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Successive but Not Successful: Does the AEDPA Allow Federal Prisoners to Reassert Previously Presented Claims for Habeas Relief?

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SUCCESSIVE BUT NOT SUCCESSFUL: DOES THE AEDPA ALLOW FEDERAL PRISONERS TO REASSERT PREVIOUSLY PRESENTED CLAIMS FOR HABEAS RELIEF?

*by: Michael P. Bitgood**

ABSTRACT

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) unequivocally bars state prisoners from reasserting previously presented claims for habeas relief. Currently, the circuits are embroiled in a disagreement regarding whether the AEDPA also bars federal prisoners in the same way, and federal prisoners' potentially viable claims for habeas relief hang in the balance. Prior to the Ninth Circuit's decision in Jones v. United States*, six circuits agreed that the AEDPA does bar federal prisoners' previously asserted habeas claims, but the Sixth Circuit alone disagreed. Now, the* Jones *decision aligns the Ninth Circuit with the Sixth Circuit's position. Through an in-depth analysis of* Jones*, this Note argues that* Jones *was rightly decided and that the AEDPA should not be construed to bar federal prisoners' previously presented habeas claims. Since both textual analysis and sound public policy compel this conclusion, this Note proposes that the Supreme Court should adopt* Jones's *holding to end this circuit split.*

TABLE OF CONTENTS

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I. INTRODUCTION

This Note analyzes the Ninth Circuit's 2022 decision in *Jones v. United States*, in which it joined the Sixth Circuit to create a 6–2 circuit split regarding whether federal prisoners may present claims in a second or successive motion for postconviction relief if they already presented those claims in a prior motion.[1] State prisoners may apply for a writ of habeas corpus under 28 U.S.C. § 2254,[2] and federal prisoners may move for postconviction relief under § 2255.[3] Prior to 1996, § 2244 permitted courts to entertain or reject successive § 2254 applications from state prisoners at their discretion, and § 2255 allowed courts to do the same with § 2255 motions from federal prisoners.[4] However, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended §§ 2244 and 2255 to severely curtail judicial discretion to entertain second or successive habeas petitions from both state and federal prisoners.[5]

Currently, § 2244(b)(1) completely bars state prisoners from reasserting prior-presented claims for habeas relief in second or successive § 2254 applications,[6] and § 2244(b)(2) bars all newly presented claims

1. 36 F.4th 974, 982, 984 (9th Cir. 2022).

2. 28 U.S.C. § 2254(a).

3. *Id.* § 2255(a). The postconviction relief provided by a § 2255 motion is essentially equivalent to that provided by a writ of habeas corpus under § 2254. *See* United States v. Hayman, 342 U.S. 205, 218–19 (1952). Thus, this Note uses the term "habeas relief" broadly to refer to the relief provided by both § 2254 and § 2255. Likewise, this Note uses the term "habeas petitions" to refer to both § 2254 applications from state prisoners and § 2255 motions from federal prisoners.

4. Act of June 25, 1948, Pub. L. No. 80-773, §§ 2244, 2255, 62 Stat. 869, 965–68 (codified as amended at 28 U.S.C. §§ 2244, 2255).

5. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 105–106, 110 Stat. 1214, 1220–21 (codified as amended at 28 U.S.C. §§ 2244(b), 2255(h)); *see also Jones*, 36 F.4th at 980 (citing §§ 2244(b), 2255(h)) (explaining the effect of the AEDPA on §§ 2244 and 2255).

6. § 2244(b)(1).

on second or successive § 2254 applications unless those claims fall into two narrow exceptions.[7] But disagreement abounds regarding whether the restrictions in § 2244(b) also apply to federal prisoners filing § 2255 motions.[8] In *Jones*, the Ninth Circuit considered a federal prisoner's application for leave to file a second or successive § 2255 motion that contained two claims, one of which was raised in a prior § 2255 motion.[9] Faced with the threshold issue of whether § 2244(b)(1) applied to the prisoner's prior-presented claim, the court analyzed the effect of the AEDPA on the federal habeas corpus schema and concluded that § 2244(b)(1) did not apply to claims presented in federal prisoners' second or successive § 2255 motions.[10] Instead, the court held that previously presented claims in second or successive § 2255 motions were governed by standards set forth in § 2255(h).[11]

The Ninth Circuit correctly decided *Jones* because its reading of §§ 2244 and 2255 reflects a rigorous analysis of the statutory text that harmonizes each section without rendering any provision superfluous. Reading § 2244 as fully controlling § 2255 would construe the provisions as being at war with each other. Superimposing § 2244's limitations on second or successive § 2254 applications from state prisoners over similar, but not identical, § 2255-specific limitations on second or successive motions from federal prisoners negates the congressional choice to create two distinct sets of limitations on second or successive claims for habeas relief. The court's holding properly parses the text in a way that preserves the nuances that Congress saw fit to create between §§ 2254 and 2255.

Policy-oriented canons of construction also demonstrate the wisdom of the Ninth Circuit's decision. The rule of lenity and the derogation canon further buttress the court's ruling: any possible ambiguity in §§ 2244 and 2255 should be construed to allow courts to consider more claims for habeas relief rather than fewer. If § 2244(b)(1) were applied to § 2255, then federal prisoners would be unable to reassert prior-presented claims at all, even if those claims were later recognized as valid by the Supreme Court. Applying § 2244(b)(1) this way would leave federal prisoners with currently valid constitutional claims to languish in prison because they happened to assert those claims too soon. *Jones*'s construction of §§ 2244 and 2255 ensures that prisoners are not left in confinement solely due to an accident of timing. Accordingly, the Supreme Court should resolve this circuit split by definitively construing § 2244(b)(1) as inapplicable to federal prisoners.

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7. *Id.* § 2244(b)(2).

8. *See Jones*, 36 F.4th at 981–82 (collecting cases and noting the circuit split on whether § 2244(b)(1) applies to § 2255 motions); *see also id.* at 988–89 (Wallace, J., dissenting) (opining that § 2244(b)(2) also applies to § 2255 motions).

9. *Id.* at 978–79 (majority opinion).

10. *Id.* at 982–84.

11. *Id.* at 984.

This Note begins with a review of *Jones*'s factual background and procedural posture, followed by a review of law and history relevant to understanding the development of the modern federal habeas corpus practice that contextualizes this statutory interpretation issue. Next, it uses the canons of statutory interpretation to defend the Ninth Circuit's textual analysis in the face of contrary decisions by several of the court's sister circuits. Finally, this Note closes by rebutting the dissent and considering contrary circuit authority that raises objections to the arguments in favor of the Ninth Circuit's approach.

II. Background of *Jones*

A. *The Facts*

In early 2013, Willie Byron Jones, Sr. shot a police officer on the Navajo Nation Indian Reservation as the officer responded to a call that Jones was drunk and disorderly.[12] Jones wounded the officer, but unfortunately for Jones, 18 U.S.C. § 1153—which confers federal criminal jurisdiction over felony assault and various other crimes committed on reservations[13]—brought his actions within the demesne of the federal government.[14] A federal grand jury quickly returned a six-count indictment, and in late 2013, Jones pled guilty to one count of assault resulting in serious bodily injury and one count of using a firearm in a crime of violence.[15] In the following year, the district court sentenced him to roughly 15 years of confinement followed by 3 years of supervised release.[16]

Despite waiving his right to appeal in his plea agreement, Jones attempted to appeal his sentence.[17] Jones's plea agreement also waived his right to move for postconviction relief under § 2255, but while his direct appeal was still pending, Jones filed a pro se § 2255 motion for postconviction relief.[18] The district court dismissed that motion without prejudice due to the pendency of Jones's appeal.[19] In 2016, the Ninth Circuit affirmed Jones's sentence.[20] In 2020, four years after the failure of his direct appeal, Jones filed another pro se § 2255 motion.[21]

In this "first" motion, Jones presented two claims to the district court that his conviction and sentence were invalid.[22] Jones's first claim argued

12. *Id.* at 978.
13. *See* 18 U.S.C. § 1153(a).
14. *Jones*, 36 F.4th at 978.
15. *Id.* (citing 18 U.S.C. §§ 113(a)(6), 1153, 924(c)(1)(A)).
16. *See id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. United States v. Jones, 633 F. App'x 440 (9th Cir. 2016) (mem.).
21. *Jones*, 36 F.4th at 978.
22. *See id.*

that the Supreme Court's holding in *Alleyne v. United States*—requiring any fact that increases the mandatory minimum for a sentence to be submitted to a jury—established a new retroactive rule of constitutional law that was not previously available to him.[23] With his second claim, Jones attacked his conviction for use of a firearm in a crime of violence.[24] In 18 U.S.C. § 924(c)(3)(A) and (B), the *United States Code* defines a "crime of violence" as a felony offense that

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[25]

Subsection 924(c)(3)(A) is known as the elements clause, and § 924(c)(3)(B) is known as the residual clause.[26] In *United States v. Davis*, the Supreme Court declared the residual clause void for vagueness.[27] Jones's second claim argued that *Davis* invalidated his firearm conviction.[28]

Jones made his two claims in separate filings, but the district court construed his filings as one § 2255 motion.[29] Then, four days after filing his first, still-pending motion, Jones applied pro se for leave to file a second or successive § 2255 motion.[30] Unfortunately, Jones did not inform the court of appeals in his application to file his second motion that his first § 2255 motion was still pending.[31] Had the court known of the first pending motion, it would have construed his application as an amendment to his first motion, allowing Jones to further argue his claims free of the AEDPA's limits on second or successive motions.[32]

Two months after Jones filed his first § 2255 motion, the district court summarily dismissed it.[33] The court rejected Jones's *Alleyne* claim, noting that the Supreme Court had already decided *Alleyne* before Jones pled guilty and that Jones had waived his right to appeal.[34] Likewise, the court held that Jones's *Davis* claim also failed because *Davis* only invalidated the residual clause in § 924(c)(3)(B) while Jones's conviction fell under the elements clause in § 924(c)(3)(A).[35] Interestingly, the district court incorrectly listed Jones's crime of violence as a "Hobbs

23. *Id.* at 978 & n.1 (citing Alleyne v. United States, 570 U.S. 99, 103 (2013)).
24. *See id.* at 978.
25. 18 U.S.C. § 924(c)(3)(A)–(B).
26. *Jones*, 36 F.4th at 978.
27. 139 S. Ct. 2319, 2323–24 (2019).
28. *See Jones*, 36 F.4th at 978.
29. *Id.*
30. *Id.*
31. *Id.* at 979 n.3.
32. *Id.* (citing Goodrun v. Busby, 824 F.3d 1188, 1194 (9th Cir. 2016)).
33. *Id.* at 979.
34. *Id.*
35. *Id.*

Act robbery" rather than an assault causing serious bodily injury.[36] But since the court decided the *Davis* claim on its merits and Jones failed to appeal, nothing came of the error.[37]

Three months later, the Ninth Circuit requested further briefing on Jones's application for leave to file a second or successive § 2255 motion.[38] Jones's application dropped his *Alleyne* claim, essentially reasserted his *Davis* claim, and added a new claim that pointed to a then-forthcoming Supreme Court case—*Borden v. United States*[39]—with the potential to substantially alter the law underlying Jones's firearm conviction.[40] Before the government filed its brief opposing Jones's application, the Supreme Court decided *Borden*, "holding that '[o]ffenses with a mens rea of recklessness do not qualify as violent felonies' under the elements clause of the Armed Career Criminal Act" (ACCA).[41] The ACCA's definition of a "violent felony" closely parallels § 924(c)(3)(A)'s definition of a "crime of violence."[42] Since assault causing serious bodily injury could be committed recklessly, Jones's assault conviction could no longer qualify as a "crime of violence" to support his conviction for using a firearm in a crime of violence.[43] Jones's *Borden* claim turned to gold overnight, and the government conceded that assault causing serious bodily injury no longer qualified as a crime of violence under § 924(c)(3).[44]

B. *The Ninth Circuit's Analysis—An Overview*

Thus, the Ninth Circuit was set to examine whether it could properly consider the merits of Jones's *Davis* and *Borden* claims.[45] Jones's claims came in an application for leave to file a second or successive § 2255 motion; hence, the claims needed to clear the AEDPA's limitations on successive motions by federal prisoners, enumerated in § 2255(h).[46] But § 2255(h) also cross-references § 2244, which lists the AEDPA's limitations on successive habeas applications by state prisoners under § 2254.[47] In relevant part, § 2244(b)(1) completely bars claims

36. *Id.*
37. *See id.* at 985.
38. *Id.* at 979.
39. 141 S. Ct. 1817 (2021) (plurality opinion).
40. *See Jones*, 36 F.4th at 979 (citing *Borden*, 141 S. Ct. 1817); *see also id.* at 986 n.8 (noting that it was unclear if Jones actually raised a *Borden* claim in his application but construing his application liberally as if Jones had done so).
41. *Id.* at 980 (first quoting *Borden*, 141 S. Ct. at 1834; and then citing 18 U.S.C. § 924(e)(2)(B)(i)).
42. *See id.* (comparing the nearly identical language of § 924(e)(2)(B)(i) and § 924(c)(3)(A)).
43. *See id.* at 979–80.
44. *Id.* at 980.
45. *See id.* at 980–81.
46. *See id.* (quoting 28 U.S.C. § 2255(h)).
47. § 2255(h).

presented in previous habeas applications,[48] and § 2244(b)(2) bars most newly presented claims unless they rely on a new, retroactive, and previously unavailable rule of constitutional law or they present facts not previously discoverable through due diligence that show the factfinder would not have convicted the applicant absent constitutional error.[49] Lastly, § 2244(b)(3) lays out procedures for certifying second or successive state prisoners' § 2254 applications that comply with the requirements of § 2244(b)(1) and (2).[50]

Consequently, the court first needed to determine whether § 2255(h)'s cross-reference incorporates the limitations in § 2244(b)(1) and (2) or just the certification procedures in § 2244(b)(3).[51] If § 2255(h) incorporates § 2244(b)(1) and (2), then Jones's claims would have to satisfy all the restrictions in both § 2255(h) and § 2244(b)(1) and (2);[52] if not, Jones's claim would only need to satisfy the restrictions in § 2255(h).[53] Curiously, the court only analyzed whether § 2244(b)(1) barred Jones's prior-presented *Davis* claim without also directly considering whether § 2244(b)(2) governed Jones's newly presented *Borden* claim.[54] If the court was examining whether § 2244(b)(1) applied to the *Davis* claim, it follows that the court should have also examined the applicability of § 2244(b)(2) to the *Borden* claim, but the Ninth Circuit appeared to assume from the outset that the *Borden* claim was subject only to the limitations in § 2255(h).[55] On this issue, Jones argued that his *Davis* claim should only be subject to the limitations in § 2255(h), and despite opposing Jones's motion generally, the government agreed with Jones that § 2244(b)(1) did not apply to his motion.[56]

In an opinion written by Judge Danny Boggs, a Sixth Circuit judge sitting on the Ninth Circuit by designation, the court held that Jones's *Davis* claim was only subject to the limitations in § 2255(h).[57] Initially, the court acknowledged a prior decision that appeared to assume § 2244(b)(1) would apply to federal prisoners' claims in a § 2255 motion, but it dismissed those previous remarks as unreasoned dictum.[58] It then considered how other circuits had decided the issue and adopted the Sixth Circuit's view that § 2255(h) does not incorporate the total bar in § 2244(b)(1) but rather incorporates the certification procedures listed in § 2244(b)(3).[59] The court reasoned that the statutory text and structure

48. *Id.* § 2244(b)(1).
49. *Id.* § 2244(b)(2).
50. *Id.* § 2244(b)(3).
51. *See Jones*, 36 F.4th at 981.
52. *See id.*
53. *See id.*
54. *Id.*
55. *See id.*
56. *See id.* at 982.
57. *See id.* at 984.
58. *Id.* at 981 n.5 (quoting Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999)).
59. *Id.* at 982–83.

limited § 2244(b)(1)'s applicability to § 2254 applications.[60] It also noted that policy concerns surrounding the purpose of the AEDPA did not favor applying the limitations in § 2244(b)(1) to federal prisoners.[61]

Having settled the main threshold issue, the Ninth Circuit then proceeded to determine whether Jones's *Davis* and *Borden* claims could satisfy the requirements of § 2255(h).[62] To satisfy § 2255(h), Jones's motion needed to contain either (1) newly discovered evidence "sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [Jones] guilty"[63] or (2) a new, retroactive, and previously unavailable rule of constitutional law.[64] The court found that Jones's *Davis* claim could not support postconviction relief because it failed to satisfy § 2255(h)(2)'s requirement that the claim be based on a previously unavailable rule of constitutional law.[65] Because the district court had considered and dismissed the *Davis* claim in Jones's first § 2255 motion, the Ninth Circuit observed that the claim was previously available.[66] Similarly, the court rejected Jones's *Borden* claim because *Borden*'s holding interpreted a statute rather than announcing a new constitutional rule.[67] Having rejected both of Jones's claims, the Ninth Circuit proceeded to deny Jones's application.[68]

C. *An Explanation of* Jones*'s Relevance*

While the Ninth Circuit's construction of § 2244(b)(1) and § 2255(h) ultimately did not help Jones, it bears acknowledgement that it could have if Jones had filed his claim before the Supreme Court decided *Davis*. If Jones had been convicted under the residual clause in 18 U.S.C. § 924(c)(3)(B) and he had—prior to the *Davis* decision—argued in a § 2255 motion that the residual clause was unconstitutionally vague, his first § 2255 motion would have failed because *Davis* was not yet decided. However, once the Supreme Court decided *Davis*, Jones could have successfully reasserted his vagueness claim under § 2255(h). If the limitations in § 2244(b)(1) applied to Jones's motion, he would have been barred from reasserting his now-valid vagueness argument because he had presented it previously—even though his argument would now be based on a new, retroactive, and previously unavailable constitutional rule. As a result, Jones would be unable to reassert a claim that could invalidate his firearm conviction, even though that claim had not been available when Jones filed his prior motion.

60. *See id.* at 983–84.
61. *See id.* at 984.
62. *Id.* at 984–85.
63. 28 U.S.C. § 2255(h)(1).
64. *See id.* § 2255(h)(2).
65. *Jones*, 36 F.4th at 985.
66. *Id.*
67. *Id.* at 986.
68. *Id.* at 987.

Simply put, applying § 2244(b)(1) to § 2255 motions has significant implications for certain federal prisoners. If a federal prisoner presents a claim for relief and fails, the prisoner remains barred from ever presenting the claim again—even if the Supreme Court later changes the law in a way that would make the prisoner's claim successful. The Ninth Circuit's decision in *Jones* allows prisoners to have prior-presented claims at least reheard if the legal landscape changes enough to revitalize those claims.

III. Review of Relevant Law

A. *A Brief History of the Development of Habeas Corpus*

Reviewing the history of habeas jurisprudence shows that habeas corpus has not been a static concept. The writ's development demonstrates its malleability, as it was fashioned from an ordinary administrative device into a guarantor of due process. Through that process, the writ's scope has been expanded and contracted as equitable principles have required. Thus, a survey of the writ's history supports the need for courts today to approach potential ambiguities in habeas jurisprudence with an eye toward leniency and flexibility.

The current statutory habeas corpus framework belies the writ's ancient origins. William Blackstone famously referred to the writ of habeas corpus as "the most celebrated writ in the English law."[69] Initially, the term "habeas corpus" encompassed a variety of writs that had developed at common law over the centuries: *habeas corpus ad respondendum*; *habeas corpus ad satisfaciendum*; *habeas corpus ad prosequendum*, *testificandum*, *deliberandum*, etc.; and *habeas corpus ad faciendum et recipiendum*.[70] These more mundane writs of habeas corpus addressed various circumstances in which the administration of justice required a prisoner to be removed from one court into another.[71] However, the term eventually came to refer exclusively to the most notable among all the habeas writs: the writ of *habeas corpus ad subjiciendum.*[72] The Court of King's Bench developed the writ in the sixteenth century,[73] and Blackstone referred to it as "the great and efficacious writ, in all manner of illegal confinement."[74] The writ commanded a jailer to produce the body of a prisoner and give the reason for the prisoner's

69. 3 William Blackstone, Commentaries *129.
70. *See id.* at *130–31.
71. *See id.* at *129.
72. Stone v. Powell, 428 U.S. 465, 474 n.6 (1976); *see* Brown v. Davenport, 142 S. Ct. 1510, 1520 (2022). This Note's references to "habeas corpus" or "habeas relief" refer exclusively to the writ of *habeas corpus ad subjiciendum* or the relief provided by it, respectively.
73. John Baker, An Introduction to English Legal History 157 (5th ed. 2019).
74. 3 Blackstone, *supra* note 69, at *131.

detention.[75] The issuing court could then review the reason given by the jailer and determine whether to release the prisoner or remand the prisoner back into custody.[76] In addition, res judicata did not apply to the writ, meaning that a court's denial of a habeas application did not bar the prisoner from applying for the writ again.[77]

Habeas corpus ad subjiciendum was a prerogative writ, meaning it was "conceived as being intimately connected with the rights of the Crown";[78] namely, the king's right "to have an account why the liberty of any of his subjects [was being] restrained."[79] Eventually, common-law courts seized on the writ as a device "to compel the [C]rown to explain its actions—and, if necessary, ensure adequate process, such as a trial, before allowing any further detention."[80] Thus, the writ became a restraint on the king's power rather than an extension of it[81] and developed into a remedy for vindicating the right of individuals to be free from extrajudicial confinement.[82] At least according to Blackstone, that right had been recognized by the Saxons and confirmed by William the Conqueror after the Norman Conquest of 1066, and the writ's development appears to have formalized existing methods for vindicating the right.[83] More concretely, as early as 1166, Henry II promulgated the Assize of Clarendon, requiring sheriffs to justify the seizure of an alleged robber, murderer, or thief by producing the suspect before the king's justices and bringing two witnesses who could testify as to why the suspect had been seized.[84] From the outset, the common law's respect for this right to personal liberty "induce[d] an absolute necessity of expressing upon every commitment the reason for which it [was] made."[85]

Magna Carta would go on to offer a clear expression of the right to personal liberty underlying the Assize of Clarendon, declaring in chapter 29 that an English freeman was not to "be taken or imprisoned . . . but by lawful judgement of his peers, or by the law of the

75. BAKER, *supra* note 73, at 157.

76. *Id.*

77. *See* WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS § 386, at 518 (San Francisco, A.L. Bancroft & Co. 1884); *see also, e.g.*, *Ex parte* Partington (1845) 153 Eng. Rep. 284, 286; 13 M. & W. 679, 683–84 (entertaining a habeas application from a prisoner who was previously denied habeas relief from two other courts).

78. S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 40–41 (1951) (U.K.).

79. 3 BLACKSTONE, *supra* note 69, at *131.

80. Brown v. Davenport, 142 S. Ct. 1510, 1520 (2022) (citing Petition of Right 1627, 3 Car. 1 c. 1, §§ 5, 8 (Eng.), *reprinted in* 5 THE STATUTES OF THE REALM 23, 24 (photo. reprt. 1963) (1819)).

81. Boumediene v. Bush, 553 U.S. 723, 741 (2008).

82. *See* 3 BLACKSTONE, *supra* note 69, at *133.

83. *Id.* at *133–34; *see also* 1 *id.* at *134–35 (explaining the right to personal liberty recognized by English law).

84. *See* Assize of Clarendon ¶ 4 (1166), *translated in* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 16, 17 (Ernest F. Henderson ed. & trans., London, Bell & Sons 1892).

85. *See* 3 BLACKSTONE, *supra* note 69, at *133.

land."[86] While the original intent of Magna Carta had little to do with habeas corpus, it was not long after the development of *habeas corpus ad subjiciendum* that clever advocates linked the writ to Magna Carta chapter 29.[87] Ultimately, in 1604, then-sitting attorney general Edward Coke authored a memorandum that firmly anchored the writ's authority to Magna Carta, making it the guarantor of the rights secured by chapter 29.[88]

Even then, the writ still had yet to become a complete remedy for arbitrary imprisonment. In 1627, Charles I imprisoned five knights for refusal to pay the Crown a forced loan.[89] The knights procured writs of habeas corpus to challenge their detention, and their warden stated only that they were confined "by the special command of [the king]."[90] Counsel for the knights argued that their imprisonment violated Magna Carta because imprisonment by the king's command alone did not satisfy chapter 29's requirement that a freeman could only be imprisoned by the law of the land.[91] However, the court ultimately remanded the knights, finding that a writ of habeas corpus could not deliver those imprisoned by the king's command.[92] The court's decision prompted Parliament to produce the Petition of Right in response,[93] which included a provision effectively stating "that subjects should not be detained by the king's special command without cause shown."[94]

However, the Petition did not specify habeas corpus as a remedy for the kind of arbitrary imprisonment it prohibited, leaving the writ's efficacy unsettled.[95] After a period of contentious uncertainty, Parliament passed the Habeas Corpus Act 1640[96] to guarantee the remedy of habeas corpus to those committed by the king's command.[97] Still, the Act was often circumvented to frustrate the relief it provided.[98] As a

86. Magna Charta 1225 c. 29, *translated in* 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 1, 45 (Francis Hargrave & Charles Butler eds., London, E. & R. Brooke 15th ed. 1797) (1642) (cleaned up).

87. *See* BAKER, *supra* note 73, at 157 & n.76, 506.

88. *Id.* at 508; *see also* 2 COKE, *supra* note 86, at 52–53 (presenting the writ of habeas corpus as the remedy for wrongful imprisonment).

89. *Id.*

90. Darnel's Case (The Five Knights' Case) (1627) 3 How. St. Tr. 1, 3 (Eng.). (The nominate reporter abbreviation "How. St. Tr." refers to A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS (T.B. Howell & Thomas Jones Howell eds., London, T.C. Hansard 1816–1826).)

91. *Darnel's Case*, 3 How. St. Tr. at 17–19.

92. 3 BLACKSTONE, *supra* note 69, at *134; *see also Darnel's Case*, 3 How. St. Tr. at 59 (remanding the prisoners).

93. *See* Petition of Right 1627, 3 Car. 1 c. 1, §§ 5, 8 (Eng.), *reprinted in* 5 THE STATUTES OF THE REALM, *supra* note 80, at 23, 24.

94. BAKER, *supra* note 73, at 509.

95. *See id.*

96. 16 Car. 1 c. 10 (Eng.), *reprinted in* 5 THE STATUTES OF THE REALM, *supra* note 80, at 110, 110–12.

97. *See* BAKER, *supra* note 73, at 509.

98. *See, e.g.*, 3 BLACKSTONE, *supra* note 69, at *135 (explaining that jailers would wait for a writ to be issued a second or third time before producing a prisoner).

result, Parliament adopted the Habeas Corpus Act 1679[99] to strengthen the writ's effectiveness and close procedural loopholes in the 1640 Act.[100] The 1679 Act created a new statutory form of habeas corpus that did not extend to all the circumstances covered by the common-law writ of habeas corpus,[101] but the passage of the Act brought about a tradition of immediate compliance with both the statutory and common law types of the writ.[102] Consequently, Blackstone referred to the 1679 Act as "another *magna carta*," and through it, the writ of habeas corpus became a complete remedy "for removing the injury of unjust and illegal confinement."[103]

The Act's enduring framework also served as a model for the Thirteen Colonies' habeas statutes.[104] At the American founding, the Framers considered the writ so important that they wished to safeguard it against arbitrary suspension.[105] Thus, the Constitution's Suspension Clause provides that "[t]he 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."[106] While the writ may not be unconstitutionally suspended, Congress retained the authority to make legislative judgments about the proper scope of the writ.[107] As a result, the First Congress passed the Judiciary Act of 1789, giving federal courts the "power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment"; however, the statute applied only to federal prisoners at the time.[108] Following the Civil War, Congress amended the Act in 1867 and extended the writ to state prisoners by giving federal courts the "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."[109]

Over time, the writ's scope in American law has expanded.[110] At first, the writ was primarily a preconviction remedy and served only to test "the jurisdiction of the sentencing court or the legality of Executive

99. 31 Car. 2 c. 2 (Eng.), *reprinted in* 5 THE STATUTES OF THE REALM, *supra* note 80, at 935, 935–38.

100. *See* 3 BLACKSTONE, *supra* note 69, at *135–37.

101. *See id.* at *137 ("[T]hat great and important statute . . . extends . . . only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the habeas corpus at common law.").

102. *See id.* at *137–38.

103. *Id.* at *136, *138.

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

105. *See id.* at 743.

106. U.S. CONST. art. I, § 9, cl. 2; *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (making clear that the Suspension Clause refers specifically to the writ of *habeas corpus ad subjiciendum*).

107. *E.g.*, Felker v. Turpin, 518 U.S. 651, 664 (1996) (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996)).

108. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

109. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

110. *See* Wainwright v. Sykes, 433 U.S. 72, 77–79 (1977).

detention."[111] In *Ex parte Watkins*, Chief Justice Marshall expounded on this principle, writing that "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."[112] Thus, after conviction, a habeas court could only grant relief based on a trial court's lack of jurisdiction because that would render the judgment itself void; however, the writ did not provide license to reexamine the trial court's findings.[113] Nevertheless, habeas courts had, at various times, entertained constitutional challenges to final convictions, and they did so with more frequency after Congress's 1867 amendment to the Judiciary Act.[114] In any case, the writ eventually became a postconviction remedy as well, and its scope came to "encompass review of constitutional error" in criminal proceedings.[115]

B. *The Current Federal Habeas Corpus Framework*

Central to the writ's evolution, Congress codified Title 28 of the *United States Code*—which governs the federal judiciary and judicial procedure—in 1948.[116] The codification replaced the Judiciary Act's habeas authorization with a comprehensive statutory framework that better accounted for the expanding scope of the writ.[117] The new Judicial Code restructured federal habeas corpus primarily into three statutes: 28 U.S.C. §§ 2241, 2254, and 2255.[118]

Within this current framework, Congress enacted § 2241 to recodify the Judiciary Act's original habeas authorization, providing that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."[119] Procedurally, the phrase "within their respective jurisdictions" requires that a habeas court have jurisdiction over the petitioner's custodian; thus, a writ issued under § 2241 must normally be issued in the federal district where the prisoner is confined.[120] However, in exceptional circumstances where "adequate relief cannot be obtained

111. Schlup v. Delo, 513 U.S. 298, 317 (1995) (citing McCleskey v. Zant, 499 U.S. 467, 478 (1991)); *see* Brown v. Davenport, 142 S. Ct. 1510, 1521 (2022) (citing *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202–03 (1830)).

112. 28 U.S. (3 Pet.) at 203.

113. *See id.*

114. *See, e.g.*, *Davenport*, 142 S. Ct. at 1532–33 (Kagan, J., dissenting) (collecting cases).

115. *Schlup*, 513 U.S. at 317–18.

116. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869 (codified as amended at 28 U.S.C. §§ 1–2680).

117. *See id.* §§ 2241–2255, 62 Stat. at 964–68.

118. *See* BRENT E. NEWTON, PRACTICAL CRIMINAL PROCEDURE: A CONSTITUTIONAL MANUAL 295 (4th ed. 2021) (citing 28 U.S.C. §§ 2241, 2254–2255).

119. § 2241(a).

120. *See* Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004) (quoting § 2241(a)).

in any other form or from any other court," a prisoner may also apply directly to the Supreme Court for an original writ of habeas corpus.[121]

Unlike the prior habeas authorizations of 1867, § 2241(c) gives federal courts the power to grant writs of habeas corpus in only five specific circumstances:

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
> (5) It is necessary to bring him into court to testify or for trial.[122]

Applications for habeas relief under § 2241 challenge aspects of a prisoner's confinement rather than the validity of a prisoner's conviction.[123] As a result, § 2241 is the appropriate vehicle for more traditional habeas relief, such as securing a prisoner's release from illegal detention or imprisonment.[124] Likewise, a state prisoner—prior to trial or conviction—may use § 2241 to obtain federal review of constitutional challenges to the state's right to proceed with a criminal prosecution.[125] Section 2241 also has a limited use in the federal postconviction context, allowing a federal prisoner to challenge the execution of a sentence.[126]

To challenge the validity of a state conviction or sentence, a state prisoner must turn to the second key statute in the new framework: § 2254.[127] Although § 2241 provides a general habeas authorization, § 2254 lays out special limits on the circumstances in which a federal court may grant habeas relief to state prisoners after their convictions.[128] Therefore, a convicted state prisoner must apply for habeas relief under the more onerous requirements of § 2254 rather than applying directly through § 2241.[129] When Congress codified the Judicial Code in 1948, it

121. SUP. CT. R. 20.4(a); *cf.* 28 U.S.C. § 2242 (requiring habeas applications addressed directly to the Supreme Court to state the reasons for not filing the application in the district of confinement).

122. § 2241(c); *see also* Dominguez v. Kernan, 906 F.3d 1127, 1134 (9th Cir. 2018) (discussing § 2241's requirements).

123. *See* NEWTON, *supra* note 118, at 291, 295–96.

124. *See id.* at 296.

125. *See id.* at 291 & n.4.

126. *E.g.*, United States v. Cleto, 956 F.2d 83, 84 (5th Cir. 1992).

127. *See* 28 U.S.C. § 2254(a).

128. *See, e.g.*, Dominguez v. Kernan, 906 F.3d 1127, 1134 (9th Cir. 2018) (citing § 2254).

129. *See, e.g.*, *id.* at 1134–35.

originally enacted § 2254 simply to restrict state prisoners from seeking writs of habeas corpus under § 2241 before exhausting all their state-court remedies.[130] Since then, Congress has expanded the number of restrictions in § 2254,[131] but the statute has always acted purely as a limitation on the relief provided by § 2241 rather than as a separate habeas remedy.[132]

Currently, § 2254(a) states that a federal "court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[133] While § 2241(c) allows for habeas relief in five circumstances, § 2254(a) limits postconviction habeas relief for state prisoners to only one of those circumstances: when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States."[134] Likewise, § 2254 still prevents state prisoners from obtaining relief before exhausting their state-court remedies.[135] It also requires deference to decisions made in state-court proceedings[136] and establishes a rebuttable presumption of correctness for factual determinations made by state courts.[137] Even though § 2254 contains most of the habeas requirements applicable to convicted state prisoners, § 2241 also includes one provision applicable only to the state postconviction context. Subsection 2241(d) allows convicted state prisoners to apply for a writ in either the district of confinement or the district where the prisoner was convicted and sentenced.[138]

Lastly, Congress's new habeas framework included § 2255, an alternative remedy to habeas corpus available only to federal prisoners after

130. *See* Act of June 25, 1948, Pub. L. No. 80-773, § 2254, 62 Stat. 869, 967 (codified as amended at 28 U.S.C. § 2254); *see also* Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800, 802 n.10 (1950) (noting that § 2254 codified *Ex parte* Hawk, 321 U.S. 114, 116 (1944)).

131. *See* Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1104, 1105–06 (codified as amended at 28 U.S.C. § 2254); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1220–21 (codified as amended at 28 U.S.C. § 2254).

132. *See* Eric Johnson, *An Analysis of the Antiterrorism and Effective Death Penalty Act in Relation to State Administrative Orders: The State Court Judgment as the Genesis of Custody*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 153, 168 (2003) (noting that § 2254 "has not metamorphosed into an alternative to habeas relief"). Some scholars characterize § 2254 as a separate habeas remedy. *See* NEWTON, *supra* note 118, at 295. However, a careful reading of the statute suggests that, while § 2254 may impose limits on the relief offered by § 2241, §§ 2241 and 2254 are both vehicles for the same relief. *See* §§ 2241, 2254.

133. § 2254(a).

134. *See id.*; *see also id.* § 2241(c)(3) (presenting the grounds for relief used in § 2254(a)).

135. *Id.* § 2254(b)(1)(A).

136. *See id.* § 2254(d).

137. *See id.* § 2254(e).

138 *See id*. § 2241(d).

conviction.[139] Prior to the restructuring of the federal habeas framework in 1948, the expanding scope of the writ had caused the number of habeas corpus applications filed in federal courts to soar.[140] Because habeas applications were necessarily filed in prisoners' districts of confinement, districts that were home to major federal prisons fielded an excessive number of habeas applications.[141] Often, habeas courts in those districts had trouble accessing witnesses or records located in the district of conviction, making it difficult to quickly determine if an application was frivolous.[142] Seeking to ameliorate these logistical hardships, Congress enacted § 2255.[143]

Subsection 2255(a) provides that

> [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.[144]

Thus, a § 2255 motion allows a federal prisoner to seek postconviction relief from the sentencing court itself instead of from the district court in the district of confinement.[145] Notably, a § 2255 motion is not technically an application for a writ of habeas corpus;[146] rather, § 2255 provides a distinct form of postconviction relief.[147] Regardless, when compared to traditional habeas relief, the relief provided by § 2255 is essentially equivalent.[148] To ensure that federal prisoners always utilize § 2255, the statute generally prohibits a federal prisoner from applying for habeas relief under § 2241, but § 2255(e) does create an exception in any case where a § 2255 motion would be inadequate to test the legality of the prisoner's detention.[149]

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139. Act of June 25, 1948, Pub. L. No. 80-773, § 2255, 62 Stat. 869, 967–68 (codified as amended at 28 U.S.C. § 2255).

140. *See* United States v. Hayman, 342 U.S. 205, 212 & n.13 (1952).

141. *See id.* at 213–14.

142. *See id.*

143. *See id.* at 219.

144. 28 U.S.C. § 2255(a).

145. *See id.*

146. Johnson, *supra* note 132, at 167–68.

147. *See* § 2255 note (1948) (Reviser's Note) (stating that § 2255 "provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus").

148. *See Hayman*, 342 U.S. at 219 ("[T]he sole purpose [of § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.").

149. § 2255(e); *see also* Jones v. Hendrix, 143 S. Ct. 1857, 1866 (2023) (describing that a § 2255 motion would be inadequate if, for example, the sentencing court was dissolved).

C. *The AEDPA and Its Effects on Habeas Jurisprudence*

In 1996, Congress enacted the AEDPA, which heralded several sweeping changes to the 1948 habeas framework.[150] The AEDPA imposed arduous new requirements on habeas applications and post-conviction motions to restrict access to relief.[151] Congress passed these restrictions to accelerate the imposition of state and federal criminal sentences and "to advance 'the principles of comity, finality, and federalism.'"[152] Like the common law, American law did not apply the principle of res judicata to habeas corpus proceedings.[153] As the scope of the writ expanded, courts were inundated with habeas applications and motions for postconviction relief largely because inmates began to abuse the writ by repeatedly filing frivolous petitions.[154] Through the AEDPA, Congress sought to reform habeas jurisprudence to address this problem, among others.[155]

Within the 1948 habeas framework, § 2244 governs the consideration of second or successive habeas corpus applications by state prisoners under § 2254.[156] Prior to the AEDPA, § 2244(a) permissively stated only that "[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus . . . if it appears that the legality of such detention has been determined . . . on a prior application."[157] To address the problem of frivolous successive § 2254 applications, the AEDPA substantively amended § 2244.[158] Firstly, the AEDPA altered § 2244(a) by adding the words "except as provided in section 2255" to the end of the language quoted directly above.[159] This change created a caveat in a court's discretion to dismiss a duplicative habeas claim: a claim that might otherwise be summarily dismissed under § 2244 must be entertained if required by § 2255.[160]

The AEDPA then altered § 2244(b) by adding § 2244(b)(1)–(4).[161] First, § 2244(b)(1) now provides that "[a] claim presented in a second or

150. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–106, 110 Stat. 1214, 1217–21 (codified as amended at 28 U.S.C. §§ 2244, 2253–2255).

151. *See* Brown v. Davenport, 142 S. Ct. 1510, 1524 (2022).

152. Shoop v. Twyford, 142 S. Ct. 2037, 2043 (2022) (first quoting Woodford v. Garceau, 538 U.S. 202, 206 (2003); and then quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).

153. Sanders v. United States, 373 U.S. 1, 7–8 (1963).

154. United States v. Hayman, 342 U.S. 205, 212 & n.14 (1952); *see also, e.g.*, Louis E. Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 315 (1947) (noting that one inmate in Alcatraz Prison had filed 16 successive habeas petitions in 10 years).

155. *See* Felker v. Turpin, 518 U.S. 651, 664 (1996).

156. *See* 28 U.S.C. § 2244.

157. Act of June 25, 1948, Pub. L. No. 80-773, § 2244, 62 Stat. 869, 965–66 (codified as amended at 28 U.S.C. § 2244).

158. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220–21 (codified as amended at 28 U.S.C. § 2244).

159. *Id.* § 106(a), 110 Stat. at 1220 (codified as amended at 28 U.S.C. § 2244(a)).

160. *See id.*

161. *Id.* § 106(b), 110 Stat. at 1220–21 (codified as amended at 28 U.S.C. § 2244(b)).

successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed."[162] Regarding newly presented claims, § 2244(b)(2) states that

> [a] claim presented in a second or successive habeas corpus application *under section 2254* that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[163]

Together, § 2244(b)(1) and (2) generally bar state prisoners from relief on all claims except those that fit within the exceptions listed in § 2244(b)(2)(A) and (B).[164] More specifically, § 2244(b)(1) prohibits a state prisoner from ever raising a prior-presented claim again.[165]

Section 2244(b)(3) requires state prisoners to obtain authorization from the appropriate circuit court of appeals to file a second or successive § 2254 application in a district court.[166] Prisoners must obtain this authorization from a three-judge panel, and the panel must determine within 30 days whether the second or successive § 2254 application makes a prima facie showing that it satisfies the AEDPA's requirements for filing a second or successive habeas application, which are listed in § 2244(b)(1) and (2).[167] Additionally, the panel's decision to grant or deny authorization is not appealable or subject to petitions for rehearing or certiorari.[168] Lastly, even if the panel authorizes an application, § 2244(b)(4) requires a district court to dismiss any claim in a second or successive habeas application if the claim does not in fact satisfy the AEDPA's restrictions in § 2244(b)(1) and (2).[169]

With respect to § 2255, which governs federal prisoners, the AEDPA amended the statute directly by adding § 2255(h), which details

162. § 2244(b)(1) (emphasis added).
163. *Id.* § 2244(b)(2)(A)–(B) (emphasis added).
164. *See id.* § 2244(b)(1)–(2).
165. *See id.* § 2244(b)(1).
166. *Id.* § 2244(b)(3)(A).
167. *See id.* § 2244(b)(3)(B)–(D).
168. *Id.* § 2244(b)(3)(E).
169. *See id.* § 2244(b)(4).

restrictions specifically applicable to second or successive § 2255 motions.[170] In full, § 2255(h) now provides that

> [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.[171]

In general, this provision requires federal prisoners to also obtain authorization from the appropriate court of appeals to file a second or successive § 2255 motion.[172] Critically, § 2255(h) cross-references § 2244, but the cross-reference refers to § 2244 generally without explicitly specifying which subsection or subsections of § 2244 should apply to second or successive § 2255 motions filed by federal prisoners.[173]

Unfortunately, the broadness of the cross-reference creates latent ambiguity[174] about how § 2255(h) operates.[175] On the one hand, "certified as provided in section 2244" may suggest that § 2255(h) incorporates all of § 2244's certification limitations and procedures, which are contained in § 2244(b)(1)–(4).[176] This reading would subject a second or successive § 2255 motion to all the requirements of both § 2255(h) and § 2244(b).[177] On the other hand, both § 2244(b)(1) and (2) state that their limitations apply specifically to habeas applications made "under section 2254."[178] This appears to imply § 2255(h)'s cross-reference may not incorporate § 2244(b)(1) and (2) because those subsections explicitly restrict their own scope to § 2254 applications.[179] In that case, a

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

171. § 2255(h) (emphasis added).

172. *Id.*

173. *See id.*

174. The Supreme Court has remarked that a term is ambiguous if it is "reasonably susceptible of different interpretations." Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451, 473 n.27 (1985); *see also Ambiguity, n.* (sense 1.a), Oxford English Dictionary, https://doi.org/10.1093/OED/1070385339 [https://perma.cc/Z7MV-XLSF] (July 2023) ("[T]he fact or quality of having different possible meanings; capacity for being interpreted in more than one way . . . ."). Specifically, latent ambiguity "does not readily appear in the language of a document, but instead arises from a collateral matter once the document's terms are applied." *Latent Ambiguity*, Black's Law Dictionary (11th ed. 2019).

175. *See* Jones v. United States, 36 F.4th 974, 981–82 (9th Cir. 2022) (noting the circuit split on the issue).

176. *See, e.g.*, *In re* Bradford, 830 F.3d 1273, 1276 (11th Cir. 2016).

177. *See, e.g.*, *id.* at 1276–77.

178. 28 U.S.C. § 2244(b)(1)–(2).

179. *See, e.g.*, Williams v. United States, 927 F.3d 427, 435 (6th Cir. 2019).

second or successive § 2255 motion would only be subject to the limitations in § 2255(h) and the procedures in § 2244(b)(3) and (4), which outline how the courts of appeals must authorize a second or successive habeas petition.[180]

D. *The Circuits Applying § 2244(b)(1) to § 2255 Motions*

Since § 2244(b)(1) and (2) contain identical language referring to § 2254, questions arise about whether § 2255(h) incorporates either or both of those subsections.[181] Nevertheless, *Jones* only considers whether § 2255(h) incorporates § 2244(b)(1).[182] Before *Jones*, the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits all considered the same question and agreed that it does.[183] Only the Sixth Circuit took the opposite tack.[184] Of the Circuits in the majority, some considered their construction of § 2255(h) so obvious as to not require analysis,[185] but others have explained their reasoning at greater length.[186]

In *Taylor v. Gilkey*, the Seventh Circuit became one of the first courts to explicitly adopt the now majority view that § 2255(h) incorporates § 2244(b)(1).[187] *Taylor* concerned a federal prisoner attempting to effectively reassert a claim from a previously denied § 2255 motion.[188] During its discussion, the court held that the prisoner could not reassert the claim from his previous § 2255 motion because § 2244(b)(1) required the claim to be dismissed.[189] To support its conclusion, the court explained that the § 2255(h) cross-reference made § 2244 equally applicable to § 2255 motions and then cited a prior decision, *Bennett v. United States*, for that proposition.[190]

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180. *See, e.g.*, *id.*

181. For example, even among those who agree that § 2255(h) incorporates § 2244(b)(1), some disagree on whether § 2255(h) also incorporates § 2244(b)(2). In *Bradford*, the Eleventh Circuit held that § 2255(h) could not incorporate § 2244(b)(2) because § 2244(b)(2) was inconsistent with § 2255(h). 830 F.3d at 1276 n.1. However, the dissent in *Jones* appeared to disagree, arguing that § 2255(h) does incorporate § 2244(b)(2) and that the two subsections do not conflict. *See* Jones v. United States, 36 F.4th 974, 989 (9th Cir. 2022) (Wallace, J., dissenting) (citing Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999)).

182. *See Jones*, 36 F.4th at 981; *supra* text accompanying notes 54–55.

183. *Jones*, 36 F.4th at 982 (collecting cases).

184. *Id.* (citing *Williams*, 927 F.3d at 434).

185. *See, e.g.*, Winarske v. United States, 913 F.3d 765, 768 (8th Cir. 2019); United States v. Winkelman, 746 F.3d 134, 135 (3d Cir. 2014); Green v. United States, 397 F.3d 101, 102 n.1 (2d Cir. 2005).

186. *See, e.g.*, *In re* Bourgeois, 902 F.3d 446, 447 (5th Cir. 2018); *In re* Baptiste, 828 F.3d 1337, 1339–40 (11th Cir. 2016) (per curiam); Taylor v. Gilkey, 314 F.3d 832, 836 (7th Cir. 2002) (citing Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997)).

187. 314 F.3d at 836.

188. *See id.* at 833–34.

189. *Id.* at 836.

190. *Id.* (citing *Bennett*, 119 F.3d at 469).

Yet *Bennett* makes no mention of § 2244(b)(1), and its holding appears more limited than *Taylor* implies.[191] Shortly after the AEDPA's enactment in 1996, the court in *Bennett* was presented with a federal prisoner's request to file his third § 2255 motion, which asserted a claim based on newly discovered evidence.[192] The court took note that it needed to "certify 'as provided in section 2244'" that the successive § 2255 motion satisfied the statutory requirements in § 2255(h)(1) regarding newly discovered evidence.[193] Examining § 2244, the court observed that § 2244(b)(3)(C) requires a state prisoner's § 2254 application to make a prima facie showing that it satisfies the limitations listed in § 2244(b)(1) and (2).[194] Likewise, the Seventh Circuit noted that the AEDPA's legislative history did not distinguish between federal or state prisoners' second or successive petitions with respect to the standard of proof required for each.[195] Thus, the court concluded that it should analogously certify § 2255 motions according to the standard in § 2244(b)(3)(C); namely, that it should certify a federal prisoner's motion for habeas relief if the motion makes a prima facie showing of satisfying the requirements listed in § 2255(h).[196]

Thus, a close reading of *Bennett* indicates that *Taylor* extended *Bennett*'s reasoning by applying it to the entirety of § 2244(b), even though *Bennett* focused on the procedural requirements of § 2244(b)(3).[197] Additionally, the Seventh Circuit strengthened *Taylor*'s interpretation of *Bennett* in *White v. United States*.[198] In *White*, the court reasoned that "[i]t would be odd if Congress had intended that a federal prisoner could refile the same motion over and over again without encountering a bar similar to that of section 2244(b)(1)."[199] With this reasoning, the court affirmed *Taylor*'s holding that § 2255(h) incorporates § 2244(b)(1).[200]

191. *See Bennett*, 119 F.3d at 468–69.
192. *Id.*
193. *Id.* (quoting 28 U.S.C. § 2255(h)).
194. *See id.* at 469 (quoting 28 U.S.C. § 2244(b)(3)(C)).
195. *See id.*
196. *See id.*
197. *See* Taylor v. Gilkey, 314 F.3d 832, 836 (citing *Bennett*, 119 F.3d at 469).
198. *See* White v. United States, 371 F.3d 900, 901 (7th Cir. 2004).
199. *Id.*
200. *See id.* The Sixth Circuit has opined that "[i]t is not clear that the Seventh Circuit ever interrogated its later interpretation of [*Bennett*'s] logic as extending to cover § 2244(b)(1) despite that subsection's glaring textual red flag." Williams v. United States, 927 F.3d 427, 435 n.5 (6th Cir. 2019) (citing *Taylor*, 314 F.3d at 836). However, it does bear noting that Judge Richard Posner authored the *Bennett* opinion. 119 F.3d at 468. He also sat on the panel that decided the *Taylor* case, in which Judge Frank Easterbrook authored the opinion. 314 F.3d at 833. Judge Posner then wrote the *White* opinion, affirming *Taylor*'s interpretation of *Bennett*. *White*, 371 F.3d at 901. This would imply that Judge Posner's opinion in *Bennett* was not simply misconstrued in *Taylor* but rather that Judge Posner agreed with *Taylor*'s extension of *Bennett*'s reasoning.

The Eleventh Circuit also adopted identical reasoning in *In re Baptiste*.[201] In *Baptiste*, a federal prisoner reasserted a claim challenging his firearm convictions in an application to file a second or successive § 2255 motion.[202] Despite noting that § 2244(b)(1) explicitly applies to state prisoners' § 2254 applications, the court determined that Congress would not have intended to allow federal prisoners to reassert previously presented habeas claims while denying state prisoners the same right.[203] Two weeks later, the Eleventh Circuit affirmed *Baptiste* in *In re Bradford*, though it acknowledged that *Baptiste*'s holding had encountered some subsequent criticism.[204] Defending *Baptiste*'s holding, the court stated that *Baptiste* had followed logically from prior decisions that read § 2255(h) as incorporating § 2244(b)(3)(A)–(E) and (b)(4).[205] The court then suggested that § 2255(h)'s cross-reference incorporates nearly all of § 2244(b) because it refers to all of § 2244 rather than to specific provisions.[206]

Lastly, the case of *In re Bourgeois* provided the Fifth Circuit an opportunity to consider whether § 2244(b)(1) barred a federal death-row inmate's successive § 2255 motion.[207] In *Bourgeois*, the prisoner attempted to reassert a claim from a previously denied § 2255 motion, arguing that a recent Supreme Court decision had suddenly rendered the claim viable.[208] The prisoner also invoked the canon of *expressio unius est exclusio alterius*—which holds that the expression of one thing can imply the exclusion of another[209]—to argue that Congress's inclusion of the language "under section 2254" in § 2244(b)(1) precluded that subsection's application to federal prisoners' § 2255 motions.[210] Determining that the statutory context overcame the implication of *expressio unius*, the court held that § 2244(b)(1) applies to § 2255 motions.[211] To support this conclusion, the Fifth Circuit quoted *Bennett* for the proposition that the AEDPA's legislative history did not distinguish between federal or state prisoners' second or successive petitions.[212] In doing so, the court extended *Bennett*'s reasoning from its original context—pertaining to the burden of proof applicable to § 2255

201. *See* 828 F.3d 1337, 1339–40 (11th Cir. 2016) (per curiam).
202. *See id.* at 1338.
203. *See id.* at 1339.
204. *See In re* Bradford, 830 F.3d 1273, 1275 (11th Cir. 2016); *see also In re* Anderson, 829 F.3d 1290, 1295–97 (11th Cir. 2016) (Martin, J., dissenting) (suggesting that *Baptiste* was wrongly decided); *In re* Clayton, 829 F.3d 1254, 1266–67 (11th Cir. 2016) (Martin, J., concurring) (same).
205. *See Bradford*, 830 F.3d at 1276.
206. *See id.* at 1276 & n.1 (citing United States v. Chafin, 808 F.3d 1263, 1271 (11th Cir. 2015)).
207. 902 F.3d 446, 447–48 (5th Cir. 2018).
208. *See id.* at 447.
209. *See, e.g.*, Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012).
210. *Bourgeois*, 902 F.3d at 447.
211. *See id.* at 447–48.
212. *Id.* at 448 (quoting Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997)).

motions—to suggest that Congress did not distinguish between federal and state prisoners' second or successive petitions at all.[213] As a result, the court rejected the federal prisoner's claim.[214]

E. *The Sixth Circuit's Approach*

After years of unanimous agreement on applying § 2244(b)(1) to § 2255 motions, the Sixth Circuit broke ranks with its sister circuits in *Williams v. United States*.[215] In *Williams*, the court had to decide, among other things, whether § 2244(b)(1) barred a federal prisoner's challenge to his 15-year sentence as an armed career criminal under the ACCA.[216] The defendant had unsuccessfully challenged his sentence thrice before, but the fickle winds of Supreme Court precedent had recently shifted in his favor and reanimated his claim.[217] Serendipitously, the government's view of § 2244(b)(1) also shifted in *Williams*: the government agreed with the defendant that § 2244(b)(1) did not apply to his § 2255 motion.[218] Holding that § 2244(b)(1) did not apply to § 2255 motions, the Sixth Circuit read the text of § 2244(b)(1)—which refers explicitly to claims in "a second or successive habeas corpus application under section 2254"—to mean that § 2244(b)(1) could only affect state prisoners' § 2254 applications.[219] The court noted that since § 2244(a) made reference to § 2255 motions, Congress knew how to refer to federal prisoners when it wished to do so.[220] Thus, by leaving § 2255 motions out of the text of § 2244(b)(1), Congress meant to convey that § 2244(b)(1) should not apply to § 2255 motions.[221]

Responding to the argument that § 2255(h)'s broad cross-reference incorporates § 2244(b)(1) regardless of the plain language, the Sixth Circuit determined that the § 2255(h) cross-reference refers to the certification procedures listed in § 2244(b)(3).[222] The court particularly

213. *See id.*
214. *Id.*
215. *See* 927 F.3d 427, 436 (6th Cir. 2019). Notably, even earlier Sixth Circuit precedent appeared to agree that § 2244(b)(1) applied to § 2255 motions. *See* Charles v. Chandler, 180 F.3d 753, 758 (6th Cir. 1999) (per curiam) ("[P]ursuant to 28 U.S.C. § 2244(b)(1), if a litigant seeks permission to file the same claims that were filed in a previous application, such claims 'shall be dismissed.'"); *In re* Liddell, 722 F.3d 737, 738 (6th Cir. 2013) (per curiam) (citing *Charles*, F.3d at 758). However, the court in *Williams* ultimately dismissed the prior statements in *Charles* and *Liddell* as nonbinding dictum. *Williams*, 927 F.3d at 435–36. Interestingly, Judge Boggs, who wrote the *Jones* opinion while sitting by designation on the Ninth Circuit, also sat on the Sixth Circuit panels that decided *Charles* and *Liddell*. *Charles*, 180 F.3d at 754; *Liddell*, 722 F.3d at 738.
216. *See* 927 F.3d at 431, 433–34.
217. *See id.* at 431–32.
218. *Id.* at 435.
219. *Id.* at 434 (emphasis omitted) (first quoting § 2244(b)(1); and then quoting Magwood v. Patterson, 561 U.S. 320, 332 (2010)).
220. *Id.* at 435 (first citing § 2244(a); and then citing *id.* § 2244(b)(3)(A)).
221. *See id.*
222. *Id.* (first citing § 2244(b)(3); and then quoting *id.* § 2255(h)).

focused on § 2255(h)'s instruction that a "second or successive [§ 2255] motion must be certified as provided in section 2244" to contain one of the two threshold conditions listed in § 2255(h)(1) and (2).[223] By considering the statute's instruction, the court concluded that reading § 2244(b)(1) into § 2255(h) made no linguistic sense because a court cannot certify a § 2255 motion according to § 2244(b)(1) to contain the conditions listed in § 2255(h)(1) or (2).[224] Rather, the Sixth Circuit read § 2255(h) as instructing courts to certify a federal prisoner's § 2255 motion according to the procedures listed in § 2244(b)(3) if it satisfies the conditions in § 2255(h)(1) or (2).[225]

Lastly, the Sixth Circuit reflected on *Baptiste*'s conclusion that it would be odd if Congress allowed federal prisoners to reassert previously presented habeas claims while denying the same right to state prisoners.[226] Dispensing with this reading as "an unjustifiable contravention of plain statutory text," the court also remarked that allowing federal prisoners to refile their habeas claims is not absurd in light of the AEDPA's purpose.[227] Since the AEDPA was enacted to advance "comity, finality, and federalism," Congress could have reasonably intended fewer restrictions on § 2255 motions because providing postconviction relief to federal prisoners does not threaten comity or federalism interests.[228] As a result, the Sixth Circuit then held that § 2244(b)(1) did not bar the defendant's claims in his § 2255 motion.[229]

Notably, the Sixth Circuit's view finds some qualified support in the Supreme Court case of *Magwood v. Patterson*.[230] In *Magwood*, the Supreme Court commented that "[t]he limitations imposed by § 2244(b) apply *only* to a 'habeas corpus application under section 2254,' that is, an 'application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court.'"[231] However, the Supreme Court's statement appears as a singular, casual remark that opens a discussion on a different legal issue.[232] And manifestly, § 2255(h)'s cross-reference indicates that at least some limitations in § 2244(b)—if only those related to certification procedures—do apply to § 2255 motions.[233]

223. *Id.* (quoting § 2255(h)).
224. *Id.* (quoting § 2255(h)).
225. *Id.*
226. *Id.* at 436 (citing *In re* Baptiste, 828 F.3d 1337, 1339 (11th Cir. 2016) (per curiam)).
227. *Id.* at 436 & n.6.
228. *Id.* at 436 n.6 (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).
229. *Id.* at 436.
230. 561 U.S. 320, 332 (2010).
231. *Id.* (emphasis added and omitted) (first quoting 28 U.S.C. § 2244(b); and then quoting *id.* § 2254(b)(1)).
232. *See id.* at 330–34. It bears noting that Justice Kennedy, who dissented in *Magwood*, commented to the opposite effect in his dissent that "the 'second or successive' bar under § 2244(b) applies to § 2255 motions." *Id.* at 348 (Kennedy, J., dissenting on other grounds). The context of Justice Kennedy's dissent suggests that his statement was also a casual, offhand remark made in a larger discussion regarding a different legal issue. *See id.* at 344–48.
233. *See* 28 U.S.C. § 2255(h).

Thus, the cursory nature of the statement in *Magwood* would indicate that the Court was not contemplating whether § 2244(b)(1) applies to § 2255 motions.[234] In any case, no Circuit to consider the issue since *Magwood* was decided has treated *Magwood* as dispositive.[235] Far more recently, though, the Supreme Court denied certiorari in *Avery v. United States*,[236] and Justice Kavanaugh wrote separately to state his view that § 2244(b)(1) covers only state prisoners' § 2254 applications.[237] He highlighted that the government had also argued that § 2244(b)(1) does not apply to § 2255 motions, disagreeing with the six circuits that had previously ruled in its favor.[238] Thus, Justice Kavanaugh expressed that he would grant certiorari in a future case to resolve the issue.[239]

IV. Analysis of *Jones*

A critical assessment of the Ninth Circuit's analysis in *Jones* demonstrates its accuracy. The court properly rooted its holding in the plain text and structure of the statutory habeas scheme. Furthermore, sound public policy favors not applying § 2244(b)(1) to federal prisoners because doing so will likely produce far harsher consequences than Congress originally intended. As a result, courts should resolve any possible ambiguities in the habeas scheme with an eye toward lenity. Finally, an examination of contrary authority reinforces *Jones*'s holding as the correct interpretation of §§ 2244(b)(1) and 2255(h).

A. *The Ninth Circuit's Analysis—A Closer Look*

The Ninth Circuit began its analysis by first observing that the plain text of § 2244(b)(1) applies it only to habeas applications "under section 2254."[240] Then, the Ninth Circuit rejected the argument that § 2244(b)(1) applies to federal prisoners because § 2255(h) cross-references § 2244 in its entirety.[241] It pointed out that Congress divided § 2244 into subsections of two types: those that specify their applicability to § 2254 applications, namely § 2244(b)(1) and (2), and those that do not specify any applicability, namely § 2244(b)(3) and (4).[242] Thus, ignoring the

234. *See* 561 U.S. at 332.
235. *See, e.g.*, Jones v. United States, 36 F.4th 974, 982 (9th Cir. 2022) (collecting cases). It appears universally understood that the statement in *Magwood* is not binding on this point. *See id.*
236. 140 S. Ct. 1080 (2020) (mem.).
237. *Id.* (Kavanaugh, J., statement respecting the denial of certiorari).
238. *Id.* at 1080–81.
239. *Id.* at 1081.
240. Jones v. United States, 36 F.4th 974, 982 (9th Cir. 2022).
241. *See id.*
242. *Id.* at 982–83.

words "under section 2254" in § 2244(b)(1) and (2) would render that language superfluous.[243]

The court then moved on to the statutory structure, finding support for its reading in a comparison of § 2244(b)(2) and § 2255(h).[244] Both § 2244(b)(2) and § 2255(h) lay out similar tests for courts of appeals to apply before authorizing second or successive petitions for habeas relief.[245] The Ninth Circuit concluded that applying § 2244(b)(2) to second or successive § 2255 motions would cause the test in § 2244(b)(2) to overlap and conflict with the test in § 2255(h).[246] And since § 2244(b)(1) and (2) both contain the same "under section 2254" language, the court determined that neither subsection applies to second or successive § 2255 motions.[247]

Lastly, the court reviewed the policy considerations presented by its sister circuits in favor of applying § 2244(b)(1) to federal prisoners.[248] Unpersuaded, the Ninth Circuit rejected the idea that allowing federal prisoners to reassert prior-presented claims would undermine the purposes of the AEDPA.[249] Noting that the AEDPA was enacted to further "comity, finality, and federalism," the court pointed out that comity and federalism concerns do not arise when federal courts review federal convictions.[250] As a result, the court held that the text of § 2244(b)(1) precluded it from applying to federal prisoners and that § 2255(h) incorporated only the certification procedures listed in § 2244(b)(3).[251]

B. *A Critical Assessment of the Ninth Circuit's Analysis*

1. The Treatment of the Statutory Text

In *Jones*, the Ninth Circuit properly gives primacy to the text of §§ 2244 and 2255. Of the AEDPA, the Supreme Court has quipped that "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."[252] Nevertheless, statutory interpretation begins with the plain text of the statute.[253] By contemplating the text, courts must first determine whether the statutory language is plain or ambiguous.[254] To judge whether the text is plain or ambiguous, courts

243. *Id.* at 983.
244. *See id.*
245. *Id.*
246. *Id.*
247. *See id.*
248. *See id.* at 984.
249. *Id.*
250. *Id.* (internal quotation marks omitted) (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).
251. *See id.* at 983–84.
252. Lindh v. Murphy, 521 U.S. 320, 336 (1997).
253. *E.g.*, Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) (citing Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004)).
254. *E.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

look to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[255] Where the statutory text is plain, courts simply apply the statute in accordance with its terms.[256] If the text is ambiguous, then courts properly resolve that ambiguity by utilizing interpretive principles, such as the canons of statutory construction, to choose among the meanings that the text itself may permissibly bear.[257]

A step-by-step textual analysis confirms the Ninth Circuit's interpretation of § 2244(b)(1) and § 2255(h). The analysis begins with § 2255(h)'s instruction to the courts of appeals to certify, "as provided in section 2244," that second or successive § 2255 motions meet certain statutory requirements.[258] Contextually, the words "as provided in section 2244"[259] cue the reader to look at § 2244 for instructions on how the courts of appeals must certify second or successive petitions. A survey of § 2244 reveals that the section has four subsections, but only subsection (b) pertains to certifying second or successive petitions.[260] Even though § 2255(h) appears to cross-reference § 2244 in its entirety, the words "as provided in section 2244"[261] suggest that § 2255(h) does not actually cross-reference all of § 2244. The word "in" implies that the cross-reference refers to specific provisions within § 2244 rather than the entire section. Additionally, reading the unrelated subsections of § 2244 into § 2255(h) produces unintelligible results. This compels the conclusion that § 2255(h) cross-references § 2244(b) at most.

At this juncture, the analysis turns to the canons of statutory construction for guidance because § 2255(h) is ambiguous: there are multiple permissible readings of the cross-reference because it does not specify which provisions it incorporates, and all the provisions in § 2244(b) are at least somewhat related to certifying second or successive petitions.[262] Thus, does § 2255(h) cross-reference all of § 2244(b) or just specific provisions within § 2244(b)? Here, the presumption of consistent usage and meaningful variation—which presumes that variations in language convey differences in meaning[263]—favors the latter interpretation. Congress drafted § 2244(b)(1) and (2) with language referring to an "application under section 2254."[264] However, the next part of the statute, § 2244(b)(3) and (4), does not use the same language; instead, subsection (b)(3) refers to an "application permitted by this

255. *E.g.*, *id.* at 341 (first citing Est. of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); and then citing McCarthy v. Bronson, 500 U.S. 136, 139 (1991)).
256. *E.g.*, *Jimenez*, 555 U.S. at 118 (collecting cases).
257. *See, e.g.*, *Robinson*, 519 U.S. at 345–46 (applying the whole-text canon to resolve statutory ambiguity).
258. 28 U.S.C. § 2255(h).
259. *Id.*
260. *See id.* § 2244.
261. *Id.* § 2255(h).
262. *See supra* text accompanying notes 175–80.
263. *See, e.g.*, SCALIA & GARNER, *supra* note 209, at 170.
264. § 2244(b)(1), (2).

section,"[265] and subsection (b)(4) refers to an "application that the court of appeals has authorized."[266] The meaningful-variation canon suggests that Congress worded each subsection differently because it intended that § 2244(b)(1) and (2) should apply only to § 2254 applications while § 2244(b)(3) and (4) should apply to both § 2254 applications and § 2255 motions.

Moreover, the canon against surplusage advises that courts should give effect to every word and provision in a statute whenever possible.[267] Because § 2244(b)(1) and (2) use different language than subsections (b)(3) and (4), a court should strive to interpret § 2244(b) in a way that gives effect to all of its provisions. Construing § 2244(b)(1)–(4) as all applying to § 2255 motions would ignore the more specific language in subsections (b)(1) and (2) referring to an "application under section 2254."[268] To give effect to the "under section 2254"[269] language in § 2244(b)(1) and (2), those subsections must be read as applicable only to § 2254 applications; otherwise, the language is reduced to surplusage.

Furthermore, the harmonious-reading canon counsels that courts should interpret statutory provisions as compatible with each other whenever possible.[270] If § 2244(b)(1) and (2) were applied to § 2255 motions, this application would implicitly conflict with the plain text of § 2244(b)(1) and (2), which applies those subsections specifically to § 2254 applications. As noted above, the text of § 2255(h)'s cross-reference does not incorporate all of § 2244. Similarly, there is no reason to conclude that the § 2255(h) cross-reference must incorporate all of § 2244(b), especially when that conclusion causes a conflict between the statutes. Even if § 2255(h) did encompass § 2244(b)(1) and (2), specific language prevails over more general language when statutes conflict.[271] Therefore, the more specific language in § 2244(b)(1) and (2) should still prevail over the generically worded cross-reference in § 2255(h).

The context and wording of § 2255(h)'s cross-reference also supply more evidence that it does not incorporate § 2244(b)(1) and (2). The cross-reference provides that a second or successive § 2255 motion must be "certified as provided in section 2244 . . . to contain" the threshold conditions listed in § 2255(h)(1) or (2).[272] Viewed in context, this provision only commands the courts of appeals to check that a § 2255 motion satisfies § 2255(h)(1) or (2). But reading § 2244(b)(1) and (2) into § 2255(h) would command a court to dismiss a § 2255 motion for

265. *Id.* § 2244(b)(3).
266. *Id.* § 2244(b)(4).
267. *See, e.g.*, SCALIA & GARNER, *supra* note 209, at 174.
268. § 2244(b)(1), (2).
269. *Id.*
270. *See, e.g.*, SCALIA & GARNER, *supra* note 209, at 180.
271. *See, e.g.*, *id.* at 183.
272. 28 U.S.C. § 2255(h).

failing to meet the requirements of § 2244(b)(1) and (2) in order to certify that the § 2255 motion does meet the requirements of § 2255(h)(1) or (2). Quite simply, this reading makes absolutely no sense. On the whole, the text of §§ 2244 and 2255 decisively supports *Jones*'s holding that § 2255(h) does not apply § 2244(b)(1) to § 2255 motions.

2. An Examination of Statutory Structure

Besides the statutory text, the structure of §§ 2244(b) and 2255(h) bolsters the view that § 2244(b)(1) does not apply to § 2255 movants. Because § 2254 is silent regarding second or successive applications, § 2244(b) lists the limitations and procedures that govern second or successive habeas corpus applications. However, as explained above, Congress enacted § 2255 to create a form of postconviction relief for federal prisoners analogous to, yet distinct from, habeas corpus.[273] Since § 2255 provides a different type of relief, § 2255(h)(1) and (2) provide their own limitations on second or successive motions, which are quite similar, but not identical, to those listed in § 2244(b)(2)(A) and (B). Namely, § 2244(b)(2)(A) and § 2255(h)(2) are virtually identical and both provide that a successive habeas petition may be filed if it contains a new, retroactive, and previously unavailable rule of constitutional law.[274] Likewise, § 2244(b)(2)(B) and § 2255(h)(1) are similar because both subsections permit the filing of a successive petition that is based on new facts or evidence.[275] However, while § 2255(h)(1) only requires new evidence to show that a reasonable factfinder would not have convicted the petitioner,[276] § 2244(b)(2)(B) requires that the factual predicate underlying the prisoner's claim could not have been previously discovered through due diligence and that the facts show a reasonable factfinder would not have convicted the petitioner absent constitutional error.[277] As a result, the limitations provided by § 2255(h)(1) and (2) are largely duplicative of those in § 2244(b)(2) but are still more permissive.

If § 2244(b)(2) applies to second or successive § 2255 motions, then Congress effectively repeated itself in two different places for no reason. Such a reading would render § 2255(h)(1) and (2) surplusage because the limitations in § 2244(b)(2) would control in all circumstances. This interpretation is especially untenable because Congress chose to cross-reference § 2244 in § 2255(h). If Congress wanted to create one standard for second or successive petitions, then it could have simply cross-referenced § 2244 without adding separate limitations in § 2255(h)(1) and (2). Congress also worded § 2255(h)(1) and (2) differently from § 2244(b)(2), further indicating that it intended to establish

273. *See supra* notes 146–48 and accompanying text.
274. *See* § 2244(b)(2)(A); *id.* § 2255(h)(2).
275. *See id.* § 2244(b)(2)(B); *id.* § 2255(h)(1).
276. *See id.*
277. *See id.* § 2244(b)(2)(B).

two independent standards for state and federal prisoners' successive petitions for habeas relief.

For these reasons, applying § 2244(b)(2) to § 2255 motions makes little sense. Because § 2244(b)(1) and (2) share the same "under section 2254"[278] language, the consistent-usage canon suggests that Congress intended both subsections to have the same scope. As a result, since it makes little sense to apply § 2244(b)(2) to § 2255 motions, that conclusion applies with equal force to § 2244(b)(1).

3. A Consideration of Policy Concerns

While the latent ambiguity in § 2255(h) appears resolvable through employing the linguistic canons alone, policy considerations nevertheless reinforce the Ninth Circuit's conclusion that § 2244(b)(1) does not apply to federal prisoners. Primarily, § 2244(b)(1)'s total bar on state prisoners' second or successive § 2254 applications can punish a petitioner who asserts a not-yet-meritorious claim before the Supreme Court recognizes it as valid.[279] Once the claim is rejected, the state prisoner cannot reassert it in a second or successive § 2254 application, even if the Supreme Court later recognizes the validity of that claim. This potentially draconian result is tolerable with respect to state prisoners because they have additional state remedies.[280] But federal prisoners have no such recourses.

If any doubt persists regarding the applicability of § 2244(b)(1), the rule of lenity advises that ambiguity in penal statutes should be resolved in a defendant's favor.[281] Even though § 2244(b)(1) is not technically a penal statute, the rule still seems apposite. The application of § 2244(b)(1) can make the difference between freedom or continued incarceration in the same way that a penal statute can. Applying § 2244(b)(1) to § 2255 movants could potentially subject federal prisoners with valid claims for relief to years in prison without further recourse. This penalty warrants construing any ambiguity in § 2255(h) in favor of the prisoners that it operates against.

Furthermore, courts have long preferred to strictly construe statutes in derogation of the common law.[282] As explored above, the history of common law habeas corpus demonstrates that the writ was malleable, ever-expanding, and not subject to the principle of res judicata.[283] Because the AEDPA imposes a "modified res judicata rule" on the writ,[284] the statute arguably derogates the common law. Therefore,

278. *Id.* § 2244(b)(1), (2).
279. *See id.* § 2244(b)(1).
280. *See id.* § 2254(b)(1)(A).
281. *See, e.g.*, SCALIA & GARNER, *supra* note 209, at 296.
282. *See, e.g.*, Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304–05 (1959).
283. *See supra* Section III.A.
284. Felker v. Turpin, 518 U.S. 651, 664 (1996).

courts should strictly construe the AEDPA to not strip away more access to the writ than the statute requires. While § 2255 is distinct from the common law writ of habeas corpus, its scope is just as broad.[285] For that reason, any ambiguity regarding federal prisoners' access to potential postconviction relief should be resolved in favor of allowing more access to relief rather than less.

C. *A Rebuttal to the Dissent*

Judge J. Clifford Wallace cogently dissented in *Jones*, disagreeing with the majority's holding that § 2244(b)(1) does not apply to § 2255 motions.[286] Judge Wallace's dissent principally argued that § 2244(b)(1) applies to federal prisoners because § 2255(h) incorporates § 2244(b)(1) and (2).[287] Throughout his dissent, Judge Wallace appealed heavily to the Ninth Circuit's prior precedent, which the majority had dismissed as dictum.[288] He also opined that § 2244(b)(1) and (2) should apply to § 2255 motions—even if § 2255(h) only incorporates § 2244(b)(3)—because § 2244(b)(3)(C) also incorporates the limitations listed in § 2244(b)(1) and (2).[289] Furthermore, he read § 2244(b)(2) as supplementing § 2255(h) rather than rendering it redundant.[290] Lastly, Judge Wallace stated that applying § 2244(b)(1) to federal prisoners would advance the valuable policy of barring prisoners "from refiling the same non-meritorious motions over and over again."[291]

Judge Wallace's argument regarding § 2244(b)(3)(C) is perhaps the strongest argument for applying § 2244(b)(1) and (2) to federal prisoners. Subsection 2244(b)(3)(C) allows a court of appeals to authorize a second or successive application only if it meets the "requirements of this subsection."[292] In context, the words "requirements of this subsection"[293] refer back to § 2244(b)(1) and (2). Hence, § 2244(b)(3)(C) only allows the authorization of second or successive applications that satisfy § 2244(b)(1) and (2). Since § 2255(h) does incorporate the procedures in § 2244(b)(3), it appears that § 2244(b)(3)(C) subjects second or successive § 2255 motions to the limitations in § 2244(b)(1) and (2). However, if one reads § 2244(b)(3)(C) into § 2255(h) then the words "requirements of this subsection"[294] properly refer to the requirements listed in § 2255(h)(1) and (2). Thus, § 2244(b)(3)(C) does not actually apply § 2244(b)(1) and (2) to § 2255 motions.

285. *See* United States v. Hayman, 342 U.S. 205, 219 (1952).
286. Jones v. United States, 36 F.4th 974, 987 (9th Cir. 2022) (Wallace, J., dissenting).
287. *Id.* at 988.
288. *See id.* at 987, 989 (citing Moore v. Reno, 185 F.3d 1054 (9th Cir. 1999)).
289. *Id.* at 988.
290. *Id.* at 989.
291. *Id.*
292. 28 U.S.C. § 2244(b)(3)(C).
293. *Id.*
294. *Id.*

D. *A Response to Contrary Circuit Authority*

Lastly, several other circuits have offered reasons for applying § 2244(b)(1) to federal prisoners that merit response. First, the Seventh and Eleventh Circuits concluded in *White* and *Baptiste*, respectively, that § 2244(b)(1) applies to federal prisoners because Congress would not have allowed federal prisoners to refile the same motions multiple times while barring state prisoners from doing the same.[295] Yet that conclusion does not follow the premise. The Supreme Court has rightly remarked that federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority" because it "overrides the States' core power to enforce criminal law."[296] Because federal habeas review is so invasive of state sovereignty, it makes sense that Congress would heavily restrict state prisoners' access to it while allowing federal prisoners more leeway. After all, federal prisoners' convictions do not implicate state sovereignty.

In *Bradford*, the Eleventh Circuit uniquely reasoned that § 2255(h) incorporates nearly all of § 2244(b) because § 2255(h) cross-references § 2244 in its entirety.[297] But this reasoning is easily countered by looking at the entire cross-reference. Since the § 2255(h) cross-reference states "provided *in* section 2244,"[298] there is no reason to force the square peg of § 2244(b)(1) into the round hole of § 2255(h). Without a compelling reason for incorporating § 2244(b)(1) into § 2255(h), the Eleventh Circuit's analysis loses its persuasiveness.

Finally, the Fifth Circuit determined in *Bourgeois* that § 2244(b)(1) applies to federal prisoners because Congress did not distinguish between federal and state prisoners' second or successive petitions.[299] However, the Fifth Circuit drew this conclusion from a comment in *Bennett* taken out of its original context. In context, that statement supported *Bennett*'s proper conclusion that Congress did not establish two different burdens of proof for second or successive § 2254 applications and § 2255 motions.[300] Even though Congress did not establish different burdens of proof, it did establish different authorization standards for each type of petition. The textual differences between § 2244(b)(2) and § 2255(h)(1) and (2) demonstrate that Congress did distinguish between the two types of relief.

295. *See* White v. United States, 371 F.3d 900, 901 (7th Cir. 2004); *In re* Baptiste, 828 F.3d 1337, 1339 (11th Cir. 2016) (per curiam).

296. Shinn v. Ramirez, 142 S. Ct. 1718, 1731 (2022) (internal quotation marks omitted) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

297. *See In re* Bradford, 830 F.3d 1273, 1276 & n.1 (11th Cir. 2016) (citing United States v. Chafin, 808 F.3d 1263, 1271 (11th Cir. 2015)).

298. 28 U.S.C. § 2255(h) (emphasis added).

299. *See In re* Bourgeois, 902 F.3d 446, 448 (5th Cir. 2018) (quoting Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997)).

300. *See Bennett*, 119 F.3d at 469.

V. Conclusion

In sum, the Ninth Circuit correctly decided *Jones* by refusing to apply the limitations in § 2244(b)(1)—which apply to state prisoners—to federal prisoners who file second or successive motions under § 2255. The court's reading hewed close to the statutory text and is buttressed by longstanding canons of statutory interpretation. Importantly, *Jones* interprets § 2255 harmoniously with § 2244, and it properly gives effect to every provision in both statutes, taking full account of the surrounding statutory landscape. The Ninth Circuit's interpretation also respects Congress's decision to treat federal prisoners' second or successive § 2255 motions more liberally than state prisoners' second or successive § 2254 applications, and it accords with the historical broadness of the habeas remedy. Moreover, policy concerns weigh in favor of not barring federal prisoners from reasserting claims because federal prisoners have no other avenue for seeking relief on previously presented claims subsequently made viable by later Supreme Court decisions. The possibility of extended incarceration due to § 2244(b)(1)'s bar on prior-presented claims also justifies construing any ambiguity in §§ 2244 and 2255 to allow federal prisoners to present their claims. Undoubtedly, §§ 2244(b)(1) and 2255(h) are not specimens of artful statutory drafting. Nevertheless, both dispassionate textual analysis and charitable public policy compel the same conclusion: the price of an ambiguous cross-reference should not be additional years in federal prison.

This Note thus concludes with a simple proposal: the Supreme Court should adopt *Jones*'s holding to end the circuit split regarding § 2244(b)(1)'s applicability. Encouragingly, Justice Kavanaugh signaled his desire to do just that. Likewise, since *Jones*, the Fourth Circuit has joined the Ninth and Sixth Circuits in agreeing that § 2244(b)(1) does not apply to § 2255 motions.[301] Only the First and Tenth Circuits have yet to take a stance on this issue. Due to the Ninth and Sixth Circuits' forceful reasoning in *Jones* and *Williams*, respectively, the circuit split will almost certainly continue to deepen if this issue comes squarely before either of the undecided circuits, especially since even the government now agrees—contrary to its own prior position—that § 2244(b)(1) does not apply to federal prisoners.

301. *In re* Graham, 61 F.4th 433, 438 (4th Cir. 2023).