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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

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LYN S. ENTZEROTH*

I. INTRODUCTION

Assuring Americans that he was "confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary," President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or "the Act")[1] into law.[2] With this purported guarantee, the AEDPA ushered in a new, and some would say radically new,[3] regimen of habeas corpus[4] requirements that state

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1. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

2. President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 29, 1996).

3. *See, e.g.*, 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, 179 (2003) ("AEDPA has radically altered the applicable standards for abusive and successive petitions."); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001) (describing the AEDPA as "the most significant habeas reform since 1867"); *see also* Bryan Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 706-31 (2002) (tracing the historical evolution of the law of successive habeas corpus petitions).

4. The writ of habeas corpus generally provides a civil remedy that allows a federal court to review a federal or state prisoner's incarceration to determine whether that incarceration comports with the federal constitution or federal law. The scope and purpose of the writ have been a source of controversy, particularly during the twentieth century. *See generally* LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS (2003). Given current and proposed federal laws affecting the writ, such as 28 U.S.C. § 2241 (2000), Streamlined Procedures Act of 2005, H.R. 3035, 109th Cong. (2005), S. 1088, 109th Cong. (2005), the scope and purpose of the writ will undoubtedly remain a source of controversy and interest. For a comprehensive examination of the writ see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4d, at 72-78, § 41.2 (4th ed. 2001).

and federal prisoners seeking federal habeas relief must meet. Although the AEDPA adopted and implemented a number of themes and restrictions on federal habeas review that the Supreme Court had been articulating and imposing since the late 1970s,[5] the AEDPA went further in erecting roadblocks and barriers for state and federal prisoners seeking federal habeas review of their convictions and sentences.[6] Some of these obstacles to review created increased complexity and ambiguity about the habeas review process.[7] Other aspects of the AEDPA raised questions about the constitutional legitimacy of the Act.[8] This article examines one aspect of the AEDPA that creates significant complexity and barriers to federal court review for federal prisoners with clear claims of factual innocence. The particular problem considered below highlights the struggle that innocent prisoners confront when seeking relief under the AEDPA, and also illustrates the manner by which federal courts sometimes fashion the necessary federal court review to save the AEDPA from unconstitutionality.

In the late 1990s and early 2000s, federal courts entertained claims for collateral and habeas relief brought by federal prisoners who were serving prison sentences for conduct that the Supreme Court had determined was, in fact, not criminal. Specifically, in 1995, in *Bailey v. United States*,[9] the Supreme Court held that in order to sustain a conviction for use of a firearm during a drug-related offense under 18 U.S.C. § 924(c)(1), the federal government must present "evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense."[10] In 1998, the Supreme Court clarified that this construction of the law applied retroactively to all federal prisoners convicted under the statute, regardless of when the erroneous conviction became final.[11]

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5. *See* HERTZ & LIEBMAN, *supra* note 4, §§ 2.4d, 41.2; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathology of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1-47 (1997).

6. *See, e.g.*, 28 U.S.C. §§ 2244(d), 2255 (2000) (establishing a one-year statute of limitations for filing petitions and motions); *id.* §§ 2244(b), 2255 (limiting second and successive petitions and motions).

7. For example, there have been a number of Supreme Court decisions, not to mention numerous lower court decisions, in which the Court has attempted to decipher the AEDPA's statute of limitations. *See, e.g.*, Mayle v. Felix, 125 S. Ct. 2562 (2005); Dodd v. United States, 125 S. Ct. 2478 (2005); Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005); Johnson v. United States, 125 S. Ct. 1571 (2005); Rhines v. Weber, 125 S. Ct. 1528 (2005); Pliler v. Ford, 542 U.S. 225 (2004); Carey v. Saffold, 312 F.3d 1031 (2002), *cert. denied*, 539 U.S. 927 (2003); Duncan v. Walker, 533 U.S. 167 (2001).

8. *See, e.g.*, Felker v. Turpin, 518 U.S. 651 (1996).

9. 516 U.S. 137 (1995).

10. *Id.* at 143.

11. Bousley v. United States, 523 U.S. 614 (1998). Under the Supreme Court's modern retroactivity doctrine, a new rule of criminal procedure generally applies only to those cases in

Given these holdings, federal prisoners, who had been convicted for conduct that did not constitute active employment of a firearm during a drug-related offense, sought relief from federal courts so that they could be released from serving criminal sentences for noncriminal conduct. Some of these prisoners had to seek relief pursuant to a second or successive motion under the applicable provisions of the AEDPA, since they had exhausted their direct appeals and had already litigated at least one collateral motion for relief. Unfortunately, due to the AEDPA's changes to the rules governing successive motions,[12] these prisoners found the courthouse doors closed to them, or at least, quite difficult to pry open.[13] At best, federal courts found an exception providing a habeas hearing for certain prisoners with *Bailey* claims, although reaching this end was far from certain or easy.

To understand the importance of the problem, this article first examines the history of habeas corpus review for federal prisoners, the method by which federal prisoners are able to obtain habeas or collateral review, and the manner in which the AEDPA changed the collateral and habeas review process, particularly the process for obtaining a second or successive review. The article then takes an in-depth look at the problem presented by federal prisoners seeking second or successive habeas or collateral review of their *Bailey* claim, the provisions and language of the AEDPA that obstruct review of these claims, and the way in which federal courts responded to the obstacles created by the AEDPA amendments. The article finally considers the broader implications and problems created by the AEDPA and the role of the federal courts in interpreting these provisions to assure judicial review and, ultimately, to protect the rights of prisoners.

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which the conviction and sentence is not considered "final." *See* Teague v. Lane, 489 U.S. 288, 310 (1989). A conviction and sentence is deemed final when the defendant has completed his direct appeal, including petitioning the Supreme Court for certiorari review. Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 169-70 (2005). A defendant whose conviction and sentence is final when the new rule is handed down will not generally receive the benefit of the new rule except under very limited circumstances. *See generally id.*

12. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, §§ 105, 106, 110 Stat. 1214, 1220-21 (codified at 28 U.S.C. §§ 2255, 2244 (2000)).

13. Other commentators also have examined this dilemma. *See, e.g.*, Hack, *supra* note 3, at 190 (discussing AEDPA and alternative post-conviction remedies federal courts may use to grant relief in cases of improper detention); Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43 (2002) (describing post-conviction remedies and alternatives to the writ of habeas corpus); Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413 (2002) (discussing post-conviction remedies in the wake of AEPDA); HERTZ & LIEBMAN, *supra* note 4, §§ 2.4d, 41.2.

II. Federal Collateral or Habeas Review of a Federal Prisoner's Challenge to the Validity of His Conviction and Sentence: The Relationship Between 28 U.S.C. § 2255 and 28 U.S.C. § 2241

Habeas corpus, from the Latin meaning "that you have the body,"[14] describes certain types of writs, some quite ancient in form, "having for their object to bring a party before a court or judge."[15] As the writ of habeas corpus has evolved, it has become a means for a court to test the legality of an individual's confinement in a federal or state prison.[16] However, the method and manner by which a federal prisoner may seek habeas or collateral review to test the legality of his confinement is quite complicated. Indeed, the current federal habeas corpus system is not unlike a maze filled with wrong turns, funhouse mirrors, and dead ends that one must try to navigate before attaining the evermore elusive goal of meaningful federal habeas review. This article charts a course through the maze, which a federal prisoner who is incarcerated for behavior that is in fact not criminal must travel to obtain federal habeas review. Before traversing this path, however, it is necessary to engage in an overview of the historic and current methods of habeas and collateral review available to federal prisoners.

A. *Historical Overview of Habeas Corpus Review for Federal Prisoners*

The writ of habeas corpus,[17] described for centuries in Great Britain and the United States as the Great Writ of Liberty,[18] existed in colonial America and is enshrined in the United States Constitution, which guarantees: "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."[19] In giving effect to the writ, the first United States Congress provided in the Judiciary Act of 1789 that "courts of the United States, shall have power to issue writs of . . . *habeas corpus* . . . . And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for

14. Black's Law Dictionary 728 (8th ed. 1979).

15. *Id.*

16. *Id.*

17. The roots of the writ of habeas corpus reach back to the English Middle Ages. Yackle, *supra* note 4, at 9.

18. *See id.* at 15; Hertz & Liebman, *supra* note 4, § 2.3; Hack, *supra* note 3, at 173-74; Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 1 (2001); William F. Duker, A Constitutional History of Habeas Corpus 7 (1980).

19. U.S. Const. art 1, § 9, cl. 2.

the purpose of an inquiry into the cause of commitment."[20] Thus, as early as 1789, federal prisoners had the ability to seek redress in federal court, pursuant to a writ of habeas corpus, to examine "the cause of commitment."

The use of the writ to test federal confinement was an important part of early federal court review power.[21] Although the Judiciary Act of 1789 authorized lower federal courts to adjudicate violations of federal penal law,[22] it did not provide for direct federal appellate review of federal criminal convictions rendered by lower federal courts.[23] Rather, under the Judiciary Act of 1789, review of a federal conviction was attained, if at all, by means of a writ of habeas corpus.[24] Thus, for certain classes of federal cases, seeking a writ of habeas corpus under the Judiciary Act of 1789 provided for a form of direct review that otherwise was unavailable.[25]

After the Civil War, Congress amended the federal habeas corpus statute.[26] In the Habeas Corpus Act of 1867, Congress provided:

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20. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73. The Judiciary Act of 1789 established the federal judicial system including setting up the lower federal court system and the Supreme Court's appellate jurisdiction. For further discussion of the Judiciary Act of 1789 see ERWIN CHEMERINSKY, FEDERAL JURISDICTION (4th ed. 2001).

21. HERTZ & LIEBMAN, *supra* note 4, § 2.4d.

22. Judiciary Act of 1789 §§ 9, 11; *see also* HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 42.

23. HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 42.

24. *Id.* at 46 ("In short, as interpreted by the Court, the 1789 Act used habeas corpus review as a substitute for the Court's direct review of nationally important questions when the latter review was not meaningfully available to incarcerated individuals. Having withheld from federal prisoners any right to plenary direct appeal, the Act granted them instead the more limited, but still appellate, remedy of habeas review of fundamental (including all constitutional) legal claims.").

25. HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 39-40 ("Federal habeas corpus is not a substitute for a *general* writ of error or other direct appeal as of right. Since 1789, however, it has provided statutorily specified classes of prisoners with a *limited* and *substitute* federal writ of error or appeal as of right. That appellate procedure has been *limited* because it has lain only to hear claims of particular national importance – a category of claims that Congress has delineated with greater specificity over time, but that has consistently been interpreted to include recognized constitutional claims. It has been a *substitute* because it has served only in the absence of Supreme Court review of right."). Scholars have debated the scope of habeas review for federal prisoners under the 1789 Judiciary Act. For example, Professor Paul Bator argued that early habeas review was circumscribed, focusing primarily on whether the lower court had jurisdiction to impose the conviction and sentence. Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). The writings of Professor Bator have been used to support a narrower role for the modern day writ of habeas corpus. On the other hand, Professors Hertz and Liebman, as well as Professor Peller, point out that the early Court heard habeas cases and granted habeas relief in a broader range of cases. HERTZ & LIEBMAN, *supra* note 4, § 2.4d; Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 603-07, 611 (1982).

26. Act of Feb. 5, 1867, ch. 28, §1, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2000)). Congress had previously amended the early habeas statute in the Habeas Act of 1833, thus empowering federal courts to hear claims where states detained an individual for acts authorized

> That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.[27]

Among the notable changes that the 1867 Act brought to federal habeas corpus review was the language providing that the writ may issue when a person is "restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States"; this language replaced the earlier "cause of confinement" language used in the Act of 1789.[28] In describing this habeas power, the Supreme Court stated, "[t]his legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[29]

Professors Hertz and Liebman describe this early post-Civil War period – when courts arguably exercised more expansive habeas review, particularly with respect to federal prisoners – as a "Golden Age" of habeas review.[30] For example, during this period, the Supreme Court granted habeas relief to federal prisoners in cases involving,[31] inter alia, violations of the Fifth Amendment,[32] Sixth Amendment,[33] and various

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by federal law. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634. For an excellent discussion on the history of federal habeas review, including the Habeas Act of 1833, see Peller, *supra* note 25, at 616-17, 616 n.196; HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 42; FREEDMAN, *supra* note 18, at 1.

27. Act of Feb. 5, 1867 §1.

28. The 1867 Act also explicitly provided the writ to any prisoner, whether held in state or federal custody.

29. *Ex parte* McCardle, 73 U.S. 318, 325-26 (1867). For further discussion on the 1867 Act, see HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 47-55. In a more recent description of the habeas power conferred on federal courts by the 1867 Act, the Supreme Court in *Felker v. Turpin*, 518 U.S. 651, 659 (1996), characterized the 1867 Habeas Act as greatly expanding the scope of the writ.

30. HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 47-50. For further discussion on the expansive role of the writ under the 1867 Act, see Peller, *supra* note 25, at 618-29. For a contrary view, see Bator, *supra* note 25.

31. Professors Hertz, Liebman, and Peller argue these cases tend to contradict Professor Bator's historical analysis of federal court review of writs of habeas corpus. HERTZ & LIEBMAN, *supra* note 4, § 2.4d; Peller, *supra* note 25, at 623-29.

32. *Ex parte* Wilson, 114 U.S. 417, 429 (1885) ("[O]ur judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment of the constitution; and that the district court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged."); *see* HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 51.

33. Callan v. Wilson, 127 U.S. 540 (1880) (granting habeas relief for violation of right to jury trial); *see* HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 51.

federal statutes.[34] As the Supreme Court stated in *In re Bonner*,[35] "it should be constantly borne in mind that the writ was intended as protection of the citizen from encroachment upon his liberty from any source."[36]

According to Professors Liebman and Hertz, this "Golden Age" began to wane in the early 1890s, when Congress began to provide federal prisoners with the ability to seek writs of errors in the Supreme Court, thus establishing direct appellate review of federal convictions.[37] With the availability of direct review, the writ of habeas corpus was no longer the primary method by which a federal prisoner could have his conviction and sentence reviewed by a higher court.[38] Moreover, the Supreme Court established a requirement that prisoners exhaust federal direct appeal remedies before seeking habeas review.[39] Thus, federal prisoners generally had to first raise relevant claims of error with the applicable appellate court on direct appeal before seeking federal habeas relief on such claims. Although federal habeas review remained available to challenge the validity of a conviction and sentence, it became in 1891, and continues to be today, a collateral post-conviction proceeding that usually occurs, if at all, after the exhaustion of the direct federal appeal process.

In 1948, another key statutory modification of federal habeas corpus occurred when Congress enacted 28 U.S.C. §§ 2241 and 2254.[40] Section 2241, following the expansive language of the 1867 habeas statute, provides that any Supreme Court justice, or any district or circuit court judge may issue a writ of habeas corpus to any prisoner "in custody in violation of the Constitution or laws or treaties of the United States."[41] Likewise, 28 U.S.C. § 2254 provides that any person held pursuant to a state court judgment may seek a writ of habeas corpus in federal court if "he is in custody in violation of the Constitution or laws or treaties of the United States."[42] Thus, like the 1867 Act, the 1948 habeas statute provides review to prisoners detained by a state or federal government when such detention violates the federal constitution or federal law. Sections 2241 and 2254 remain the modern-day habeas stat-

34. *E.g.*, *In re* Mills, 135 U.S. 263 (1890) (granting habeas relief to prisoner incarcerated in penitentiary in violation of federal statute).

35. 151 U.S. 242 (1894).

36. *Id.* at 259.

37. HERTZ & LIEBMAN, *supra* note 4, § 2.4d, at 54-56.

38. *Id.* at 56.

39. *Id.*

40. Act of June 25, 1948, ch. 646, 62 Stat. 869, 964-65, 967 (current version at 28 U.S.C. §§ 2241, 2254 (2000)).

41. 28 U.S.C. § 2241(c)(4).

42. *Id.* § 2254(a).

utes, although significant portions of the habeas statutory scheme, 28 U.S.C. §§ 2241-2255, were amended by the AEDPA.[43] For reasons discussed below, however, a federal prisoner today seeking collateral review of his conviction or sentence should move for relief under § 2255, which was also enacted in 1948,[44] rather than filing a writ of habeas corpus under § 2241. The procedural mechanism established in § 2255 for collateral review of a federal prisoner's claim provides a post-conviction process designed to deal with administrative concerns that arose in the middle of the twentieth century with respect to habeas petitions filed by federal prisoners.

B. *The Relationship Between § 2241 and § 2255*

As discussed above, Congress empowered federal courts to hear habeas petitions of federal prisoners as early as 1789.[45] At the time that Congress was revising its federal habeas statute in 1948, the venue practices of the federal courts allocated habeas review to the district court in the district where the prisoner was incarcerated.[46] The practical effect of this venue requirement was significant. By the middle of the twentieth century, the number of habeas petitions filed by federal prisoners was increasing dramatically;[47] at the same time, federal prisons were located in only a few federal districts.[48] Thus, there were only a few district courts where a federal prisoner was likely to be incarcerated and could file his § 2241 petition. Needless to say, the district courts in these districts bore a disproportionate share of the federal habeas petitions.[49] In

43. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.). Prior to the AEDPA amendments in 1996, the 1948 habeas statute was amended in 1949, Act of May 24, 1949, ch. 139, §§ 112-14, 63 Stat. 89, 105; 1951, Act of Oct. 31, 1951, ch. 655, § 52, 65 Stat. 710, 727-28; and 1966, Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104.

44. *See* 62 Stat. at 967. If, however, a prisoner is challenging the execution of his sentence, as opposed to the validity of his conviction and sentence, the petitioner proceeds under § 2241. Thus, for example, if a prisoner wishes to challenge the manner in which parole is calculated, he would file a petition for a writ of habeas corpus pursuant to § 2241. *See infra* text accompanying note 55.

45. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73; HERTZ & LIEBMAN, *supra* note 4, §§ 2.4d, 41.2.

46. *See* United States v. Hayman, 342 U.S. 205, 212-13, 213 n.13 (1952); HERTZ & LIEBMAN, *supra* note 4, §41.2a; *see also* Ahrens v. Clark, 335 U.S. 188 (1948).

47. *See Hayman*, 342 U.S. at 212-13, 213 n.13 (noting that the number of habeas petitions nearly tripled from 1936 to 1945, and observing that a large number of the petitions were repetitive or contained frivolous claims); HERTZ & LIEBMAN, *supra* note 4, § 41.2a; *see also* Wofford v. Scott, 177 F.3d 1236, 1238-39 (11th Cir. 1999) (discussing history of §§ 2241, 2255, and the disproportionate burden that § 2241 petitions placed on certain district courts in 1948).

48. *See Hayman*, 342 U.S. at 213-14, 214 n.18 (noting that prior to § 2255, sixty-three percent of habeas petitions were filed in five of the eighty-four district courts in the United States); HERTZ & LIEBMAN, *supra* note 4, § 41.2a.

49. *See Hayman*, 342 U.S. at 212-13, 213 n.13; *see also* HERTZ & LIEBMAN, *supra* note 4,

response to this problem, as well as other administrative considerations,[50] Congress enacted 28 U.S.C. § 2255,[51] which was designed as a procedural post-conviction remedy that would allow prisoners to challenge the validity of their convictions and sentences in the district where they were convicted and sentenced.[52] This post-conviction process alleviated some of the practical problems of the venue requirements of federal habeas review by distributing collateral review among most, if not all, district courts.[53]

In crafting a post-conviction collateral review process for federal prisoners under § 2255, Congress provided, in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.[54]

Thus, § 2255 establishes a post-conviction vehicle that allows a federal prisoner to challenge the validity of his conviction and sentence, without resort to the writ of habeas corpus. Sections 2241 and 2254 remain the mechanism for challenging the execution of a prison sentence, which includes issues such as the terms and conditions of parole or the calculation of credits towards parole.[55]

While § 2255 provides a simple, convenient procedural device for seeking collateral review of the validity of a federal conviction and sentence,[56] Congress did not intend § 2255 to limit the purpose or function of collateral review that prisoners otherwise would have enjoyed under

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§ 41.2a; *In re* Davenport, 147 F.3d 605, 608-09 (7th Cir. 1998) (discussing venue problems that § 2255 was intended to cure).

50. An additional practical reason for § 2255 was to provide a post-conviction forum in the sentencing court where the records and witnesses were more readily available. *See Hayman*, 342 U.S. at 212; *Wofford*, 177 F.3d at 1238-39 (noting that a hearing on the validity of a conviction and sentence is more conveniently held in the sentencing court where witnesses and evidence are more easily available).

51. Act of June 25, 1948, ch. 646, 62 Stat. 869, 967.

52. *See* 28 U.S.C. § 2255 (2000).

53. HERTZ & LIEBMAN, *supra* note 4, § 41.2a; *Wofford*, 177 F.3d at 1238-39.

54. 28 U.S.C. § 2255.

55. *See, e.g.*, Jimimian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001); Charles v. Chandler, 180 F.3d 753, 755-56 (6th Cir. 1999); Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996); Cabrera v. United States, 972 F.2d 23, 25-26 (2d Cir. 1992).

56. *See Wofford*, 177 F.3d at 1239 ("The purpose of § 2255 was to clarify and simplify the procedure and provide an expeditious remedy in the sentencing court without resort to habeas corpus.").

§ 2241 or § 2254.[57] In considering the scope and function of § 2255, the Supreme Court stated:

> [T]he history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.[58]

Likewise, the Supreme Court has made clear that:

> No microscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief "on the ground that (the prisoner) is in custody in violation of the . . . laws . . . of the United States" or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect. Thus, we cannot agree that the third paragraph of § 2255 was in any fashion designed to mark a retreat from the clear statement that § 2255 encompasses a prisoner's claim of "the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States."[59]

In *Davis v. United States*,[60] the Supreme Court considered the § 2255 motion filed by a federal defendant seeking collateral review to vacate his conviction for failing to report for induction into the United States armed services.[61] The Court stated that, like habeas review, § 2255 "permits a federal prisoner to assert a claim that his confinement is 'in violation of the Constitution or laws of the United States.'"[62] Where an intervening change in the statutory law renders a conviction invalid, a prisoner may seek and obtain collateral review and relief under § 2255. As the Court stated:

> [T]he petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* cases after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not lawfully be convicted for failure to comply with that order. If this contention is well taken, then Davis'

57. *See* Sanders v. United States, 373 U.S. 1, 12-14 (1963) (stating that § 2255 was enacted to address practical problems with the writ and to provide the same review in the sentencing court as had been available by habeas corpus); *Wofford*, 177 F.3d at 1239.

58. United States v. Hayman, 342 U.S. 205, 219 (1952). For further discussion on *Hayman* see HERTZ & LIEBMAN, *supra* note 4, § 41.2a.

59. Davis v. United States, 417 U.S. 333, 344-45 (1974).

60. *Id.* at 333.

61. *Id.* at 334-41.

62. *Id.* at 342-43.

> conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present(s) exceptional circumstances" that justify collateral relief under § 2255. Therefore, although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a § 2255 proceeding.[63]

In giving effect to this federal court review power, the Court made clear that the district court hearing a § 2255 motion had power equivalent to its power in habeas proceedings to redress violations of constitutional and federal statutory rights.[64]

Given the expansive scope of § 2255, Congress clearly intended it as the primary procedural process to challenge the validity of a conviction and sentence:

> 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.[65]

Accordingly, a federal prisoner must move for relief under § 2255; he may not use § 2241 habeas review to remedy unlawful detentions that can be remedied under § 2255.

However, § 2255 has not rendered § 2241 a nullity with respect to federal court review of the constitutional or statutory validity of a conviction and sentence. As the language of § 2255 provides, where the "remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention," a prisoner may seek traditional habeas relief under § 2241.[66] On one level, it seems curious that Congress should provide any resort to a writ of habeas corpus given that it intended § 2255 to reach as broadly as § 2241. Perhaps, as Judge Posner suggests, given that the Suspension Clause prohibits Congress from suspending the writ of habeas corpus except in cases of rebellion or invasion,[67] the "outright abolition of habeas corpus for federal prisoners might conceivably have been held to violate the Constitution."[68] Even though the legislative history of § 2255 is not clear as to the purpose, or

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63. *Id.* at 346-47.

64. United States v. Hayman, 342 U.S. 205, 214-17 (1952) (reviewing the legislative history of § 2255, and noting that § 2255 is intended to provide as broad a remedy as habeas corpus).

65. 28 U.S.C. § 2255 (2000).

66. *Id.*

67. U.S. CONST. art. I, § 9, cl. 2.

68. *In re* Davenport, 17 F.3d 605, 609 (7th Cir. 1998).

even the full scope of the savings clause, it seems apparent nonetheless that "Congress created a safety hatch: if section 2255 proved in a particular case not to be an adequate substitute for habeas corpus, the prisoner could seek habeas corpus."[69] This safety hatch or savings clause assures that the writ of habeas corpus remains available to federal prisoners, at least to some extent, and that Congress, by including a savings clause in § 2255, did not violate the Suspension Clause.[70]

While the savings clause has been a part of § 2255 since 1948, and continues to be a part of § 2255 today, the Supreme Court has not provided a great deal of guidance on the types of cases that fall within its ambit. For example, in *United States v. Hayman*,[71] the Court simply stated that "[i]n a case where the Section 2255 procedure is shown to be 'inadequate or ineffective', the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing."[72] Perhaps offering a little insight on the savings clause, the Court in *Sanders v. United States*,[73] suggested that the savings clause might allow a prisoner to seek a writ of habeas corpus under § 2241 when he was unable to obtain an adequate hearing on a successive § 2255 motion;[74] however, *Sanders* was based on pre-AEDPA law and a construction of the writ that was more generous than current standards.[75]

As a practical matter, federal courts construe the savings clause in § 2255 quite narrowly. For example, § 2241 habeas review is unavailable where a prisoner simply has been denied relief in his § 2255 motion,[76] even if that denial of relief is arguably erroneous.[77] Likewise, § 2241 is generally unavailable where the district court declines to hear a § 2255 motion because it is time-barred,[78] or where legal claims for

69. *Id.*; *accord* Wofford v. Scott, 177 F.3d 1236, 1240-42 (11th Cir. 1999) (discussing the legislative history of the savings clause of § 2255).

70. The scope and meaning of the Suspension Clause are hotly disputed. *See* Felker v. Turpin, 518 U.S. 651, 663-64 (1996); INS v. St. Cyr, 533 U.S. 289, 300-05 (2001); YACKLE, *supra* note 4, at 24-25.

71. 342 U.S. 205 (1952).

72. *Id.* at 223.

73. 373 U.S. 1 (1963).

74. *Id.* at 15.

75. Prior to the AEDPA, some circuit courts indicated that "a motion pursuant to Section 2255 'can be inadequate or ineffective to test the legality of . . . detention only if it can be shown that some limitation of scope or procedure would prevent a Section 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention.'" *In re* Galante, 437 F.2d 1164, 1165 (3d Cir. 1971) (quoting United States *ex rel.* Leguillou v. Davis, 212 F.2d 681, 684 (3d Cir. 1954) (internal quotations omitted)).

76. *See, e.g.*, Darby v. Hawk-Sawyer, 405 F.3d 942, 945 (11th Cir. 2005); Abdullah v. Hedrick, 392 F.3d 957, 959 (8th Cir. 2004).

77. *See, e.g.*, *Abdullah*, 392 F.3d at 963.

78. *See, e.g.*, *id.* at 959; United States v. Lurie, 207 F.3d 1075, 1077 (8th Cir. 2000).

relief have been procedurally defaulted.[79] To the extent that § 2255 provides full and fair collateral review, such a limited interpretation of the savings clause is unlikely to foreclose opportunities to review or to raise concerns about possible suspension of the writ. However, as one commentator has noted,[80] a more restricted § 2255 review, such as that established under the AEDPA, may pose a different question about the scope of the savings clause and the constitutional validity of § 2255. To put this issue in context requires a consideration of the changes the AEDPA made to § 2255 motions.

C. *The AEDPA and § 2255*

The AEDPA substantially amended 28 U.S.C. §§ 2241-2255, and ushered in a new set of restrictions on federal habeas and collateral review.[81] While leaving intact the language from the 1948 statute that a § 2255 motion could be brought on the grounds that the federal prisoner's "sentence was imposed in violation of the Constitution or laws of the United States," and also leaving intact the savings clause of § 2255,[82] the AEDPA nevertheless created significant restrictions on a federal prisoner's ability to actually move a federal court for such relief.

The AEDPA was the triumph of a movement by certain members of the judiciary, Congress, and state legislatures to restrict access to and limit the availability of habeas or collateral relief to state and federal prisoners.[83] Among its stated purposes, the AEDPA was designed to "curb abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[84] One of the ways in which Congress sought to achieve its stated objectives was by curtailing access to federal court review for federal and state prisoners.[85] Among the changes implemented to limit access to review

79. *See, e.g.*, *Abdullah*, 392 F.3d at 959.

80. *See* Hack, *supra* note 3, at 190 (observing that since the AEDPA, the savings clause of § 2255 "has become the focus of intense debate").

81. For an excellent comparison of the AEDPA and previous habeas law see HERTZ & LIEBMAN, *supra* note 4, § 3.1-§3.5b; *see also* Tushnet & Yackle, *supra* note 5, at 1-47.

82. *See* 28 U.S.C. § 2255 (2000).

83. *See* Stevenson, *supra* note 3, at 706-31; James Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 411-16 (2001); Williams, *supra* note 3, at 923; Tushnet & Yackle, *supra* note 5, at 1-47; Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015 (1993).

84. H.R. REP. No. 104-518, at 111 (1996) (Conf. Rep.); *see also* HERTZ & LIEBMAN, *supra* note 4, § 3.1.

85. In addition, Congress created special restrictive measures for capital cases for those states that opt-in to the requirements of these special procedures. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221-26 (codified at 28 U.S.C. §§ 2261-2266 (2000)).

were a one-year statute of limitations for filing § 2255 claims,[86] limits on appeals of denial of habeas or collateral relief,[87] and limits on second or successive § 2254 habeas petitions and § 2255 motions.[88] A subtext of the AEDPA appears to have been lawmakers' displeasure with the ability, and perceived willingness, of federal courts to act independently and actually grant writs of habeas corpus to state and federal prisoners, and particularly prisoners on death row.

One of the more significant changes brought about by the AEDPA was the limitations placed on second or successive § 2255 motions. The terms "second" or "successive" motion generally refer to a § 2255 motion that a federal prisoner may seek to file after he has litigated his initial or first § 2255 motion.[89]

The need to file a second or successive motion may arise when a prisoner discovers new facts, or when the law changes significantly after the first motion. However, a rehearing on a previously litigated claim may also become necessary.[90] Counterbalancing this need for further federal court review are concerns that prisoners will take advantage of or abuse the successive habeas motion process to delay review, or continually litigate the same claims.[91] Prior to the enactment of the AEDPA, § 2255 provided that no sentencing court was required to hear "a second or successive motion for similar relief on behalf of the same prisoner";[92] however, under pre-AEDPA law, successive § 2255 motions were heard even on grounds similar to the previous motion.[93] These pre-1996 stan-

86. Antiterrorism and Effective Death Penalty Act § 105, at 1220 (codified as amended at 28 U.S.C. § 2255) (2000) ("A 1-year period of limitation shall apply to a motion under this section"). A similar one-year statute of limitations exists for state prisoners seeking federal habeas relief. Antiterrorism and Effective Death Penalty Act § 106, at 1220-21 (codified at 28 U.S.C. § 2244(d)(1) (2000)). A great deal of litigation has occurred over the meaning of the one-year statute of limitations, when it applies, and when it is tolled. *See* cases cited *supra* note 8.

87. Antiterrorism and Effective Death Penalty Act §§ 102, 105, at 1217-18, 1220 (codified as amended at 28 U.S.C. §§ 2253, 2255 (2000)); *see also* HERTZ & LIEBMAN, *supra* note 4, § 3.2.

88. Antiterrorism and Effective Death Penalty Act §§ 101, 105, at 1217, 1220 (codified as amended at 28 U.S.C. §§ 2244, 2255 (2000)); HERTZ & LIEBMAN, *supra* note 4, § 3.2.

89. For further discussion on successive motions see HERTZ & LIEBMAN, *supra* note 4, §§ 28, 41.7(d); Brent E. Newton, *A Primer on Post-Conviction Habeas Review*, CHAMPION, June 2005, at 16; *Habeas Relief for Federal Prisoners*, 91 GEO. L.J. 862 (2003); Jeffrey, *supra* note 13; Stevenson, *supra* note 3.

Not all "second" petitions or motions will be considered second or successive for purposes of the AEDPA. *See, e.g.*, Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) (holding that when federal court dismissed one claim in petition on the grounds that the claim was premature, the petitioner was not barred by the second and successive provisions of AEDPA from raising that claim when it was ripe).

90. HERTZ & LIEBMAN, *supra* note 4, § 28.1.

91. *Id.*

92. 28 U.S.C. § 2255; *see* HERTZ & LIEBMAN, *supra* note 4, § 28.2b.

93. *See, e.g.*, Sanders v. United States, 373 U.S. 1 (1963); HERTZ & LIEBMAN, *supra* note 4, §§ 28.2b, 41.7(d).

dards allowed, under certain circumstances, a successive motion on a previously-litigated claim if the petitioner was not afforded a full and fair hearing on the prior motion, or "if the ends of justice" warranted another motion on the claim.[94] The pre-AEDPA standards also allowed, under certain circumstances, for a successive motion for claims not previously litigated.[95] However, judicially created doctrines, such as the abuse of the writ doctrine,[96] limited a prisoner's ability to bring a successive motion for either a new claim or a previously litigated claim.[97]

The AEDPA significantly changed the availability of successive motions, making it much more difficult for a prisoner to obtain a second collateral hearing. Specifically with respect to § 2255 motions, the AEDPA added the following restrictions:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain–
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[98]

Thus, a second or successive motion under the AEDPA is only allowed if there is new evidence that meets a very high evidentiary burden in establishing innocence, or if there is a new rule of constitutional law that the Supreme Court applies retroactively to cases pending on collateral review. Neither the merits of the claim nor the actual innocence of the prisoner alone can be grounds for a successive motion. Additionally, the AEDPA does not allow for re-litigation of a claim previously heard in a § 2255 motion, even if a second or successive motion arguably would have been allowed under the pre-AEDPA "ends of justice" exception.[99]

Further, prior to bringing a second or successive petition, the prisoner must undergo the certification process of 28 U.S.C. § 2244(b)(3), which provides:

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94. HERTZ & LIEBMAN, *supra* note 4, §§ 28.1, 28.2b.

95. *Id.*

96. The abuse of the writ doctrine articulated by the Supreme Court in *Sanders v. United States*, 373 U.S. 1 (1963), and later modified in *McClesky v. Zant*, 499 U.S. 467 (1991), essentially created a defense that the government could assert to bar review of a second or successive motion on the grounds that the prisoner had abused the habeas corpus review process by failing to raise a claim in an earlier motion. Congress codified the abuse of the writ standard in its 1966 and 1976 amendments to the federal habeas statute. *Id*

97. HERTZ & LIEBMAN, *supra* note 4, § 28.1.

98. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified as amended at 28 U.S.C. § 2255 (2000)).

99. *See* Triestman v. United States, 124 F.3d 361, 368-69 (2d Cir. 1997).

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.[100]

Under the certification process of the AEDPA, the circuit courts of appeals serve a "gatekeeping"[101] function, and keep the courthouse doors closed unless an individual meets the narrow criteria of new evidence or new constitutional law entitling one to a second or successive motion. This gatekeeping function does not address the ultimate merits of the successive motion, that is, whether the prisoner is entitled to relief; its function is to prevent a hearing on the merits at all. Moreover, as difficult as it is to get the circuit court to open the door for successive motion review, § 2244(b)(3) is not the end of the procedural barriers. In addition, § 2244(b)(4) provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."[102] Accordingly, even if the circuit court allows a litigant a hearing, the district court still may slam the courthouse doors shut.[103]

Plainly, the AEDPA erects significant obstacles to the initiation of a second or successive motion. It is important to note that these restrictions keep a federal court from even hearing a case. Thus, even if the prisoner has a meritorious claim, if he cannot survive the certification

100. 28 U.S.C. §2244(b)(3) (2000).

101. Felker v. Turpin, 518 U.S. 651, 657 (1996) ("[Section] 2241(b)(3) . . . creates a 'gatekeeping mechanism' for the consideration of second or successive applications . . . .").

102. 28 U.S.C. § 2244(b)(4).

103. *See* Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001) (explaining that under the certification process, a district court may deny review even after the circuit has granted it).

process, the federal court cannot hear his claim, cannot exercise its power over it, and cannot grant appropriate relief. In this way, the AEDPA not only restricts the remedies available to prisoners, but also limits the power of federal courts.

Interestingly, however, a previous § 2255 motion does not trigger any limits on § 2241 petitions brought by federal prisoners.[104] A prisoner who has litigated one or more § 2255 motions would not have to surmount the certification process for second or successive motions in order to file a § 2241 petition for a writ of habeas corpus. Therefore, § 2241 initially appears to provide an attractive alternative to a § 2255 second or successive motion that has little likelihood of being heard. Moreover, while the AEDPA changed many aspects of federal habeas and collateral review, it left intact the savings clause of § 2255 that offers the possibility of a § 2241 petition. As noted earlier, however, a federal prisoner who is authorized to seek relief pursuant to a § 2255 motion may not file for habeas relief under § 2241 "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."[105] Thus, under the AEDPA, the scope of the savings clause of § 2255 is of paramount importance to a prisoner who is barred from pursuing a second or successive § 2255 motion.[106]

III. THE SEARCH FOR FEDERAL REVIEW OF SUCCESSIVE CLAIMS OF ACTUAL INNOCENCE UNDER *BAILEY V. UNITED STATES*

Congress, in 18 U.S.C. § 924(c)(1), provides, in relevant part, that any person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm" shall be punished by a term of imprisonment of not less than five years.[107] Prior to the Supreme Court's decision in *Bailey*, some circuit courts of appeals interpreted the term "use" in § 924(c)(1) as essentially equivalent to possession or presence of a firearm,[108] while other circuits found that "use" meant something more than mere possession.[109] In the mid-1990s, the U.S. Supreme Court granted certiorari to resolve the meaning of the

104. *See* Zayas v. INS, 311 F.3d 247, 255 (3d Cir. 2002); HERTZ & LIEBMAN, *supra* note 4, § 3.2. *But see* Simon v. United States, 359 F.3d 139, 142-44 (2d Cir. 2004) (observing that the AEDPA does not apply to traditional habeas petitions brought pursuant to § 2241, but suggesting that the AEDPA limits on second or successive motions may apply to § 2241 petitions).

105. 28 U.S.C. § 2255 (2000).

106. *See* Hack, *supra* note 3, at 181.

107. 18 U.S.C. § 924(c)(1) (2000).

108. *See, e.g.*, United States v. Torres-Rodriguez, 930 F.2d 1375, 1385 (9th Cir. 1991); United States v. McFadden, 13 F.3d 463, 465 (1st Cir. 1994); United States v. Hager, 969 F.2d 883, 889 (10th Cir. 1992).

109. *See, e.g.*, United States v. Castro-Lara, 970 F.2d 976, 983 (1st Cir. 1992); United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988).

word "use."[110] Acknowledging that "use" may have different meanings, the Court nevertheless found that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense."[111] Rather, the Court concluded that to sustain a conviction under § 924(c)(1), the government must show that the defendant actively employed a firearm during a drug-related offense.[112]

The Supreme Court's holding in *Bailey* had the effect of not only clarifying the meaning of the term "use" in on-going and future prosecutions under § 924(c)(1), but it also had the potential effect of rendering void already-imposed convictions that were based on an erroneous reading of "use." Because the Supreme Court in *Bailey* was not creating new law but rather clarifying pre-existing substantive law that some circuits had misinterpreted, the Court's construction of "use" was equally applicable to pending and previously litigated cases.[113]

Defendants whose cases were pending on direct appeal at the time *Bailey* was handed down, and who were convicted under an erroneous reading of § 924(c)(1), undoubtedly raised *Bailey* as an issue on direct appeal. With respect to prisoners who had exhausted their direct appeals, the Supreme Court had earlier indicated in *Davis* that a § 2255 motion was an appropriate remedy where a prisoner had been convicted for engaging in behavior that was not in fact criminal.[114] Moreover, in *Bousley v. United States*,[115] the Supreme Court explained that when the Court interprets or decides the substantive meaning of a statute, that decision applies retroactively to cases pending in collateral review, and § 2255 may provide an appropriate avenue to review such claims.[116] Thus, a federal prisoner wrongfully incarcerated under § 924(c)(1), but who had exhausted his direct appeals, nonetheless could seek collateral relief pursuant to a § 2255 motion.[117]

However, by the time the Supreme Court decided *Bailey*, some federal prisoners not only had exhausted their direct appeals, but also had already litigated at least one § 2255 motion. To pursue the *Bailey* claim, these prisoners had to persuade a federal circuit court of appeals and a federal district court to entertain a second or successive § 2255 motion.

110. Bailey v. United States, 516 U.S. 137, 142 (1995).

111. *Id.* at 143.

112. *See id.* at 148-50.

113. *See* Bousley v. United States, 523 U.S. 614, 620-21 (1998).

114. Davis v. United States, 417 U.S. 333, 346-47 (1974).

115. 523 U.S. at 614.

116. *Id.*

117. *See id.* at 620-21. However, the *Bousley* Court noted that other procedural barriers, such as procedural default, might still deprive the defendant of relief. *Id.* at 621.

A. *The Collision of the AEDPA Second or Successive Motion Provisions and Claims of Innocence Under Bailey*

As the Supreme Court noted more than thirty years ago, the continued incarceration of a person for non-criminal conduct "results in a complete miscarriage of justice."[118] As several circuit courts of appeals have observed, before the AEDPA, a district court would have had the power to hear a successive § 2255 motion raising the *Bailey* claim on the ground that the ends of justice necessitate review of an incarceration for a non-existent crime.[119] Yet, the rules have changed. Under the AEDPA, a prisoner seeking a successive motion must undergo a certification process to establish that the motion is based on either "newly discovered evidence," or "a new rule of constitutional law."[120] The problem facing the prisoner seeking a second or successive § 2255 review of a *Bailey* claim is that *Bailey* merely interprets the meaning of the term "use" in a federal statute.

The Second Circuit in *Triestman v. United States*[121] considered a successive § 2255 motion filed by a federal prisoner who challenged the validity of his guilty plea to, inter alia, violation of 18 U.S.C. § 924(c) by use of a firearm during a drug-related offense.[122] Triestman had previously lost a direct appeal and three pro se § 2255 motions for collateral relief.[123] His third pro se successive motion was pending before the Supreme Court on a petition for certiorari when the Court decided *Bailey*.[124] Approximately four months after the Court issued *Bailey*, it denied certiorari review to Triestman.[125] Then, a little less than five months after the Court decided *Bailey* and two days after the Supreme Court denied Triestman certiorari review, the AEDPA went into effect.[126] Eleven days after the Supreme Court denied certiorari review and nine days after the AEDPA and its amendments to successive motions went into effect, Triestman filed another § 2255 motion raising the *Bailey* claim.[127]

The problem for Triestman, of course, was that *Bailey* fits neither of the § 2255 exceptions that allow federal review of a successive motion. The first exception allows successive review based on "newly

118. *Davis*, 417 U.S. at 346-47.

119. *E.g.*, Triestman v. United States, 124 F.3d 361, 367-68 (2d Cir. 1997).

120. 28 U.S.C. § 2255 (2000).

121. 124 F.3d at 361.

122. *Id.* at 363-64. Triestman also pleaded guilty to two counts of drug conspiracy. *Id.* His § 924 conviction resulted in a mandatory consecutive sentence of sixty months. *Id.* at 364.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 365.

127. *Id.*

discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense . . . ."[128] Triestman did not rely on new evidence to show that he was innocent of using a gun during a drug-related offense; he argued that based on the evidence, the court applied the law incorrectly and punished him for conduct that was not criminal. This argument does not open the new evidence door of the successive motion provisions.

The second exception for successive review applies when a prisoner raises "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[129] *Bailey* clearly does not provide a new rule of constitutional law. Rather, *Bailey* interprets and clarifies a federal statute. Although Triestman argued that *Bailey*'s statutory interpretation implicated the Constitution, the Second Circuit rejected this argument and refused to review Triestman's successive motion.[130]

Other circuits agree with the Second Circuit. In *In re Vial*,[131] the Fourth Circuit found that a federal prisoner could not seek a successive petition on a *Bailey* claim, and specifically rejected the prisoner's argument that *Bailey* was a new rule of constitutional law.[132] In *United States v. Lorentsen*,[133] the Ninth Circuit found that even if a prisoner was factually innocent under *Bailey*, he nonetheless could not present his claim in a successive § 2255 motion because *Bailey* was not newly discovered evidence or a new rule of constitutional law.[134] The Seventh Circuit in *In re Davenport*[135] found that the AEDPA amendments preclude a successive motion on a *Bailey* claim.[136] Similarly, the Tenth Circuit in *Coleman v. United States*,[137] held that a successive *Bailey* motion did not meet the prima facie showing required for a successive motion to proceed.[138] In *In re Dorsainvil*,[139] the Third Circuit explicitly found that a claim premised on *Bailey* was neither newly discovered evidence nor a new rule of constitutional law, and thus did not fit into

128. 28 U.S.C. § 2255 (2000).
129. *Id.*
130. *Triestman*, 124 F.3d at 372-73.
131. 115 F.3d 1192 (4th Cir. 1997).
132. *Id.* at 1195.
133. 106 F.3d 278 (9th Cir. 1997).
134. *Id.* at 279.
135. 147 F.3d 605 (7th Cir. 1998).
136. *Id.* at 611-12.
137. 106 F.3d 339 (10th Cir. 1997) (per curiam).
138. *Id.* at 341.
139. 119 F.3d 245 (3rd Cir. 1997).

the limited exceptions for successive motions under the AEDPA.[140] The Fifth Circuit in *Reyes-Requena v. United States*,[141] found *Bailey* to be a substantive, non-constitutional change in the law that could not be heard in a successive § 2255 motion;[142] the Sixth Circuit in *In re Hanserd*[143] denied a request to file a successive motion raising a *Bailey* claim because the AEDPA successive motions standards precluded that motion;[144] and the Eleventh Circuit in *In re Blackshire*[145] found that a successive § 2255 motion was unavailable to *Bailey* claims.[146] Finally, the D.C. Circuit held that a successive § 2255 motion was not available to raise a *Bailey* claim, even though the court found that "[t]here is no question that [the defendant's] conviction is no longer valid."[147]

The overwhelming conclusion drawn by the circuit courts of appeals is that a successive § 2255 motion does not provide recourse for claims of actual innocence under *Bailey*. Although § 2255 was intended to provide the same relief as a writ of habeas corpus,[148] and was intended to remedy convictions based on non-criminal conduct,[149] the § 2255 successive motion rules close the door to federal court review and bar federal courts from hearing certain *Bailey* claims, even though some meritorious claims of innocence will go unheard.

B. *Innocent Prisoners Saved by the Savings Clause of § 2255 and § 2241*

The conclusion that the AEDPA prevents a federal court from hearing the claim of an innocent federal prisoner – a prisoner who is wrongfully imprisoned for conduct that Congress did not in fact make criminal – is troubling. This problem troubled the circuit courts as well. If factually innocent prisoners are denied access to the courts, the constitutionality of the AEDPA's successive motions provisions is potentially jeopardized.

Shortly after the AEDPA became law, certain aspects of the successive petition provisions that apply to state prisoners were challenged as amounting to an unconstitutional suspension of the writ. The Supreme Court in *Felker v. Turpin*[150] specifically examined § 2244(b)(3)(E),

140. *Id.* at 247-48.
141. 243 F.3d 893 (5th Cir. 2001).
142. *Id.* at 900.
143. 123 F.3d 922 (6th Cir. 1997).
144. *Id.* at 933-34.
145. 98 F.3d 1293 (11th Cir. 1998) (per curiam).
146. *Id.* at 1293-94; *see also* Abdullah v. Hedrick, 392 F.3d 957 (8th Cir. 2004).
147. *In re* Smith, 285 F.3d 6, 7-8 (D.C. Cir. 2002).
148. *See supra* notes 56-63 and accompanying text.
149. Davis v. United States, 417 U.S. 333, 346-47 (1974).
150. 518 U.S. 651 (1996).

which provides: "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."[151] Reacting to this jurisdictional limit on its appellate review, the Supreme Court referred to several post-Civil War cases dealing with the Supreme Court's appellate jurisdiction to review writs of habeas corpus; in these post-Civil War cases the Court upheld Congress's jurisdictional restrictions because Congress had not abrogated all habeas corpus review by the Court.[152] In reviewing the AEDPA successive motion provisions, the Court found that although Congress had restricted the Court's appellate jurisdiction over certain aspects of successive habeas petitions, Congress had not precluded a prisoner from filing a petition for an original writ directly with the Supreme Court pursuant to 28 U.S.C. § 2241.[153] Accordingly, the Court found that retention of the Court's original jurisdiction under § 2241 assured access to the Court,[154] even though the Court has not accepted original jurisdiction in such a case since the 1920s.[155] This potential, though rarely used, avenue to Supreme Court original review was sufficient to defeat the constitutional challenges to the successive provisions of the AEDPA.[156] Moreover, the Court did not find that the successive provisions, in and of themselves, constituted a suspension of the writ.[157] Rather, the Court found these rules represented an evolution of the abuse of the writ doctrine that existed prior to the AEDPA.[158]

A different, albeit related, question emerges where the successive petition rules are construed to preclude any review of a federal prisoner's claim of actual innocence. One way in which the Supreme Court in *Felker* avoided a confrontation between the Constitution and the successive petition provisions of the AEDPA was to find that the ability to file an original petition with the Court pursuant to § 2241 provides constitutionally adequate habeas review.[159] However, as the Second Circuit framed the problem in *Triestman*, "serious constitutional questions would arise if a person who can prove his actual innocence on the existing record – and who could not have effectively raised his claim of innocence at an earlier time – had no access to judicial review."[160]

151. 28 U.S.C. § 2244(b)(3)(E) (2000).
152. *Felker*, 518 U.S. at 658-62.
153. *Id.* at 660-61.
154. *See id.* at 660-62.
155. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 158 (2d ed. 2002).
156. *Felker*, 518 U.S. at 661.
157. *Id.* at 664.
158. *Id.*
159. *See id.* at 662.
160. Triestman v. United States, 124 F.3d 361, 363 (2d Cir. 1997).

A complete denial of review raises several constitutional problems. First, under the Suspension Clause, Congress may only suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."[161] If Congress cuts off all meaningful review to prisoners held for nonexistent crimes, it raises the specter that Congress has suspended the writ with respect to them. While the precise method for determining what constitutes a suspension of the writ may not be completely clear,[162] the prospect of denying all review is, at the very least, constitutionally troubling. Second, the Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law . . . ."[163] At issue here are cases where individuals were convicted under then-existing erroneous interpretations of a federal criminal statute that rendered non-criminal conduct criminal. After these individuals' convictions were final and they pursued collateral review, the Supreme Court struck down the erroneous interpretation of the statute, clarifying that the conduct for which they were serving criminal sentences was not, and never had been, unlawful. If these wrongfully confined individuals cannot get meaningful habeas hearings based upon proper interpretations of the law, the legal system faces serious questions regarding this lack of due process. Third, a potential Eighth Amendment problem emerges when a person is forced to serve a criminal sentence for a non-existent crime.[164]

One solution that avoids addressing the constitutionality of the AEDPA is to use the savings clause of § 2255 to allow prisoners to bring § 2241 habeas petitions for hearings on their innocence claims.[165] The Second Circuit availed itself of this remedy in *Triestman*, when a prisoner with a strong *Bailey* claim of innocence was unable to obtain a successive hearing.[166] The savings clause of § 2255 provides that a prisoner may seek a writ of habeas corpus if it appears that a motion under § 2255 "is inadequate or ineffective to test the legality of his detention."[167] While recognizing the significant limits of the savings clause

161. U.S. CONST. art. I, § 9, cl. 2.

162. In general, the Supreme Court has required a specific and unambiguous statement of congressional intent to repeal habeas corpus jurisdiction in order to constitute a suspension of the writ. *See* INS v. St. Cyr, 533 U.S. 289, 298-99 (1993); *Felker*, 518 U.S. at 660-61.

163. U.S. CONST. amend. V.

164. *See Triestman*, 124 F.3d at 379.

165. Some commentators have suggested other vehicles, such as a writ of *coram nobis* or a writ under the All Writs Act, as providing alternative avenues for review. *See* Hack, *supra* note 3, at 211-18; Jeffrey, *supra* note 13, at 62. At least one court considering these writs with respect to successive *Bailey* claims has declined to allow review on that basis. *In re* Davenport, 147 F.3d 605, 607-08 (7th Cir. 1998).

166. *Triestman*, 124 F.3d at 373.

167. 28 U.S.C. § 2255 (2000).

of § 2255, the *Triestman* court found that the terms "inadequate" and "ineffective" include cases of legal as well as practical difficulty, and that the savings clause may provide review in certain of these cases.[168]

Nonetheless, the Second Circuit did not provide an expansive reading of the savings clause of § 2255. In fact, the Second Circuit made clear that the savings clause is not available simply because a prisoner encounters substantive or procedural barriers to review, including barriers created by the AEDPA amendments.[169] The Second Circuit instead observed:

> We have already stated that "inadequate or ineffective" is not limited merely to the practical considerations suggested by the government, but refers to something that is still less than the full set of cases in which § 2255 is either unavailable or unsuccessful. We now hold that that "something" is, at the least, the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions.[170]

The Second Circuit concluded that the preclusion of review under § 2255 of Triestman's *Bailey* claim raises serious due process and cruel and unusual punishment concerns, and potentially calls into question the constitutionality of the successive provisions of the AEDPA.[171] Because review of Triestman's *Bailey* claim was previously unavailable,[172] and because the preclusion of such review raises significant constitutional issues, the Second Circuit found that § 2255, at least with respect to Triestman and other similarly situated federal prisoners, was inadequate and ineffective.[173] Triestman, therefore, was entitled to pursue a § 2241 petition in district court.[174] Since the *Triestman* decision, the Second Circuit has made clear that the only claims that have fit within the savings clause to date are those where the prisoner is actually innocent and where he could not have effectively raised his claim in an earlier

168. *Triestman*, 124 F.3d at 375-76.

169. *Id.* at 376.

170. *Id.* at 377.

171. *Id.* at 376-78.

172. Subsequently, in *Jiminiam v. Nash*, 245 F.3d 144 (2d Cir. 2001), the Second Circuit clarified that § 2255 is not considered inadequate or ineffective where the prisoner had a prior opportunity to raise his claim on direct appeal or in a prior motion. *Id.* at 147-48.

173. *Triestman*, 124 F.3d at 380.

174. *Id.* It should be noted that simply because a prisoner with a *Bailey* claim receives a hearing under § 2241 does not mean that the prisoner will receive relief. First, the Supreme Court in *Bousley* found that prisoners wishing to raise a *Bailey* claim in collateral review may face procedural barriers if the prisoner failed to properly raise the issue on direct appeal. Bousley v. United States, 523 U.S. 614, 621 (1998). Second, under *Bousley*, the prisoner will have to show that, based on *Bailey* and in light of all the evidence, no reasonable jury would have convicted him of violating § 924(c). *See* De Jesus v. United States, 161 F.3d 99, 103 (2d Cir. 1998).

proceeding.[175]

The Third Circuit also recognized that the successive motion preclusion of *Bailey* claims is constitutionally problematic, and in *Dorsainvil* found that resort to the savings clause and § 2241 was an appropriate solution.[176] Providing a very narrow application of the savings clause, the Third Circuit found § 2241 an appropriate avenue for review where a federal prisoner has not had a previous opportunity for a hearing on a claim that his conviction has been affected by a substantive change in the law rendering his conduct non-criminal.[177] In reaching this conclusion, the *Dorsainvil* court noted:

> If, as the Supreme Court stated in *Davis*, it is a "complete miscarriage of justice" to punish a defendant for an act that the law does not make criminal, thereby warranting resort to the collateral remedy afforded by § 2255, it must follow that it is the same "complete miscarriage of justice" when the AEDPA amendment to § 2255 makes that collateral remedy unavailable.[178]

While cautioning that the savings clause would not provide an avenue for habeas review "merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255,"[179] the Third Circuit nonetheless reasoned that based on the unusual circumstances of Dorsainvil's case, there was no reason why § 2241 would not be available.[180]

As the Seventh Circuit stated in *Davenport*, the "essential function" of the writ of habeas corpus "is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence."[181] The *Davenport* court found that a *Bailey* challenge – that is, a challenge that a prisoner is being held in prison for a nonexistent crime - goes to the essential function of habeas corpus.[182] Although the successive motion provisions preclude review of *Bailey* claims, the savings clause of § 2255 offers another avenue to review. While rejecting the Second Circuit's formulation that a prisoner could use § 2241 where the lack of a successive review raised serious

175. Cephas v. Nash, 328 F.3d 98, 104 (2d Cir. 2003).

176. *In re* Dorsainvil, 119 F.3d 245, 252 (3d Cir. 1997).

177. *Id.* at 251.

178. *Id.*

179. *Id.*

180. *Id.* As contrary examples, in *United States v. Brooks*, 230 F.3d 643 (3d Cir. 2000), the court refused to find § 2255 inadequate or inefficient where the prisoner had a previous opportunity to fully litigate the claim he wished to raise in a § 2241 petition, and in *Okereke v. United States*, 307 F.3d 117 (3d Cir. 2002), the court, applying *Dorsainvil*, found that § 2255 was not inadequate or ineffective with respect to the prisoner's inability to raise *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in a successive motion.

181. *In re* Davenport, 147 F.3d 605, 609 (7th Cir. 1998).

182. *Id.* at 610.

constitutional problems, the Seventh Circuit nevertheless found that the savings clause and § 2241 provide review where the prisoner has "had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion."[183] While opening § 2241 to *Bailey* claims, the Seventh Circuit imposed three requirements for the application of § 2255's savings clause: (1) a change in the law made retroactive by the Supreme Court,[184] (2) the change in the law is not one in which the prisoner is entitled to a successive motion review, and (3) the alleged change in the law is not merely a difference between the law in the circuit of the sentencing court as opposed to the habeas court.[185]

Similarly, in *Reyes-Requena v. United States*,[186] the Fifth Circuit relied upon the savings clause to allow a prisoner with a *Bailey* claim to bring a § 2241 petition.[187] Reiterating that the savings clause's inadequacy or inefficiency language should be applied stringently, the court nonetheless found that an exception should apply to *Bailey* claims.[188] In an attempt to reconcile the differing circuits' approaches to the successive motion and *Bailey* dilemma, the Fifth Circuit articulated two savings clause requirements: (1) the prisoner was convicted of a "nonexistent offense" based on a Supreme Court decision that applies retroactively; and (2) review of the claim was foreclosed in a previous direct appeal or § 2255 motion.[189] Under this test, the Fifth Circuit concluded that the prisoner in question presented a claim based on actual innocence due to a retroactive Supreme Court decision that rendered his conduct non-criminal, and that he could not have previously presented this claim.[190] Under these circumstances, the prisoner could pursue a § 2241 petition on his *Bailey* claim.[191]

In *In re Jones*,[192] the Fourth Circuit, relying on concerns similar to those expressed by the other circuits, also found that the savings clause of § 2255 encompassed certain claims based on *Bailey*.[193] Specifically,

183. *Id.* at 611.

184. As explained in *Bousley*, and as the Court more recently clarified in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2522-23 (2004), the *Teague* retroactivity doctrine applies only to new rules of criminal procedure, *see supra* note 11; changes in substantive federal criminal law apply retroactively.

185. *Davenport*, 147 F.3d at 611-12.

186. 243 F.3d 893 (5th Cir. 2001).

187. *Id.* at 901, 906.

188. *Id.*

189. *Id.* at 904.

190. *Id.* at 904-05.

191. *Id.* at 906.

192. 226 F.3d 328 (4th Cir. 2000).

193. *Id.* at 333-34.

the Fourth Circuit found that a prisoner could avail himself of the savings clause when:

> (1) [A]t the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.[194]

Applying this standard, the court allowed the prisoner in question to file a § 2241 petition.[195]

The Ninth Circuit in *Lorentsen v. Hood*,[196] also considered the various circuits' responses to the *Bailey* problem, and summarized these responses as providing that the savings clause of § 2255 allows "in essence, that a federal prisoner who is 'actually innocent' of the crime of conviction, but who never has had 'an unobstructed procedural shot' at presenting a claim of innocence, may resort to § 2241 if the possibility of relief under § 2255 is foreclosed."[197] The Ninth Circuit, however, ultimately did not feel compelled to embrace this test because it found the prisoner was guilty of using a gun under the new interpretation of 18 U.S.C. § 924(c), and thus not entitled to a hearing.[198]

Finally, the Sixth and Eighth Circuits also have weighed the problem. The Sixth Circuit observed that, in *Bailey* cases, other circuits had allowed the claims to be heard pursuant to § 2241, and thus concluded that § 2241 is arguably available to a factually innocent prisoner who is otherwise barred under the AEDPA from a federal hearing on his claim.[199] Similarly, after reviewing the other circuits' consideration of these issues, the Eighth Circuit concluded that to take advantage of the savings clause, prisoners must show both actual innocence and an inability to attain previous review of the claim.[200]

Thus, just as the circuit courts overwhelmingly agree that successive motions are unavailable to raise a *Bailey* claim, the circuits have reacted with equal concern that this preclusion presents significant constitutional problems, and uniformly agree that these concerns are best resolved by resort to the savings clause of § 2255 and § 2241. Although the circuits have not devised precisely uniform tests for the application

194. *Id.*
195. *Id.* at 334.
196. 223 F.3d 950 (9th Cir. 2000).
197. *Id.* at 954.
198. *Id.* at 955-56.
199. Charles v. Chandler, 180 F.3d 753, 757 (6th Cir. 1999).
200. Abdullah v. Hedrick, 392 F.3d 957, 960-63 (8th Cir. 2004).

of the savings clause, they have focused consistently on two elements that make § 2241 an appropriate remedy: (1) under a substantive change in the law, the federal prisoner is factually innocent, and (2) the prisoner had no prior opportunity to raise his claim. As the Third Circuit observed in *United States v. Brooks*,[201] "[i]ndeed, a common theme is evident in the circuit court opinions addressing the availability of § 2241: in those cases in which recourse to § 2241 is granted, the petitioner would have *no other means* of having his or her claim heard."[202] Evidently, federal courts are unwilling to construe the AEDPA so as to cut off all federal court review to prisoners with colorable claims of innocence under *Bailey*.

IV. THE IMPLICATIONS OF THE *BAILEY* SUCCESSIVE MOTION DILEMMA

No doubt, the AEDPA forbids a successive § 2255 hearing for claims of factual innocence under *Bailey*. The language of the AEDPA's successive motion provisions makes no exceptions for innocent prisoners who are serving time for a nonexistent crime. Yet, federal courts are reluctant to apply such a draconian interpretation of the AEDPA so as to preclude all of their power to review the claims of these prisoners. Relying on the history of the writ and construing the AEDPA to avoid a constitutional showdown, federal courts turn to § 2241, the traditional writ of habeas corpus, to grant federal court review to prisoners serving federal criminal sentences for nonexistent crimes. Of course, getting into court through a § 2241 petition does not necessarily mean that these prisoners will be released from their prison sentences. It means, simply, that they will get a hearing. At this hearing, both the prisoner and the government can present evidence on whether the prisoner is actually innocent under *Bailey* and thereby entitled to relief. The circuit courts' various constructions of the savings clause and § 2241 merely open the courthouse door.

Whether the concern is an unconstitutional suspension of the writ, a violation of due process, or the prospect of an Eighth Amendment violation caused by incarcerating a prisoner for non-criminal behavior, federal courts recognize the emergence of serious constitutional problems when the restrictive provisions of the AEDPA collide with claims of actual innocence. At least in cases involving a successive motion raising a *Bailey* claim, the courts are unwilling to relinquish their traditional role of providing review. Yet, the courts' constructions of the savings clause in these cases should not be overstated. The courts have constructed not

201. 230 F.3d 643 (3d Cir. 2000).
202. *Id.* at 648.

a blanket actual innocence exception to successive motions, but only a narrow exception that closely tracks the unusual circumstances of the *Bailey* claims. The circuit courts may have opened the courthouse to successive petitions raising *Bailey* claims of actual innocence, but they opened it only a crack.

The successive motion provisions of the AEDPA, in the cases discussed above, come perilously close to undermining what Judge Posner described as the essential function of habeas review: "to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence."[203] To the extent the courts see the AEDPA as completely eviscerating this judicial function, the courts choose to avoid a head-on confrontation with the constitutional validity of the AEDPA by allowing review in a limited number of cases. Although a judicial solution to the problem of successive motions that raise *Bailey* claims has been found, the fact that courts had to find a solution reflects the AEDPA's indifference to, and neglect of, innocent prisoners. Only through a quite convoluted process are courts able to hear successive motions presenting *Bailey* claims, even though *Bailey* claims go to the heart of the function of habeas review. Moreover, because of the courts' narrow construction of the savings clause, there is no guarantee that courts will have the power to hear other successive claims of actual innocence.

A more workable alternative would be for Congress to include an innocence exception within its successive motions provisions.[204] Although a prisoner may bring a successive claim based on new evidence that meets the high threshold of demonstrating innocence, this exception is too narrow to provide review of all claims of actual innocence. A more general innocence exception would provide a clear, straight-forward method for reviewing all meritorious claims of actual innocence and would give federal courts the independence to review and provide relief in appropriate cases. This exception would not be a get-out-of-jail-free card; it would merely simplify and provide a federal court hearing for *Bailey* claims and other claims of actual innocence that do not fit neatly within the constraints of the AEDPA.

Unfortunately, Congress does not seem to be moving in this direction. Although bills are currently pending in the Senate and the House of Representatives to amend the federal habeas review statutes once

203. *In re* Davenport, 147 F.3d 605, 609 (7th Cir. 1998).

204. Other commentators have recommended innocence exceptions with respect to other AEDPA restrictions such as the statute of limitations. *See* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343 (2001-2002).

again,[205] neither bill takes any steps to assure federal court review for innocent prisoners. To the contrary, the pending legislation seems calculated to further reduce court review and quicken the habeas process.[206] The proposed bills, like the current restrictions on successive motions in the AEDPA, create the very real possibility that meritorious claims and claims of actual innocence will go unheard. Perhaps federal courts, like in the successive petition *Bailey* cases, will feel compelled to craft a limited exception for cases where there is a colorable claim of innocence, or where serious constitutional errors call into question the validity of the conviction and sentence. However, as the *Bailey* cases suggest, even where the courts feel compelled to craft such an exception, the exception is crafted in an extremely narrow way.

Part of the intent of the AEDPA is not only to limit the ability of federal prisoners to seek habeas relief, but also to restrict the independence and discretion of federal courts to hear and grant such claims for relief. As the problem of successive motions and *Bailey* claims suggests, the AEDPA's restrictions and inattention to claims of innocence create an environment where a prisoner serving a sentence for a nonexistent crime may have no judicial remedy for his plainly unlawful detention. By failing to take a broader view of the fundamental role of the writ of habeas corpus in American law, and by failing to accord sufficient independence to federal courts to hear all claims of factual innocence, the AEDPA adds unnecessary complexity to habeas and collateral review, threatens to consign federal courts to the sidelines, and creates the very real risk that innocent prisoners' claims will go unheard.

205. *See, e.g.*, H.R. 3035, 109th Cong. (2005); S. 1088, 109th Cong. (2005).
206. *See, e.g.*, H.R. 3035 §§ 4, 6, 9.