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Low Savings Rate: Applying the Section 2255 "Savings Clause" to Federal Sentencing Claims in *Gilbert v. United States*

Nicholas Matteson
Boston College Law School, nicholas.matteson@bc.edu

LOW SAVINGS RATE: APPLYING THE SECTION 2255 "SAVINGS CLAUSE" TO FEDERAL SENTENCING CLAIMS IN *GILBERT v. UNITED STATES*

Abstract: On May 19, 2011, in *Gilbert v. United States*, the U.S. Court of Appeals for the Eleventh Circuit held that a federal prisoner could not use the savings clause contained in 28 U.S.C. § 2255 to challenge collaterally an erroneous application of federal sentencing guidelines when the challenge was otherwise barred by the second or successive motion restriction. In doing so, the court closed off any avenue for relief for a significant number of federal prisoners who may have been sentenced erroneously. This Comment argues that the court's interpretation of section 2255 represents an unconstitutional suspension of the writ of habeas corpus.

Introduction

In March of 1996, Ezell Gilbert pled guilty to possession with intent to distribute more than fifty grams of crack cocaine.[1] The U.S. District Court for the Middle District of Florida applied a career offender enhancement to Gilbert, increasing his minimum sentence from twelve years and seven months to twenty-four years and four months.[2] Gilbert vigorously objected to the application of the enhancement, arguing that his prior conviction for carrying a concealed weapon did not qualify as a crime of violence, which was required by the sentencing guidelines for the enhancement.[3] The district court rejected that claim, as did the U.S. Court of Appeals for the Eleventh Circuit in 1998 in *United States v. Gilbert* (*Gilbert I*).[4] After his appeal was denied, Gilbert again challenged his conviction in a motion to vacate his sentence under 28 U.S.C. § 2255; that motion was also denied.[5]

Ten years after Gilbert's direct appeal, the Eleventh Circuit explicitly overruled *Gilbert I*, vindicating Gilbert's argument that a conviction for carrying a concealed weapon was not a crime of violence for the

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[1] Gilbert v. United States (*Gilbert III*), 640 F.3d 1293, 1298 (11th Cir. 2011) (en banc).

[2] *See* Gilbert v. United States (*Gilbert II*), 609 F.3d 1159, 1160–61 (11th Cir. 2010), *vacated*, 625 F.3d 716 (11th Cir. 2010), *aff'd en banc*, 640 F.3d 1293, 1298 (11th Cir. 2011).

[3] *Gilbert III*, 640 F.3d at 1300.

[4] *Id.*

[5] *See id.* at 1301.

purposes of the enhancement.[6] The following year, Gilbert filed a second motion to vacate his sentence, arguing that the enhancement was wrongly applied to him, an argument now bolstered by the change in Eleventh Circuit precedent.[7]

Gilbert, however, faced an obstacle due to new restrictions on post-conviction challenges.[8] In the years between Gilbert's direct appeal and the Eleventh Circuit's overruling of that decision, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which significantly restricted the ability of federal prisoners to file more than one motion to vacate a federal sentence.[9] In Gilbert's case, an Eleventh Circuit panel held in *Gilbert v. United States* (*Gilbert II*) that although AEDPA prevented Gilbert from filing a second motion to vacate, the inadequacy of the motion allowed him to file for relief through the writ of habeas corpus.[10] The Eleventh Circuit reheard the case en banc and held in *Gilbert v. United States* (*Gilbert III*) that Gilbert was statutorily prevented from filing either a second motion to vacate or a petition for the writ of habeas corpus, leaving him with no recourse to challenge his sentence.[11]

The Eleventh Circuit's interpretation of the statutory standards under the AEDPA has important implications: the interpretation may severely limit post-conviction relief for erroneously sentenced federal convicts.[12] The court's interpretation limits relief under the statute so significantly that the restrictions arguably amount to an unconstitutional suspension of habeas corpus as applied to Gilbert.[13]

Part I of this Comment gives the factual and procedural background relating to Gilbert's arrest, trial, appeal, and collateral attacks on his sentence.[14] Part II examines the key point of divergence between the *Gilbert II* decision and the *Gilbert III* decision.[15] Finally, Part III argues that the *Gilbert III* interpretation of the relevant statute was incor-

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[6] United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008).

[7] *See* Gilbert v. United States, No. 8:99-CV-2054-T-30TGW, 2009 WL 981918, at *1, *2, *4 (M.D. Fla. Apr. 13, 2009).

[8] *See Gilbert III*, 640 F.3d at 1301.

[9] 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 (2006 & Supp. III 2009)).

[10] *See Gilbert II*, 609 F.3d at 1163, 1166–67.

[11] *Gilbert III*, 640 F.3d at 1302, 1305, 1323.

[12] *See id.* at 1332 (Martin, J., dissenting).

[13] *See* U.S. CONST. art. I, § 9, cl. 2; *Gilbert III*, 640 F.3d at 1329–30 (Barkett, J., dissenting); *id.* at 1330–31 (Martin, J., dissenting).

[14] *See infra* notes 17–63 and accompanying text.

[15] *See infra* notes 64–88 and accompanying text.

rect and that the statute, as interpreted by the Eleventh Circuit, represents an unconstitutional suspension of the writ of habeas corpus.[16]

I. Gilbert's Conviction and Challenges within the Legal Landscape of Section 2255 Motions

After a criminal conviction and appeal, a federal prisoner may challenge his or her conviction or the resulting sentence using either a petition for writ of habeas corpus or a motion to vacate the conviction or sentence.[17] Habeas corpus, enshrined in the Constitution by the Suspension Clause, guarantees the right of a prisoner to challenge the legality of his or her detention.[18] Congress granted federal courts jurisdiction to issue the writ in 1789.[19] Today, however, to challenge a federal conviction or sentence after an appeal, a prisoner may not use the writ of habeas corpus but must use a motion to vacate the conviction or sentence under 28 U.S.C. § 2255.[20] Section 2255 allows a federal prisoner to move a federal court to vacate, set aside, or correct a sentence.[21] Congress devised section 2255 in 1948 as a more practical alternative to habeas corpus petitions; like a habeas corpus petition, a section 2255 motion allows a federal prisoner to make a collateral challenge to a federal conviction or sentence.[22] At the same time, Congress also added a restriction to section 2255 which requires federal prisoners to challenge their convictions through section 2255 and prohibited them from using writs of habeas corpus, except when a section 2255 motion would be "inadequate or ineffective" to test the legality of the detention.[23]

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[16] *See infra* notes 89–114 and accompanying text.

[17] *See* Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. Miami L. Rev. 75, 82–83 (2005).

[18] U.S. Const. art. 1, § 9, cl. 2. ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see* Larry W. Yackle, Federal Courts: Habeas Corpus 12–15 (2d ed. 2010) (providing an early history of the Suspension Clause).

[19] Yackle, *supra* note 18, at 27.

[20] *See* 28 U.S.C. § 2255(e) (2006 & Supp. III 2009).

[21] *Id.*

[22] United States v. Hayman, 342 U.S. 205, 206, 219 (1952). Substituting a separate collateral remedy for the writ of habeas corpus, as Congress did with section 2255, does not in itself constitute a suspension of habeas corpus. *See id.* at 223. The Supreme Court, however, has strongly implied that a Suspension Clause analysis would be required in cases where the substituted remedy was "inadequate or ineffective" to test the legality of a prisoner's detention under section 2255. *See* Swain v. Pressley, 430 U.S. 372, 381 (1977); *Hayman*, 342 U.S. at 223.

[23] 28 U.S.C. § 2255(e); *see* Entzeroth, *supra* note 17, at 85.

The conduct leading to Gilbert's conviction occurred on October 11, 1995 in Tampa, Florida.[24] Tampa police observed suspicious activity involving Gilbert's car and approached the car.[25] While Gilbert reached for the car's registration, a bag containing crack cocaine fell into plain view.[26] The police searched the car and found sixty-seven grams of crack cocaine, two grams of powder cocaine, and one hundred and eleven grams of marijuana.[27]

In March of 1996, Gilbert pled guilty to possession of more than fifty grams of crack cocaine and more than one hundred grams of marijuana with intent to distribute.[28] At sentencing, the U.S. District Court for the Middle District of Florida applied the career offender enhancement, which permits enhanced sentences for individuals with certain prior offenses.[29] To be considered a career offender under the enhancement, the individual must have at least two prior convictions either for a crime of violence or for a controlled substance offense.[30]

At sentencing, the district court found that Gilbert had a prior controlled substance offense and also considered a prior conviction for carrying a concealed weapon to be a "crime of violence."[31] Accordingly, the court found Gilbert to be a career offender for the purposes of the enhancement.[32] Gilbert objected at sentencing that a conviction for carrying a concealed weapon should not be considered a "crime of violence" under the enhancement.[33] Yet, the court overruled his objection

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[24] *Gilbert III*, 640 F.3d at 1296.

[25] *See id.*

[26] *See id.*

[27] *Id.*

[28] *Id.* at 1298. Although Tampa police arrested Gilbert and the State of Florida instituted criminal proceedings, the State dismissed charges in deference to a federal indictment for the same conduct. *Id.*

[29] *Id.* at 1299; U.S. Sentencing Guidelines Manual § 4B1.1 (1995).

[30] U.S. Sentencing Guidelines Manual § 4B1.1 (1995). The Guidelines define "crime of violence" as:

> any offense under federal or state law punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. § 4B1.2.

[31] United States v. Gilbert (*Gilbert I*), 138 F.3d 1371, 1372 (11th Cir. 1998) (direct appeal), *abrogated by* United States v. Archer, 531 F.3d 1347 (11th Cir. 2008).

[32] *Id.*; U.S. Sentencing Guidelines Manual § 4B1.1 (1995).

[33] *Gilbert III*, 640 F.3d at 1300.

and sentenced Gilbert to 292 months on the crack cocaine count and 120 months on the marijuana count to run concurrently.[34]

Afterward, Gilbert filed the first of three attacks on his conviction and sentence.[35] In 1997, he filed an appeal to the U.S. Court of Appeals for the Eleventh Circuit, contending, among other claims, that the district court had erred in considering his conviction for carrying a concealed weapon to be a crime of violence under the career offender enhancement.[36] Nonetheless, the Eleventh Circuit affirmed the district court.[37] In September of 1999, in Gilbert's second attack on his conviction and sentence, he filed a pro se motion for post-conviction relief under section 2255.[38] The district court found that all of his claims lacked merit and denied the motion.[39]

The calculation of Gilbert's sentence stood undisturbed for five years after his first section 2255 motion was denied.[40] Then, in 2008, in *Begay v. United States*, the U.S. Supreme Court held that a conviction for driving under the influence of alcohol is not a "violent felony" under the Armed Career Criminal Act.[41] Additionally, later in 2008, the Eleventh Circuit applied the *Begay* decision to the career offender en-

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[34] *Id.* The court arrived at the sentences by applying the Federal Sentencing Guidelines. *Id.* at 1299–1300. The Guidelines function by providing a base offense level that corresponds to the crime charged. U.S. Sentencing Guidelines Manual § 1B1.1 (1995). That base offense level is adjusted up or down depending on numerous aggravating and mitigating factors relating to the crime, the victim, and the defendant. *Id.* Then, a judge inputs that adjusted offense level and a second number, based on the criminal history of the defendant, into a rubric which provides a sentencing range. *Id.* In Gilbert's case, the enhancement contained in the Guidelines altered both his adjusted offense level and the effect of his prior criminal history, resulting in a near doubling of the minimum sentence under the Guidelines from 12 years, 7 months to 24 years, 4 months. *Gilbert III*, 640 F.3d at 1300. At the time of Gilbert's sentencing, imposing a sentence within the range provided by the Guidelines was mandatory. *Id.*

[35] *Gilbert III*, 640 F.3d at 1301 (reviewing district court's ruling on second collateral attack, and discussing history of first collateral attack); *Gilbert I*, 138 F.3d at 1372 (direct appeal).

[36] *Gilbert I*, 138 F.3d at 1372.

[37] *Id.* Gilbert's motion for rehearing en banc and petition for writ of certiorari to the Supreme Court were denied as well. Gilbert v. United States, 526 U.S. 1111 (1999) (denying petition for writ of certiorari); United States v. Gilbert, 156 F.3d 188, 188 (11th Cir. 1998) (denying rehearing en banc).

[38] *Gilbert III*, 640 F.3d at 1301 (recounting history of first collateral attack). Gilbert did not raise the issue of carrying a concealed weapon as a crime of violence in his first section 2255 motion, likely because circuit precedent prevented Gilbert from pressing the same issues in a collateral attack as on direct appeal. *See id.* at 1331 (Martin, J., dissenting).

[39] *Id.* at 1301 (majority opinion).

[40] *Archer*, 531 F.3d at 1352.

[41] 553 U.S. 137, 148 (2008).

hancement in *United States v. Archer*.[42] The *Archer* court held that a conviction for carrying a concealed weapon is not a "crime of violence" for the purposes of applying the career offender enhancement, explicitly overruling their prior holding in Gilbert's appeal.[43]

In January 2009, responding to this change in Eleventh Circuit jurisprudence, Gilbert filed a second section 2255 motion to challenge his sentence.[44] By this time, however, such collateral attacks were governed by the Antiterrorism and Effective Death Penalty Act (AEDPA).[45] The enactment of the AEDPA restricted prisoners' ability to challenge criminal sentences because it amended section 2255 to require prisoners to receive authorization from the appropriate court of appeals before making a second or successive section 2255 motion (the "second or successive bar").[46] The second or successive bar, when taken in conjunction with the preexisting section 2255 prohibition against resorting to habeas corpus, limited prisoners' post-appeal review, in most cases, to a single section 2255 motion.[47]

As a result, when Gilbert filed his third attack in 2009, he was faced with the problem that, despite the fact that the Eleventh Circuit in *Archer* agreed that the trial court had erroneously sentenced Gilbert, the second or successive bar prevented Gilbert from filing a second section 2255 motion.[48] He sought to avoid the second or successive bar by arguing that the court should construe his motion as a petition for habeas corpus, not as a second section 2255 motion.[49] For although section 2255 prevents a federal prisoner from challenging a federal sen-

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[42] *Archer*, 531 F.3d at 1352.

[43] *Id.*

[44] *Gilbert*, 2009 WL 981918, at *1, *2.

[45] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, § 105, 110 Stat. 1214, 1220 (codified as amended at 28 U.S.C. § 2255 (2006 & Supp. III 2009)). Congress passed the AEDPA in the wake of the Oklahoma City bombing to "deter terrorism, provide justice for victims, [and] provide for an effective death penalty . . . ." *Id.* at pmbl.; *see* Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 Ariz. L. Rev. 1115, 1116–17 (1998).

[46] Antiterrorism and Effective Death Penalty Act § 105. The amendment required that courts of appeals only authorize second or successive motions when new evidence is uncovered that establishes that the prisoner is actually innocent of the offense or a new rule of constitutional law applies to the case that the Supreme Court holds to be retroactively applicable. *See id.*

[47] *See* 28 U.S.C. § 2255; Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 Am. J. Crim. L. 171, 179–81 (2003).

[48] *Gilbert II*, 609 F.3d at 1162; *Archer*, 531 F.3d at 1352.

[49] *Gilbert III*, 640 F.3d at 1302.

tence or conviction through a habeas corpus petition, that prohibition admits one exception, known as the "savings clause."[50]

The savings clause allows a federal prisoner to challenge a conviction or sentence through a petition for a writ of habeas corpus when section 2255 is "inadequate or ineffective to test the legality of his detention."[51] The scope of the savings clause is not clear from the text of section 2255, and the Supreme Court has not spoken directly on the issue.[52] In fact, from the enactment of the savings clause in 1948 until the enactment of the AEDPA, the savings clause received relatively little attention.[53] With the arrival of the restrictions on post-conviction relief contained in the AEDPA, however, the scope of the savings clause has become a very live issue on which the circuits have differed.[54]

The test for the application of the savings clause in the Eleventh Circuit was set out in 1999 in *Wofford v. Scott*.[55] In Gilbert's case, the U.S. District Court for the Middle District of Florida applied the *Wofford* test and concluded that the test required that the prisoner be convicted of a nonexistent offense for the savings clause to apply.[56] The district court found that Gilbert's motion challenged his sentence, not his conviction, and declined to apply the savings clause.[57]

Gilbert appealed to the Eleventh Circuit, and a panel of the court reversed the district court's decision.[58] *The Gilbert II* court reasoned that because an erroneously applied career offender enhancement was sufficiently similar to a conviction for a nonexistent offense, Gilbert satisfied the *Wofford* test.[59] Accordingly, the court held that the savings clause allowed Gilbert to file a habeas petition challenging his sentence.[60]

The government petitioned for a rehearing en banc, which was granted.[61] On rehearing, the *Gilbert III* court affirmed the district court's denial of relief, but declined to apply the *Wofford* test, stating that the test was merely dicta.[62] The *Gilbert III* court then determined that the

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[50] 28 U.S.C. § 2255(e).

[51] *Id.*

[52] *See* Entzeroth, *supra* note 17, at 86.

[53] *See Hayman*, 342 U.S. at 206; Hack, *supra* note 47, at 190.

[54] *See* Hack, *supra* note 47, at 190–91.

[55] 177 F.3d 1236, 1244 (11th Cir. 1999).

[56] *Gilbert*, 2009 WL 981918, at *3–4.

[57] *Id.* at *4.

[58] *Gilbert II*, 609 F.3d at 1160.

[59] *Id.* at 1165.

[60] *Id.* at 1166–67.

[61] Gilbert v. United States, 625 F.3d 716, 716 (11th Cir. 2010) (granting petition for rehearing en banc and vacating *Gilbert II*).

[62] *Gilbert III*, 640 F.3d at 1319 & n.20.

savings clause does not apply to sentencing claims like Gilbert's, where the sentence is less than the statutory maximum for the charged offense.[63]

II. Conflicting Interpretations of the Savings Clause

The main point of divergence between the *Gilbert II* panel and the *Gilbert III* court is whether the savings clause applies to federal prisoners who challenge their sentences.[64] Both the district court and the *Gilbert II* panel applied the *Wofford* test to determine if the savings clause should apply to Gilbert's sentencing claim.[65] In 1999, in *Wofford v. Scott*, the U.S. Circuit Court of Appeals for the Eleventh Circuit set out a three-prong test to determine when to apply the savings clause to challenges to federal convictions and sentences.[66] To satisfy the *Wofford* test (1) the claim must be based upon a retroactively applicable U.S. Supreme Court decision, (2) the holding of the Supreme Court decision must establish that the petitioner was convicted for a nonexistent offense, and (3) circuit precedent must have "squarely foreclosed" the claim at the time it otherwise should have been raised.[67]

The *Gilbert II* panel held that Gilbert's claim satisfied both the first and third prong of the *Wofford* test.[68] The panel also held that Gilbert's position of being sentenced as a career offender with only one predicate offense satisfied the second prong of the *Wofford* test: that a Supreme Court decision must establish that the prisoner was convicted for a nonexistent offense.[69] The panel reasoned that the career offender enhancement is, in essence, a separate offense—one that has its own elements, provides for additional punishment, and, accordingly, should be treated as an offense of conviction for the purposes of the

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[63] *Id.* at 1323.

[64] *See* Gilbert v. United States (*Gilbert III*), 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc); Gilbert v. United States (*Gilbert II*), 609 F.3d 1159, 1166–67 (11th Cir. 2010), *vacated*, 625 F.3d 716 (11th Cir. 2010), *aff'd en banc*, 640 F.3d 1293, 1298 (11th Cir. 2011).

[65] *Gilbert II*, 609 F.3d at 1166–67; Gilbert v. United States, No. 8:99-CV-2054-T-30TGW, 2009 WL 981918, at *3 (M.D. Fla. Apr. 13, 2009).

[66] 177 F.3d 1236, 1244 (11th Cir. 1999).

[67] *Id.* The *Wofford* Court's analysis focused on the decisions of other circuits interpreting the savings clause in light of the Supreme Court's 1995 decision in *Bailey v. United States*. *Id.* at 1242; *see* Bailey v. United States, 516 U.S. 137 (1995). *Bailey* held that a statute that criminalized using a firearm during or in relation to a drug trafficking crime requires active employment of the firearm. *Bailey*, 516 U.S. at 143. Because *Bailey* resulted in many prisoners being jailed for nonexistent offenses, the *Wofford* court considered the application of the savings clause in that context. *Wofford*, 177 F.3d at 1242.

[68] *Gilbert II*, 609 F.3d at 1165.

[69] *Id.*

Wofford test.[70] The *Gilbert II* panel considered this expansion of the second prong of the *Wofford* test as necessary to avoid constitutional questions related to the second or successive bar.[71]

In contrast, the en banc *Gilbert III* court concluded the *Wofford* test did not apply to Gilbert's claim.[72] The court rejected the rationale of the *Gilbert II* court—that the career offender enhancement is so similar to a crime of conviction that Gilbert was in essence convicted of a nonexistent offense.[73] The court noted that Gilbert was not separately charged with or convicted of being a career offender, but rather was charged with and convicted of possession of crack cocaine with intent to distribute, a conviction that was not contested.[74]

Further, the *Gilbert III* court held that the savings clause could not be as robust as Gilbert and the *Gilbert II* panel believed and found section 2255 to be adequate and effective in Gilbert's case.[75] At the outset the *Gilbert III* court decided that the mere fact that section 2255 does not provide a remedy to a prisoner—as when the second or successive bar prevents a prisoner from filing a motion—does not, in itself, trigger the savings clause.[76] The court concluded that something more is required and that the concern for finality, inherent in the limitations on collateral review added by the AEDPA, prevents claims of sentencing error from being that "something more" sufficient to trigger the savings clause.[77] Although the *Gilbert III* court did not categorically hold that the savings clause could never apply to a sentencing claim, the court implied that the savings clause would only be applied in cases of conviction for a nonexistent offense.[78] The *Gilbert III* court found support for

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[70] *Id.*

[71] *Id.* at 1163. The court concluded that where a prisoner had a claim that went to the fundamental legality of his sentence, the second or subsequent bar might foreclose all relief creating "serious constitutional issues." *Id.* The court elaborated that allowing individuals to remain imprisoned without allowing them to bring claims going to the fundamental legality of their sentences may give rise to constitutional claims in that "the right not to be imprisoned for a nonexistent offense is probably inherent in the modern interpretation of substantive due process." *Id.* at 1165 n.11.

[72] *See Gilbert III*, 640 F.3d at 1319–20. The court referred to the *Wofford* test as dicta, noting that the holding of *Wofford* was merely that the savings clause didn't apply to sentencing claims that could have been raised in proceedings prior to a second section 2255 motion. *Id.* at 1319.

[73] *Id.* at 1320.

[74] *Id.*

[75] *See* 28 U.S.C. § 2255(e) (2006 & Supp. III 2009); *Gilbert III*, 640 F.3d at 1308, 1323.

[76] *See Gilbert III*, 640 F.3d at 1308.

[77] *See id.* at 1312.

[78] *See id.* at 1312–15. The court suggested that its analysis might be different where a sentencing error resulted in a sentence greater than the statutory maximum. *See id.* at 1323.

this reading of the savings clause in the decisions of other circuits, noting that the U.S. Courts of Appeals for the Second, Third, Fifth, and Seventh Circuits, using similar reasoning, also held that federal prisoners cannot use the savings clause to challenge sentencing determinations.[79]

In holding that Gilbert could not challenge his sentence either through a second section 2255 motion or a petition for the writ of habeas corpus, the *Gilbert III* court recognized that he had no judicial recourse available to challenge his sentence.[80] Yet, in *Felker v. Turpin*, in 1996, the Supreme Court held that the restrictions placed on second or successive motions by AEDPA, on their face, did not violate the Suspension Clause.[81] Relying on *Felker*, the *Gilbert III* court held that the second or successive bar as applied to Gilbert did not violate the Suspension Clause.[82] Nonetheless, the dissent argued that this operation of the second or successive bar might amount to an unconstitutional suspension of the writ of habeas corpus.[83]

In addition, the *Gilbert III* court considered broader, constitutional policy issues of habeas corpus.[84] The court rejected the suggestion that more recent Supreme Court decisions supported the view that there had been a suspension in Gilbert's case.[85] For example, in 2008, in *Boumediene v. Bush*, the Supreme Court held that the Suspension Clause guarantees noncitizens held outside of U.S. sovereign territory the privilege of invoking the writ of habeas corpus.[86] In so holding, the Supreme Court affirmed that the Suspension Clause provides the threshold right of all prisoners to a meaningful opportunity to challenge the legality of their detention.[87] Nonetheless, the *Gilbert III* court held *Boumediene* inapplicable on the grounds that *Boumediene* challenged executive detention of noncitizens, not detention upon conviction and sentence by a federal court, and on the grounds that the *Boumediene*

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[79] *Id.* at 1312–16 (citing Taylor v. Gilkey, 314 F.3d 832, 835–36 (7th Cir. 2002); Okereke v. United States, 307 F.3d 117, 120–21 (3d Cir. 2002); United States v. Peterman, 249 F.3d 458, 461–62 (6th Cir. 2001); Kinder v. Purdy, 222 F.3d 209, 213–14 (5th Cir. 2000); *In re* Davenport, 147 F.3d 605, 609–10 (7th Cir. 1998)).

[80] *See id.* at 1295, 1324.

[81] 518 U.S. 651, 664 (1996).

[82] *Gilbert III*, 640 F.3d at 1317–18.

[83] *Gilbert III*, 640 F.3d at 1329–30 (Barkett, J., dissenting); *id.* at 1330–31 (Martin, J. dissenting).

[84] *Id.*; *see* Boumediene v. Bush, 553 U.S. 723, 771 (2008).

[85] *Gilbert III*, 640 F.3d at 1318.

[86] 553 U.S. at 770–71.

[87] *Id.* at 779.

holding concerned the right to habeas corpus review at all, not the right to successive rounds of such review.[88]

III. The Case for a Robust Savings Clause

The *Gilbert III* court's analysis of the savings clause is flawed in several respects.[89] For one, the *Gilbert III* court's argument fails to provide a sufficient justification for the different outcomes in section 2255 motions based on convictions for nonexistent offenses and those based on sentencing errors.[90] Additionally, the *Gilbert III* court's holding leaves Gilbert without the opportunity to bring a claim that his sentence was erroneously calculated, even though the Supreme Court had since determined that Gilbert was not a career offender under the guidelines.[91] By interpreting section 2255 to preclude the opportunity to bring such a claim, the court created a serious question as to whether section 2255 unconstitutionally suspends the writ of habeas corpus.[92]

Rather than providing reasoning to justify the different outcomes between section 2255 motions based on convictions for nonexistent offenses and those based on sentencing errors, the court relied on the need for finality and the non-binding precedent of other circuits.[93] Instead, the majority reasoned that the second or successive bar does not by itself make section 2255 "inadequate or ineffective" and that such an emasculation of the second or successive bar would be contrary to the finality principles that underpin the AEDPA.[94] Yet such reasoning is insufficient because there are certain times when the savings clause does

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[88] *Gilbert III*, 640 F.3d at 1318.

[89] *See* Gilbert v. United States (*Gilbert III*), 640 F.3d 1293, 1331–35 (11th Cir. 2011) (Martin, J., dissenting).

[90] *See id.* at 1312 (majority opinion).

[91] *See id.* at 1330 (Barkett, J., dissenting).

[92] *Id.* at 1330–31 (Martin, J., dissenting).

[93] *Id.* at 1312–16 (majority opinion) (citing Taylor v. Gilkey, 314 F.3d 832, 835–36 (7th Cir. 2002); Okereke v. United States, 307 F.3d 117, 120–21 (3d Cir. 2002); United States v. Peterman, 249 F.3d 458, 461–62 (6th Cir. 2001); Kinder v. Purdy, 222 F.3d 209, 213–14 (5th Cir. 2000); *In re* Davenport, 147 F.3d 605, 609–10 (7th Cir. 1998)). The *Gilbert III* court reasoned that all of the above cited cases are broadly supportive of limiting operation of the savings clause to cases of actual innocence of a crime of conviction. *See id.*; *Taylor*, 314 F.3d at 835–36 (interpreting section 2255 to require a constitutional defect equivalent to conviction for nonexistent offense); *Okereke*, 307 F.3d at 120–21 (implying same). Not all of these cases, however, categorically preclude sentencing claims in Gilbert's situation. *See, e.g.*, *Peterman*, 249 F.3d at 462 (stating that the court was not determining the exact scope of the savings clause beyond its application to the prisoners in that case); *Kinder*, 222 F.3d at 214 (noting that prisoner had the opportunity to raise the claim in an earlier section 2255 motion); *Davenport*, 147 F.3d at 609 (same).

[94] *See Gilbert III*, 640 F.3d at 1308.

operate to allow a federal prisoner to file a petition for habeas corpus despite the second or successive bar.[95] Furthermore, finality, although an important concern within the criminal justice system, is naturally limited by competing constitutional concerns.[96] Thus, the savings clause problem is one of careful balancing between competing interests.[97]

The *Gilbert III* court's reasoning is also unwise in that it creates a strong probability that the second or successive bar violates the Suspension Clause of the Constitution.[98] The court, in drawing the line at all sentencing claims, completely eliminates judicial review for sentencing claims made by federal prisoners arising only after the prisoners' first section 2255 motions.[99]

Yet because section 2255 was intended as a more efficient substitute to the writ of habeas corpus, statutory interpretation of section 2255 should be governed by Suspension Clause concerns.[100] The *Gilbert III* court, in considering the Suspension Clause issue, looked to the Supreme Court's 1996 case, *Felker v. Turpin*, which held that a second or successive bar does not, on its face, unconstitutionally suspend habeas.[101] Accordingly, the *Gilbert III* court considered *Felker* determinative authority that second or successive restrictions do not unconstitutionally suspend the writ.[102] The court, however, failed to seriously consider whether, *as applied* to the facts of Gilbert's case, the second or successive bar amounted to a suspension of the writ.[103] As noted in Judge Beverly Martin's dissent in *Gilbert III*, in this regard it is helpful to consider the

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[95] *See id.* at 1312–15. The court implied that where the second or successive bar operates to deprive a prisoner of the ability to bring a claim, alleging that the prisoner was convicted of a nonexistent offense, relief under the motion would be "inadequate or ineffective" to test the legality of the detention, which would trigger the savings clause. *See id.*

[96] *See id.* at 1337 (Hill, J., dissenting); Hack, *supra* note 47, at 223.

[97] *See Gilbert III*, 640 F.3d at 1324.

[98] *See id.* at 1331 (Martin, J., dissenting); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 561 (2010) (implying that *Boumediene* suggests habeas review of judicial detention is required). Unlike the court in *Gilbert III*, the Supreme Court has exhibited reluctance to interpret statutes in a way that creates serious questions of constitutional suspension. *See* INS v. St. Cyr, 533 U.S. 289, 305 (2001) (suggesting that when interpreting statutes, the Court will err on the side of an interpretation that does not create "serious and difficult constitutional issue[s]").

[99] *See Gilbert III*, 640 F.3d at 1331–32 (Martin, J., dissenting); Hack, *supra* note 47, at 196.

[100] *See Gilbert III*, 640 F.3d at 1330–31 (Martin, J., dissenting) (arguing that accepting the marjority's statutory interpretation forces the question of constitutional suspension); *cf. St. Cyr*, 533 U.S. at 305 (interpreting statute so as to avoid "serious and difficult constitutional issue[s]").

[101] *See* Felker v. Turpin, 518 U.S. 651, 664 (1996); *Gilbert III*, 640 F.3d at 1317.

[102] *See Gilbert III*, 640 F.3d at 1317.

[103] *See id.* at 1330 n.2 (Barkett, J., dissenting).

history of Gilbert's case.[104] The majority's decision would leave Gilbert without any opportunity for collateral review of his claim, despite the fact that the claim only became available after a change in the law that was subsequent to his first section 2255 motion.[105]

This conclusion—that Gilbert lacks any opportunity to obtain judicial review of his claim—is in tension with the conception of habeas corpus as set out in the 2008 Supreme Court case, *Boumediene v. Bush*.[106] On the one hand, the *Gilbert III* court was correct that *Boumediene* applies to noncitizens held subject to executive detention.[107] On the other hand, however, *Boumediene*, explicitly sets out baseline elements required of an adequate substitute for habeas corpus so as not to be an unconstitutional suspension of the writ.[108] Further, in describing the essence of habeas corpus, the Court stated that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[109] Although a "meaningful opportunity" likely does not mean that prisoners may use the writ to file petitions that could have been filed previously, Gilbert had no opportunity to have a court examine the legality of his sentence in light of the change in the law.[110] For that reason, given the *Gilbert III* court's interpretation of the savings clause, the court likely suspended Gilbert's right to the writ of habeas corpus.[111]

In contrast, the *Gilbert II* court recognized the Suspension Clause trap involved in overly restricting the operation of the savings clause.[112] By modifying the test set out by the Eleventh Circuit in 1999 in *Wofford v. Scott*, the *Gilbert II* panel more pragmatically interpreted section 2255, by finding a black-letter rule for the savings clause, but modifying the rule where section 2255 was plainly "inadequate or ineffective."[113] Such an approach, although possibly allowing some abuse of the writ at the margins, is more consistent with the plain meaning of the savings

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[104] *Id.* at 1331 (Martin, J., dissenting).

[105] *Id.* at 1331–32.

[106] *See id.* at 1331; Neuman, *supra* note 98, at 561.

[107] Boumediene v. Bush, 553 U.S. 723, 771 (2008)

[108] *Id.* at 779; *see Gilbert III*, 640 F.3d at 1318; Neuman, *supra* note 98, at 560.

[109] *Boumediene*, 553 U.S. at 779.

[110] *See Gilbert III*, 640 F.3d at 1329–30 (Barkett, J., dissenting).

[111] *See id.*; *id.* at 1330–31 (Martin, J., dissenting).

[112] *See* Gilbert v. United States (*Gilbert II*), 609 F.3d 1159, 1163 (11th Cir. 2010), *vacated*, 625 F.3d 716 (11th Cir. 2010), *aff'd en banc*, 640 F.3d 1293, 1298 (11th Cir. 2011).

[113] *See id.* at 1163–65; *see also* Wofford v. Scott, 177 F.3d 1236, 1244 (11th Cir. 1999).

clause and avoids creating an unnecessary constitutional issue out of the second or successive bar.[114]

Conclusion

The *Gilbert III* court held that a sentencing error cannot trigger the savings clause in section 2255 as long as the resulting sentence is less than the statutory maximum. Yet such a conception of the savings clause effectively reads the savings clause out of existence for an entire class of prisoners who might have legitimate sentencing claims, which could not have been raised before a second section 2255 motion. The result of such a statutory interpretation is that the second or successive bar likely becomes an unconstitutional suspension of the writ of habeas corpus as applied to individuals like Gilbert. Instead, the better path is that of the *Gilbert II* court, which, by setting out a rule for applying the savings clause and modifying it in response to a case where section 2255 appeared "inadequate or ineffective," remains consistent with the plain meaning of the savings clause and avoids any Suspension Clause implications stemming from an impotent savings clause.

Nicholas Matteson

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[114] *See Gilbert III*, 640 F.3d at 1331–32, 1333 (Martin, J., dissenting).