

FEELING INADEQUATE?: THE STRUGGLE TO DEFINE THE SAVINGS CLAUSE IN 28 U.S.C. § 2255

Abstract: Federal prisoners who wish to mount a collateral challenge to their conviction or sentence are generally prohibited from making their claim via the writ of habeas corpus and are forced to proceed under a similar procedure set out in 28 U.S.C. § 2255. After the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), which added significant restrictions to § 2255 review but not to habeas review, that prohibition can be the difference between freedom and incarceration for a federal prisoner serving a term of incarceration based on an illegal conviction or sentence. There is, however, a provision within § 2255, known as the savings clause, that contains an exception to the habeas bar where the remedy provided by § 2255 is “inadequate or ineffective to test the legality of the detention.” The courts of appeals have split on the proper test to govern the application of the savings clause. This Note examines each of the tests that has been adopted by the circuits and shows how each is problematic when analyzed in light of the text of § 2255, the legislative intent behind the passage of the AEDPA, and the constitutional considerations inherent in post-conviction review. This Note goes on to posit a new test for the application of the savings clause that more effectively navigates those competing interests.

INTRODUCTION

In 1995, police arrested Ezell Gilbert when a search of his car revealed large amounts of crack cocaine and marijuana.¹ A federal indictment followed, and, in 1996, Gilbert pleaded guilty in federal court to possession of the drugs with intent to distribute.² Gilbert’s sentencing range under the federal sentencing guidelines was twelve and one-half to fifteen and one-half years.³ The court, however, did not apply

¹ *Gilbert v. United States*, 640 F.3d 1293, 1296 (11th Cir. 2011) (en banc).

² *Id.* at 1298.

³ *Id.* at 1300. During this period, imposing a sentence within the guideline range was mandatory. *Id.* In 2005, in *United States v. Booker*, the U.S. Supreme Court held that the Sixth Amendment right to a jury trial required severance of the statutory provision making imposition of a sentence within the guidelines range mandatory. 543 U.S. 220, 245 (2005). The upshot of this development for Gilbert is, if resentenced, he could be subject to a sentence that is as long, if not longer, than his current sentence, as judges are now free to depart from the sentencing range. *Gilbert*, 640 F.3d at 1304.

that range to Gilbert because it found that a sentencing enhancement contained within the sentencing guidelines applied to him.⁴ The enhancement increased his sentencing range under the guidelines to twenty-four and one-half to thirty and one-half years, nearly doubling the unenhanced range.⁵

Gilbert's sentence was enhanced by the Career Offender enhancement, which applies to sentences for certain crimes where the defendant has at least two prior felony convictions for either "crimes of violence" or controlled substance offenses.⁶ Gilbert objected at sentencing that his prior conviction for carrying a concealed weapon did not constitute a prior "crime of violence," which was required for the application of the enhancement in his case.⁷ The trial court overruled his objection, and the U.S. Court of Appeals for the Eleventh Circuit affirmed his conviction and sentencing.⁸

Then, in 2008, ten years after Gilbert's appeal, the U.S. Supreme Court, in *Begay v. United States*, held that driving while intoxicated was not a "violent felony" under a similar sentencing statute.⁹ This holding raised doubt about the viability of the Eleventh Circuit's holding in Gilbert's case.¹⁰ Ultimately, in 2008, in *United States v. Archer*, the Eleventh Circuit held that carrying a concealed weapon was not a "crime of violence" under the sentencing enhancement applied to Gilbert, explicitly overruling the decision in Gilbert's appeal.¹¹

In 2009, Gilbert filed a motion to be resentenced under 28 U.S.C. § 2255.¹² He cited *Archer*, in which the Eleventh Circuit admitted that it erred in applying the sentencing enhancement to him.¹³ Gilbert, however, would not receive a new sentencing hearing.¹⁴ His motion was denied due to the restrictions put in place by the Antiterrorism and Effec-

⁴ *Gilbert*, 640 F.3d at 1299–1300.

⁵ *Id.*

⁶ *Id.* at 1299; U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (1995).

⁷ *Gilbert*, 640 F.3d at 1299–1300.

⁸ *Id.* at 1300.

⁹ 553 U.S. 137, 148 (2008). The Court in *Begay* interpreted the term "violent felony" in the Armed Career Criminal Act. *Id.* at 139 (discussing 18 U.S.C. § 924(e) (2006)).

¹⁰ See *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (recognizing the Supreme Court's abrogation of *Gilbert*).

¹¹ *Id.* In *Archer*, the Eleventh Circuit used the Court's holding in *Begay* to inform its interpretation of "crime of violence" under the Career Offender enhancement, noting that the definitions of that term and "violent felony" in the Armed Career Criminal Act are "virtually identical." *Id.* at 1352.

¹² *Gilbert*, 640 F.3d at 1301.

¹³ *Id.* at 1301–02.

¹⁴ *Id.* at 1295.

tive Death Penalty Act of 1996 (AEDPA).¹⁵ The AEDPA added restrictions to § 2255 that made it very difficult for federal prisoners to get judicial review of their conviction or sentence if they, like Gilbert, had already challenged their conviction or sentence after their direct appeal.¹⁶

Gilbert's argument hinged on the application of the savings clause contained within § 2255, one of the very few exceptions by which a prisoner can avoid the restrictions added by the AEDPA.¹⁷ The savings clause allows federal prisoners to file a petition for a writ of habeas corpus when the remedy provided by § 2255 is deemed "inadequate or ineffective."¹⁸ The scope of "inadequate or ineffective" is unclear from the text of the statute and has become a significant source of litigation.¹⁹ The importance of a correct resolution to the savings clause problem cannot be overstated, as illustrated by the case of Ezell Gilbert, who will likely serve the entirety of his enhanced sentence despite a judicial admission that the sentencing guidelines were erroneously applied.²⁰

Part I of this Note discusses the enactment of 28 U.S.C. § 2255 as an alternative to the writ of habeas corpus and the fundamental changes the enactment of the AEDPA brought to that statute.²¹ Part II considers attempts by the courts of appeals to define the term "inadequate or ineffective," the operative language of the savings clause.²² Part III argues that all of the tests adopted by the courts of appeals are fundamentally flawed when weighed against the text of § 2255, the legislative intent that motivated the enactment of the AEDPA, and the constitutional considerations inherent in post-conviction review.²³ Finally, Part IV proposes a new test to govern the operation of the savings clause that avoids the pitfalls of the tests adopted by the courts of appeals.²⁴

¹⁵ *Id.* at 1302; see Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2255 (2006 & Supp. IV 2010)).

¹⁶ 28 U.S.C. § 2255; Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 90 (2005).

¹⁷ 28 U.S.C. § 2255(e); *Gilbert*, 640 F.3d at 1295; see Entzeroth, *supra* note 16, at 85–86, 90.

¹⁸ 28 U.S.C. § 2255(e).

¹⁹ *Gilbert*, 640 F.3d at 1307; see Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 190 (2003).

²⁰ See *Gilbert*, 640 F.3d at 1330 (Martin, J., dissenting).

²¹ See *infra* notes 25–89 and accompanying text.

²² See *infra* notes 90–191 and accompanying text.

²³ See *infra* notes 192–294 and accompanying text.

²⁴ See *infra* notes 295–354 and accompanying text.

I. THE LEGISLATIVE HISTORY OF THE SAVINGS CLAUSE AND THE AEDPA SEA CHANGE

The statute that governs collateral review of federal convictions and sentences is 28 U.S.C. § 2255.²⁵ This Part will trace the history of habeas corpus and the legislative history leading to the enactment of § 2255 as they are relevant to the savings clause.²⁶ This Part will also discuss the AEDPA and the significant changes that that legislation brought to § 2255.²⁷

For federal prisoners like Ezell Gilbert who wish to challenge their federal conviction or sentence after the denial of a direct appeal, or the failure to file one, the process is known as collateral review.²⁸ The term “collateral review” broadly refers to review of a criminal conviction or sentence that is separate from the direct appeal process.²⁹ Included within the broad umbrella of collateral review is § 2255, which Gilbert employed to challenge his sentence.³⁰ Possibly the best-known example of collateral review is the writ of habeas corpus and, in fact, the terms “collateral review” and “habeas corpus” are often used interchangeably.³¹ Section 2255 is distinct from habeas corpus, but is linked in its creation and scope to the ancient writ.³² Accordingly, a brief examination of the history of habeas corpus informs the analysis of collateral review generally and § 2255 specifically.³³

The origins of the writ of habeas corpus can be traced back to the emergence of the rule of law in England.³⁴ Originally, the writ served to safeguard the jurisdiction of the King’s courts over his subjects to ensure compliance with royal law.³⁵ Over time, however, the writ of habeas corpus became an important tool to ensure the legality of detention by the sovereign.³⁶ As such, the framers of the U.S. Constitution saw the writ as an important check on government power as well as a

²⁵ 28 U.S.C. § 2255 (2006 & Supp. IV 2010).

²⁶ See *infra* notes 28–69 and accompanying text.

²⁷ See *infra* notes 70–89 and accompanying text.

²⁸ See *Wall v. Kholi*, 131 S. Ct. 1278, 1284 (2011).

²⁹ *Id.*

³⁰ *Id.*; see 28 U.S.C. § 2255(c).

³¹ See *Wall*, 131 S. Ct. at 1284.

³² See *id.*; *United States v. Hayman*, 342 U.S. 205, 214–17 (1952).

³³ See *Triestman v. United States*, 124 F.3d 361, 373–74 (2d Cir. 1997).

³⁴ NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY*, at vii (2011).

³⁵ *Id.* at 3.

³⁶ *Id.*

guarantee of individual liberty.³⁷ The inclusion of the writ, embodied in the Suspension Clause of the Constitution, stands as a testament to the framers' view of the centrality of the writ to a free society.³⁸

The inclusion of the Suspension Clause in the Constitution also makes clear that collateral review has a constitutional dimension in that it must comply with that provision.³⁹ But, more generally, the constitutional implications of collateral review reach beyond the Suspension Clause to other provisions of the Constitution.⁴⁰ The Due Process Clause of the Fifth Amendment can be implicated by requiring that convictions and sentences be the result of fundamentally fair processes.⁴¹ Equal protection of the law can also be implicated if a collateral review procedure distinguishes between two classes of individuals without justification.⁴² Additionally, the Cruel and Unusual Punishment Clause of the Eighth Amendment can be implicated if a collateral review procedure fails to provide a remedy for a wrongfully incarcerated prisoner.⁴³

³⁷ *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

³⁸ U.S. CONST. art. 1, § 9, cl. 2 ("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."); see Hack, *supra* note 19, at 174; Mark D. Pezold, Note, *When to Be a Court of Last Resort: The Search for a Standard of Review for the Suspension Clause*, 51 B.C. L. REV. 243, 248 (2010).

³⁹ See *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997).

⁴⁰ See *Triestman*, 124 F.3d at 378–80 & nn.21–22. The Suspension Clause, by its terms at least, does not grant an affirmative right. See U.S. CONST. art. 1, § 9, cl. 2. Rather, the text of the clause sets out a limitation on Congress, albeit one that implies a right. LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS* 14 (2d ed. 2010). From the time of the Marshall Court, it has been thought that the Suspension Clause, in itself, is not sufficient to grant federal courts jurisdiction over habeas claims, and thus Congress must grant jurisdiction by statute. *Id.* at 15–16. Accordingly, there are often two questions in a collateral review case: (1) the statutory question of interpreting and ensuring compliance with the statutory framework, and (2) whether, given that statutory framework, the Suspension Clause is implicated. See *Gilbert*, 640 F.3d at 1330–31 (Martin, J., dissenting). Occasionally, the two issues can fade into one another where courts use the possibility of a Suspension Clause violation to inform the interpretation of the statute. YACKLE, *supra*, at 16. This Note focuses on the interpretation of a statutory habeas provision, although, as just mentioned, collateral review statutes are often informed by constitutional imperatives. See *id.*

⁴¹ U.S. CONST. amend. V; see *Triestman*, 124 F.3d at 379.

⁴² U.S. CONST. amend. XIV, § 1; see *Triestman*, 124 F.3d at 379 n.22. Although the Equal Protection Clause of the Fourteenth Amendment by its terms applies only to the states, in 1954, in *Bolling v. Sharpe*, the U.S. Supreme Court held the right to equal protection under the law to be implicit in due process of the law, which is protected against federal encroachment by the Fifth Amendment. 347 U.S. 497, 498–500 (1954).

⁴³ U.S. CONST. amend. VIII; see *Triestman*, 124 F.3d at 379.

A. *The Enactment of 28 U.S.C. § 2255*

The history of § 2255 has its roots in the expansion of the scope of habeas corpus in the nineteenth century.⁴⁴ In the context of federal criminal convictions, the early exercise of habeas review was limited to ensuring that the sentencing court had proper jurisdiction.⁴⁵ Congress, however, expanded habeas review in the Habeas Corpus Act of 1867.⁴⁶ In the decades after its enactment, the Supreme Court interpreted the language of the 1867 Act to provide much more comprehensive review than earlier conceptions of habeas corpus provided.⁴⁷

Section 2255 came about as a response to this expansion of the scope of habeas review.⁴⁸ Under the 1867 Act, as under the current habeas statute, writs of habeas corpus had to be filed in the federal district court having jurisdiction over the prisoner's place of confinement.⁴⁹ The combination of this jurisdictional requirement along with more comprehensive habeas review resulted in habeas petitions disproportionately clogging the dockets of those federal courts with federal prisons within their territorial jurisdiction.⁵⁰

The Judicial Conference of the United States looked to remedy this problem beginning in 1942.⁵¹ The Judicial Conference submitted a

⁴⁴ See *Hayman*, 342 U.S. at 212.

⁴⁵ See YACKLE, *supra* note 40, at 30.

⁴⁶ Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86; KING & HOFFMANN, *supra* note 34, at 9. From the founding until Reconstruction, statutory habeas corpus was interpreted according to a conservative view of English common law. YACKLE, *supra* note 40, at 30–31. This interpretation limited habeas review solely to a review of jurisdiction. See *id.* at 30. The 1867 Act conferred on federal courts the power to grant the writ “in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.” *Id.* at 31 (quoting the Habeas Corpus Act of 1867, 14 Stat. 385, 385). The Supreme Court interpreted this language to allow for a much broader review of criminal convictions and sentences. KING & HOFFMANN, *supra* note 34, at 108–09. The modern successor to the 1867 Act is codified at 28 U.S.C. § 2241 (2006 & Supp. IV 2010).

⁴⁷ KING & HOFFMANN, *supra* note 34, at 108–09; see, e.g., *House v. Mayo*, 324 U.S. 42, 46 (1945) (stating that issuing the writ is appropriate where a prisoner is being held in violation of his or her constitutional rights and the writ is the only means of enforcing those rights (citing *Waley v. Johnston*, 316 U.S. 101, 104–05 (1942)), *overruled by* *Hohn v. United States*, 524 U.S. 236 (1998); *Frank v. Mangum*, 237 U.S. 309, 330–31 (1915) (noting that the 1867 Act provided for a “more searching investigation” than the “bare legal review” under the common law).

⁴⁸ KING & HOFFMANN, *supra* note 34, at 108–10.

⁴⁹ *Hayman*, 342 U.S. at 212–13.

⁵⁰ *Id.* at 214 n.18. The Supreme Court in *Hayman* noted that, at the time of § 2255's enactment, sixty-three percent of habeas petitions filed by federal prisoners were filed in only five district courts. *Id.*

⁵¹ *Id.* at 214.

proposed bill to Congress that established a procedure requiring federal prisoners to challenge their conviction in the court that sentenced them, as opposed to the court with territorial jurisdiction over their place of confinement.⁵² Congress acted on the proposed bill in 1948, creating 28 U.S.C. § 2255, which included portions of the bill proposed by the Judicial Conference.⁵³ Reflecting on this history, the Supreme Court concluded that Congress enacted § 2255 as a practical remedy to the difficulties that resulted from the jurisdictional requirement of the writ of habeas corpus.⁵⁴ As a mere practical alternative, the Supreme Court determined that the scope of the review provided by § 2255 was the same as that provided by the general habeas corpus statute.⁵⁵ In another case, the Court noted that nothing in the legislative history of § 2255 indicated that Congress intended to alter the scope of review from the traditional habeas procedure.⁵⁶

Section 2255 provides a procedure whereby a prisoner in custody under sentence of a federal court may move the court to “vacate, set aside or correct [a] sentence.”⁵⁷ The motion must be filed in the court that sentenced the prisoner, not the district of detention as in a habeas petition.⁵⁸ Section 2255 also requires that federal prisoners detained upon criminal convictions use § 2255 as the vehicle to challenge their conviction or sentence by explicitly prohibiting federal district courts from hearing habeas corpus petitions filed by such prisoners.⁵⁹ Thus, habeas review, which became much less restrictive than § 2255 after the passage of the AEDPA, is closed to federal prisoners.⁶⁰ This prohibition, however, contains one exception, known as the savings clause, which allows a prisoner to file a habeas petition when the remedy provided by § 2255 is “inadequate or ineffective to test the legality of his deten-

⁵² *Id.* at 214–15.

⁵³ *Id.* at 206, 218; see Act of June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 967–68 (codified as amended at 28 U.S.C. § 2255 (2006 & Supp. IV 2010)).

⁵⁴ *Hayman*, 342 U.S. at 219.

⁵⁵ *Id.* at 217, 219; see also *Kaufman v. United States*, 394 U.S. 217, 221 (1969) (noting that the history of the statute suggests that the legislation was not meant to restrict the scope of review).

⁵⁶ *Kaufman*, 394 U.S. at 222.

⁵⁷ 28 U.S.C. § 2255.

⁵⁸ *Id.*

⁵⁹ 28 U.S.C. § 225 (2006 & Supp. IV 2010).

⁶⁰ *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998). Habeas corpus remains available as the procedure for federal prisoners challenging the *execution* of their sentence, as distinguished from those challenging the basis of conviction and imposition of a sentence. *Charles v. Chandler*, 180 F.3d 753, 755–56 (6th Cir. 1999).

tion.”⁶¹ So for those prisoners for whom § 2255 applies, the only recourse to habeas corpus is via the savings clause, and, in turn, the savings clause only applies when the remedy provided by § 2255 is “inadequate or ineffective.”⁶²

The savings clause was included in § 2255 when it was first enacted in 1948.⁶³ The language of the savings clause as enacted differs from the language in the proposed bill recommended by the Judicial Conference that served as the basis of § 2255.⁶⁴ The proposed bill prohibited a prisoner from filing a habeas petition except when it was not “practicable to determine his rights to discharge from custody on [a § 2255] motion because of his inability to be present at the hearing on such motion, or for other reasons.”⁶⁵ The text of the savings clause as enacted in § 2255 contains much broader language—a federal prisoner does not have recourse to habeas corpus unless § 2255 is “inadequate or ineffective to test the legality of his detention.”⁶⁶ Courts have interpreted this substitution to mean that Congress rejected the narrow formulation of the savings clause presented by the Judicial Conference, which was concerned with practical considerations.⁶⁷ Its replacement with more expansive language is thought to be indicative of Congress’s intent for the savings clause to apply beyond situations of practical difficulty.⁶⁸ Beyond this conclusion, however, the legislative history of the savings clause does not appear to shed any more light on its scope.⁶⁹

⁶¹ *In re Davenport*, 147 F.3d at 608.

⁶² See 28 U.S.C. § 2255(e) (2006 & Supp. IV 2010).

⁶³ Act of June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 967–68 (codified as amended at 28 U.S.C. § 2255). The text of the subsection containing the savings clause is as follows, with the text of the savings clause itself italicized:

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.*

28 U.S.C. § 2255(e) (emphasis added).

⁶⁴ *Wofford v. Scott*, 177 F.3d 1236, 1239, 1241 (11th Cir. 1999).

⁶⁵ *Hayman*, 342 U.S. at 215 n.23 (quoting from the proposed bill).

⁶⁶ 28 U.S.C. § 2255; see *Wofford*, 177 F.3d at 1241.

⁶⁷ E.g., *Wofford*, 177 F.3d at 1241; *Triestman*, 124 F.3d at 375.

⁶⁸ *Wofford*, 177 F.3d at 1241; *Triestman*, 124 F.3d at 375.

⁶⁹ See *Wofford*, 177 F.3d at 1241 & n.2.

B. Section 2255 After the AEDPA

In the 1990s, Congress enacted a sea change in collateral review jurisprudence.⁷⁰ In the days following the Oklahoma City bombing, Senator Robert Dole introduced the bill that was to become the AEDPA.⁷¹ The AEDPA was, in part, a response to the appearance that criminals were “gaming the system” by filing numerous “unnecessary appeals.”⁷² As part of the AEDPA, Congress amended § 2255 to restrict the jurisdiction of federal courts to hear post-conviction challenges under the statute.⁷³ The legislation added a one-year statute of limitations to motions brought under § 2255.⁷⁴ The AEDPA also amended § 2255 to require a prisoner bringing a second or successive motion to obtain certification from the appropriate court of appeals that the motion contained “(1) newly discovered evidence . . . sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty or . . . (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”⁷⁵

The result of the AEDPA amendments is that there are only three ways in which a prisoner can obtain collateral review of a federal conviction and sentence after his or her first § 2255 motion.⁷⁶ First, a prisoner may file a second or successive § 2255 motion after obtaining certification that the motion contains newly discovered evidence establishing that the movant is not guilty.⁷⁷ Second, and similarly, a prisoner may file a second or successive § 2255 motion after obtaining certification that the motion contains a claim based on a new rule of constitutional law that the Supreme Court has held to be retroactive.⁷⁸ If neither of the above criteria is satisfied, a court of appeals may not issue the certification, and a district court will dismiss the motion for lack of jurisdiction.⁷⁹

⁷⁰ See *Gilbert*, 640 F.3d at 1310–11.

⁷¹ 141 CONG. REC. 11,407 (1995) (statement of Sen. Robert Dole); see Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2255 (2006 & Supp. IV 2010)).

⁷² 141 CONG. REC. 11,407 (1995) (statement of Sen. Robert Dole) (“[Violent criminals] can appeal and appeal and appeal in the event they are apprehended, tried and convicted—continued appeals for 7, 8, 10, 15 years in some cases.”).

⁷³ AEDPA § 105; see Entzeroth, *supra* note 16, at 87.

⁷⁴ AEDPA § 105.

⁷⁵ *Id.*

⁷⁶ See 28 U.S.C. § 2255(e), (h).

⁷⁷ 28 U.S.C. § 2255(h)(1) (2006 & Supp. IV 2010).

⁷⁸ *Id.* § 2255(h)(2).

⁷⁹ *Stanko v. Davis*, 617 F.3d 1262, 1265–66 (10th Cir. 2010); see 28 U.S.C. § 2255(h).

Even where those requirements are not satisfied, however, a prisoner may obtain collateral review of his or her federal conviction or sentence after a prior § 2255 motion by a third means if, for some reason, the remedy under § 2255 is “inadequate or ineffective to test the legality of his detention.”⁸⁰ In that case, he or she may obtain review of his or her claims not through § 2255, but by filing a petition for the writ of habeas corpus under § 2241.⁸¹ This language is the reason for the outsized importance of the savings clause; it transforms the savings clause into a catch-all that provides an opportunity for review of a claim that otherwise would be barred as a successive motion under the AEDPA restrictions.⁸²

The AEDPA amendment’s addition of the second or successive bar was a dramatic break from the preexisting jurisprudence in its restriction of collateral review after a first § 2255 motion.⁸³ The pre-AEDPA standards for second or successive § 2255 motions were substantially more flexible.⁸⁴ This earlier jurisprudence permitted federal prisoners to file both previously raised claims and unraised claims in a subsequent § 2255 motion, subject to limitation if the claim was considered to be “abuse of the writ.”⁸⁵ The flexibility of pre-AEDPA collateral review is illustrated by the fact that the “abuse of the writ” limitation could be overcome by a finding that the “ends of justice” required a hearing.⁸⁶

Thus, the AEDPA amendments changed the focus of litigation by making dismissal of subsequent § 2255 motions automatic in most cases.⁸⁷ For movants who could not obtain authorization from a court of appeals under the stringent successive motion standards, the motion would be summarily dismissed unless the movant could make a claim to relief under the savings clause.⁸⁸ In those situations, the savings clause stands as the only means to obtain review of a conviction or sentence that may be illegal.⁸⁹

⁸⁰ 28 U.S.C. § 2255(e).

⁸¹ *Id.*; see 28 U.S.C. § 2241; Hack, *supra* note 19, at 191.

⁸² See Hack, *supra* note 19, at 191.

⁸³ See Entzeroth, *supra* note 16, at 87–88.

⁸⁴ *Id.* at 88–89.

⁸⁵ RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.1, at 1558 (6th ed. 2011).

⁸⁶ *Id.* § 28.1, at 1558–59 & n.11.

⁸⁷ See 28 U.S.C. § 2255(h) (2006 & Supp. IV 2010) (a second or subsequent § 2255 motion must be dismissed if it does not meet either the “newly discovered evidence” or the “new rule of constitutional law” prongs); Hack, *supra* note 19, at 179.

⁸⁸ See Entzeroth, *supra* note 16, at 90–91.

⁸⁹ See *id.*

II. ATTEMPTS TO INTERPRET “INADEQUATE OR INEFFECTIVE”

The application of the savings clause is limited to circumstances where § 2255 is “inadequate or ineffective to test the legality” of a prisoner’s detention.⁹⁰ The meaning of this language, however, is not entirely clear from its terms alone.⁹¹ Although the U.S. Supreme Court has decided several cases concerning § 2255,⁹² the Court has never addressed the scope of the savings clause.⁹³ Accordingly, divining the meaning and scope of the savings clause has fallen to the courts of appeals.⁹⁴ This Part will explore those courts’ attempts to derive a test to govern the operation of the savings clause and will examine in depth three different tests used by the courts of appeals.⁹⁵

As a beginning point to the analysis of the savings clause, it is important to note that any interpretation of § 2255 is naturally limited by situations where the prisoner can obtain a successive hearing despite the AEDPA amendments.⁹⁶ If a federal prisoner falls into one of the exceptions to the successive motion bar—the “newly discovered evidence” prong or the “new rule of constitutional law” prong—the prisoner gets to have his or her claim heard on the merits, which would eliminate any claim that § 2255 is inadequate or ineffective to test the legality of the detention.⁹⁷ Thus, the statutory interpretation of the savings clause only comes into play in those situations where a prisoner cannot meet the successive motion requirements.⁹⁸

The most frequent claim not covered by exceptions to the second or successive bar is a change in statutory interpretation that affects previously convicted federal prisoners.⁹⁹ To explain how these types of

⁹⁰ 28 U.S.C. § 2255(c) (2006 & Supp. IV 2010).

⁹¹ See *Gilbert v. United States*, 640 F.3d 1293, 1307 (11th Cir. 2011) (en banc).

⁹² See, e.g., *Swain v. Pressley*, 430 U.S. 372, 377–78 & n.9 (1977) (interpreting a section of the District of Columbia Code that is “almost identical” to § 2255); *United States v. Hayman*, 342 U.S. 205, 210 (1952).

⁹³ *Taylor v. Gilkey*, 314 F.3d 832, 834 (7th Cir. 2002).

⁹⁴ See *HERTZ & LIEBMAN*, *supra* note 85, § 41.2[b], at 2134 n.19.

⁹⁵ See *infra* notes 110–191 and accompanying text.

⁹⁶ See *Triestman v. United States*, 124 F.3d 361, 369, 371 (2d Cir. 1997) (implying that there is no need to look to the savings clause if a § 2255 movant can meet either of the successive motion prongs).

⁹⁷ See *Entzeroth*, *supra* note 16, at 89–91.

⁹⁸ See *id.* at 90–91.

⁹⁹ See *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011) (“[A] new statutory interpretation . . . is neither [newly discovered evidence nor a new rule of constitutional law].”); *United States v. Barrett*, 178 F.3d 34, 51 (1st Cir. 1999) (stating that the petitioner’s claims based on a new statutory interpretation were “barred by the AEDPA ‘second or successive’ rules”).

claims come before courts, it is helpful to look to one case of statutory interpretation in particular that spawned many savings clause cases.¹⁰⁰ It is a federal crime under 18 U.S.C. § 924 to use a firearm during a crime of violence or a drug trafficking crime.¹⁰¹ In 1995, in *Bailey v. United States*, the Supreme Court held that that statute requires that the government prove that the defendant actively employed the weapon, not just that he or she possessed the weapon.¹⁰² A significant number of federal prisoners at this time were incarcerated because several circuits had interpreted the statute to apply to mere possession of a firearm during the predicate crime.¹⁰³ Yet, according to the Supreme Court in *Bailey*, that action was not criminal under the statute without proof that the accused actively employed the weapon.¹⁰⁴

For those prisoners who had already filed an unsuccessful § 2255 motion, filing a motion in response to the *Bailey* decision constituted a second § 2255 motion.¹⁰⁵ Unfortunately for those prisoners, *Bailey* claims could not meet the stringent gatekeeping restrictions on successive motions because a Supreme Court interpretation of a substantive criminal law is neither newly discovered evidence that would show the movant was innocent nor a new rule of constitutional law under § 2255.¹⁰⁶ Thus, if such prisoners were to press their claims that the Supreme Court had decided that their actions were not actually criminal, they had to claim that the savings clause applied to their cases.¹⁰⁷ The decision of whether the savings clause applied in these cases faced many courts of appeals in the years after Congress enacted the AEDPA,¹⁰⁸ and, in many circuits, it framed the debate about the scope of the savings clause.¹⁰⁹

Despite the fact that similar statutory interpretation claims often arise in savings clause cases, the courts of appeals have not defined the

¹⁰⁰ See, e.g., *Triestman*, 124 F.3d at 365; *In re Dorsainvil*, 119 F.3d 245, 247 (3d Cir. 1997).

¹⁰¹ 18 U.S.C. § 924(c)(1) (2006).

¹⁰² 516 U.S. 137, 150 (1995).

¹⁰³ See *Wofford v. Scott*, 177 F.3d 1236, 1242 (11th Cir. 1999) (noting that the Supreme Court's interpretation in *Bailey* was contrary to the interpretation in several courts of appeals).

¹⁰⁴ See *Entzeroth*, *supra* note 16, at 92; *Bailey*, 516 U.S. at 150.

¹⁰⁵ *Hack*, *supra* note 19, at 191.

¹⁰⁶ See *In re Dorsainvil*, 119 F.3d at 247–48.

¹⁰⁷ See *Reyes-Requena v. United States*, 243 F.3d 893, 900, 901 (5th Cir. 2001); *Triestman*, 124 F.3d at 372–73.

¹⁰⁸ HERTZ & LIEBMAN, *supra* note 85, § 41.2[b], at 2134 n.19 (collecting cases).

¹⁰⁹ See *id.*

contours of the savings clause uniformly.¹¹⁰ Although the exact phrasing of each of the tests formulated to govern the applicability of the savings clause varies, the formulations endorsed by the circuits can be separated into three general tests.¹¹¹ Those three tests are: (1) the actual innocence and unobstructed procedural shot test, (2) the constitutional avoidance test, and (3) the initial motion test.¹¹² Examining each test separately will illuminate the distinct ways the courts have analyzed the savings clause.¹¹³

A. *The Actual Innocence and Unobstructed Procedural Shot Test*

The actual innocence and unobstructed procedural shot test was adopted by the U.S. Court of Appeals for the Third Circuit shortly after the passage of the AEDPA.¹¹⁴ Subsequently, the test has been adopted or cited approvingly by a majority of the courts of appeals.¹¹⁵ As the name suggests, the test consists of two prongs: the actual innocence prong and the unobstructed procedural opportunity prong.¹¹⁶

The actual innocence prong looks to whether the prisoner is making a claim that he or she is actually innocent of the crime of conviction.¹¹⁷ Prisoners are not able to access habeas via the savings clause unless they can make a colorable claim of actual innocence.¹¹⁸

For a definition of actual innocence, courts often reference the Supreme Court's 1998 decision in *Bousley v. United States*, which defined actual innocence in a related context concerning procedural default of claims made under § 2255.¹¹⁹ In *Bousley*, the Court held that, in order

¹¹⁰ *Prost*, 636 F.3d at 594 (noting division among the circuits in their interpretations of the savings clause); Hack, *supra* note 19, at 191–93.

¹¹¹ *Prost*, 636 F.3d at 584 (applying the initial motion test); *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (applying the actual innocence and unobstructed procedural shot test); *Triestman*, 124 F.3d at 377 (applying the constitutional avoidance test).

¹¹² See *supra* note 111.

¹¹³ See *infra* notes 114–188 and accompanying text.

¹¹⁴ See *Abdullah v. Hedrick*, 392 F.3d 957, 960 (8th Cir. 2004) (noting the genesis of the test in *In re Dorsainvil*, its timing shortly on the heels of *Bailey*, and the enactment of the AEDPA).

¹¹⁵ See *Stephens*, 464 F.3d at 898 (9th Cir.); *Abdullah*, 392 F.3d at 963 (8th Cir.); *Reyes-Requena*, 243 F.3d at 904 (5th Cir.); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *Wofford*, 177 F.3d at 1244 (11th Cir.); *In re Davenport*, 147 F.3d 605, 611–12 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d at 251 (3d Cir.).

¹¹⁶ *Stephens*, 464 F.3d at 898.

¹¹⁷ See, e.g., *In re Jones*, 226 F.3d at 334; *Kinder v. Purdy*, 222 F.3d 209, 214 (5th Cir. 2000).

¹¹⁸ See *Stephens*, 464 F.3d at 898–99.

¹¹⁹ 523 U.S. 614, 623 (1998); see, e.g., *Stephens*, 464 F.3d at 898 (9th Cir.); *Charles v. Chandler*, 180 F.3d 753, 757 (6th Cir. 1999); *Wofford*, 177 F.3d at 1244 n.3 (11th Cir.).

to establish actual innocence, the prisoner must show by a preponderance of the evidence that “no reasonable juror” would have convicted him or her.¹²⁰ The Court in *Bousley* also noted that establishing actual innocence required showing “factual innocence” and not simply “legal insufficiency.”¹²¹ Courts have applied this standard to cases in which changes in statutory interpretation have rendered the conduct of defendants not criminal.¹²²

The inclusion of an actual innocence requirement does not come from the text of the provision; there is no reference to “actual innocence” in the subsection of § 2255 containing the savings clause.¹²³ Its inclusion may be explained by its close relation to the specific statutory interpretation problem posed by *Bailey*.¹²⁴ In fact, some courts phrase the test as covering a situation where the movant makes a showing that a subsequent interpretation has made the movant guilty of a nonexistent offense,¹²⁵ which seems to be an apt, if specific, description of the *Bailey* problem where a change in statutory interpretation resulted in prisoners standing convicted for conduct that was no longer considered criminal.¹²⁶ Similarly, a requirement of actual innocence may be related to the innocence required in the “newly discovered evidence” prong for a second or successive § 2255 motion.¹²⁷

Courts have found support for implying an actual innocence component by noting that Congress, in enacting the AEDPA, meant to limit relief under § 2255.¹²⁸ The actual innocence requirement furthers that intent by acting as a limiting factor for a remedy that is intended to be rare.¹²⁹ In addition, courts have considered claims of imprisonment for a nonexistent offense to be much more serious than other claims of

¹²⁰ *Bousley*, 523 U.S. at 623 (citation omitted).

¹²¹ *Id.*

¹²² *E.g.*, *Wofford*, 177 F.3d at 1244 & n.3.

¹²³ See 28 U.S.C. § 2255(e) (2006 & Supp. IV 2010); *supra* note 63 (reproducing the text of the savings clause).

¹²⁴ *Hack*, *supra* note 19, at 190–91; see *supra* notes 99–109 and accompanying text.

¹²⁵ *E.g.*, *Wofford*, 177 F.3d at 1244 (holding the savings clause applicable where a “Supreme Court decision establishes the petitioner was convicted for a nonexistent offense”).

¹²⁶ See *Hack*, *supra* note 19, at 190–91.

¹²⁷ See 28 U.S.C. § 2255(h) (1) (allowing a second or successive motion where a claim contains “newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that *no reasonable factfinder would have found the movant guilty of the offense*” (emphasis added)).

¹²⁸ See *Gilbert*, 640 F.3d at 1308; *Triestman*, 124 F.3d at 376.

¹²⁹ See *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002).

injustice, like sentencing errors, and therefore, particularly deserving of a hearing to determine if relief is appropriate.¹³⁰

The second prong of the test looks to whether the prisoner has had “an unobstructed procedural opportunity” to have his or her claim heard.¹³¹ If a prisoner has had a prior unobstructed opportunity to raise the claim, then the savings clause will not be open to him or her.¹³² Courts have emphasized that the standard is an opportunity, not an actual hearing, and have considered the fact that the prisoner did not take advantage of the opportunity to raise a claim to be irrelevant for the purpose of the test.¹³³

The procedural opportunity must be “unobstructed,” which refers to the accessibility of the claim being made.¹³⁴ A claim may be obstructed because the claim had not yet been recognized by the court at the time of the hearing or because the claim went against circuit precedent at the time but the precedent was later overruled.¹³⁵ Either situation could render an opportunity to raise the claim vacuous.¹³⁶

Just how obstructed the opportunity must be for the purposes of the test is an issue that has divided the courts who use this test.¹³⁷ The Third, Eighth, and Ninth Circuits have used “unobstructed opportunity” or similar language that is broad enough to include not only cases in which the prisoner is dissuaded from bringing the claim because of adverse circuit precedent, but also cases in which the prisoner was not aware of the claim because it had not been recognized at the time of the prior hearing.¹³⁸ Nevertheless, the Fourth, Fifth, Seventh, and Eleventh Circuits have all adopted more restrictive language that only encompasses cases in which the prisoner’s claim was blocked by circuit

¹³⁰ *E.g.*, *In re Davenport*, 147 F.3d at 609–10; *In re Dorsainvil*, 119 F.3d at 251 (noting that it would be a “complete miscarriage of justice” if the restrictions in § 2255 served to prevent a prisoner from bringing a newly accrued claim that he was imprisoned for acts that were not criminal).

¹³¹ *Abdullah*, 392 F.3d at 963.

¹³² *Id.*

¹³³ *Id.*; *Wofford*, 177 F.3d at 1244.

¹³⁴ *Harrison v. Ollison*, 519 F.3d 952, 959–60 (9th Cir. 2008).

¹³⁵ *Prost*, 636 F.3d at 605–06 (Seymour, J., concurring in part and dissenting in part) (arguing that adverse precedent prevents a meaningful hearing of a claim and noting that other circuits have decided the issue in favor of granting a hearing in such a case).

¹³⁶ *See id.*

¹³⁷ *See id.* at 588–89 (majority opinion).

¹³⁸ *See Stephens*, 464 F.3d at 898 (9th Cir.); *Abdullah*, 392 F.3d at 960 (8th Cir.); *In re Dorsainvil*, 119 F.3d at 251–52 (3d Cir.) (noting that the prisoner lacked the opportunity to raise a claim before the claim was recognized in a subsequent Supreme Court case).

precedent at the time of the prior hearing.¹³⁹ For example, the Fourth Circuit breaks the prong into two subsections, requiring (1) that, at the time of conviction, circuit or Supreme Court precedent supported the conviction, and (2) that the law changed after the movant's direct appeal.¹⁴⁰ This difference appears to reflect a judgment that, although prisoners should be held responsible for presenting "novel" legal arguments, they should not be held responsible for presenting arguments directly foreclosed by circuit or Supreme Court precedent.¹⁴¹

Both the actual innocence and unobstructed procedural opportunity prongs have been subject to criticism.¹⁴² The actual innocence prong has been attacked as having no textual basis in the savings clause.¹⁴³ In addition, one dissenting judge has argued that there are instances where a prisoner could have a claim that, even if the claim did not plead actual innocence, would still create constitutional concerns if all review of the claim was denied.¹⁴⁴ Accordingly, critics contend that § 2255 should be interpreted to avoid constitutional issues by allowing claims to proceed under the habeas statute even when those claims do not assert actual innocence.¹⁴⁵

One court has also attacked the unobstructed procedural shot prong for lacking a textual basis in § 2255.¹⁴⁶ The Tenth Circuit has reasoned that Congress enumerated specific circumstances when a second or successive motion should be allowed, and the nonexistence of supporting precedents or the existence of precedents adverse to the claim are not among them.¹⁴⁷ The Tenth Circuit also noted that if a prisoner does not bring a claim because it has not been recognized or faces adverse circuit precedent, the inability to obtain review does not reflect a failure of § 2255, but rather a failure of the prisoner or his or her lawyers.¹⁴⁸

¹³⁹ *Reyes-Requena*, 243 F.3d at 904 (5th Cir.); *In re Jones*, 226 F.3d at 333–34 (4th Cir.); *Wofford*, 177 F.3d at 1244 (11th Cir.); *In re Davenport*, 147 F.3d at 611 (7th Cir.).

¹⁴⁰ *In re Jones*, 226 F.3d at 333–34.

¹⁴¹ *Compare Harrison*, 519 F.3d at 959–60 (explaining that "unobstructed" includes situations where the claim did not exist at the time of the first § 2255 motion), *with In re Jones*, 226 F.3d at 333–34 (limiting operation of the savings clause to situations where the claim was foreclosed by adverse precedent at the time of the first § 2255 motion).

¹⁴² *See Prost*, 636 F.3d at 589, 591–92; Hack, *supra* note 19, 195.

¹⁴³ Hack, *supra* note 19, 195.

¹⁴⁴ *See Gilbert*, 640 F.3d at 1330–31 (Martin, J., dissenting).

¹⁴⁵ *See id.*; *see also Triestman*, 124 F.3d at 377 (reasoning that the savings clause should be construed to avoid serious constitutional questions).

¹⁴⁶ *See Prost*, 636 F.3d at 589.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

B. The Constitutional Avoidance Test

The essence of the constitutional avoidance test is that the restrictions on successive motions could function to deny collateral review in ways that could put the constitutionality of those restrictions in question.¹⁴⁹ Like the actual innocence and unobstructed procedural shot test, the constitutional avoidance test also was enunciated shortly after the enactment of the AEDPA.¹⁵⁰ In 1997, the Third Circuit noted that there was surely a constitutional dimension to any interpretation that entirely eliminated collateral review.¹⁵¹ Shortly thereafter, in *Triestman v. United States*, the U.S. Court of Appeals for the Second Circuit articulated the constitutional avoidance test to determine the applicability of the savings clause.¹⁵²

In analyzing the scope of the savings clause, the Second Circuit reasoned that several constitutional provisions could be implicated by denying collateral review.¹⁵³ The court noted that the Eighth Amendment and the Due Process Clause of the Fifth Amendment could be implicated by denying collateral review to someone who claimed to be innocent of the crime for which he or she was convicted.¹⁵⁴ Additionally, the court observed that removing all collateral review could violate the Suspension Clause and that a collateral review framework that allowed review in some cases and denied it in others could be unconstitutional on an equal protection basis.¹⁵⁵ The Second Circuit declined to reach the merits of any of those constitutional claims.¹⁵⁶ Rather, because such serious constitutional issues existed, the court reasoned that the savings clause should be interpreted to allow review whenever § 2255 functioned to deny review where such denial would raise “serious constitutional questions.”¹⁵⁷

The Second Circuit’s analysis is based on a principle of statutory construction known as the canon of constitutional avoidance.¹⁵⁸ The Supreme Court has explained this “cardinal principle” of statutory con-

¹⁴⁹ *Triestman*, 124 F.3d at 377.

¹⁵⁰ See *Abdullah*, 392 F.3d at 960 (noting the timing of *Triestman* and *In re Dorsainvil* shortly on the heels of the enactment of the AEDPA).

¹⁵¹ *In re Dorsainvil*, 119 F.3d at 248.

¹⁵² *Triestman*, 124 F.3d at 377.

¹⁵³ *Id.* at 378–79 & nn.21–22.

¹⁵⁴ *Id.* at 378–79.

¹⁵⁵ *Id.* at 378–79 nn.21–22.

¹⁵⁶ *Id.* at 378.

¹⁵⁷ *Id.* at 377, 380.

¹⁵⁸ See *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005); NORMAN J. SINGER & J.D. SHAM-BIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:11 (7th ed. 2007).

struction, that where “a serious doubt of constitutionality is raised . . . [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”¹⁵⁹

The fact that certain applications of § 2255 might create constitutional concerns has not gone unnoticed beyond the Second Circuit.¹⁶⁰ The Tenth Circuit has cited the Second Circuit’s constitutional inquiry approvingly, noting the validity of considering the constitutionality of denying review, but the court chose not to adopt the test and questioned whether the restrictions in § 2255 could ever raise a serious constitutional question.¹⁶¹ Additionally, other circuits, although not adopting the test, have recognized a constitutional dimension involved in denying review to prisoners, especially when a prisoner has a claim of actual innocence.¹⁶²

Nonetheless, the constitutional avoidance test has been roundly criticized by other courts of appeals.¹⁶³ The Seventh Circuit condemned the test as “too indefinite” to “meet the needs of practical judicial enforcement.”¹⁶⁴ Similarly, the Eleventh Circuit noted that the “‘serious constitutional question’ standard is only about as definite as a ‘tough issue’ or ‘hard set of circumstances’ standard would be.”¹⁶⁵ The Eleventh Circuit has also implied that any constitutional concerns dissipate with the multiple opportunities for review provided by direct appeal and the first round of collateral review, and that such concerns are no longer substantial after those opportunities for review.¹⁶⁶

C. *The Initial Motion Test*

Long after the first two tests, the Tenth Circuit set out a new test that substantially differed from the previous tests.¹⁶⁷ In 2011, in *Prost v. Anderson*, the U.S. Court of Appeals for the Tenth Circuit held that the

¹⁵⁹ *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (internal quotation marks and citations omitted).

¹⁶⁰ *See, e.g., Prost*, 636 F.3d at 593–94; *Abdullah*, 392 F.3d at 963; *In re Dorsainvil*, 119 F.3d at 248.

¹⁶¹ *Prost*, 636 F.3d at 593–94.

¹⁶² *E.g., Abdullah*, 392 F.3d at 963; *In re Dorsainvil*, 119 F.3d at 248.

¹⁶³ *Reyes-Requena*, 243 F.3d at 903 n.28 (5th Cir.) (noting that although the test functionally takes into account the same considerations as other circuits, its particular formulation “creates the appearance of a standardless test with no limiting principles”); *Wofford*, 177 F.3d at 1243 (11th Cir.); *In re Davenport*, 147 F.3d at 611 (7th Cir.).

¹⁶⁴ *In re Davenport*, 147 F.3d at 611.

¹⁶⁵ *Wofford*, 177 F.3d at 1243.

¹⁶⁶ *See Gilbert*, 640 F.3d at 1318 (implying that the Suspension Clause does not require multiple rounds of review).

¹⁶⁷ *See Prost*, 636 F.3d at 584, 591, 594.

savings clause only applies when a prisoner's claim could not have been brought in an initial § 2255 motion.¹⁶⁸ Under the initial motion test, if the prisoner could have brought the claim in his initial § 2255 motion, the opportunity for habeas review via the savings clause will not be open to him or her.¹⁶⁹ In some respects, the test is not very different from the unobstructed procedural shot prong of the test discussed above.¹⁷⁰

The initial motion test, however, does differ significantly in how it looks at excuses for failing to bring a claim.¹⁷¹ When determining whether a prisoner could have brought a claim in an initial § 2255 motion, the Tenth Circuit held that neither a claim's lack of prior recognition nor the fact that it was foreclosed by adverse circuit precedent prevented a prisoner from bringing the claim for the purposes of the test.¹⁷² What that conclusion means for prisoners is that the failure to bring a claim would not be excused in either of those circumstances, and thus the mere fact that the circuit later held the specific conduct to be noncriminal in these circumstances would not permit the prisoner to obtain habeas review via the savings clause.¹⁷³

The Tenth Circuit supported this conclusion by looking to the text of the savings clause as well as the surrounding provisions of § 2255.¹⁷⁴ The Tenth Circuit noted that by adding the successive motion bar, Congress intended to limit prisoners to one, and only one, § 2255 motion unless the prisoner pleaded one of the two exceptions that Congress exempted from the rule—either newly discovered evidence or a new rule of constitutional law.¹⁷⁵ Additionally, the Tenth Circuit reasoned that Congress undoubtedly understood that prisoners would seek successive motions to test claims other than the ones within the two exceptions, yet it chose not to include additional exceptions.¹⁷⁶ In

¹⁶⁸ *Id.* at 584.

¹⁶⁹ *Id.*

¹⁷⁰ Compare *Prost*, 636 F.3d at 584 (holding that a prisoner may only utilize the savings clause when the claim could not have been tested in an initial § 2255 motion), with *Ivy v. Pontesso*, 328 F.3d 1057, 1060 (9th Cir. 2003) (holding that the savings clause is not available to a prisoner who had an unobstructed opportunity to raise the claim in his initial § 2255 motion). In many cases, the outcome under the two tests would be the same. See *Prost*, 636 F.3d at 584; *Ivy*, 328 F.3d at 1060. What distinguishes the two tests are the acceptable excuses for not bringing a claim in an initial § 2255 motion. See *Prost*, 636 F.3d at 588–89, 591–92; *Harrison*, 519 F.3d at 960; *supra* notes 131–141 and accompanying text (discussing the unobstructed procedural shot analysis).

¹⁷¹ *Prost*, 636 F.3d at 589–90.

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ *Id.* at 585.

¹⁷⁵ See *id.*

¹⁷⁶ *Id.*

this way, Congress created a very limited subset of claims that could be tested on a second § 2255 motion and excluded all other claims.¹⁷⁷ Thus, by strictly requiring a prisoner to bring a claim in his or her initial motion, the Tenth Circuit maintained that it was effectuating Congress's intent in passing the AEDPA.¹⁷⁸

The dissent in *Prost* vigorously disagreed with the majority's conception of the savings clause.¹⁷⁹ The dissenting judge noted that common sense and the plain language of the statute prevent § 2255 from being considered adequate when it functions to deny even an initial meaningful hearing of a claim, as it would if a claim was foreclosed by adverse precedent when a prisoner's first § 2255 motion was brought.¹⁸⁰ The dissent also observed that the initial motion approach to the savings clause had not been adopted by any other circuit.¹⁸¹

Even before Mr. Prost's motion arrived at the Fifth Circuit, other courts of appeals had criticized this type of approach as too narrow a reading of the savings clause.¹⁸² These circuits found it necessary to provide habeas review via the savings clause at least in those cases in which a conviction was premised on settled law at the time of conviction, but later changes in the law made the prisoner's conduct not criminal.¹⁸³ Several courts have noted that the failure to provide review in such a case could give rise to constitutional issues of due process and cruel and unusual punishment.¹⁸⁴ Aware of this facet of other circuits' savings clause jurisprudence, the Tenth Circuit noted it might be necessary to adopt the Second Circuit's constitutional avoidance approach to supplement the initial motion test in some cases.¹⁸⁵ The court, however, declined to adopt the constitutional avoidance test in *Prost* because the prisoner failed adequately to allege a constitutional violation.¹⁸⁶

The Seventh Circuit, in rejecting the approach of the Tenth Circuit, has noted practical and fairness-based arguments against requiring prisoners to bring every conceivable claim against their conviction or

¹⁷⁷ See *Prost*, 636 F.3d at 586.

¹⁷⁸ *Id.* at 586 n.6.

¹⁷⁹ *Id.* at 605–06 (Seymour, J., concurring in part and dissenting in part).

¹⁸⁰ *Id.*

¹⁸¹ See *id.* at 604.

¹⁸² See, e.g., *Reyes-Requena*, 243 F.3d at 904; *Wofford*, 177 F.3d at 1244; *In re Davenport*, 147 F.3d at 611.

¹⁸³ E.g., *Reyes-Requena*, 243 F.3d at 904; *Wofford*, 177 F.3d at 1244; *In re Davenport*, 147 F.3d at 611.

¹⁸⁴ E.g., *Abdullah*, 392 F.3d at 963; *Triestman*, 124 F.3d at 377–79; *In re Dorsainvil*, 119 F.3d at 248.

¹⁸⁵ See *Prost*, 636 F.3d at 593–94.

¹⁸⁶ *Id.* at 594.

sentence in an initial § 2255 motion, which would be the practical result of the initial motion test.¹⁸⁷ The Seventh Circuit has reasoned that such a requirement would be a waste of judicial resources and has implied that it would place an unreasonable burden on prisoners challenging a conviction or sentence.¹⁸⁸

In sum, the courts of appeals have suggested three tests to define the scope of the savings clause: the actual innocence and unobstructed procedural shot test, the constitutional avoidance test, and the initial motion test.¹⁸⁹ Despite their different foci, none has escaped criticism.¹⁹⁰ A rigorous examination of each of the tests will show that such criticism is warranted.¹⁹¹

III. FAILING TO BALANCE THE SAVINGS CLAUSE'S COMPETING INTERESTS

All of the attempts by the courts of appeals to define the scope of the savings clause are imperfect.¹⁹² Evaluating those attempts requires that parameters be set out by which one can assess those efforts.¹⁹³ This Part sets out three factors that should be used to evaluate any test that governs the operation of the savings clause.¹⁹⁴ It then proceeds to evaluate the three tests described in Part II in light of those factors.¹⁹⁵

A. Factors for Assessing the Savings Clause

In order to conduct a comprehensive analysis of the attempts to define the scope of the savings clause, one must consider at least three factors.¹⁹⁶ First, any definition of the savings clause must align with the

¹⁸⁷ See *In re Davenport*, 147 F.3d at 610.

¹⁸⁸ See *id.*

¹⁸⁹ See *Prost*, 636 F.3d at 584 (the initial motion test); *Stephens*, 464 F.3d at 898 (the actual innocence and unobstructed procedural shot test); *Triestman*, 124 F.3d at 377 (the constitutional avoidance test).

¹⁹⁰ See *supra* notes 114–188 and accompanying text.

¹⁹¹ See *infra* notes 192–294 and accompanying text.

¹⁹² See *supra* notes 114–188 and accompanying text.

¹⁹³ See *Prost v. Anderson*, 636 F.3d 578, 596–97 (10th Cir. 2011) (attacking the concurrence and dissent's interpretation for ignoring the text of the statute and Congress's intent); *id.* at 599 (Seymour, J., concurring in part and dissenting in part) (claiming that the majority's interpretation unnecessarily creates constitutional issues).

¹⁹⁴ See *infra* notes 196–211 and accompanying text.

¹⁹⁵ See *infra* notes 212–294 and accompanying text.

¹⁹⁶ See *Gilbert v. United States*, 640 F.3d 1293, 1312 (11th Cir. 2011) (en banc) (utilizing the concept of finality as embodied in the AEDPA as a guide to interpreting the savings clause); *Prost*, 636 F.3d at 585–87 (reasoning that the text of the savings clause and the surrounding sections should be used to determine the appropriate scope of the savings

text of the savings clause and should be consistent with the text of the surrounding sections of § 2255.¹⁹⁷ Statutory interpretation, of course, must begin with an examination of the text.¹⁹⁸ Where that text is ambiguous, as is the case with the savings clause, the rest of the statute should be considered as an interpretative tool.¹⁹⁹ For example, an interpretation will fail if it interprets a provision in a way that nullifies a neighboring provision.²⁰⁰ For these reasons, consulting the text of the statute is of paramount importance.²⁰¹

Second, any attempt to define the scope of the savings clause should also be consistent with the intent of Congress in passing the AEDPA.²⁰² It is clear from the legislative history of the AEDPA that Congress intended the legislation as a clear break with the status quo.²⁰³ Specifically, courts have reasoned that, by passing the AEDPA, Congress intended to increase finality in criminal convictions and limit the discretion of judges to allow § 2255 hearings.²⁰⁴ To the extent that the savings clause could be read in a manner that would vitiate Congress's intent, consideration of the legislative intent should be part of any scope analysis.²⁰⁵

Third, any definition of the scope of the savings clause must be considered in light of the constitutional issues inherent in collateral review.²⁰⁶ The scope and content of collateral review is replete with constitutional issues.²⁰⁷ Because one can assume that Congress did not intend to pass legislation that runs afoul of the Constitution, the U.S. Supreme Court has affirmed that, when possible, statutes should be interpreted to avoid questions of constitutionality.²⁰⁸ Accordingly, any analysis of the

clause); *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997) (reasoning that the savings clause should be interpreted to avoid serious constitutional issues).

¹⁹⁷ See *Prost*, 636 F.3d at 585–87.

¹⁹⁸ See *id.* at 584–85; SINGER & SINGER, *supra* note 158, § 47:1, at 274.

¹⁹⁹ See *Prost*, 636 F.3d at 585; SINGER & SINGER, *supra* note 158, § 47:2, at 278–80.

²⁰⁰ See SINGER & SINGER, *supra* note 158, § 45:12, at 110–11.

²⁰¹ See *Prost*, 636 F.3d at 585–87 (noting that a close analysis of the text is required to avoid an interpretation of the savings clause that nullifies other portions of the statute).

²⁰² See *Gilbert*, 640 F.3d at 1312.

²⁰³ See *id.* at 1310–11; see also 141 CONG. REC. 11,407–08 (1995) (statement of Sen. Robert Dole) (introducing the bill that would become the AEDPA); *supra* notes 70–75 and accompanying text (discussing the changes that the AEDPA brought to § 2255).

²⁰⁴ See, e.g., *Gilbert*, 640 F.3d at 1310–11; *Prost*, 636 F.3d at 592.

²⁰⁵ See *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

²⁰⁶ See *Triestman*, 124 F.3d at 377.

²⁰⁷ See *id.* at 378–80 & nn.21–22 (discussing the constitutional issues that can arise in regulating collateral review).

²⁰⁸ *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); SINGER & SINGER, *supra* note 158, § 45:11, at 84, 87–88.

scope of the savings clause must consider the constitutional provisions implicated by collateral review, or the denial thereof.²⁰⁹

Satisfying all three of these parameters is no small feat; when taken to a logical extreme, any one of the above considerations competes with, and may conflict with, the other interests.²¹⁰ Nonetheless, by balancing all three factors in interpreting § 2255, the resulting interpretation will defeat most criticism.²¹¹

B. *The Initial Motion Test*

The Tenth Circuit's initial motion test limits the operation of the savings clause to situations where the claim challenging the legality of the detention could not have been raised in an initial § 2255 motion, regardless of whether the claim was foreclosed by adverse precedent or had not been recognized by the circuit.²¹² Of the three tests, it is perhaps subject to the strongest objections.²¹³ Its main fault lies in the fact that the formulation favors the legislative intent contained within the AEDPA at the expense of the other factors.²¹⁴

In 2011, in *Prost v. Anderson*, the U.S. Court of Appeals for the Tenth Circuit set out the initial motion test.²¹⁵ The initial motion test strongly embraces the legislative intent of the AEDPA as an interpretative tool.²¹⁶ Based on the legislative history, courts have held that the purpose of the AEDPA is to ensure a greater measure of finality in criminal convictions.²¹⁷ Using that intent, the Tenth Circuit created arguably the most restrictive of the three tests embraced by the circuits.²¹⁸ In being so restrictive, the test satisfies one of the factors in that it is con-

²⁰⁹ See *Triestman*, 124 F.3d at 377–78.

²¹⁰ See *infra* notes 212–294 and accompanying text.

²¹¹ See *Gilbert*, 640 F.3d at 1312; *Prost*, 636 F.3d at 585–87; *Triestman*, 124 F.3d at 377.

²¹² See *Prost*, 636 F.3d at 584, 589–90; *supra* notes 167–178 and accompanying text (discussing the initial motion test as enunciated by the Tenth Circuit).

²¹³ *Prost*, 636 F.3d at 603–04 (Seymour, J., concurring in part and dissenting in part) (noting that no other circuit has read the savings clause as restrictively as the majority).

²¹⁴ See *id.* at 587 (majority opinion) (reasoning that viewing § 2255 in the context of the AEDPA amendments provides support for its interpretation). But see *id.* at 605–07 (Seymour, J., concurring in part and dissenting in part) (criticizing the majority for taking a crabbed view of the text of the savings clause and creating “serious constitutional concerns”).

²¹⁵ *Id.* at 584 (majority opinion).

²¹⁶ *Id.* at 585–87.

²¹⁷ See *Calderon v. Thompson*, 523 U.S. 538, 558 (1998); *Gilbert*, 640 F.3d at 1310; see also 141 CONG. REC. 11,407–08 (1995) (statement of Sen. Robert Dole) (offering the sponsor's view that the bill that would become the AEDPA would reduce the duration of collateral review of criminal convictions).

²¹⁸ See *Prost*, 636 F.3d at 603–04 (Seymour, J., concurring in part and dissenting in part).

sistent with the legislative intent of the AEDPA, namely to increase finality in criminal convictions.²¹⁹

When examining the test in light of the other interests relevant to any interpretation of the savings clause, however, the test does not measure up as well.²²⁰ Looking first at the test's fidelity to the text of § 2255 and the surrounding sections, the Tenth Circuit in *Prost* focused more on the restrictions on second and successive motions than on the text of the savings clause itself.²²¹ The actual text of the savings clause reads that a prisoner will not be allowed to file a petition for a writ of habeas corpus "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his [or her] detention."²²² The most logical reading of that language is that the "remedy by motion" referred to in the statute is the judicial review that results from the prisoner's motion to set aside his or her sentence.²²³ It is that review which would or would not be adequate and effective to "test the legality of [the] detention."²²⁴

This reading of the statute undermines any claim that the initial motion test is a faithful interpretation of § 2255.²²⁵ Contrary to the reasoning of the Tenth Circuit in *Prost*, the restrictions contained within § 2255 can cause the judicial review of the claim to be inadequate, like where a prisoner was convicted for conduct that is no longer criminal and the restrictions serve to deny any hearing.²²⁶ By emphasizing the restrictions on successive motions, and rejecting the possibility that the restrictions themselves can cause the motion to be inadequate, the Tenth Circuit's initial motion test embraces the second or successive

²¹⁹ See *id.* at 588 (majority opinion).

²²⁰ See *id.* at 605–07 (Seymour, J., concurring in part and dissenting in part).

²²¹ See *id.* at 584–86 (majority opinion); see also Hack, *supra* note 19, at 195–96 (noting that the language of the savings clause undermines any claim that Congress intended to eliminate all successive motions other than those contained within the exceptions).

²²² 28 U.S.C. § 2255(e) (2006 & Supp. IV 2010); see *supra* note 63.

²²³ See *id.*; *Prost*, 636 F.3d at 605–06 (Seymour, J., concurring in part and dissenting in part).

²²⁴ See *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998) (noting that the "essential function" of collateral review is to provide a judicial hearing on the legality of the prisoner's conviction and sentence).

²²⁵ *Prost*, 636 F.3d at 605–06 (Seymour, J., concurring in part and dissenting in part) (expressing skepticism that the harsh outcomes that result from the test conform to the text of § 2255).

²²⁶ See *In re Davenport*, 147 F.3d at 610–11 (arguing that the successive motion restriction operated to prevent the prisoner in question from ever getting a hearing on a claim that went to the fundamental legality of his sentence).

restrictions, but restricts the operation of the savings clause beyond what the plain language of the text most logically suggests.²²⁷

Looking next at the constitutional issues that might arise as a result of the application of the initial motion test, the consequences are similarly problematic.²²⁸ Under the initial motion test, a prisoner who can claim actual innocence based on a later statutory interpretation that made his or her conduct not criminal would have no opportunity for judicial review if he or she had already filed one § 2255 motion, regardless of his or her reason for not bringing the claim in the prior motion.²²⁹

Outside the Tenth Circuit, several courts maintain that such a denial of review would raise serious questions about the constitutionality of § 2255.²³⁰ At the very least, where an actually innocent prisoner is deprived of any opportunity to receive a judicial hearing of his or her claim, there is a possibility of a due process violation because such a situation could violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”²³¹ Yet the initial motion test makes this outcome exceedingly likely by holding prisoners responsible for bringing all claims in an initial motion, including claims that were foreclosed by adverse circuit precedent at the time of the initial motion.²³² In addition to due process concerns, such a situation could raise an Eighth Amendment issue in that continued

²²⁷ See *id.* at 605, 606 & n.7.

²²⁸ See *id.* at 599.

²²⁹ See *id.*

²³⁰ See, e.g., *Triestman*, 124 F.3d at 378–79 (noting that Eighth Amendment and Due Process issues may arise if collateral review were unavailable); *In re Dorsainvil*, 119 F.3d at 248 (“Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue.”).

²³¹ *Medina v. California*, 505 U.S. 437, 445 (1992) (internal quotation marks and citations omitted).

²³² See *In re Davenport*, 147 F.3d at 610, 611 (implying that it is unreasonable to require prisoners to bring every conceivable claim against their conviction or sentence at the risk of losing the ability to ever have those claims heard). This was the case in *Bailey v. United States*, where, in 1995, the U.S. Supreme Court held that the statute making it a federal crime to use a firearm during a crime of violence or a drug trafficking crime required that the government prove that the defendant actively employed the weapon, contrary to the law in several of the circuits. 516 U.S. 137, 150 (1995). The result was many prisoners left imprisoned for conduct that was non-criminal, but who had already filed one § 2255 motion. See Hack, *supra* note 19, at 190–91.

imprisonment of an actually innocent individual might constitute cruel and unusual punishment.²³³

Perhaps realizing this aspect of its decision, the *Prost* court cited approvingly, but did not adopt, the constitutional avoidance test.²³⁴ Although such a two-part test would solve the constitutional objections to the formulation, the test is still subject to criticism as to the court's interpretative analysis.²³⁵ Cases abound in which there is a claim of actual innocence that only accrues after an initial § 2255 motion.²³⁶ The statutory interpretation in *Bailey* resulted in a wave of prisoners with just such a predicament.²³⁷ To the extent constitutional issues could arise in such a scenario, they might not be isolated circumstances, but could be a widespread phenomenon, making the initial motion test particularly problematic.²³⁸

C. *The Constitutional Avoidance Test*

The Second Circuit's constitutional avoidance test allows prisoners recourse to habeas review via the savings clause where a prisoner is prevented from bringing his or her claim under § 2255 and such a denial of review presents "serious constitutional questions."²³⁹ Although the constitutional implications of failing to provide review have been noted by many courts, other circuits have not adopted the constitutional

²³³ *Triestman*, 124 F.3d at 379. The Second Circuit has also noted that a Suspension Clause issue could arise when removing all opportunity for judicial review of a claim of actual innocence, but the court chose not to use it in its analysis because of the "limited reading [the Suspension Clause] has been given in recent years." *Id.* at 378 n.21. It bears noting that this case was decided before *Boumediene v. Bush*, 553 U.S. 723, 723 (2008). In 2008, in *Boumediene v. Bush*, the U.S. Supreme Court held that the Suspension Clause guarantees noncitizens held outside of the sovereign territory of the United States the privilege of invoking the writ of habeas corpus. *Id.* at 770–71. One would imagine that this development might change the *Triestman* court's assessment of the Suspension Clause. See *Triestman*, 124 F.3d at 378 n.21.

²³⁴ See *Prost*, 636 F.3d at 593–94. The court declined to adopt the constitutional avoidance test in this case because the movant had not adequately briefed the argument that the unavailability of habeas would offend the Constitution. *Id.* at 594. The court, however, did evince some doubt as to whether the operation of the savings clause could ever violate the Constitution. See *id.*

²³⁵ See *Prost*, 636 F.3d at 605–06 (Seymour, J., concurring in part and dissenting in part); *supra* notes 215–233 and accompanying text.

²³⁶ Hack, *supra* note 19, at 190–91 (noting that a "host" of prisoners made *Bailey* claims following that case).

²³⁷ *Id.*

²³⁸ See *Wofford v. Scott*, 177 F.3d 1236, 1242–43 (11th Cir. 1999) (discussing the litigation that ensued following the *Bailey* decision).

²³⁹ See *Triestman*, 124 F.3d at 377; *supra* notes 149–159 and accompanying text (discussing the constitutional avoidance test as enunciated by the Second Circuit).

avoidance test and, in fact, other courts have strongly criticized the test as not lending itself to judicial enforcement.²⁴⁰

If the constitutional avoidance test does one thing well, it is insulating § 2255 from any concerns that its restrictions may violate constitutional provisions that are implicated by restricting collateral review.²⁴¹ By allowing habeas review via the savings clause whenever a “serious constitutional issue” is raised, the test assures that the provisions of § 2255 cannot serve to violate any constitutional imperatives, at least insofar as the constitutional issue arose from a denial of review.²⁴²

This test too, however, fares less well when assessed in regard to the other interests tied up in the interpretation of § 2255.²⁴³ Looking first at the formulation’s connection to the text of the savings clause and the surrounding sections, the link is tenuous.²⁴⁴ Again, the text of the savings clause allows for the prisoner to file a habeas petition only when it “appears that the remedy by motion is inadequate or ineffective to test the legality of [the] detention.”²⁴⁵ There is nothing in the text that directly links the “inadequate or ineffective” standard to a requirement that a “serious constitutional question” be presented.²⁴⁶ Although surely there is considerable overlap between the inadequate or ineffective standard and the constitutional standard formulated by the Second Circuit, the test could be underinclusive in that there may be some circumstances where the remedy is inadequate, but the denial of review does not rise to the level of a serious constitutional issue.²⁴⁷ Accordingly, the proffered test does not fit comfortably with the text of the statute.²⁴⁸

The constitutional test also conflicts with the legislative intent of the AEDPA.²⁴⁹ Apart from ensuring finality in criminal convictions, the

²⁴⁰ See, e.g., *Reyes-Requena v. United States*, 243 F.3d 893, 903 n.28 (5th Cir. 2001); *Wofford*, 177 F.3d at 1243; *In re Davenport*, 147 F.3d at 611.

²⁴¹ See *Triestman*, 124 F.3d at 378–79 & nn.21–22 (discussing the various constitutional issues implicated by collateral review that could require habeas review via the savings clause).

²⁴² See *id.* at 377.

²⁴³ See *Reyes-Requena*, 243 F.3d at 903 n.28; *In re Davenport*, 147 F.3d at 611.

²⁴⁴ See *Wofford*, 177 F.3d at 1243; *In re Davenport*, 147 F.3d at 611; *supra* note 63.

²⁴⁵ 28 U.S.C. § 2255(e) (2006 & Supp. IV 2010).

²⁴⁶ See *id.* § 2255; see also *Wofford*, 177 F.3d at 1243 (“[T]here is no apparent logical or textual nexus between the crucial ‘inadequate or ineffective’ language of § 2255 and the difficulty of any constitutional issue that may arise because of that language’s interpretation.”).

²⁴⁷ See *In re Davenport*, 147 F.3d at 611 (“Even if the purpose of the ‘adequacy’ escape hatch in section 2255 was and is to preserve whatever constitutional right there may be to habeas corpus, the escape hatch is not worded so narrowly.”).

²⁴⁸ See *Wofford*, 177 F.3d at 1243; *In re Davenport*, 147 F.3d at 611.

²⁴⁹ See *Reyes-Requena*, 243 F.3d at 903 n.28.

AEDPA clearly was meant to remove discretion from judges in granting § 2255 hearings on successive motions.²⁵⁰ Whereas before the AEDPA, judges retained discretion to hear successive motions, the AEDPA amendments significantly curtailed that discretion.²⁵¹ Despite that development, the undefined boundaries of the “serious constitutional issue” standard would return broad discretion to judges to grant habeas hearings pursuant to the savings clause.²⁵² For that reason, some courts of appeals have not been receptive to this return of discretion, one describing it as “squishy”²⁵³ and another noting that it does not “meet the needs of practical judicial enforcement.”²⁵⁴ Part of that discomfort may be due to the fact that reposing discretion limited only by a vague standard appears contrary to the intent of the AEDPA.²⁵⁵ Therefore, in addition to its tenuous connection with the text, the constitutional avoidance test is not entirely consistent with the congressional intent behind the enactment of the AEDPA.²⁵⁶

D. *The Actual Innocence and Unobstructed Procedural Shot Test*

The actual innocence and unobstructed procedural shot test, in its simplest form, asks whether the prisoner (1) is making a claim of actual innocence and (2) has been given an unobstructed procedural opportunity to raise that claim.²⁵⁷ Several courts of appeals have narrowed the second prong to include only those circumstances where the prisoner’s opportunity to present his or her claim was obstructed by ad-

²⁵⁰ See Entzeroth, *supra* note 16, at 104.

²⁵¹ Compare 28 U.S.C. § 2255(h) (2006 & Supp. IV 2010) (providing the only exceptions to the successive motion bar with no discretion to district or court of appeals judges), with HERTZ & LIEBMAN, *supra* note 85, § 28.1, at 1558–59 (describing the permissive pre-AEDPA standards for successive motions).

²⁵² See *Reyes-Requena*, 243 F.3d at 903 n.28 (noting that the formulation “creates the appearance of a standardless test with no limiting principles”). The extent to which such discretion would exist with such a standard is easily illustrated by looking to the relative assessments of majorities and dissents of constitutional claims in savings clause cases. Compare *Gilbert*, 640 F.3d at 1316–18 (declining to recognize a Suspension Clause violation in denying review), with *id.* at 1329–30 (Barkett, J., dissenting) (arguing that the Suspension Clause had been violated by denying review), and *id.* at 1330–31 (Martin, J., dissenting) (same).

²⁵³ *Gilbert*, 640 F.3d at 1315 n.19.

²⁵⁴ *In re Davenport*, 147 F.3d at 611.

²⁵⁵ See *Reyes-Requena*, 243 F.3d at 903 n.28; Entzeroth, *supra* note 16, at 104.

²⁵⁶ See *supra* notes 243–255 and accompanying text.

²⁵⁷ See *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006); *supra* notes 114–141 and accompanying text (discussing the actual innocence and unobstructed procedural shot test).

verse circuit precedent that was later overturned.²⁵⁸ This test, in its two variations, is the most widely used, having been adopted by the majority of the circuits.²⁵⁹

Looking first at the test's connection to the text of the statute, it is clear that one prong has a closer connection than the other.²⁶⁰ The actual innocence prong has an attenuated relationship to the text of the savings clause, which makes no reference to actual innocence as a trigger for review.²⁶¹ One scholar has noted that there could well be instances where claims of actual innocence were not presented but § 2255 was still inadequate to test the legality of the sentence.²⁶² Indeed, the use of the word "detention" in the saving clause seems to imply that the savings clause is concerned with more than the legality of just the conviction.²⁶³ The actual innocence inquiry goes to the merits of a claim against the legality of a conviction, rather than the adequacy of § 2255 as a remedy, which, by the terms of the statute, is the focus of the savings clause.²⁶⁴

The second prong, which forecloses habeas review via the savings clause to prisoners who have had an unobstructed procedural shot at presenting their claim, bears a stronger relation to the text of § 2255.²⁶⁵ There is a clear logical relation between the inability to have a claim heard and the adequacy and effectiveness of the remedy to test the legality of detention.²⁶⁶ Where restrictions within the statute prevent a prisoner from having any unobstructed opportunity to present a claim that goes to the legality of his or her conviction or sentence, that would seem to be the exemplary case in which the remedy is inadequate to test the legality of the detention.²⁶⁷

²⁵⁸ *Reyes-Requena*, 243 F.3d at 904 (5th Cir.); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *Wofford*, 177 F.3d at 1244 (11th Cir.); *In re Davenport*, 147 F.3d at 611–12 (7th Cir.).

²⁵⁹ See *supra* note 115 and accompanying text (noting that the Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have adopted or cited approvingly the actual innocence and unobstructed procedural shot test).

²⁶⁰ See *infra* notes 261–276 and accompanying text.

²⁶¹ See 28 U.S.C. § 2255(e) (2006 & Supp. IV 2010) (providing that a court will not hear a petition for habeas corpus filed by a prisoner unless "the remedy by motion is inadequate or ineffective to test the legality of [the] detention").

²⁶² Hack, *supra* note 19, at 195.

²⁶³ See *id.* at 195–96.

²⁶⁴ See *id.*; see also *In re Davenport*, 147 F.3d at 609 (noting that a sentencing claim can "go to the fundamental legality of [a] sentence[]").

²⁶⁵ See *In re Dorsainvil*, 119 F.3d at 251.

²⁶⁶ See *Ivy v. Pontesso*, 328 F.3d 1057, 1059–60 (9th Cir. 2003); *In re Dorsainvil*, 119 F.3d at 251.

²⁶⁷ See *In re Dorsainvil*, 119 F.3d at 251.

The variation of the unobstructed procedural shot test, which limits the savings clause to instances where the claim is foreclosed by adverse circuit precedent, has slightly less textual basis.²⁶⁸ That variation closes the door to habeas review via the savings clause in all other circumstances where a claim was not brought in a prior motion, such as where the circuit had not recognized the claim until after the initial motion.²⁶⁹ The question with this variation is whether § 2255 can be inadequate where an argument is not foreclosed by circuit precedent, but merely has not been successfully raised by a litigant and recognized by the circuit.²⁷⁰ The Tenth Circuit stated with some force that, textually speaking, the failure is with the prisoner (or the prisoner's counsel) for not considering and raising a novel argument.²⁷¹ Yet the further implication that § 2255 can be inadequate only where a claim was foreclosed by circuit precedent seems somewhat strained.²⁷² One could imagine a case in which a prisoner was barred from raising a claim that had just recently been recognized and went to the fundamental legality of his or her sentence.²⁷³ Under such a circumstance, it is hard to imagine that such a denial of review would be adequate to test the legality of the detention.²⁷⁴ One circuit has recognized that § 2255 could be inadequate in just such a situation.²⁷⁵ For this reason, the limited variant of the unobstructed procedural shot test seems to ascribe a narrower definition to "inadequate" than a natural reading would suggest.²⁷⁶

Looking at the next factor, the actual innocence and unobstructed procedural shot test aligns well with the legislative intent of the AEDPA to streamline the collateral review process and increase finality in criminal convictions.²⁷⁷ The actual innocence prong serves as a limiting fac-

²⁶⁸ See 28 U.S.C. § 2255 (2006 & Supp. IV 2010); *Harrison v. Ollison*, 519 F.3d 952, 960 (9th Cir. 2008); *supra* notes 137–141 and accompanying text (discussing the different interpretations of how unobstructed a claim must be to satisfy the unobstructed procedural shot prong).

²⁶⁹ See *In re Jones*, 226 F.3d at 333–34.

²⁷⁰ See 28 U.S.C. § 2255(e); *Harrison*, 519 F.3d at 960.

²⁷¹ See *Prost*, 636 F.3d at 589. The intuitive nature of this argument is perhaps the reason that the narrower definition of an unobstructed procedural shot, which excuses the failure to bring a claim only when it is blocked by adverse circuit precedent, has been adopted by the Fourth, Fifth, Seventh, and Eleventh Circuits. See *Reyes-Requena*, 243 F.3d at 904 (5th Cir.); *In re Jones*, 226 F.3d at 333–34 (4th Cir.); *Wofford*, 177 F.3d at 1244 (11th Cir.); *In re Davenport*, 147 F.3d at 611–12 (7th Cir.).

²⁷² See 28 U.S.C. § 2255(e); *Harrison*, 519 F.3d at 960.

²⁷³ See *Harrison*, 519 F.3d at 960.

²⁷⁴ See *id.*

²⁷⁵ *Id.*

²⁷⁶ See 28 U.S.C. § 2255(e) (2006 & Supp. IV 2010); *Harrison*, 519 F.3d at 960.

²⁷⁷ See *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002).

tor that automatically closes the door to any motion that does not include a claim of actual innocence.²⁷⁸ Yet, the prong allows arguably the most egregious injustices—claims that a prisoner is actually innocent of the crime of conviction—to receive a hearing.²⁷⁹ These two factors are consistent with the AEDPA amendments' apparent intent to restrict, but not totally eliminate, review under § 2255.²⁸⁰ Combining the actual innocence with the unobstructed procedural shot prong, in either variation, strengthens this alignment by ensuring that the savings clause will not allow prisoners to make repeated motions based on the same claims.²⁸¹ When the two prongs of the test are viewed in concert, it is clear that the actual innocence and unobstructed procedural shot test is well constructed to embody the change in collateral review that the AEDPA represented.²⁸²

When, however, the actual innocence and unobstructed procedural shot test is assessed in terms of possible constitutional issues that might arise, it fares less well.²⁸³ The actual innocence prong, although conforming to the purpose of the AEDPA, closes the door to any claim against a conviction or sentence that does not entail a claim of actual innocence.²⁸⁴ This result seems to be based on the assumption that the denial of review could raise constitutional issues only where there is a claim of actual innocence.²⁸⁵ Although surely the imprisonment of an innocent person would raise the most serious constitutional concerns, it does not follow that such issues exist only where there is a claim of

²⁷⁸ See *Gilbert*, 640 F.3d at 1323 (holding that the savings clause does not apply to sentencing claims that do not include a claim of actual innocence); *Stephens*, 464 F.3d at 899 (holding that the savings clause does not apply to faulty jury instruction claims that do not raise a factual innocence claim).

²⁷⁹ See *In re Dorsainvil*, 119 F.3d at 251.

²⁸⁰ See 28 U.S.C. § 2255(h); *supra* notes 202–205 and accompanying text (discussing the legislative intent behind the passage of the AEDPA). Section 2255(h) bars successive motions except in cases in which new evidence suggests actual innocence or a new rule of constitutional law affects the legality of the detention, two circumstances that arguably protect against the most serious injustices: the incarceration of an actually innocent person or a person held in violation of his or her constitutional rights. See *Prost*, 636 F.3d at 586 n.6.

²⁸¹ *Gilkey*, 314 F.3d at 836 (noting that Congress, by passing the AEDPA, intended to limit collateral review to an initial § 2255 motion).

²⁸² See *In re Dorsainvil*, 119 F.3d at 251 (noting that the application of the test would not undermine the restrictions added by the AEDPA amendments).

²⁸³ See *Gilbert*, 640 F.3d at 1330–31 (Martin, J., dissenting).

²⁸⁴ See *Gilbert*, 640 F.3d at 1323; *Stephens*, 464 F.3d at 899.

²⁸⁵ See *Gilbert*, 640 F.3d at 1312, 1315–16 (noting that no circuit has found a violation of the Suspension Clause where a court denied review of a sentencing claim, which, by definition, lacks a claim of actual innocence).

actual innocence.²⁸⁶ There clearly is a difference between someone who, for example, is actually innocent of a crime and is serving a five-year sentence, and someone who is guilty of the same crime and who was erroneously sentenced to ten years instead of five.²⁸⁷ Yet both prisoners are wrongly imprisoned, and the fact that one of the prisoners was wrongfully convicted changes the severity of the prisoners' constitutional claims, but not the existence of those claims.²⁸⁸

Unlike the actual innocence prong, the unobstructed procedural shot prong of the test does not add to the likelihood that the test would run afoul of constitutional provisions.²⁸⁹ Constitutional concerns linked to an application of § 2255 by and large stem from a denial of review.²⁹⁰ In its broadest form, requiring an unobstructed procedural opportunity to have a judicial determination of a claim would seem to dissipate any constitutional issues.²⁹¹

In sum, the actual innocence and unobstructed procedural shot test, as with the two preceding tests, cannot satisfy all of the interests involved in interpreting § 2255.²⁹² Although the test aligns with the legislative intent of the AEDPA, it fares less well considering its textual basis and constitutional concerns.²⁹³ Because none of the tests that have been adopted by the circuits have successfully navigated all three interests, one must look elsewhere to locate a test that better addresses these considerations.²⁹⁴

²⁸⁶ See *id.* at 1329–30 (Barkett, J., dissenting) (arguing that the Suspension Clause has been violated by denying review on a sentencing claim); *id.* at 1330–31 (Martin, J., dissenting) (same).

²⁸⁷ *In re Davenport*, 147 F.3d at 609–10, 611 (comparing a sentencing claim to a claim of actual innocence).

²⁸⁸ See *Gilbert*, 640 F.3d at 1330–31 (Martin, J., dissenting); *In re Davenport*, 147 F.3d at 610–11.

²⁸⁹ See *Reyes-Requena*, 243 F.3d at 903 n.28 (noting that the constitutional avoidance test is based on the same principles as the Seventh and Eleventh Circuit's unobstructed procedural shot test).

²⁹⁰ See *Triestman*, 124 F.3d at 378–80 & n.21–22 (citing Due Process, Cruel and Unusual Punishment, Equal Protection, and Suspension Clause issues that could arise from denying review, and holding that providing a hearing would avoid those issues).

²⁹¹ See *id.* at 380.

²⁹² See *Triestman*, 124 F.3d at 378–80 & n.21–22; Hack, *supra* note 19, at 195–96; *supra* notes 212–291 and accompanying text.

²⁹³ See *Gilkey*, 314 F.3d at 836; *Triestman*, 124 F.3d at 378–80 & n.21–22.

²⁹⁴ See *infra* notes 295–354 and accompanying text.

IV. STRIKING THE RIGHT BALANCE

From the analysis above, it is clear that each of the tests adopted by the courts of appeals is problematic when it comes to at least one of the interests involved in defining the proper scope of the savings clause.²⁹⁵ This Part posits a new test to define the scope and govern the operation of the savings clause; it then examines that test in light of the parameters considered in Part III.²⁹⁶

A modified unobstructed procedural shot test would more appropriately define the scope and operation of the savings clause.²⁹⁷ The modified unobstructed procedural shot test uses the unobstructed procedural shot analysis adopted by a number of circuits but eliminates the actual innocence requirement.²⁹⁸ The test allows a prisoner to file a petition for the writ of habeas corpus via the savings clause when the prisoner has a claim against the legality of his or her detention and has not had an unobstructed procedural opportunity to raise the claim because of the second or successive bar or for some other reason.²⁹⁹ The test considers a claim obstructed when a claim is not brought either because it has not been recognized by the circuit or because it was foreclosed by circuit precedent.³⁰⁰ This Note argues that, assessed against the three interests relevant to the interpretation of the statute, the modified unobstructed procedural shot test performs better than any of the alternatives adopted by the circuits.³⁰¹

A. *The Text of the Savings Clause and Surrounding Sections*

The modified unobstructed procedural shot test is consistent with the language of the savings clause and the surrounding sections of the statute.³⁰² The savings clause conditions the availability of habeas cor-

²⁹⁵ See *supra* notes 212–293 and accompanying text.

²⁹⁶ See *infra* notes 297–354 and accompanying text.

²⁹⁷ See *infra* notes 298–300 and accompanying text.

²⁹⁸ See *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006); *Abdullah v. Hedrick*, 392 F.3d 957, 960 (8th Cir. 2004); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999); *In re Davenport*, 147 F.3d 605, 611–12 (7th Cir. 1998).

²⁹⁹ See *Harrison v. Ollison*, 519 F.3d 952, 960 (9th Cir. 2008).

³⁰⁰ See *id.*

³⁰¹ See *infra* notes 302–350 and accompanying text (arguing that the text of the savings clause and surrounding sections, the legislative intent evinced in passing the AEDPA, and the constitutional issues inherent in collateral review are factors that should be considered in interpreting the scope of the savings clause).

³⁰² See 28 U.S.C. § 2255(e) (2006 & Supp. IV 2010); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997); *supra* note 63.

pus on the “remedy by motion” being “inadequate or ineffective to test the legality of [the] detention.”³⁰³ That provision does not contain exclusions or qualifications, which suggests that anything could cause the review to be inadequate or ineffective, including a provision of the statute itself.³⁰⁴ Thus, a close reading of the text of the savings clause suggests that that language contemplates the possibility that the provisions of the statute could render the remedy inadequate or ineffective.³⁰⁵

The modified unobstructed procedural shot test takes this into account and focuses on whether the motion provides an opportunity for every claim to be heard.³⁰⁶ Where the restrictions within § 2255 result in a prisoner having never received an unobstructed opportunity to raise a claim, the motion has been insufficient to test the legality of the detention.³⁰⁷ Simply stated, the motion is inadequate and ineffective to test the legality of the prisoner’s detention exactly because it has failed to provide any hearing for a claim that challenges the legality of the conviction or sentence.³⁰⁸ Accordingly, by linking habeas review via the savings clause to the lack of a prior opportunity for a hearing, the modified unobstructed procedural shot test provides a concrete and faithful embodiment of the generally phrased “inadequate or ineffective” language of the savings clause.³⁰⁹

The test also does not conflict with the neighboring restrictions on successive § 2255 motions imposed by the AEDPA amendments.³¹⁰ After an initial § 2255 motion, the test only allows claims to be brought that could not have been presented previously.³¹¹ Thus, the test prevents exactly what the successive motion bar sought to eliminate: prisoners filing repeated motions arguing the same claim or withholding claims in order to receive multiple rounds of judicial review.³¹² Because the test furthers the purpose which motivated the successive motion bar, it cannot be claimed that it interferes with the restrictions added by the AEDPA amendments.³¹³

³⁰³ See 28 U.S.C. § 2255(e).

³⁰⁴ See *id.*

³⁰⁵ See *id.* § 2255(e), (h).

³⁰⁶ See *Prost v. Anderson*, 636 F.3d 578, 584 (10th Cir. 2011).

³⁰⁷ See *In re Dorsainvil*, 119 F.3d at 251.

³⁰⁸ See *id.*

³⁰⁹ See *id.*

³¹⁰ See *id.*

³¹¹ See *Ivy v. Pontesso*, 328 F.3d 1057, 1060 (9th Cir. 2003).

³¹² See *In re Dorsainvil*, 119 F.3d at 251; Entzeroth, *supra* note 16, at 87–88.

³¹³ See *In re Dorsainvil*, 119 F.3d at 251; Entzeroth, *supra* note 16, at 87–88.

The modified test also improves on the test adopted by several of the circuits by eliminating the actual innocence prong.³¹⁴ The actual innocence prong has been used to limit the operation of the savings clause to only the most egregious injustices of wrongful imprisonment.³¹⁵ As discussed above, however, it lacks any textual link to the savings clause itself, and it is not implied by the surrounding statutory sections.³¹⁶ For that reason, savings clause tests that include an actual innocence exception impose a restriction that is divorced from the actual language of the statute in order to enforce a more ambiguous and less logically grounded legislative intent.³¹⁷

The modified unobstructed procedural shot test thus embraces the plain text of the savings clause and remains true to the successive motion restrictions.³¹⁸ As a result, it satisfies the first and primary consideration in interpreting § 2255, consistency with the text of the statute.³¹⁹

B. *The Legislative Intent of the AEDPA Amendments*

In passing the AEDPA, Congress clearly meant to effect a change in the status quo of collateral review.³²⁰ Any judicial interpretation of the savings clause should be cognizant of that intent and not interpret the savings clause so as to eviscerate it.³²¹

The modified unobstructed procedural shot test is consistent with the legislative intent behind the enactment of the AEDPA.³²² Perhaps the strongest and most specific intent behind the passage of the AEDPA was the intent to limit successive § 2255 motions.³²³ This intent was embodied in the restrictions that bar successive motions, subject to only two exceptions.³²⁴ The modified unobstructed procedural shot test

³¹⁴ See Hack, *supra* note 19, at 195–96.

³¹⁵ See *In re Dorsainvil*, 119 F.3d at 251.

³¹⁶ See 28 U.S.C. § 2255 (2006 & Supp. IV 2010); Hack, *supra* note 19, at 195–96 (discussing the atextual nature of an actual innocence requirement for the savings clause); *supra* notes 260–264 and accompanying text (same).

³¹⁷ See *Gilbert v. United States*, 640 F.3d 1293, 1333–34 (11th Cir. 2011) (en banc) (Martin, J., dissenting).

³¹⁸ See *In re Dorsainvil*, 119 F.3d at 251 (applying an unobstructed procedural shot analysis and noting that it is consistent with the successive motion restrictions).

³¹⁹ See *Prost*, 636 F.3d at 584–85.

³²⁰ See *Gilbert*, 640 F.3d at 1310–11; see also 141 CONG. REC. 11,407–08 (1995) (statement of Sen. Robert Dole) (stating his intent to change the then-existing law of collateral review through passage of AEDPA).

³²¹ See *In re Dorsainvil*, 119 F.3d at 251.

³²² See *id.*

³²³ See *Gilbert*, 640 F.3d at 1310–11.

³²⁴ See 28 U.S.C. § 2255(h) (2006 & Supp. IV 2010).

keeps the teeth in the successive motion restrictions.³²⁵ The test reserves habeas review via the savings clause for only those claims that have not been presented previously.³²⁶ In so doing, the test prevents the abuses sought to be curtailed by the restrictions: relitigation of claims that have already been decided, and prisoners withholding claims in an attempt to assure multiple hearings.³²⁷

The AEDPA also was meant to limit the discretion that federal judges exercise in hearing successive motions.³²⁸ The unobstructed procedural shot test limits such discretion by looking to the relatively objective question of whether the prisoner has had a prior, unobstructed procedural opportunity to raise his or her claim.³²⁹ As such, it is more in line with the legislative intent behind the AEDPA than the constitutional avoidance test, which gives judges significant discretion to determine what constitutes a “serious constitutional question.”³³⁰

Some might argue that Congress in enacting the AEDPA may have intended to eliminate a broader swath of successive motions than would receive review under the unobstructed procedural shot test.³³¹ One scholar, however, has noted that arguments for such an intent are belied by the continued existence of the savings clause itself.³³² A reading of § 2255 that denies habeas review based on an argument that the AEDPA strictly disallows review of successive motions ignores the plain meaning of the savings clause and the logical inference supplied by its continued existence after a major overhaul of the statutory scheme.³³³

³²⁵ See *In re Dorsainvil*, 119 F.3d at 251.

³²⁶ See *Ivy*, 328 F.3d at 1060 (applying the unobstructed procedural shot test to deny access to the savings clause where the prisoner could have brought the claim previously).

³²⁷ See *id.* (denying access to the savings clause because the claim could have been brought previously); cf. *Kinder v. Purdy*, 222 F.3d 209, 214 (5th Cir. 2000) (interpreting § 2255 in a similar fashion as the unobstructed procedural shot test, though not explicitly using any recognized test, to deny access to the savings clause where a claim had been previously reviewed and denied).

³²⁸ Entzeroth, *supra* note 16, at 104.

³²⁹ See *Ivy*, 328 F.3d at 1060 (applying the unobstructed procedural shot test by looking to whether a prisoner could have raised the claim in a trial, direct appeal, or initial § 2255 motion).

³³⁰ See *supra* notes 249–256 and accompanying text (discussing the conflict between the constitutional avoidance test and the legislative intent behind the AEDPA). Compare *Ivy*, 328 F.3d at 1060 (considering the application of the savings clause in light of the possibility of bringing claims during a trial, direct appeal, or initial § 2255 motion), with *Triestman*, 124 F.3d at 379–80 (determining whether the savings clause applies by relying on whether “serious constitutional questions” would result from denial of review).

³³¹ See Hack, *supra* note 19, at 192, 195.

³³² See *id.* at 195–96.

³³³ See *Gilbert*, 640 F.3d at 1332 (Martin, J., dissenting); Hack, *supra* note 19, at 195–96.

C. *The Constitutional Interests in Collateral Review*

There are many constitutional provisions that can be implicated by the granting or denial of a collateral review hearing.³³⁴ The Supreme Court has noted that the savings clause insulates § 2255 from many of those constitutional questions.³³⁵ Interpreting the savings clause without due consideration of those constitutional provisions would risk violating the constitutional rights of prisoners,³³⁶ would conflict with rules of statutory interpretation,³³⁷ and would contradict relevant Supreme Court precedent.³³⁸

The unobstructed procedural shot test satisfies many, if not all, of the constitutional concerns connected to the operation of § 2255.³³⁹ It has been noted that the unobstructed procedural shot test is governed by the same principles as the constitutional avoidance test.³⁴⁰ What is meant by that conclusion is that the two tests address latent constitutional issues in collateral review in the same way.³⁴¹ Of all the constitutional provisions that have been cited as being implicated in decisions concerning collateral review—the Due Process Clause, the Eighth Amendment, the Suspension Clause, and the Equal Protection Clause—all are implicated by the *denial* of a meaningful round of collateral review.³⁴² The unobstructed procedural shot test avoids running afoul of those provisions by allowing habeas review via the savings clause for all claims that could not have been brought previously and otherwise would not be heard, thus ensuring a meaningful opportunity for collateral review of every claim.³⁴³

Further, the modified unobstructed procedural shot test's more expansive definition of "unobstructed" also eliminates constitutional concerns.³⁴⁴ The test embraces a broader definition of "obstructed" that

³³⁴ *Triestman v. United States*, 124 F.3d 361, 378–79 & nn.21–22 (2d Cir. 1997) (citing the Due Process Clause, the Eighth Amendment, the Suspension Clause, and the Equal Protection Clause as possibly implicated by denial of collateral review).

³³⁵ *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *United States v. Hayman*, 342 U.S. 205, 223 (1952).

³³⁶ See *Gilbert*, 640 F.3d at 1330–31 (Martin, J., dissenting).

³³⁷ See SINGER & SINGER, *supra* note 158, § 45:11, at 87.

³³⁸ See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Gilbert*, 640 F.3d at 1330–31 (Martin, J., dissenting).

³³⁹ See *Triestman*, 124 F.3d at 378–79 & nn.21–22.

³⁴⁰ See *Reyes-Requena*, 243 F.3d at 903 n.28.

³⁴¹ See *id.*

³⁴² See *Triestman*, 124 F.3d at 378–79 & nn.21–22 (noting that all constitutional issues considered by the court were linked to the denial of a hearing).

³⁴³ See *In re Dorsainvil*, 119 F.3d at 251.

³⁴⁴ See *Harrison*, 519 F.3d at 960; *Triestman*, 124 F.3d at 378–79 & nn.21–22.

includes claims not brought either because of adverse circuit precedent or lack of recognition of the claim by the circuit.³⁴⁵ One could imagine a case in which either situation—the existence of adverse precedent or the absence of recognition of a claim—would excuse the failure to have brought a claim previously and where § 2255 would be inadequate if its terms prevented a hearing on that claim.³⁴⁶ If a movant was denied a hearing in spite of having such an excuse, the lack of review would also threaten constitutional violations.³⁴⁷ For this reason, the definition of unobstructed used by the modified unobstructed procedural shot test works to diminish the likelihood that the test would offend the Constitution.³⁴⁸

Accordingly, the modified unobstructed procedural shot test forestalls any constitutional issues by providing review in cases in which the denial of review could create constitutional issues.³⁴⁹ The test operates to give every claim that a prisoner may have a meaningful hearing, and in doing so, eliminates the commonly cited constitutional concerns that have been linked with denying § 2255 review.³⁵⁰

In conclusion, the unobstructed procedural shot test, decoupled from an actual innocence requirement, best navigates the competing interests involved in determining the scope of the savings clause.³⁵¹ The test is faithful to the text of the savings clause without undermining the restrictions included in the statute.³⁵² The test also aligns with the legislative intent that motivated the passage of the AEDPA.³⁵³ Finally, the test avoids constitutional issues that plague other tests by always allowing an opportunity for review of a claim against the legality of a conviction or sentence.³⁵⁴

CONCLUSION

The savings clause of 28 U.S.C. § 2255 is often the only means for a federal prisoner to get a second round of collateral review of his or her conviction or sentence. Yet, the key language of the savings clause—

³⁴⁵ See *Harrison*, 519 F.3d at 960.

³⁴⁶ See *id.*; *Triestman*, 124 F.3d at 378–79 & nn.21–22.

³⁴⁷ See *Triestman*, 124 F.3d at 378–79 & nn.21–22; *In re Dorsainvil*, 119 F.3d at 248.

³⁴⁸ See *Harrison*, 519 F.3d at 960; *Triestman*, 124 F.3d at 378–79 & nn.21–22.

³⁴⁹ *Triestman*, 124 F.3d at 378–79 & nn.21–22.

³⁵⁰ See *id.*

³⁵¹ See *Gilbert*, 640 F.3d at 1310; *Triestman*, 124 F.3d at 378–79 & nn.21–22; *In re Dorsainvil*, 119 F.3d at 251; Hack, *supra* note 19, at 195–96.

³⁵² See *In re Dorsainvil*, 119 F.3d at 251.

³⁵³ See *Gilbert*, 640 F.3d at 1310–11.

³⁵⁴ See *In re Dorsainvil*, 119 F.3d at 248.

triggering habeas review when the remedy provided by § 2255 is “inadequate or ineffective to test the legality” of the detention—has not been interpreted definitively. At least three tests have been utilized by the courts of appeals: the constitutional avoidance test, the actual innocence and unobstructed procedural shot test, and the initial motion test. Evaluating those tests in light of the interests relevant to interpreting § 2255—the text of the statute, the legislative intent that undergirds the AEDPA, and the constitutional concerns relevant to collateral review—demonstrates that all three tests are fundamentally flawed. Instead, this Note proposes using an unobstructed procedural shot test without any actual innocence requirement to determine the operation of the savings clause. Such a test is consistent with the text of § 2255, the legislative intent of Congress, and the constitutional imperatives inherent in collateral review.

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