(e)*, 103 KY. L.J. 169, 191 (2014) ("'Detention' differs from a criminal 'sentence.'"). This Article agrees with that definition. This Article disagrees, however, with the notion that someone serving an unlawful sentence does not fall in that category. Those courts and scholars would limit "detention" only to claims challenging good-time credits, parole revocation, or other prison disciplinary proceedings.

166. *See McCarthan*, 851 F.3d at 1085–86 ("Whether circuit precedent 'was once adverse to a prisoner has nothing to do with whether his motion to vacate his sentence is inadequate or ineffective to test the legality of his detention.'" (internal quotation marks omitted) (quoting Samak v. Warden, FCC Coleman-Medium, 766 F.3d 1271, 1276 (11th Cir. 2014) (W. Prior, J., concurring))); *id.* at 1086 ("That is, he could have made the argument that his prior convictions did not qualify him for an enhanced sentence under the statute. 'To test' the legality of his detention and satisfy the saving clause, a prisoner is not required 'to win' his release."); *id.* at 1087 ("Despite circuit precedent, McCarthan could have tested the legality of his detention by requesting that we reconsider our precedent en banc or by

had a formal chance to raise his claim in a section 2255 motion—even if there was existing Supreme Court or circuit court precedent that rendered that claim futile—the section 2255 proceeding is deemed adequate and effective.[167] According to these courts, the savings clause is limited to claims challenging the "execution of a sentence," such as "the deprivation of good-time credits or parole determinations."[168] That means the Meaning, unless a prisoner can meet one of section 2255(h)'s two exceptions to the successive-motions bar, is that he can *never* file another collateral attack on his sentence or conviction.[169] This, of course, reads the savings clause right out of the statute, even for claims based on new decisions that make clear that a defendant was convicted of conduct that is not a crime.[170] Stripping the savings clause of any independent meaning while simultaneously engrafting section 2255(h)'s requirements onto it is antithetical to the text, purpose, and structure of section 2255.[171] Courts must endeavor to apply both statutory provisions fully and prevent one from limiting the legal effect of the other. This can be done—this Article provides a sound statutory pathway forward.[172]

Indeed, a federal prisoner should always "be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion."[173] In other words, the relevant inquiry should be whether the prisoner, through no fault of his own, is seeking relief for a fundamental defect for which he has no source of redress under section 2255.[174] It makes little sense to preclude habeas relief where the defendant had a theoretical opportunity to test the legality of his conviction or sentence by raising his claim at an earlier stage, even though that claim was foreclosed by either Supreme Court or circuit law throughout his sentence, direct appeal, and initial motion under section 2255.

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petitioning the Supreme Court for a writ of certiorari."); *see also* Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011) ("The relevant metric or measure, we hold, is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion."); *id*. ("[T]he clause is concerned with process—ensuring the petitioner an *opportunity* to bring his argument—not with substance—guaranteeing nothing about what the *opportunity* promised will ultimately yield in terms of relief.").

167. *McCarthan*, 851 F.3d at 1086 ("That a court might reject a prisoner's argument does not render his 'remedy by motion' an inadequate 'means by which' to challenge the legality of his sentence."); *id*. at 1087 ("That a particular argument is doomed under circuit precedent says nothing about the nature of the motion to vacate.").

168. *Id*. at 1089, 1092–93.

169. *See id*. at 1088 ("[A] motion to vacate could be 'inadequate or ineffective to test' a prisoner's claim about the *execution* of his sentence because that claim is not cognizable under section 2255(a).").

170. *See, e.g.*, *In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000) ("[U]nder *Bailey*, mere possession of firearms during and in relation to a drug trafficking offense does not constitute 'use' within the meaning of § 924(c)(1); thus, Jones is incarcerated for conduct that is not criminal." (footnote omitted)).

171. It is also antithetical to traditional canons of statutory interpretation. Implied repeals of jurisdictional statutes, for example, are disfavored. *See, e.g.*, Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 643 (2002). This is especially true where, as here, the implied repeal raises constitutional concerns.

172. *See infra* Section III.D & Part IV.

173. *In re* Davenport, 147 F.3d 605, 611 (7th Cir. 1998).

174. *Jones*, 226 F.3d at 333 n.3.

In practice, where erroneous circuit precedent was in effect at the time of the initial section 2255 motion, it is virtually impossible to meaningfully raise a sentencing or actual innocence claim. Specifically, it is entirely conceivable that every single court to consider the prisoner's case—the district court, the court of appeals panel, the en banc panel, and the Supreme Court—could conclude that the prisoner's detention is unlawful, and yet also deny relief. For example, as argued in a recent petition for certiorari filed in *Lewis v. English*:

- The district judge and appellate panel could conclude that his sentence was incorrect but that they were bound by the existing circuit precedent;
- All of the court of appeals judges voting on the petition for rehearing en banc might conclude that the sentence was illegal, but that en banc review was not "necessary to secure or maintain uniformity of the court's decisions" and not warranted because the case did not "involve[] a question of exceptional importance"; and
- [The Supreme Court] could conclude that his sentence is unlawful, but that certiorari is unwarranted because there is no "conflict with the decision of another United States court of appeals on the same important matter" and the decision below did not "so far depart[] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."[175]

Because every single court and jurist in that chain "could conclude that the prisoner's detention is unlawful—and yet the prisoner could still be properly denied relief—necessarily means that in that circumstance, Section 2255 is 'inadequate or ineffective to test the legality of his detention.'"[176]

Stated more succinctly, a defendant cannot readily test his claim when that claim is foreclosed by controlling circuit law.[177] The district and circuit courts are bound by precedent; only rare and discretionary action by the en banc court or the Supreme Court can change the law.[178] And when a law-changing decision comes

175. Petition for a Writ of Certiorari at 18–19, Lewis v. English, 139 S. Ct. 1318 (2019) (mem.) (No. 18-292), 2018 WL 4298032, at *18–19 (citation omitted) (quoting FED. R. APP. P. 35(a) and SUP. CT. R. 10(a) (providing rules for when hearing or rehearing en banc can be ordered and for consideration of certiorari)).

176. *Id.* at *19 (quoting 28 U.S.C. § 2255(e) (2012)).

177. *See* MLC Auto., LLC v. Town of S. Pines, 532 F.3d 269, 278 (4th Cir. 2008) ("[A]s a panel, we cannot overrule a prior panel and are bound to apply principles decided by prior decisions of the court to the questions we address." (internal quotation marks omitted) (quoting R.R. ex rel. R. v. Fairfax Cty. Sch. Bd., 338 F.3d 325, 332 n.6 (4th Cir. 2003))).

178. *See* Adams v. Zarnel, 619 F.3d 156, 168 (2d Cir. 2010) ("This panel is 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.'" (quoting United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004))); United States v. Vega-Castillo, 540 F.3d 1235, 1236 (11th Cir. 2008) (per curiam) ("Under the prior precedent rule, we are bound to follow a prior binding precedent 'unless and until it is overruled by this court en banc or by the Supreme Court.'" (quoting United States v. Brown, 342 F.3d 1245, 1246 (11th Cir. 2003))).

after the usual avenues of relief—after direct appeal and initial adjudication of a section 2255 motion—are exhausted, a prisoner had no reasonable opportunity to rely on it at an earlier time.

Importantly, Supreme Court precedent supports this interpretation. The Supreme Court has been clear that decisions "narrow[ing] the scope of a criminal statute by interpreting its terms" are given retroactive effect because such decisions "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him."[179] When the Supreme Court or a circuit court interprets a statute and applies its ruling retroactively, but a prisoner is barred from relying on that interpretation merely because the Supreme Court or circuit court decided the case after his first section 2255 proceeding was done, section 2255 has certainly "proved inadequate or ineffective" within the meaning of the savings clause.[180]

We need only look to the definitions of "inadequate" and "ineffective" and how those terms of art are used in our constitutional system to confirm this interpretation.

The term "inadequate" is a term of art that appears in our equity jurisprudence, which finds in habeas corpus "a comfortable home."[181] And courts have routinely held that a remedy at law is "inadequate" if it is not "as complete, practical and efficient as that which equity could afford."[182] By definition, then, section 2255 proves inadequate if that process "does not sufficiently correct the wrong."[183]

The term "ineffective,"[184] as noted by Judge Robin S. Rosenbaum in her dissent in *McCarthan*, "is a term of art in Sixth Amendment claims,"[185] and is a common subject of habeas jurisprudence. In this context, as the Supreme Court has held, ineffective means "constitutionally deficient," as in ineffective assistance of counsel.[186] Thus, when federal prisoners file second or successive motions asserting that a retroactively applicable new rule of statutory law means

179. Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004) (internal quotation marks omitted) (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

180. Boumediene v. Bush, 553 U.S. 723, 776 (2008).

181. Holland v. Florida, 560 U.S. 631, 647 (2010); *see also Boumediene*, 553 U.S. at 780 ("Habeas 'is, at its core, an equitable remedy.'" (quoting Schlup v. Delo, 513 U.S. 298, 319 (1995))).

182. Terrace v. Thompson, 263 U.S. 197, 214 (1923).

183. *Inadequate Remedy at Law*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1105 (11th Cir. 2017) (en banc) (Jordan, J., concurring in part and dissenting in part) (defining "inadequate" as "lacking in effectiveness" (emphasis omitted)), *cert. denied*, 138 S. Ct. 502 (2017).

184. *Ineffective*, 5 OXFORD ENGLISH DICTIONARY 239 (1st ed. 1933) (stating that "ineffective" means "[o]f such a nature as not to produce . . . the intended [] effect").

185. *McCarthan*, 851 F.3d at 1132 (Rosenbaum, J., dissenting).

186. *See* Strickland v. Washington, 466 U.S. 668, 682, 687 (1984); Powell v. Alabama, 287 U.S. 45, 71–72 (1932). In *Strickland*, the Supreme Court set forth a two-part test for deciding ineffective assistance of counsel claims. 466 U.S. at 687. "First, the defendant must show that counsel's performance was deficient." *Id.* To prove deficiency, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. "Second, the defendant must show that the deficient performance" resulted in actual prejudice to the defendant. *Id.* at 687.

that their sentences implicate certain constitutional principles—such as separation of powers and due process—section 2255's remedy, or procedures, are "ineffective to test" the legality of their detentions.[187]

D. THE RIGHT RESULT

Congress's words and intent are clear: a federal prisoner is permitted to seek habeas corpus relief via the savings clause if the prisoner had no reasonable opportunity to obtain earlier judicial correction of a "fundamental defect" in the prisoner's conviction or sentence because the law changed after the first section 2255 motion.[188] Distilled to its essence, the habeas savings clause has two procedural components—first, the federal prisoner was foreclosed from bringing his claim at an earlier proceeding (for example, direct appeal or first section 2255 motion) by precedent, and second, there has been an intervening decision of statutory interpretation that is determined to be retroactive. Certainly, these are significant hurdles that will bar many from habeas relief. There is also a substantive component: whether the claim raises a fundamental defect in the criminal proceedings, either in the conviction or the sentence. Because of these components, this Article proposes that courts adopt the following doctrinal test to determine the legality of detention: section 2255 is inadequate and ineffective to test the legality of a sentence when the claim (1) relies on a retroactively applicable decision of statutory interpretation; (2) was foreclosed by binding precedent at the time of the initial section 2255 motion; and (3) involves a "fundamental defect" in the sentence. The issue becomes what types of sentencing errors constitute a fundamental defect, to which this Article now turns.

IV. FUNDAMENTAL DEFECT: THE CEILING AND THE FLOOR

Admittedly, the more difficult question (than the question of whether section 2255 is inadequate and ineffective to test the legality of a sentence) is what types of sentencing errors constitute fundamental defects. There is little precedent that addresses this issue, and what precedent there is lacks much analysis—the thinking must be that you know it when you see it. There is, however, common sense. And, as we know, "the most fundamental guide to statutory construction [is] common sense,"[189] and statutes should be constructed to avoid constitutional

187. *See infra* Part IV.

188. If, for example, a federal prisoner could have brought the claim—and did not—then courts would likely determine that section 2255 was adequate and effective. In other words, if a federal prisoner had an "unobstructed procedural shot" at filing a section 2255 motion, meaning there was not existing precedent foreclosing the claim on her direct appeal or initial section 2255 motion, then section 2255 would likely prove adequate and effective. *See, e.g.*, Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006) (listing circuits that have held that prisoners must have "unobstructed procedural shot[s]" at presenting their claims).

189. First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 869 (4th Cir. 1989); *see also* United States v. Mike, 632 F.3d 686, 701 (10th Cir. 2011) (applying a "commonsense" interpretation of release conditions over an interpretation that is "overly technical").

questions[190] and absurd results.[191] With these principles in mind, this Article argues that any *error* that alters the statutory range Congress prescribed for punishment—the ceiling or the floor—raises separation of powers and due process concerns. In these instances, a federal prisoner should have the ability to seek relief under the habeas savings clause, assuming the procedural requirements discussed above are met. If the prisoner lacks this ability, the savings clause is rendered meaningless in violation, arguably, of the Suspension Clause of the United States Constitution.[192] Habeas review, after all, is inextricably intertwined with both the separation of powers doctrine and the Due Process Clause.[193]

A. SEPARATION OF POWERS CONCERN

Pursuant to the design of our constitutional system, "defining crimes and fixing penalties are legislative, not judicial, functions."[194] "Congress has the power to define criminal punishments without giving the courts any sentencing discretion," or to provide for individualized sentencing.[195] In other words, Congress alone can set the maximum and minimum terms of imprisonment,[196] and together they define legal boundaries for the punishment of a particular crime.[197] Consistent with the constitutional principle of separation of powers, a defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress," and a violation of that principle "trenches

190. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them*.").

191. *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *In re* Chapman, 166 U.S. 661, 667 (1897) ("[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion . . . .").

192. *See infra* Section IV.C (discussing the Suspension Clause).

193. The Constitution, through its separation of powers, secures individual liberty from unlawful or arbitrary restraint. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives."); Hamdi v. Rumsfeld, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."); Immigration & Naturalization Sys. v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." (footnote omitted)).

194. United States v. Evans, 333 U.S. 483, 486 (1948) (footnote omitted).

195. Chapman v. United States, 500 U.S. 453, 467 (1991) (citing *Ex parte* United States, 242 U.S. 27 (1916)).

196. *See Evans*, 333 U.S. at 486 (observing that "fixing penalties" is a "legislative, not judicial, function[]").

197. *See, e.g.*, Williams v. New York, 337 U.S. 241, 247 (1949) ("A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.").

particularly harshly on individual liberty."[198]

A statutory construction error that results in a sentence that exceeds the statutory maximum provided by Congress unquestionably implicates that separation of powers principle.[199] In these circumstances, the court—not Congress—exercises the legislative power to set sentencing ranges. Because this raises serious, constitutional, separation of powers concerns, the Sixth and Seventh Circuits concluded that the imposition of a sentence above the otherwise applicable statutory maximum, where circuit law squarely foreclosed the petitioner from raising the claim at trial or during an initial section 2255 motion, constitutes a fundamental error that is cognizable under the savings clause and section 2241.[200]

Similarly, the imposition of an erroneous mandatory minimum sentence implicates this separation of powers principle. The separation of powers concerns raised by a judicial alteration of the statutory sentencing range are identical whether the error affects the maximum or minimum term. Congress in each instance has plenary authority to set the boundaries of punishment, and courts have no authority to alter them.[201]

Moreover, drawing a distinction between statutory mandatory-minimum and mandatory-maximum sentences is inconsistent with Supreme Court precedent. "[T]he floor of a mandatory range is as relevant to wrongdoers as the ceiling."[202] In fact, mandatory minimum errors can have a far more severe impact: "A mandatory minimum can . . . 'mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed,'" and can "eliminate a sentencing judge's discretion in its entirety."[203] Thus, an "erroneously-imposed," recidivism-based "sentencing floor is problematic on its own" because "it create[s] the mistaken impression that the district court ha[s] *no* discretion to vary downward from the low end of [the defendant's guidelines] range."[204]

Put simply, "the separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact,"[205] and "the Constitution

198. Whalen v. United States, 445 U.S. 684, 689–90 (1980).

199. *See* Hill v. Masters, 836 F.3d 591, 596 (6th Cir. 2016); Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013) (recognizing that a defendant may file a habeas petition because "sentences imposed pursuant to erroneous interpretations of the mandatory guidelines bear upon the legality of [a defendant's] detention for purposes of the savings clause"); *see also* United States v. Newbold, 791 F.3d 455, 460 (4th Cir. 2015) (recognizing, in the context of an initial section 2255 motion, that such a sentence raises "separation-of-powers concerns" because the defendant "received a punishment that the law cannot impose upon him" (first citing Bryant v. Warden, 738 F.3d 1253, 1283 (11th Cir. 2013); and then quoting United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009) (internal quotation marks omitted)).

200. *See Hill*, 836 F.3d at 598–600 (recognizing a section 2241 habeas petition within meaning of savings clause where the sentence is above statutory maximum); *Brown*, 719 F.3d at 588 (same).

201. *See Evans*, 333 U.S. at 486 ("Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted [a] provision for penalty.").

202. Alleyne v. United States, 570 U.S. 99, 113 (2013).

203. Almendarez-Torres v. United States, 523 U.S. 224, 244–45 (1998) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 95 (1986) (Stevens, J., dissenting)).

204. *Newbold*, 791 F.3d at 460 n.6 (emphasis added).

205. Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

requires substantive rules to have retroactive effect regardless of when a conviction became final."[206] Federal prisoners must be able to vindicate this separation of powers principle. Without the ability to do so, section 2255's constitutionality is doubtful. The savings clause—under this Article's interpretation—avoids this problem.[207]

In fact, that is the point of the savings clause—to "serve[] as a failsafe mechanism to protect § 2255 from unconstitutionality by providing a substitute remedy for habeas corpus relief that § 2255 otherwise precludes but the Suspension Clause may require,"[208] as the Supreme Court has recently reminded us.[209] And because the Suspension Clause is designed to protect habeas corpus,[210] "the Suspension Clause demands, at a minimum, the availability of habeas corpus relief to redress federal detention when it violates the very doctrinal underpinnings of habeas review."[211] Habeas review, as the Supreme Court has told us in *Boumediene*,[212] finds its doctrinal underpinnings in the separation of powers principle.[213] Scholars and courts[214] have consistently emphasized the central importance of this aspect of the opinion.[215] Therefore, because habeas corpus is intimately intertwined with the separation of powers principle and individual rights,

206. Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016).

207. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 776 (2008) (describing statutes containing savings clauses that provide habeas corpus protections).

208. McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1122 (11th Cir. 2017) (en banc) (Rosenbaum, J., dissenting) (footnote omitted), *cert. denied*, 138 S. Ct. 502 (2017).

209. *See Boumediene*, 553 U.S. at 776 ("The [Supreme] Court placed explicit reliance upon [the savings clause] provisions in upholding [28 U.S.C. § 2255 and the District of Columbia equivalent of section 2255] against constitutional challenges." (first citing Swain v. Pressley, 430 U.S. 372, 381 (1977); and then citing United States v. Hayman, 342 U.S. 205, 223 (1952))).

210. As Professor Amanda Tyler has explained, "the Court has often premised its analysis of constitutional habeas claims on the idea that 'at the absolute minimum, the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified.'" Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635, 638 (2015) (footnote omitted) (quoting *Boumediene*, 553 U.S. at 746).

211. *McCarthan*, 851 F.3d at 1122 (Rosenbaum, J., dissenting).

212. *Boumedien*e, 553 U.S. at 797 ("Chief among [freedom's first principles] are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.").

213. *See* Bousley v. United States, 523 U.S. 614, 620–21 (1998) (characterizing separation of powers concerns as "the doctrinal underpinnings of habeas review"); *see also* Welch v. United States, 136 S. Ct. 1257, 1268 (2016) ("*Bousley* noted that the separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact." (citing *Bousley*, 523 U.S. at 620–21)).

214. *See, e.g.*, Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1115 n.19 (9th Cir. 2019) ("[T]he writ is an indispensable separation of powers mechanism.").

215. *See, e.g.*, Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 466 (2010) (describing *Boumediene* as "rooted in separation of powers and a concern about executive manipulation of legal rules"); Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 BERKELEY J. INT'L. L. 1, 18 (2009) (describing *Boumediene* as "among the Court's most important modern statements on the separation of powers"); Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2111 (2009) (observing that *Boumediene* supports a view of habeas corpus that is "as much about preserving the role of the courts as it is about protecting the individual rights of the litigants").

detention that violates either principle necessarily tramples upon the doctrinal foundations of habeas review.[216]

Significantly, when a prisoner is detained in violation of the separation of powers principle, "the violation does not somehow become less significant simply because the Supreme Court [or controlling circuit] does not recognize the violation by issuance of a new retroactively applicable rule of law until *after* the prisoner's initial § 2255 claim has been resolved."[217] Indeed, section 2255(h)(2) allows second or successive claims based on a new retroactively applicable rule of constitutional law.[218] Because "§ 2255 does not authorize second or successive claims based on a retroactively applicable new rule of statutory law," the savings clause must allow prisoners a meaningful opportunity to raise these unlawful sentencing claims "to save § 2255 from unconstitutionality."[219]

B. DUE PROCESS CONCERNS

1. Stripping the Court of Its Sentencing Discretion

There are also fundamental due process concerns raised where a district court imposes a sentence at "statutory gunpoint."[220] This occurs when a district court is stripped of its sentencing discretion because of an incorrect understanding of the reach of a criminal statute.

In *Hicks v. Oklahoma*, the Supreme Court found a due process violation because a defendant was erroneously sentenced to a mandatory forty-year term as a recidivist, thus depriving him of a state law entitlement to have a jury fix his sentence to any term "not less than ten . . . years."[221] The Court held that a defendant always has a "substantial and legitimate expectation" under the Fourteenth Amendment to "be deprived of his liberty only to the extent determined by the [trier of fact] in the exercise of its statutory discretion."[222] Importantly, the Court rejected the state appellate court's decision to affirm simply because the

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216. *See, e.g.*, *Welch*, 136 S. Ct. at 1268 ("[T]he separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact."); *Bousley*, 523 U.S. at 620–21 ("For under our federal system it is only Congress, and not the courts, which can make conduct criminal. Accordingly, it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid." (citations omitted)).

217. McCarthan v. Dir. of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1122–23 (11th Cir. 2017) (en banc) (Rosenbaum, J., dissenting) (emphasis added), *cert. denied*, 138 S. Ct. 502 (2017); *id.* ("And the very same concepts that, under the Suspension Clause, demand the retroactivity of new rules of constitutional or statutory law on initial collateral review—the separation-of-powers doctrine and the principle of limited government powers—apply with equal force in the context of second or successive claims for collateral review based on a previously unavailable retroactively applicable rule of constitutional or statutory law.").

218. *See* 28 U.S.C. § 2255(h)(2) (2012) (providing that a second or successive motion can be filed when there is a previously unavailable "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court").

219. *McCarthan*, 851 F.3d at 1123 (Rosenbaum, J., dissenting).

220. *See* United States v. Surratt, 797 F.3d 240, 273 (4th Cir. 2015) (Gregory, J., dissenting), *reh'g granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

221. 447 U.S. 343, 346 (1980) (quoting OKLA. STAT. tit. 21, § 51(A)(1) (1971)).

222. *Id.*

erroneously imposed mandatory sentence was within the authorized range of punishment.[223]

Hicks has been found to apply with equal force to sentences imposed by judges.[224] The due process violation in *Hicks* was not deprivation of the defendant's right to a jury, but deprivation of his right to have the trier of fact "exercise . . . its statutory discretion" to impose a just sentence in light of the defendant's individual characteristics.[225] The same due process interests stated in *Hicks* are implicated by the deprivation of all judicial discretion to impose a lower sentence based on an erroneous interpretation of the sentencing statute. And the Supreme Court has not limited *Hicks* to juries simply by describing its holding in light of its facts. That *Hicks* arose on direct appeal does not imply that its assessment of the constitutional harm to the defendant is limited to that context.[226]

In *United States v. Tucker*, the Supreme Court considered whether to vacate a sentence of twenty-five years of imprisonment for armed bank robbery that was enhanced by two prior constitutionally invalid convictions.[227] The Court affirmed the Ninth Circuit's decision to vacate the sentence and remand for resentencing because "there was a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed."[228] The Court explained, "we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude."[229] It reasoned that "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue."[230] The Court thus concluded that when a court fails to sentence a defendant within its informed discretion, that defendant's due process rights have been violated.[231]

The liberty interests recognized in *Hicks* and *Tucker* are equally implicated by the total deprivation of discretionary judicial sentencing. This occurs when a district court sentences a person to an enhanced sentence under an erroneous

223. *Id.* at 345–47.

224. *See* Johnson v. Rosemeyer, 117 F.3d 104, 112 (3d Cir. 1997) ("We think that a judicial error of that kind [a judge erroneously sentencing a defendant to a mandatory term of imprisonment] would violate a defendant's due process protections and we see no reason why a different result would be reached merely because the jury imposes the sentence."); Chitwood v. Dowd, 889 F.2d 781, 786 (8th Cir. 1989) ("When the trial court exercises its [sentencing] discretion under the statute, a defendant has a legitimate expectation that he will be deprived of his liberty only to the extent determined by the court. That expectation is a liberty interest, protected by due process and enforceable by way of habeas corpus."); Prater v. Maggio, 686 F.2d 346, 350 n.8 (5th Cir. 1982) ("In *Hicks*, the jury both decided innocence or guilt and imposed sentence on the defendant. The rule of the case is not, however, limited to imposition of sentences by *juries*. In this case, the judge—not the jury—was vested with statutory discretion in sentencing.").

225. *Hicks*, 447 U.S. at 346.

226. *See, e.g.*, *Chitwood*, 889 F.2d at 786.

227. 404 U.S. 443, 444–46 (1972).

228. *Id.* at 445–46 (internal quotation marks omitted).

229. *Id.* at 447.

230. *Id.* (quoting Townsend v. Burke, 334 U.S. 736, 741 (1948)).

231. *Id.*

interpretation of the applicable statute set forth by the controlling circuit court or the Supreme Court. That person was not sentenced under the correct sentencing range, thus violating due process.

2. Lack of Access to Courts to Challenge the Legality of the Sentence

There is another due process concern at issue here—that persons should have access to courts to test whether their detention is lawful.[232] This principle is fundamental to our constitutional system. Two observations illustrate this point. First, the Framers of our Constitution were determined to constitutionalize protections against arbitrary detention. It is not an overstatement to suggest that the Framers were obsessed with creating safeguards that require the "Executive [to] answer to an impartial body with a valid cause for depriving one of his or her liberty."[233] They did precisely this by constitutionalizing due process of law in the Fifth Amendment and habeas corpus through the Suspension Clause.[234] This is important because the writ of habeas corpus—at its core—first "insure[s] the integrity of the process resulting in imprisonment"[235] and second, as the Supreme Court has held, "afford[s] a swift and imperative remedy in all cases of illegal restraint upon personal liberty."[236] Second, the right to due process and the writ of habeas corpus are "coextensive."[237] This means "'due process [wa]s concerned with how and why a man was imprisoned; the writ was a procedural avenue by which a prisoner could get those questions before a court' and be granted a remedy for any due process violations."[238] A brief historical account is necessary for context and confirmation.

Scholars and courts have written extensively on the relationship between the Due Process Clause and the writ of habeas corpus in American law.[239] Most of

232. This interest is particularly compelling when a person is serving a sentence that, after a corrected understanding of the applicable statute that resulted in the enhanced sentence, is above the sentencing guidelines range.

233. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 384 (2006) (footnote omitted); *see also* Duncan v. Louisiana, 391 U.S. 145, 169 (1968) ("[T]he origin of [due process] was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases.").

234. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended . . . .").

235. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980); *see also Ex parte* Watkins, 28 U.S. (1 Pet.) 193, 202 (1830) ("The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

236. Price v. Johntson, 334 U.S. 266, 283 (1948).

237. Tyler, *supra* note 233, at 383.

238. *Id.* at 382 (footnote omitted); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.").

239. *See, e.g.*, DUKER, *supra* note 235, at 126; Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47 (2012); Redish & McNamara, *supra* note 44; David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 61–65 (2006).

these works discuss the origins of due process of law. The phrase—due process of law—derives from the Magna Carta, which declares that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled, or in any way ruined, nor will [the king] go or send against him, [or *commit him to prison*], except by the lawful judgment of his peers or by *the law of the land*."[240] This contribution has been said to be "worth more to mankind than all the Greek and Roman classics."[241] The immediate question became what remedy, if any, is available to a person that is committed to prison without due process of law. The answer is that person "may have an habeas corpus"—the historical vehicle used to vindicate a prisoner's due process right.[242] Thus, the very purpose of liberty is to be free from indefinite imprisonment.

Blackstone, in his *Commentaries*, stated this principle clearly:

> To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing . . . and express the causes of the commitment in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner.[243]

The Founders understood the importance of Blackstone's words. Alexander Hamilton quoted from this very passage in *The Federalist Papers*.[244] Moreover, in the debates leading up to ratification of the Constitution, many prominent officials argued that the "privilege [of the writ] . . . is essential to freedom."[245] Justice Antonin Scalia succinctly summarized Blackstone's influence on our constitutional structure: "The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found

240. Magna Carta ch. 39, *reprinted in* J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992) (emphasis added); *see also* Browder v. City of Albuquerque, 787 F.3d 1076, 1079 (10th Cir. 2015) ("The constitutional due process guarantee traces its roots to the Magna Carta . . . ."); Hurtado v. California, 110 U.S. 516, 521–24 (1884) (equating Magna Carta's reference to "the law of the land" with "the due course and process of the law").

241. Isaac Franklin Russell, *Due Process of Law*, 14 YALE L.J. 322, 325–26 (1905).

242. SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (photo. reprt. 1982) (London, W. Rawlins 6th ed. 1681).

243. 1 WILLIAM BLACKSTONE, COMMENTARIES *136 (footnote omitted).

244. THE FEDERALIST NO. 84, at 432 (Alexander Hamilton) (Ian Shapiro, John Dunn, Donald L. Horowitz & Eileen Hunt Botting eds., 2001). Hamilton contended that "the establishment of the writ of habeas corpus" would protect against "the practice of arbitrary imprisonments . . . in all ages, the favorite and most formidable instruments of tyranny." *Id.*

245. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION: AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 108–09 (Jonathan Elliot ed., 1891) (statement of Judge Increase Sumner); *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 117 (Philadelphia, 2d ed. 1829) ("It is the great remedy of the citizen or subject against arbitrary or illegal imprisonment; it is the mode by which the judicial power speedily and effectually protects the personal liberty of every individual, and repels the injustice of unconstitutional laws or despotic governors.").

expression in the Constitution's Due Process and Suspension Clauses."[246]

One of the leading experts in habeas law, Professor Amanda Tyler, has—in many works—discussed this constitutional marriage between the due process clause and the writ of habeas corpus.[247] She persuasively argues that:

> This marriage of constitutional protections follows because "[t]o hold someone in detention without affording her a judicial forum to test whether the detention is lawful . . . is the very essence of a deprivation of liberty without due process." Although due process has come to mean many things over time, at its most fundamental and as it relates to the Great Writ, the guarantee of due process promises that the Executive must answer to an impartial body with a valid cause for depriving one of his or her liberty. Indeed, that the habeas remedy is so crucial to the realization of this due process guarantee suggests that "had there been no Suspension Clause, such a remedy would still be implicitly mandated by the Constitution." This conclusion follows, moreover, because the Suspension Clause should be read "as an integrated component of a broader constitutional scheme of rights to judicial review and judicial remedies."[248]

Professor Tyler is right. Federal prisoners *always* have—absent a valid suspension of the writ of habeas corpus by Congress—the due process right to ask a court to determine whether their detentions are lawful.[249] And, when a person is serving an unlawful sentence, due process requires that the principle of finality must yield to the imperative of courts correcting fundamentally unjust sentences. Any other interpretation cuts at the heart of our constitutional structure.

Indeed, another aspect of our constitutional structure that is implicated is the Suspension Clause, which ensures that the writ of habeas corpus—that is so deeply rooted in the separation of powers principle and due process—cannot be suspended.

C. SUSPENSION OF THE GREAT WRIT

The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[250] This provision "secure[s] the writ [of habeas corpus] and ensure[s] its place in our legal system."[251] Because the Suspension Clause protects the writ of habeas corpus under the Constitution,

246. Hamdi v. Rumsfeld, 542 U.S. 507, 555–56 (2004) (Scalia, J., dissenting).

247. *See* Amanda L. Tyler, *A "Second* Magna Carta*": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949 (2016); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012); Tyler, *supra* note 210.

248. Tyler, *supra* note 233, at 383–84 (footnotes omitted).

249. *See id*. at 384 ("Accordingly, in the absence of a valid suspension, an American citizen detained on American soil (our paradigmatic habeas petitioner) enjoys at a minimum the due process right to ask a court to inquire into the cause for his or her detention." (footnote omitted)).

250. U.S. CONST. art. I, § 9, cl. 2.

251. Boumediene v. Bush, 553 U.S. 723, 740 (2008).

the Supreme Court has stated that the savings clause—to the extent that the rest of section 2255 does not provide for such review—ensures access to the writ of habeas corpus commensurate with what the Suspension Clause constitutionally may require.[252]

In fact, failure to interpret the savings clause in this way would, as the Supreme Court has warned, raise "serious question[s] about the constitutionality of [section 2255]."[253] Why? Because through its jurisprudence, the Supreme Court has treated the savings clause as a constitutional failsafe for section 2255.[254] In other words, the Suspension Clause protects second and successive claims that section 2255(h) fails to permit. It does this through the savings clause.[255] If the savings clause did not protect these claims—both actual innocence and unlawful sentencing claims—section 2255 would likely violate the Suspension Clause.[256]

This conclusion does not appear to be in dispute. In *Boumediene*, a fairly recent landmark decision that comprehensively interpreted the Suspension Clause, the Supreme Court held that the Suspension Clause is violated when a prisoner is denied "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[257] Where, as here, the application of the statutory bar in section 2255(h) would deny a federal prisoner such a meaningful opportunity to show that he was sentenced under an erroneous application of statutory law—thus raising both separation of powers and due process concerns—the savings clause must apply to avoid an unconstitutional suspension of the writ of habeas corpus. There must be an adequate substitute procedure for habeas corpus—itself an indispensable separation of powers and

252. *See id.* at 776 ("The [Supreme] Court placed explicit reliance upon [the savings clause] provisions in upholding [28 U.S.C. § 2255 and the District of Columbia equivalent of § 2255] against constitutional challenges." (first citing Swain v. Pressley, 430 U.S. 372, 381 (1977); and then citing United States v. Hayman, 342 U.S. 205, 223 (1952))).

253. *Id.* at 776 (quoting *Swain*, 430 U.S. at 381 (internal quotation marks omitted)).

254. *See, e.g.*, *Hayman*, 342 U.S. at 223 ("In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy [in § 2241] shall remain open to afford the necessary hearing." (footnote omitted)).

255. *See Boumediene*, 553 U.S. at 776. Because courts "would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 n.13 (2001); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 980 (1998) (noting that "reconstructing habeas corpus law [for purposes of a Suspension Clause analysis] would be a difficult enterprise, given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions").

256. Section 2255(e) is referred to as the "savings" clause for a reason. "By permitting a federal prisoner to bring a habeas corpus petition under 28 U.S.C. § 2241 where § 2255 proves [an] 'inadequate or ineffective remedy to test the legality of his detention,' § 2255(e) operates to 'save' § 2255 from violating the Suspension Clause of the United States Constitution." Gilbert v. United States, 640 F.3d 1293, 1329 (11th Cir. 2011) (Barkett, J., dissenting).

257. 553 U.S. at 779 (quoting *St. Cyr*, 533 U.S. at 302).

due process mechanism—to be in compliance with the Suspension Clause.[258]

Additionally, as the Brennan Center has posited, "[o]nly Congress can suspend the constitutional guarantee against arbitrary detention, and only under specific, narrow circumstances not present" when a federal prisoner is serving a constitutionally suspect sentence.[259] The Supreme Court has confirmed this constitutional principle on several occasions.[260] The Suspension Clause thus applies to federal prisoners "with undiminished force."[261] Therefore, "[t]o effectuate the role of the Great Writ within the scheme of Separation of Powers [and the Due Process Clause] . . . the district court *must* have power to end [federal prisoners'] unsupportable detention."[262]

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A person should serve a sentence within the range Congress prescribed as determined by the district court after complete consideration of all relevant factors. Not only is this consistent with common sense, but is also consistent with constitutional principles. When a sentencing error moves the ceiling or floor, the effect is a fundamental defect in the criminal process that the savings clause is designed to prevent. Each of these issues were front and center in *United States v. Surratt*.

V. THE CASE: RAYMOND SURRATT JR.

The facts of *United States v. Surratt* teed up all of the issues discussed above. The public was watching this case—another perceived injustice—closely: a young, African-American man serving a life sentence for selling drugs that everyone, including the government and district court, believed was unjust.[263] Right before the entire Fourth Circuit was going to take a swing, President Barack Obama commuted Surratt's sentence, mooting Surratt's appeal.[264] These facts,

258. *Id*. at 765 ("These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.").

259. Brief for the Association of the Bar of The City of New York, The Brennan Center for Justice at the New York University School of Law, the Constitution Project, the Rutherford Institute, and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Petitioners at 8, Kiyemba v. Obama, 559 U.S. 131 (2010) (No. 08-1234), 2009 WL 1265288, at *8 [hereinafter Brief for Brennan Center et al.]. Congress has on four occasions "authorized executive suspension of the writ . . . . All such suspensions were accompanied by clear statements expressing congressional intent to suspend the writ and limiting the suspension to periods during which the predicate conditions (rebellion or invasion) existed." Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 14 (D.D.C. 2006) (citing DUKER, *supra* note 235, at 149, 178 n.190) (providing justifications for each of the four times the writ was suspended).

260. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.").

261. Brief for Brennan Center et al., *supra* note 259, at 8.

262. *Id*.; *see also Boumediene*, 553 U.S. at 783 (holding that for the writ to have meaning and fulfill its constitutional role, it "must be effective").

263. *See, e.g.*, Marimow, *supra* note 15.

264. United States v. Surratt, 855 F.3d 218, 219 (4th Cir. 2017) ("By order dated February 14, 2017, the court directed the parties to address the impact of the President's commutation of Appellant Surratt's

however, illustrate the heart of this Article's argument: any error that alters the statutory sentencing range Congress prescribed for punishment—the ceiling or the floor—is cognizable under the savings clause.

A. FACTUAL BACKGROUND

Raymond Surratt Jr. was charged with "conspiracy to possess with intent to distribute" crack and powder cocaine in violation of the Controlled Substances Act (CSA), 21 U.S.C. §§ 841(b)(1)(A) and 846.[265] Pursuant to 21 U.S.C. § 851, the government filed an information disclosing its intent to seek enhanced penalties based on Surratt's four previous convictions in North Carolina: "(1) a 1996 conviction for felony possession of cocaine; (2) a 1997 conviction for felony possession of cocaine; (3) a 1997 conviction for felony possession of cocaine and maintaining a place for storage and sale; and (4) a 1998 conviction for sale and delivery of cocaine."[266] The maximum sentence Surratt could have received for the 1996 and 1997 convictions was eight months for each offense.[267]

On February 4, 2005, Surratt pleaded guilty to one count of the conspiracy charges.[268] The plea agreement specified that Surratt potentially faced a mandatory term of life imprisonment because the CSA imposed a statutory minimum sentence of life imprisonment for anyone with two or more prior convictions for a felony drug offense.[269] At his rule 11 hearing[270] on February 4, 2005, Surratt affirmed to the magistrate judge that he understood how the sentencing guidelines might apply to his case, that he might receive a mandatory term of life imprisonment, and that if the sentence was more severe than expected, he would be bound by his plea.[271]

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sentence and, in particular, the questions of mootness and jurisdiction. Upon consideration of the responses to the court's order, the court finds this appeal to be moot.").

265. *See* United States v. Surratt, 797 F.3d 240, 244 (4th Cir. 2015), *reh'g en banc granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

266. *Id*. at 244–45.

267. Surratt's June 26, 1996 conviction was for a violation of North Carolina General Statute § 90-95(a)(3), a North Carolina Class I felony. *See* Defendant's Motion to Vacate Sentence Under 28 U.S.C. 2255; Alternative Petition for Relief Under 28 U.S.C. 2241; Alternative Petition for Writ of *Coram Nobis* at 3, United States v. Surrat, 445 Fed. App'x 64 (4th Cir. 2011) (No. 3:04-cr-00250-RJC) [hereinafter Surrat's Motion to Vacate]. His prior record level under state law was I, meaning the maximum punishment he could have received for this conviction was eight months of imprisonment. *Id*.; *see also* N.C. GEN. STAT. ANN. §§ 90-95(a), 15A-1340-17(c), (d) (West 2018). Surratt's June 27, 1997 convictions were Class I felonies with a prior record level of II, for which he could receive no more than eight months of imprisonment. *See* Surratt's Motion to Vacate, *supra*.; N.C. GEN. STAT. ANN. § 15A-1340-17(c), (d) (West 2013).

268. Surratt v. United States, No. 3:08cv181, 2011 WL 815714, at *1 (W.D.N.C. Feb. 25, 2011).

269. *See id*.; 21 U.S.C. § 841(b)(1)(A). The statutory mandatory minimum sentences were recently lessened by the Fair Sentencing Act and the First Step Act. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372; First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220.

270. *See* FED. R. CRIM. P. 11 (detailing the plea procedure in criminal cases).

271. *See* Surratt v. United States, No. 3:08cv181, 2011 WL 815714, at *1 (W.D.N.C. Feb. 25, 2011); *Surratt*, 797 F.3d at 245.

At this point, the Fourth Circuit had yet to rule in *United States v. Harp*, which was decided May 4, 2005.[272] In *Harp*—which would later be overturned by *United States v. Simmons*[273]—the Fourth Circuit considered whether a defendant's prior conviction for possession with intent to distribute marijuana made him a career offender subject to an enhanced sentence under U.S.S.G. § 4B1.1.[274] The case turned on whether the controlled substance offense was "punishable by imprisonment for a term exceeding one year."[275] The Fourth Circuit held that a prior conviction under North Carolina law qualified as such a felony if the maximum aggravated sentence that could have been imposed for that crime exceeded one year, regardless of whether the sentence actually imposed on the defendant was less than one year.[276]

Surratt's sentencing hearing took place in October 2005, by which time *Harp* had been issued.[277] Under the CSA, like in *Harp*, a prior felony drug offense is defined as an offense "punishable by imprisonment for more than one year."[278] The maximum penalty possible for three of Surratt's prior convictions was only eight months each for Surratt in his individual circumstances, but the maximum aggravated sentences permissible under North Carolina law were more than one year.[279] Thus, *Harp* dictated that all four of Surratt's previous convictions counted as felonies.[280]

Surratt's preliminary sentencing guidelines range was calculated in his presentence report as 188–235 months of imprisonment.[281] However, at the time Surratt was sentenced, the statutory minimum under the CSA for someone with two or more felony drug convictions was life imprisonment.[282] Because this mandatory minimum was greater than the maximum of the recommended guideline range, Surratt's penalty was a life term.[283] At sentencing, the district court stated it "had no other option" but to sentence Surratt accordingly, which it did.[284] Surratt appealed, but the Fourth Circuit affirmed his conviction and sentence.[285]

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272. 406 F.3d 242 (4th Cir. 2005), *overruled by* United States v. Simmons, 649 F.3d 237 (4th Cir. 2011).

273. 649 F.3d 237, 241 (4th Cir. 2011) (en banc) ("*Harp* no longer remains good law.").

274. *Harp*, 406 F.3d at 244–45.

275. *Id*. at 245 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(b) (U.S. SENTENCING COMM'N 2004)).

276. *See id*. at 246–47.

277. *See* United States v. Surratt, 797 F.3d 240, 245 (4th Cir. 2015), *reh'g en banc granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

278. *See* 21 U.S.C. § 802(44) (2012).

279. *See supra* note 267. The parties agreed that only the 1998 conviction qualified as a "felony drug offense" under the CSA. *See* United States v. Surratt, 797 F.3d 240, 245–46 (4th Cir. 2015), *reh'g en banc granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

280. *Harp*, 406 F.3d at 245.

281. *See* United States v. Surratt, 215 F. App'x 222, 223 (4th Cir. 2007).

282. *See* 21 U.S.C. § 841(b)(1)(A) (2012); *see also* First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220 (lowering the statutory mandatory minimum).

283. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(b) (U.S. SENTENCING COMM'N 2004).

284. *See* United States v. Surratt, 797 F.3d 240, 270 (4th Cir. 2015) (Gregory, J., dissenting), *reh'g en banc granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

285. United States v. Surratt, 215 F. App'x 222, 224 (4th Cir. 2007).

On April 22, 2008, Surratt filed a pro se motion to vacate his sentence under section 2255 due to ineffective assistance of counsel.[286] He also requested a sentence reduction under 18 U.S.C. § 3582(c)(2) based on amended sentencing guidelines application to crack cocaine offenses.[287] The district court denied Surratt's petition on February 24, 2011.[288]

Six months after the district court denied Surratt's motion to vacate his sentence, the Fourth Circuit issued *Simmons*. In *Simmons*, the Fourth Circuit considered the same "punishable by imprisonment for more than one year" language in the CSA.[289] This time the Fourth Circuit held that instead of looking at the maximum aggravated sentence that could possibly be imposed under North Carolina law, the question of whether a prior conviction can be considered a felony depended on the "conviction itself."[290]

If Surratt were sentenced for the same CSA violation today, under the Fourth Circuit decision in *Simmons*, his 1996 and 1997 convictions would not qualify as felonies and he would not face a mandatory minimum term of life imprisonment. Because, under *Simmons*, Surratt possessed only one CSA predicate felony, the statutory mandatory minimum for someone with one qualifying offense is not a life term, but twenty years.[291] Life with the possibility of parole was actually the

286. Surratt v. United States, No. 3:12-CV-513, 2014 WL 2013328, at *2 (W.D.N.C. May 16, 2014).

287. *See id.*

288. *See id.*

289. United States v. Simmons, 649 F.3d 237, 239 (4th Cir. 2011) (en banc).

290. *See id.* at 244 (citing Carachuri-Rosendo v. Holder, 560 U.S. 563, 576 (2010)).

291. *See* 21 U.S.C. § 841(b)(1)(A) (2012). In August 2010, Congress enacted the Fair Sentencing Act, which amended section 841(b)(1) to reduce the disparity between sentences for powder and crack cocaine offenses. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372. "The amendment, which remains in effect, responded to both public and judicial outcry regarding the 'disproportionate and unjust effect' of the 100-to-1 powder-to-crack quantity ratio on crack offenders, who were disproportionately minorities." United States v. Surratt, 855 F.3d 218, 223 (4th Cir. 2017) (Wynn, J., dissenting from dismissal) (quoting Kimbrough v. United States, 552 U.S. 85, 93 (2007)); *see also* Dorsey v. United States, 567 U.S. 260, 268 (2012) ("[T]he public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences."); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1266–68 (1996) (explaining that implementation of the 100-to-1 ratio led to significantly higher incarceration rates for black and Hispanic offenders relative to white offenders and significantly longer sentences for black offenders relative to white offenders).

The Supreme Court held in *Dorsey* that the Fair Sentencing Act applies retroactively, meaning that the statute's "more lenient mandatory minimums apply to offenders whose unlawful conduct took place before, but whose sentencing took place after, the date [the Fair Sentencing] Act took effect." 567 U.S. at 272. As Judge James A. Wynn Jr., explained in his dissent from the Fourth Circuit's 2017 *Surratt* decision,

> Had the powder-to-crack quantity ratio established by the Fair Sentencing Act been in effect at the time of his conviction, [Surratt] would have been sentenced under Section 841(b)(1)(B), rather than Section 841(b)(1)(A), because of the Fair Sentencing Act's revised quantity threshold for receiving the higher mandatory minimums set forth in Section 841(b)(1)(A).

855 F.3d at 223 (Wynn, J., dissenting from dismissal) (alteration in original) (citing 21 U.S.C. § 841(b)(1)(A), (B)). Under Section 841(b)(1)(B), because Surratt only had one predicate felony drug offense, he would face a mandatory minimum term of *ten years* of imprisonment, not life. *See* 21 U.S.C. § 841(b)(1)(B).

statutory maximum.[292] Surratt, however, was sentenced to a mandatory minimum term of life imprisonment.

B. SURRATT'S MOTION TO VACATE HIS SENTENCE

On August 15, 2012, Surratt filed a motion in the district court to vacate his sentence under section 2255 and section 2241.[293] Surratt argued that he was entitled to relief under section 2255 because, in light of *Simmons*, his sentence was not authorized by law.[294] In those proceedings, the government agreed that Surratt was entitled to resentencing under section 2255(e) and section 2241, arguing that Surratt was not eligible for the aggravated sentence he received.[295]

On April 7, 2014, the district court held a hearing on Surratt's motion and acknowledged that it would have imposed less than a life sentence at the original sentencing hearing if it had the authority to do so.[296] The district judge stated, "I was required to impose a life sentence," as well as "I'll not forget the frustration I felt in doing that because I did think it was an unjust sentence."[297] The court further stated that its "inability" to consider the possibility of a lesser sentence "based on all relevant evidence has troubled the Court to this day."[298] Nevertheless, the court denied Surratt's motion, holding that the Fourth Circuit's decision in *In re Jones* precluded any relief for sentencing errors.[299]

Jones involved a slightly different challenge under section 2255(e) and section 2241. Jones had been convicted under 18 U.S.C. § 924(c)(1) for using a firearm during the commission of a drug offense, "based on the discovery of four firearms in a locked closet."[300] After his first section 2255 motion, the Supreme Court decided *Bailey v. United States*, which held that the government must prove "active employment" to establish "use" of a firearm under the statute.[301] Without a new, retroactively applicable rule of constitutional law, this change in statutory interpretation did not satisfy the requirements for a successive petition under section 2255(h), so Jones invoked the savings clause of section 2255(e), arguing that section 2255 was "inadequate or ineffective to test the legality of his detention."[302] The Fourth Circuit agreed, especially because "*Bailey* establishes that a prisoner whose conviction rests on an improper definition of 'use' is incarcerated

292. *See* 21 U.S.C. § 841(b)(1)(A).

293. Surratt v. United States, No. 3:12-CV-513, 2014 WL 2013328, at *3 (W.D.N.C. May 16, 2014).

294. *Id*. at *3, *6.

295. *See* United States v. Surratt, 797 F.3d 240, 270 (4th Cir. 2015) (Gregory, J., dissenting), *reh'g en banc granted*, No. 14-6851 (4th Cir. Dec. 2, 2015) ("Both parties agree that Surratt is ineligible to spend the rest of his life in prison.").

296. *See* Surratt v. United States, No. 3:12-CV-513, 2014 WL 2013328, at *3 (W.D.N.C. May 16, 2014).

297. *Surratt*, 797 F.3d at 273 (Gregory, J., dissenting).

298. Surratt v. United States, No. 3:12-CV-513, 2014 WL 2013328, at *2 (W.D.N.C. May 16, 2014).

299. *Id*. at *6.

300. *In re* Jones, 226 F.3d 328, 334 (4th Cir. 2000).

301. 516 U.S. 137, 143 (1995).

302. *Jones*, 226 F.3d at 329 (quoting 28 U.S.C. § 2255(e) (2012)).

for conduct that is not criminal."[303] The Fourth Circuit therefore concluded that section 2255 is "inadequate and ineffective to test the legality of a conviction" when three criteria are met:

> (1) [A]t 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.[304]

Citing this three-part test, the district court held that Surratt could not satisfy the second requirement: that the substantive law changed such that the conduct for which Surratt was convicted was no longer criminal.[305] Ultimately the district court found it was "not at liberty to deviate" from *Jones* and could not recognize "something less than decriminalized conduct [to] support[] proceeding through the savings clause portal to section 2241 relief."[306] The court further found that due process is not violated by preventing a defendant from invoking the savings clause to "remedy a sentence based on a mandatory minimum punishment later deemed invalid."[307] Surratt appealed to the Fourth Circuit. Because both parties agreed that the savings clause permitted Surratt to challenge his unlawful sentence, the Fourth Circuit appointed an amicus to present any other potential interpretations of the savings clause.[308]

On appeal, a divided panel[309] of the Fourth Circuit concluded that "§ 2255(e)'s *text* does not permit Surratt to raise his claim under section 2241."[310] Specifically, the majority denied Surratt's section 2241 petition because he was not actually of the underlying conviction and could not—"absent verbal and logical gymnastics"— be "actually innocent" of a sentence enhancement.[311] The majority left open the possibility that section 2241 could support a prisoner's challenge to a sentence exceeding the statutory maximum, but found this exception inapplicable because Surratt's sentence was lawful—the

303. *Id*. at 333.

304. *Id*. at 333–34.

305. Surratt v. United States, No. 3:12-CV-513, 2014 WL 2013328, at *5 (W.D.N.C. May 16, 2014).

306. *Id*.

307. *Id*. at *9.

308. United States v. Surratt, 797 F.3d 240, 246 (4th Cir. 2015), *reh'g en banc granted*, No. 14-6851 (4th Cir. Dec. 2, 2015).

309. Judge Gregory issued a scathing and well-reasoned dissent. Judge Gregory anchored his argument on the history and text of the "Great Writ," tracked the impact of legislation on it, and then applied those principles and Fourth Circuit precedent to determine that the majority's holding violates them all. *Id*. at 270–76 (Gregory, J., dissenting). The core of his argument resides in the constitutional prohibition on suspension of the writ. *See id*. Judge Gregory analyzed the text, applying "the traditional savings clause analysis" (the analysis set out in *Jones*) to show why section 2255 is "inadequate or ineffective" and why section 2241 is available to address a misapplied enhancement. *Id*. at 273–76.

310. *Id*. at 251 (majority opinion).

311. *Id*. at 249–50.

statutory maximum sentence authorized for Surratt's conviction was life imprisonment, which his mandatory minimum life sentence did not exceed.[312] Surratt was thus barred from seeking habeas relief under section 2241 for a misapplied mandatory minimum life sentence.[313]

Surratt petitioned the Fourth Circuit to rehear the case en banc; the court granted his request and vacated the panel decision.[314] The en banc argument occurred on March 23, 2016.[315] However, "[o]n January 19, 2017—nearly 10 months after the rehearing en banc, and still without a decision from [the Fourth Circuit]—[President Obama] commuted [Surratt's] life sentence to a 200-month term of imprisonment."[316] Surratt's "commutation was part of a broader effort by the President to commute the sentences of inmates sentenced in accordance with the severe mandatory minimums and unjust powder-to-crack quantity ratio applicable under the earlier version of Section 841(b)(1)."[317]

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Although there is an ongoing debate about whether the President's pardon mooted Surratt's appeal,[318] there should be no debate that Surratt was entitled to relief via the savings clause, at least under this Article's interpretation of that clause.

C. SURRATT WAS ENTITLED TO HABEAS RELIEF

Under this Article's interpretation of the savings clause, Surratt was entitled to habeas relief because section 2255 was inadequate or ineffective to test the legality of his sentence. Surratt's claim relied on a retroactively applicable decision of statutory interpretation, was foreclosed by binding precedent at the time of his initial section 2255 motion, and involved a fundamental defect. The first two conditions—retroactivity and foreclosure—are easily satisfied here. *Simmons* was decided on August 17, 2011, after Surratt's direct appeal and his first section 2255 motion were filed on April 22, 2008.[319] *Simmons*, declared retroactive by *Miller v. United States*,[320] is a case about statutory interpretation—namely, the interpretation of federal sentencing law—not constitutional law. Therefore, Surratt

312. *Id*. at 255–57, 269.
313. *Id*. at 269.
314. *Id*. at 240.
315. United States v. Surratt, 855 F.3d 218, 218 (4th Cir. 2017).
316. *Id*. at 224 (Wynn, J., dissenting from dismissal).
317. *Id*.
318. *See id*. at 221. In his dissent from dismissal, Judge Wynn argued that, because Surratt still has a "concrete interest, *however small*, in the outcome of the litigation" and because the Court could grant effectual relief, the case was not moot. *Id*. at 225–27. Specifically, Judge Wynn contended that Surratt would likely face a shorter sentence than the one imposed by the commutation. *Id*. at 232. Judge Wilkinson disagreed, stating that "[t]he President's commutation order simply closes the judicial door." *Id*. at 219 (Wilkinson, J., concurring) (alteration in original).
319. Surratt v. United States, No. 3:12-CV-513, 2014 WL 2013328, at *2 (W.D.N.C. May 16, 2014); United States v. Simmons, 649 F.3d 237, 237 (4th Cir. 2011).
320. 735 F.3d 141, 147 (4th Cir. 2013) ("*Simmons* announced a new substantive rule that is retroactive on collateral review . . . .").

cannot take advantage of a second or successive petition through section 2255(h). In other words, Surratt never "had an unobstructed procedural shot at filing a § 2255 motion to take advantage of" the change brought about by *Simmons*.[321]

In addition, the error is of constitutional magnitude. The *Simmons* error in Surratt's case took away the floor of his sentencing range and tied the hands of the district court such that it was prevented from fashioning an individualized sentence within the legally correct range intended by Congress. This raises the serious and significant separation of powers and due process concerns discussed in Part IV that established the fundamental character defect in Surratt's case.

Any suggestion that Surratt's sentence is legal because it is within the applicable statutory maximum—as the majority did in *Surratt*—is, as in *Hicks v. Oklahoma*, no more than a "frail conjecture" that cannot support "[s]uch an arbitrary disregard of the petitioner's right to liberty."[322] Indeed, the conjecture is even less substantial in Surratt's case than in *Hicks* because the district court made clear that it believes Surratt's life sentence to be "unjust" and would not have imposed it but for the erroneous belief that it was compelled to do so by the statutory mandatory minimum. More importantly, the Supreme Court in *Hicks* found a due process violation *even though* the resulting sentence was "within the range of punishment that could have been imposed in any event."[323]

Surratt's case is important because it underscores what is at stake: years of Surratt's life would have wasted away in prison serving the "penultimate"[324] sentence because the Fourth Circuit wrongly interpreted the sentencing statute involved in his case. Even worse, the Fourth Circuit in its initial panel decision would have allowed Surratt no relief, the same result the Third, Fifth, Tenth, and Eleventh Circuits would reach. Surratt's "long-final" sentence, according to these courts, "must remain just that: final."[325] But, as the Supreme Court has repeatedly held, the finality principle—the notion that at some point the criminal justice process has to come to an end—"must yield to the imperative of correcting a fundamentally unjust incarceration."[326] Finality, in other words, should never be elevated over the legal rule that people should not be in prison because of an unlawful conviction or sentence.

Yet, these courts take refuge behind the finality principle, which, consequently, deprives federal prisoners "of the most basic liberties" and strips away all hope of

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321. Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010).

322. *See* 447 U.S. 343, 346 (1980); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 245 (1998) ("[Because a] mandatory minimum can . . . 'mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed' . . . . the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue." (citations omitted) (quoting McMillian v. Pennsylvania, 447 U.S. 79, 95 (1986) (Stevens, J., dissenting))).

323. *Hicks*, 447 U.S. at 345 (footnote omitted).

324. Solem v. Helm, 463 U.S. 277, 303 (1983).

325. *See* Prost v. Anderson, 636 F.3d 578, 580 (10th Cir. 2011).

326. Engle v. Isaac, 456 U.S. 107, 135 (1982). For the reasons stated in *supra* note 37, the finality principle, in my view, is not frustrated under this Article's proposal.

restoration, "except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."[327] This result is—and will always be—an extraordinary miscarriage of justice of constitutional proportions. In these cases, courts "must allow a prisoner to invoke the savings clause if the Great Writ, which has always been 'a bulwark against convictions that violate fundamental fairness,' is to mean anything at all."[328] This Article's proposal provides a bright-line test that is consistent with the text of the savings clause, provides clarity, upholds our constitutional values, and, most importantly, ensures that justice will be served.

CONCLUSION

This Article's interpretive framework, if adopted, will certainly require courts to review more cases. But these are precisely the cases courts must review to give people the confidence that the criminal justice system is working fairly. When courts correct their own mistakes concerning statutory interpretation, and that correction exposes a fundamental defect in sentencing—any error that alters the statutory range Congress prescribed for punishment—courts must address that issue head on. The mechanism to do so is the savings clause—the clause that should ensure that federal prisoners are not serving unlawful sentences and that justice is done. And, there is no basis—not in text or through any canons of interpretation—to deny federal prisoners access to the courts through the savings clause. The criminal justice process, after all, should never "rest at a point where it ought properly never to repose."[329]

327. Graham v. Florida, 560 U.S. 48, 69–70 (2010).

328. United States v. Surratt, 797 F.3d 240, 270 (4th Cir. 2015) (Gregory, J., dissenting) (internal quotation marks omitted) (quoting *Engle*, 456 U.S. at 126), *reh'g granted*, No. 14-6851 (4th Cir. 2015).

329. Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part).