

QUESTIONS PRESENTED

Petitioner Ezell Gilbert’s federal sentence was enhanced based on a prior conviction that the Eleventh Circuit deemed a “crime of violence.” Gilbert unsuccessfully challenged this enhancement at sentencing and on direct appeal. He then unsuccessfully moved for post-conviction relief under 28 U.S.C. § 2255, challenging the enhancement via an ineffective assistance of counsel claim. Subsequently, this Court decided *Begay v. United States*, 553 U.S. 137 (2008), which abrogated the decision in Gilbert’s case and established his sentence was imposed in violation of the laws of the United States. Gilbert promptly moved for habeas corpus relief from his illegal sentence under 28 U.S.C. § 2241 or, alternatively, for leave to reopen and amend his first § 2255 motion. In the en banc decision below, the Eleventh Circuit held that such relief was barred under these circumstances. This holding gives rise to the following questions:

I. Whether a federal prisoner may challenge the legality of his sentence under 28 U.S.C. § 2241 via the savings clause of § 2255(e), where the basis for the challenge is a circuit-law busting, retroactive decision by this Court that was issued after the prisoner’s first § 2255 motion had been denied?

II. Whether a federal prisoner may seek to reopen his first 28 U.S.C. § 2255 proceeding pursuant to Federal Rule of Civil Procedure 60(b) and amend his § 2255 motion to include a challenge to his sentence that is related to the challenge presented in his first § 2255 motion?

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Petitioner Ezell Gilbert respectfully prays that this Court issue a writ of certiorari to review the en banc judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Gilbert moved for post-conviction relief after an intervening decision by this Court abrogated the decision in his direct appeal, *United States v. Gilbert*, 138 F.3d 1371, *reh'g denied*, 156 F.3d 188 (11th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999) (App. D).¹ The district court denied relief, *Gilbert v. United States*, 2009 WL 981918 (M.D. Fla. Apr. 13, 2009) (App. C-1),² but a panel of the Eleventh Circuit reversed, *Gilbert v. United States*, 609 F.3d 1159 (11th Cir. 2010) (App. B). The Eleventh Circuit, en banc, then reversed the panel decision and affirmed the district court's decision, *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc) (App. A).

JURISDICTION

On May 19, 2011, the Eleventh Circuit entered its en banc decision, which Gilbert has invoked this Court's jurisdiction to review by the timely filing of this petition for writ of certiorari. *See* 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

¹ *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir.2008) (stating that *Begay v. United States*, 553 U.S. 137 (2008), is "clearly on point and has undermined *Gilbert* to the point of abrogation").

² *See also United States v. Gilbert*, 2009 WL 151108 (M.D. Fla. Jan. 21, 2009) (App. C-2) (discussing the availability of post-conviction relief in denying Gilbert a sentence reduction under 18 U.S.C. § 3582(c)(2) and the retroactive 2007 crack cocaine sentencing guideline amendment).

The Constitution’s Due Process Clause provides: “No person shall . . . be deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V.

The relevant statutory provisions – 28 U.S.C. §§ 2241 and 2255 – are contained in Appendix E and Appendix F, respectively.

STATEMENT OF THE CASE

It is irrefutable that Gilbert’s sentence was wrongly enhanced under the then-mandatory federal sentencing guidelines based upon the lower courts’ erroneous conclusion that his prior conviction for carrying a concealed firearm qualified as a “crime of violence” for career offender purposes. As a result of this error, Gilbert’s sentence was enhanced by at least eight years in prison. The district court wanted to impose a lower sentence but felt bound by the pre-*Booker*³ mandatory sentencing guideline regime. The question before this Court is how to correct that mistake in light of the procedural traffic in Gilbert’s case.

It is undisputed that Gilbert has acted diligently and reasonably in specifically challenging the career offender enhancement based on his prior carrying-concealed-firearm conviction. He objected at sentencing, raised the issue on direct appeal, petitioned for rehearing en banc, and sought certiorari review by this Court. All of these efforts were rejected, and his judgment became final in 1999. That same year – well before this Court and the Eleventh Circuit vindicated his argument that his prior conviction did not qualify as a “crime of violence” – Gilbert timely filed and lost a motion to correct his sentence under 28 U.S.C. § 2255.

To date, the government’s position has been that Gilbert’s sentence must stand because he has no available remedy. To this, Gilbert humbly disagrees. As discussed below, Gilbert has two

³ See *United States v. Booker*, 543 U.S. 220 (2005).

legal and justifiable vehicles by which to avoid the miscarriage of justice that occurred in his case:

(1) 28 U.S.C. § 2241, and (2) Fed. R. Civ. P. 60(b).

Gilbert, a federal prisoner, invoked the district court's jurisdiction, pursuant to 28 U.S.C. §§ 2241 and 2255, by filing a motion to reopen and amend his first 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence ("§ 2255 motion"), pursuant to Rule 60(b), Fed. R. Civ. P., or, alternatively, to construe his motion as a habeas corpus petition under § 2241. The district court denied Gilbert's request for post-conviction relief, App. C-1, but granted a certificate of appealability on the following issues:

1. Whether the district court erred in denying Petitioner's Rule 60(b) motion to reopen his § 2255 action and amend his § 2255 motion on the ground that the Rule 60(b) motion was in substance a successive § 2255 motion.
2. Whether the district court erred in denying Petitioner's request to treat his Rule 60(b) motion as a petition pursuant to 28 U.S.C. § 2241.

Gilbert v. United States, 2009 WL 1664075 (M.D. Fla. June 15, 2009).

The Eleventh Circuit assumed jurisdiction over Gilbert's appeal, pursuant to 28 U.S.C. §§ 1291 and 2253(a). A panel of the Eleventh Circuit reversed the district court's denial of post-conviction relief and remanded for resentencing on June 21, 2010. App. B. The government's timely petition for rehearing en banc was granted, pursuant to Rule 35, Fed. R. App. P., *see Gilbert v. United States*, 625 F.3d 716 (11th Cir. Nov. 3, 2010), and briefing was ordered on the following issue: "Did the district court err in determining that Gilbert is not entitled to relief?" On May 19, 2011, the Eleventh Circuit, en banc, affirmed the district court's denial of post-conviction relief in a sharply divided opinion. App. A.

Gilbert's case is of great significance on a number of levels. It presents important and recurring questions of federal law attendant to the interaction among the competing statutory provisions of § 2241, § 2255(e)'s savings clause, and § 2255(h)'s second/successive-motion bar.

These issues arise repeatedly throughout the country and are the subject of pervasive confusion among the lower courts and litigants. The Eleventh Circuit decision, if allowed to stand, will not just perpetuate the manifest injustice inherent in Gilbert's case; it will also perplex those who must comply with an already complex body of law, made even more difficult by the quagmire of conflicting lower court decisions. This case presents the opportunity for this Court to provide the authoritative guidance that is crucial for these lower courts. Additionally, this Court's guidance is much needed by federal prisoners nationwide, who, like Gilbert, are serving a drastically longer prison sentence than would have been imposed, had the sentencing court known of a subsequent, retroactive, circuit-law busting decision from this Court that would vindicate these defendants' sentencing objections after their sentence became final. In light of the important and recurring questions of federal law presented herein, a nationally binding rule of law is imperative.

1. The Original Criminal Proceedings

Gilbert entered federal custody on January 18, 1996, following his arrest on a two-count indictment that charged him with possession with intent to distribute crack cocaine and marijuana. After pleading guilty to both counts, he was sentenced on March 26, 1997, under the then-mandatory federal sentencing guidelines. Although his unenhanced guideline range was 151-188 months, the district court determined that he qualified as a career offender, under USSG §§ 4B1.1 and 4B1.2, which enhanced his sentencing range to 292-365 months' imprisonment.

At his sentencing hearing, Gilbert objected to one of the two prior convictions the court determined were career offender predicates. Specifically, he argued that his prior Florida conviction for carrying a concealed firearm was not a "crime of violence," and he therefore had only one prior conviction that qualified as a predicate for career offender purposes. The district court overruled Gilbert's objection and sentenced him to the minimum 292-month career offender sentence, stating:

The fact that I think the sentence is too high is immaterial. Maybe I shouldn't say what I think, but Congress has gone too far. . . . I don't see any authority under the law for me to downwardly depart. . . . If I'm wrong, they will correct it. Because if I could do it legally, I would. I don't think I can. The U.S. Attorney tells me I can't. Probation tells me I can't, so I don't think I can even though I would if I could.

Transcript of Sentencing Hearing, March 25, 1997, pages 4-5.

Gilbert pursued this challenge to his then-mandatory career offender sentence on appeal. The Eleventh Circuit affirmed Gilbert's sentence, holding that carrying a concealed firearm was a "crime of violence." *United States v. Gilbert*, 138 F.3d 1371, 1372 (11th Cir.1998). Gilbert's petition for rehearing and rehearing *en banc*, as well as his petition for writ of certiorari, seeking review of his career offender enhancement were denied. *See United States v. Gilbert*, 156 F.3d 188 (11th Cir.1998) (table); *Gilbert v. United States*, 526 U.S. 1111 (1999).

2. Section 2255 Motion

Within months of his sentence becoming final, Gilbert filed a *pro se* § 2255 motion, challenging his sentence based on, *inter alia*, the career offender enhancement predicated on the offense of carrying a concealed firearm, via an ineffective assistance of counsel challenge. The district court denied the § 2255 motion on the merits, noting that the motion, as amended, was timely. The district court also discussed and quoted from the Eleventh Circuit's decision in Gilbert's direct appeal, and addressed the prior carrying-concealed-firearm conviction, which served as a predicate for the career offender enhancement, at several other places throughout its order.

In 2004, the district and appellate courts denied Gilbert a certificate of appealability, thereby concluding Gilbert's first § 2255 proceedings. As the Eleventh Circuit later observed, "Gilbert continued serving his sentence, all paths to relief now exhausted by him." App. C. at 1161.

3. This Court's Intervening Jurisprudence

In 2008, this Court answered the question of what sort of prior convictions permit enhancement under the Armed Career Criminal Act (“ACCA”), which, like USSG §§ 4B1.1 and 4B1.2, permits enhancement of the underlying sentence where the defendant has prior “violent felony” convictions.⁴ *See Begay v. United States*, 553 U.S. 137 (2008). That same year, the Eleventh Circuit held that *Begay* abrogated its holding in Gilbert’s direct appeal that carrying a concealed firearm is a crime of violence under the career offender sentencing guidelines. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir.2008) (holding that “where the Supreme Court has clearly set forth a new standard to evaluate which crimes constitute ‘violent felonies’ and ‘crimes of violence,’ our prior panel precedent in *Gilbert* has been undermined to the point of abrogation and we are thus bound to follow [the Supreme Court’s] new rule of law”).

4. The Current Post-Conviction Proceedings in the District Court

Within months of the abrogation of the final decision in Gilbert’s case, the district court sua sponte appointed counsel for Gilbert and ordered the parties to address the applicability of the retroactive 2007 crack cocaine guideline amendment, USSG App. C, amends. 706 & 713. That amendment reduced Gilbert’s unenhanced guideline range to 130-162 months’ imprisonment.⁵

The government responded that Gilbert was not eligible for a sentence reduction because he was sentenced pursuant to the career offender guideline, not the crack cocaine guideline to which the amendment applies. The government further argued that Gilbert was entitled to no relief from

⁴ The definition of “crime of violence” in the career offender guideline is virtually identical to the definition of a “violent felony” in the ACCA. *Compare* USSG § 4B1.2(a), *with* 18 U.S.C. § 924(e)(2)(B). Those terms are therefore often used interchangeably.

⁵ That range would be reduced even farther under the retroactive crack guideline amendment that becomes effective November 1, 2011. *See* USSG App. C, amend. 750.

his career offender sentence – under *Begay* and *Archer* – because any post-conviction motion would be successive, and, therefore, disallowed absent a new constitutional rule. *See* 28 U.S.C. § 2255(h).⁶ Finding *Begay* announced a new rule of statutory construction (as opposed to a new constitutional rule), the district court reluctantly agreed, stating:

Unfortunately, Mr. Gilbert is in the unenviable position of having to remain in prison even though under the present interpretation of the law he is no longer deemed a career offender and has served the time that would be required of him were he sentenced today. Salt to the wound is that he legally challenged the very issue that now incarcerates him – but lost. It is faint justice to tell him now that he was right but there is no legal remedy.

Having exhausted all avenues known to the court, the Court determines that at this time it is unable to provide relief to Gilbert under the law as it currently exists.

App. C-2 at *5.

The following week, Gilbert filed a motion to reopen his first pro se § 2255 motion and to amend it to include a challenge arising out of the same conduct and occurrence – i.e., his career offender sentence – based on the intervening decisions in *Begay* and *Archer*. Alternatively, Gilbert asked the district court to treat the motion as one for § 2241 relief, pursuant to § 2255(e)’s savings clause. The government opposed any post-conviction relief for Gilbert.

The district court denied Gilbert’s motion, holding that he had not established that he was convicted of a nonexistent offense, as required by Eleventh Circuit precedent to file a § 2241 petition under § 2255(e)’s savings clause. *See* App. C-1 (citing *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999)). The district court also denied Gilbert’s motion to reopen his first § 2255 motion based on

⁶ Section 2255(h) permits a second or successive § 2255 motion only when there is (1) newly discovered evidence that would have led to a not-guilty verdict or (2) a new rule of constitutional law, made retroactive by this Court, that was previously unavailable.

Gonzalez v. Crosby, 545 U.S. 524 (2005). The district court, however, granted a certificate of appealability, *Gilbert*, 2009 WL 1664075.

5. The Current Post-Conviction Proceedings Before the Eleventh Circuit Panel

In reversing the district court’s denial of § 2241 relief, the Eleventh Circuit panel stated that the government’s argument that “Gilbert is entitled to no relief from an illegal sentence cannot be the law.” App. B at 1163. The panel recognized that in 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”) to limit second or successive motions under § 2255 and “achieve finality in convictions by barring successive and abusive collateral attacks.” *Id.* But the panel found that “where a petitioner has a claim that goes to the fundamental legality of his conviction and sentence, and for which he has had no prior opportunity to obtain a reliable judicial determination, serious constitutional issues might arise if the successive motion bar in § 2255 foreclosed all relief.” *Id.* (citing *Wofford*, 177 F.3d at 1244).

In *Wofford*, the Eleventh Circuit had interpreted the savings clause of § 2255(e) – which permits “traditional habeas relief by petition under § 2241 when it ‘appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [the federal prisoner’s] detention’” – as “saving § 2255 from such serious constitutional problems.” *Id.* (citing *Wofford*, 177 F.3d at 1241). After reviewing decisions of other appellate courts, the *Wofford* Court had determined that the savings clause of § 2255 applies to an otherwise barred claim when:

- 1) That claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner’s trial, appeal, or first § 2255 motion.

Id. at 1164 (quoting *Wofford*, 177 F.3d at 1244).

Wofford’s sentencing claim did not meet this standard because it was not based on a circuit-law busting, retroactive decision of this Court. *See id.* at 1164-65. The Eleventh Circuit had therefore left open the question of what sort of sentencing claim might meet that standard. *See id.*

The panel concluded that Gilbert’s claim, based on *Begay* and *Archer*, satisfied the *Wofford* savings clause standard. *Id.* at 1165-67. As to the first and third *Wofford* factors, the panel agreed with the government’s concession that *Begay* and *Archer* apply retroactively and that “circuit law squarely foreclosed [Gilbert’s] claim . . . when Gilbert presented it to every available court.” *Id.* at 1165.

Concerning the second factor, the panel found that Gilbert’s sentence was enhanced based upon a nonexistent offense – i.e., being a career offender with only one, rather than two, qualifying predicate offenses. *Id.* at 1167. The panel concluded that Gilbert, like the petitioner in *Davis v. United States*, 417 U.S. 333 (1974), had been sentenced for “an act that the law does not make criminal.” App. B at 1165.⁷ “For federal sentencing purposes,” the panel explained, “the act of being a career offender is essentially a separate offense, with separate elements (two felony convictions; for violent felonies), which must be proved, for which separate and additional punishment is provided.” *Id.* The panel also relied on this Court’s recognition of an “actual innocence of death” standard in capital cases, because both the death penalty and career offender enhancement are based on aggravating factors that result in an enhanced sentence. *Id.* at 1165-66 (citing *Sawyer v. Whitley*, 505 U.S. 333 (1992)). Drawing on the *Sawyer* actual innocence of death

⁷ The panel also noted that the defect in Gilbert’s sentence “may be of constitutional dimensions, since 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 (citing *Fiore v. White*, 531 U.S. 225, 228–29 (2001)).

standard, the panel concluded that Gilbert was “actually innocent” of the career offender enhancement. *Id.* at 1166.

Finding that Gilbert had already served more time in prison than he would have without the career offender enhancement, the panel stated that “he is, in a very real sense, presently serving his illegal enhancement. Such a complete miscarriage of justice entitles him to relief.” *Id.* at 1167. The panel then concluded its opinion by stating:

The animating principle underlying the writ of habeas corpus is fundamental fairness. *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Even as substantial roadblocks to collateral review of procedurally barred claims have been erected, the Supreme Court has consistently recognized that exceptions to these rules of unreviewability must exist to prevent violations of fundamental fairness. *Id.* at 135, 102 S.Ct. 1558. The principle of finality “must yield to the imperative of correcting a fundamentally unjust incarceration.” *Id.* Gilbert’s sentence enhancement for a nonexistent offense was fundamentally defective and his incarceration for that enhancement is a miscarriage of justice. He is entitled to relief under § 2241.

Id. at 1167-68; *see also id.* at 1168 (Martin, J., concurring) (writing separately “to note that the savings clause also applies because [] Gilbert’s sentencing claim is ‘based upon a retroactively applicable Supreme Court decision overturning circuit precedent,’” under *Wofford* and that Gilbert “is entitled to habeas relief because, on the extraordinary facts of this case, the error represents a ‘fundamental defect which inherently results in a complete miscarriage of justice’ and this case ‘present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent’”) (quoting *Davis*, 417 U.S. at 346) (internal quotation marks omitted).⁸

⁸ In so concluding, the panel rejected the government’s argument that such a ruling would open the “floodgates” to collateral attacks on sentences. As the panel noted:

The rule we formulate here today is applicable only in the rare circumstance of a retroactive Supreme Court decision that overturns clear circuit precedent and which establishes that the petitioner is serving an unlawful sentence. When these circumstances are present, relief is due.

6. The Current Post-Conviction Proceedings Before the Eleventh Circuit En Banc

A strongly divided en banc court affirmed the district court's denial of post-conviction relief. *See App. A*. Four judges concurred in three concurring opinions, and three judges dissented in three dissenting opinions.

a. Majority Opinion: The majority phrased the first question presented as: “Does the savings clause of § 2255(e) apply to claims that the sentencing guidelines were misapplied in the pre-*Booker* mandatory guidelines era in a way that resulted in a substantially longer sentence that does not exceed the statutory maximum?” *Id.* at 1306-07. In answering this question in the negative, *id.* at 1323-24, the en banc majority made the following subsidiary conclusions:

1. The majority first concluded that, as a matter of statutory construction, the “existence of the statutory bar on second and successive motions” in § 2255(h) “cannot mean that § 2255 is ‘inadequate or ineffective’ to test the legality of Gilbert’s detention within the meaning of the savings clause” of § 2255(e). *Id.* at 1307-09. The majority found that such an interpretation of the savings clause “would eviscerate the second or successive bar, and prisoners could file an endless stream of § 2255 motions, none of which could be dismissed without a determination of the merits of the claims they raise.” *Id.* at 1308.

2. In support of its statutory interpretation, the majority stated that “[t]he critically important nature of the finality interests safeguarded by § 2255(h) also weighs heavily against an

Id. at 1167 n.13; *see also App. A* at 1336 (Martin, Barkett, Hill, JJ., dissenting) (“[I]f there are others who are wrongfully detained without a remedy, we should devote the time and incur the expense to hear their cases. What is the role of the courts, if not this? But what is important today is the consequence to Mr. Gilbert of our unwillingness to correct our past legal error.”); *id.* at 1137 (Hill, Barkett, JJ., dissenting) (“The government hints that there are many others in Gilbert’s position – sitting in prison serving sentences that were illegally imposed. We used to call such systems ‘gulags.’ Now, apparently, we call them the United States.”).

interpretation of the savings clause that would lower the second or successive motions bar and permit guidelines-based attacks years after the denial of an initial § 2255 motion.” *Id.* at 1309-12; *but see id.* at 1324 (Tjoflat, Edmondson, JJ., concurring, but not joining in this section of the majority decision).

3. The majority also stated that every circuit that had considered this issue had reached the same conclusion -- *i.e.*, that “the savings clause of § 2255(e) does not permit a prisoner to bring in a § 2241 petition a guidelines miscalculation claim that is barred from being presented in a § 2255 motion by the second or successive motions bar of § 2255.” *Id.* at 1312-16; *but see id.* at 1335 (Martin, Barkett, Hill, JJ., dissenting) (disputing the majority’s view of the decisions of some circuits).

4. The majority determined, contrary to the dissenting opinions, that its interpretation of the savings clause did not violate the Suspension Clause. *Id.* at 1316-18 (citing *Felker v. Turpin*, 518 U.S. 651 (1996)).

5. The majority further concluded that “actual innocence” for savings clause purposes is limited to innocence of the offense of conviction, such as claims based on *Bailey v. United States*, 516 U.S. 137 (1995), and does not include a claim of innocence of the career offender enhancement. *Id.* at 1319-20 (limiting *Wofford*’s “nonexistent offense” standard to claims of actual innocence of the underlying conviction). Additionally, the majority stated that the “actual innocence of sentence exception” that applies in capital cases, recognized by this Court in *Sawyer*, was of no help to Gilbert. *Id.* at 1320-23. The Court cited four reasons: (i) neither this Court nor the Eleventh Circuit had applied the actual innocence of sentence exception to noncapital cases; (ii) the *Sawyer* exception is limited to claims of constitutional error, and Gilbert’s claim was not constitutional in nature; (iii) *Sawyer* requires a showing that, but for the claimed error, the petitioner would not be statutorily

eligible for the sentence imposed, but Gilbert was sentenced within the statutory maximum for his offense; and (iv) the *Sawyer* actual innocence of sentence exception – a “judge-made” doctrine – did not survive the enactment of § 2255(h), the second/successive bar that contains its own actual innocence exception. *Id.* at 1318, 1322 (quoting *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997)).

Having rejected the argument that Gilbert’s claim could be brought under § 2241 by virtue of § 2255(e)’s savings clause, the majority then turned to the question of whether Gilbert could reopen his first § 2255 proceeding. *Id.* at 1323. The majority decided that he could not, based on this Court’s decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). Although the majority recognized that *Gonzalez* was expressly limited to state prisoner cases brought under § 2254, it concluded that the statutory bars on second/successive motions in state and federal prisoner cases are “close enough that the relationship between each of those . . . provisions and Rule 60(b) should be the same.” *Id.* Accordingly, the majority decided that “[b]ecause Gilbert’s motion sought to assert or reassert a claim for relief, instead of pointing out a defect in the integrity of the earlier § 2255 motion proceeding in his case, under *Gonzalez* his motion is the equivalent of a second or successive motion and is barred by § 2255(h).” *Id.*

b. Concurring Opinions: Chief Judge Dubina specially concurred, explaining that while he had initially agreed with the panel decision, he now joined the majority because he was “persuaded that Gilbert’s sentencing claim does not fall within the savings clause of 28 U.S.C. § 2255, and that the policy principles regarding finality of judgment weigh most heavily in denying Gilbert the relief he seeks.” *Id.* at 1324.

Judge Tjoflat, in a concurring opinion joined by Judge Edmondson, agreed with the majority's decision that the savings clause did not apply to Gilbert's case, but declined to join in certain parts of the majority decision that they deemed irrelevant and speculative. *Id.*

Judge Pryor also concurred, joining fully in the majority opinion and writing separately to address the dissenting opinions. In Judge Pryor's opinion, the dissents' contention that "Gilbert has not had a 'meaningful opportunity' to challenge the legality of imprisonment," was "silly" because "Gilbert, like all other criminals prosecuted in the United States, has been afforded a panoply of rights, including the right to a jury trial, the right to counsel, and the rights to appeal and to seek postconviction relief." *Id.* at 1325; *but see id.* at 1330 n.3 (Barkett, Hill, JJ., dissenting) (finding "nothing silly – and everything solemn – about this case").

Judge Pryor further stated that the Suspension Clause could not assist Gilbert, rejecting the contrary conclusion of the dissents as being a "grandiose conception of judicial supremacy [that] would threaten the separation of powers and undermine the rule of law." *Id.* at 1327; *see also id.* at 1326 ("Because the Suspension Clause does not provide any rights to prisoners convicted and sentenced by courts of competent jurisdiction, any relief that Congress chooses to provide to federal prisoners is . . . a gift[] that may be bestowed or withheld.") (internal quotation marks and citations omitted).

c. Dissenting Opinions: Judge Barkett, in a dissenting opinion joined by Judge Hill, wrote "separately to emphasize that 28 U.S.C. § 2255(e) is referred to as the 'savings' clause for a reason." *Id.* at 1329. Judge Barkett explained:

By permitting a federal prisoner to bring a habeas corpus petition under 28 U.S.C. § 2241 where § 2255 proves "inadequate or ineffective remedy to test the legality of his detention," § 2255(e) operates to "save" § 2255 from violating the Suspension Clause of the United States Constitution. In a recent landmark decision comprehensively interpreting the Suspension Clause, the Supreme Court squarely held that the Suspension Clause is violated when a prisoner is denied "a meaningful

opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.” *Boumediene v. Bush*, 553 U.S. 723, 779, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). Thus, where the application of the statutory bar in § 2255(h) would deny a federal prisoner such a meaningful opportunity, the savings clause must apply in order to avoid an unconstitutional suspension of the writ of habeas corpus. In this case, there can be no dispute that Gilbert, through no fault of his own, has been denied a meaningful opportunity to challenge the legality of his detention. Because the Constitution guarantees him that opportunity, I believe that the savings clause authorizes him to bring his claim in a habeas corpus petition under § 2241.

Id. at 1329-30 (footnotes omitted).

Judge Barkett also noted her disagreement with Judge Pryor’s premise that the “Suspension Clause applies only where a prisoner has been convicted and sentenced by a court of incompetent jurisdiction,” because “[t]hat view. . . is not one shared by the Supreme Court.” *Id.* at 1329 n.1 (citing *Boumediene*, 553 U.S. at 785). Concerning the majority’s suggestion “that the statutory bar in § 2255(h) is wholly immune from the Suspension Clause,” Judge Barkett observed that in *Felker v. Turpin*, this Court “held only that the analogous statutory bar in 28 U.S.C. § 2244(b)(3) did not violate the Suspension Clause *on its face*.” *Id.* at 1330 n.2. The *Felker* Court did not “suggest, let alone hold, that the statutory bar would not violate the Suspension Clause where its application in a particular case has the egregious effect of denying a prisoner a meaningful opportunity to challenge the legality of his detention.” *Id.*

Finally, Judge Barkett took issue with the concurring opinion, which disputed “that Gilbert, through no fault of his own, has been denied a meaningful opportunity to challenge the legality of his detention.” *Id.* at 1330 & n.3. She expounded that “every court to review Gilbert’s meritorious claim, which he has pursued with diligence, has lacked the authority to correct the legal error he identified. Judicial review of this sort is vacuous and hollow, not meaningful.” *Id.* at 1330 n.3 (citing *Boumediene*, 553 U.S. at 785).

Judge Martin, in an opinion joined by Judge Barkett and Judge Hill, observed that Gilbert was currently in prison based on “a mistake we made in his direct appeal in 1998.” *Id.* at 1330. After having been erroneously denied relief on his career offender challenge in his direct appeal, Gilbert could not have raised that same claim in his first § 2255, Judge Martin wrote, because (1) *Begay* had not been decided by that time, and (2) binding Eleventh Circuit precedent prevented Gilbert from raising a claim that had already been denied on direct appeal. *Id.* (citing *United States v. Nyhius*, 211 F.3d 1340 (11th Cir. 2000)). Further elaborating on the consequences of the mistake in Gilbert’s direct appeal and why Gilbert is now entitled to relief, Judge Martin stated:

The effects of our mistake are quite dire for Mr. Gilbert, insofar as his properly calculated (and advisory) guideline range would today be 130–162 months, or approximately 11 to 13 years. As I write this, I understand that he has already served more than fourteen years in prison. And yet the majority opinion tells Mr. Gilbert that the laws and Constitution of this country offer him no relief. I differ with the majority insofar as I believe the statute offers Mr. Gilbert a remedy under these extraordinary circumstances. If, on the other hand, I must accept the majority position that Mr. Gilbert has no statutory remedy, I say that he has been subjected to a deprivation of liberty of such magnitude that, when paired with no possible remedy, we are confronted with a constitutional question that we otherwise need not have reached. That constitutional question is whether [AEDPA] as interpreted by the majority, constitutes a suspension of the writ in violation of Article I, § 9, cl. 2 of the United States Constitution.

Id. at 1330-31.

Judge Martin also expressly disagreed with the majority’s interpretation of the savings clause, which she found “ignores another fundamental canon of statutory construction . . . which disfavors repeal of a statute by implication.” *Id.* 1333 (citing *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974)). Noting that Congress had left § 2255(e)’s savings clause intact when it passed the AEDPA, Judge Martin reasoned that “[b]y grafting the requirements of § 2255(h) onto the savings clause, the majority has stripped that clause of any independent meaning.” *Id.* at 1334.

Judge Martin next found that, contrary to the majority's conclusion, finality interests did not favor denying Gilbert relief because:

1. "[D]enying relief does not build confidence in our court system because this looks to the world like a court refusing to acknowledge or make amends for its own mistake."
2. "[T]o the extent that there have been administrative costs and delay in considering Mr. Gilbert's request for relief, they have already been incurred, and we need only grant him that relief to end his very expensive incarceration."
3. "[B]ecause the only issue before us is a purely legal one, there is no evidence we must consult. Thus spoliation is not a concern. And . . ."
4. "Mr. Gilbert's case presents no comity concerns insofar as he seeks to correct a sentence imposed in federal court and not by the state."

Id. at 1334.

Judge Hill also dissented and, in an opinion joined by Judge Barkett, presented the following view of Gilbert's case:

Ezell Gilbert's sentence was enhanced by eight and one-half years as the result of his being found by the district court – reluctantly and at the explicit urging of the government – to be a career offender. Ezell Gilbert is not now, nor has he ever been, a career offender. The Supreme Court says so.

Today, this court holds that we may not remedy such a sentencing error. This shocking result – urged by a department of the United States that calls itself, without a trace of irony, the Department of Justice – and accepted by a court that emasculates itself by adopting such a rule of judicial impotency – confirms what I have long feared. The Great Writ is dead in this country.

Id. at 1336.

Concerning the majority's reliance on "finality interests" to deny Gilbert relief, Judge Hill agreed that "without finality there can be no justice." *Id.* at 1337. But, he continued, "without justice, finality is nothing more than a bureaucratic achievement." *Id.* Judge Hill explained that "[f]inality with justice is achieved only when the imprisoned has had a meaningful opportunity for

a reliable judicial determination of his claim.” *Id.* Gilbert, Judge Hill concluded, “has never had this opportunity.” *Id.*

REASONS FOR GRANTING THE WRIT

The essence of Gilbert's case was succinctly stated by the dissent from the en banc decision below as follows:

Ezell Gilbert is now before us asking to be relieved of the consequences of a mistake we made in his direct appeal in 1998. He told us then that the District Court was wrong in sentencing him substantially more harshly based on that court's decision that carrying a concealed weapon is a crime of violence. We rejected his argument, and affirmed his sentence of more than 24 years. We did this on a record containing the District Judge's clear statement that the sentence was longer than he would have imposed, but for the then-mandatory Sentencing Guidelines. It turns out, of course, that Mr. Gilbert was right and we were wrong. Carrying a concealed weapon is not a crime of violence. We said so, belatedly for Mr. Gilbert, in *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

App. A at 1330 (Martin, Barkett, Hill, JJ., dissenting) (internal citations omitted).

Now that Gilbert's challenge to the legality of his sentence has been vindicated by a retroactive decision of this Court – which abrogated the final judgment affirming Gilbert's sentence on direct appeal – Gilbert requests only that he be granted relief from what the court below recognized as its own “mistake” that has cost Gilbert an extra decade of his liberty. *Id.* The courts below have taken conflicting positions on this request, ultimately denying Gilbert the relief he has sought for these many years. Gilbert therefore petitions this Court for resolution of the important legal issues that have confounded the courts below in his case and in the cases of many other federal prisoners who are situated similarly to him.

These issues involve the conundrum presented by the interplay of the successive-motion bar found in § 2255(h), the savings clause codified in § 2255(e), and the habeas corpus statute at § 2241, when this Court issues a retroactively applicable, circuit law busting decision. Although such decisions do not issue on a regular basis, when they do occur, countless federal prisoners could

benefit from them.⁹ Post-conviction relief may provide these persons with their only meaningful opportunity to present the courts with a meritorious claim that their conviction or sentence violates the laws of the United States. *See* 28 U.S.C. § 2255(a) (authorizing federal prisoners apply for post-conviction relief “upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack”).

If, however, the defendant preserved the issue on direct appeal, when circuit law precluded relief, and his timely § 2255 motion was denied before this Court retroactively established his claim to relief, according to the en banc decision below, he will likely be barred from any relief. To deny such relief under these circumstances, which present a truly equitable use of post-conviction relief, raises serious constitutional concerns. *See, e.g.*, App. A at 1329-30 (Barkett, Hill, JJ., dissenting) (stating that where § 2255(h)'s successive motion bar would deny a federal prisoner “a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law,” § 2255(e)’s “savings clause must apply in order to avoid an unconstitutional suspension of the writ of habeas corpus”) (quoting *Boumediene*, 553 U.S. at 779).

I. This Court’s Guidance is Needed to Interpret the Meaning of the Savings Clause of 28 U.S.C. § 2255(e).

When Congress amended the AEDPA to include a stringent barrier to second or successive § 2255 motions, it left intact the habeas remedy codified in § 2241 and the savings clause set forth in § 2255(e). The savings clause provides a gateway for a federal prisoner who has already been denied § 2255 relief to obtain post-conviction relief under § 2241, if it “appears that the remedy by

⁹ For example, one is hard pressed to find a retroactively applicable decision of this Court that affected as substantial of a number of federal prisoners as *Bailey* in 1995 and *Begay* in 2008.

[§ 2255] motion is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). This Court’s guidance is needed concerning the meaning of this savings clause.

The interpretation given the savings clause by the court below eviscerates both § 2241 and § 2255(e) because it precludes their use whenever § 2255 relief is barred under the successive motion provision in § 2255(h). In essence, if the prisoner has previously been denied § 2255 relief, the court below has determined that he has forever forfeited any opportunity to challenge the legality of his sentence, even when this Court issues a retroactively applicable, intervening decision that overturns clear circuit precedent that was previously relied upon to deny that prisoner relief from his unlawful sentence in the first place. Gilbert, like several of the judges below, disputes this narrow interpretation of these statutes.

Despite the longevity of these statutes, and their impact nationwide on federal prisoners whose sentences have been proven to violate “the laws of the United States,” *see* § 2255(a), but only *after* their first § 2255 motion was denied, this Court has not yet spoken to the important federal questions presented here concerning the meaning and interaction of § 2255(e), § 2255(h), and § 2241. *Cf. Davis v. United States*, 417 U.S. 333, 341 (1974) (granting certiorari “[b]ecause the case presents a seemingly important question concerning the extent to which relief under 28 U.S.C. § 2255 is available by reason of an intervening change in the law”); *Barber v. Thomas*, 130 S. Ct. 2499, 2504 (granting consolidated petition for certiorari “[b]ecause the BOP’s administration of good time credits affects the interests of a large number of federal prisoners”). Gilbert’s case presents the Court with the opportunity to settle these issues.

A. The Eleventh Circuit’s Interpretation of the Savings Clause in the Decision Below is Erroneous, Internally Inconsistent, and Contrary to Other Circuit Decisions.

In the decision below, the Eleventh Circuit concluded that the savings clause could not be interpreted to permit Gilbert’s sentencing claim. App. A at 1308. Gilbert respectfully submits that the Eleventh Circuit’s interpretation of the savings clause is erroneous and deserving of review by this Court.

The Eleventh Circuit found that the “existence of the statutory bar on second and successive motions” under § 2255(h), which prevented Gilbert from filing another § 2255 motion, “cannot mean that § 2255 is ‘inadequate or ineffective’ to test the legality of Gilbert’s detention within the meaning of the savings clause.” *Gilbert*, 640 F.3d at 1308. Otherwise, the Eleventh Circuit reasoned, such an interpretation “would eviscerate the second or successive motions bar.” *Id.* As the Eleventh Circuit interpreted the savings clause, if a claim is precluded by § 2255(h), the savings clause does not permit it to be brought under § 2241. *See id.* This interpretation precluded relief in Gilbert’s case. *Id.*

The Eleventh Circuit’s conclusion, however, is deserving of this Court’s review because:

1. It is contrary to the view of the three dissenting judges, who found that the majority’s interpretation “has stripped th[e] [savings] clause of any independent meaning,” despite “Congress’s deliberate choice to leave the savings clause intact when passing AEDPA.” *Id.* at 1333-34 (Martin, Barkett, Hill, JJ., dissenting). As the dissent explained, while the majority reasoned that the more general savings clause in § 2255(e) could not override the more specific second/successive bar in § 2255(h), the majority’s interpretation ignored another canon of statutory construction “which disfavors repeal of a statute by implication.” *Id.* at 1333.

2. The majority’s interpretation of the savings clause is internally inconsistent. The court of appeals interpreted the savings clause not to permit Gilbert’s challenge to his sentence based on *Begay*, because his claim was barred by § 2255(h) and allowing such a claim under the savings clause would “eviscerate” the second or successive bar. *Id.* But the court of appeals itself recognized, later in its opinion, that the savings clause *would* permit some challenges (challenges to a federal prisoner’s conviction based on *Bailey*)¹⁰ even though they were barred by § 2255(h). *See App. A* at 1319 (limiting savings clause claims to challenges to a conviction by stating, “*Bailey* actual innocence claims are what the *Wofford* panel had in mind when it stated [in dicta] that the savings clause would permit a prisoner to bring a § 2241 petition claiming that a retroactively applicable, circuit-law busting decision of the Supreme Court established that he had been convicted of a nonexistent crime”). Thus, even the Eleventh Circuit recognized that not all claims barred by § 2255(h) are necessarily foreclosed from review under § 2241 via § 2255(e)’s savings clause.

3. The Eleventh Circuit’s interpretation conflicts with that of the dissenting judges, and the Seventh Circuit, that the savings clause’s “inadequate or ineffective” language permits a claim to be brought under § 2241 when the petitioner has not had a meaningful opportunity to challenge the legality of his detention. In Gilbert’s case, the dissent found that § 2255 had been inadequate and ineffective because: (i) he had raised his claim on direct appeal but lost, (ii) he could not raise his challenge in his first § 2255 (*Begay* had not yet been decided and he had already raised this claim on direct appeal), and (iii) a second or successive petition is not available to him under § 2255(h). *Id.* at 1331-32 (Martin, Barkett, and Hill, JJ. dissenting). And, in *In re Davenport*, 147 F.3d 605, 610 (7th Cir. 1998), the Seventh Circuit similarly found that a petitioner who “had no reasonable

¹⁰ *Bailey v. United States*, 516 U.S. 137 (1995) (narrowing the meaning of “use” under 18 U.S.C. § 924(c)).

opportunity” to challenge his conviction, where *Bailey* was decided after his § 2255 motion was denied, met the savings clause’s “inadequate or ineffective” standard.

The Eleventh Circuit majority, by contrast, read the savings clause to permit claims when a petitioner challenges his conviction (like *Bailey* claims), but not when, as in Gilbert’s case, a petitioner challenges his career offender sentence under the federal sentencing guidelines (even when that sentence was imposed under the then-mandatory guideline regime). App. A at 1319-20. However, this distinction between challenges to a conviction or guideline sentence finds no support in the text of the savings clause, which refers to the “legality of [the prisoner’s] detention.” 28 U.S.C. § 2255(e).¹¹ Nor, moreover, is the majority’s distinction supported, as it asserted, by decisions of the Seventh Circuit. Compare App. A at 1313-15, with *Davenport*, 147 F.3d at 609-10 (distinguishing, for savings clause purposes, between petitioner who could have raised sentencing claim in first § 2255 but did not, and petitioner who could not have raised conviction challenge in first § 2255 because *Bailey* decided after denial of that motion); *Cooper v. United States*, 199 F.3d 898, 901 (7th Cir. 1999) (reading *Davenport* to distinguish on this basis).¹²

¹¹ Section 2255(a) speaks in terms of challenges to the petitioner’s sentence. See 28 U.S.C. § 2255(a) (permitting claims to challenge “*sentence* 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*) (emphasis added).

¹² The Eleventh Circuit stated that in *Taylor v. Gilkey*, 314 F.3d 832 (7th Cir. 2002), the Seventh Circuit made clear that “Section 2255(e)’s savings clause does not apply to sentencing claims.” App. A at 1315. But the Seventh Circuit in *Taylor* did not exclude all sentencing claims from the savings clause. Instead, it drew a distinction for savings clause purposes between long-standing constitutional claims (such as ineffective assistance of counsel) and claims based on retroactive decisions of statutory interpretation. *Taylor*, 314 F.3d at 835 (“Because Congress may have overlooked the possibility that new and retroactive *statutory decisions* could support collateral review, we held in *Davenport* that for this small class of situations § 2255 is inadequate or ineffective to test the legality of [the] detention. What *Davenport* strongly implied-what we now

For these reasons, this Court’s guidance is needed to address the competing interpretations of the savings clause. The Eleventh Circuit’s interpretation of the savings clause to preclude any meaningful opportunity for Gilbert to correct his erroneous career offender sentence “cannot be the law.” App. B at 1163 (panel decision).

B. This Court’s Guidance is Needed to Address the Scope of *Sawyer’s* Actual Innocence of Sentence Exception and Whether that Exception Survived AEDPA’s Second or Successive Bar (§ 2255(h)).

Having concluded that Gilbert’s claim did not fall within the savings clause of § 2255(e), and that its interpretation of the savings clause did not run afoul of the Suspension Clause, the Eleventh Circuit considered whether the “actual innocence of **sentence** exception” that this Court has recognized in capital cases, *Sawyer v. Whitley*, 505 U.S. 333 (1992), applied to Gilbert’s case. App. A at 1320-23 (emphasis added). In *Sawyer*, this Court addressed what it meant to be “actually innocent” of the death penalty. 505 U.S. at 335. Actual innocence allows a claim that is otherwise barred (because it is successive, abusive, or defaulted)¹³ when cause and prejudice cannot be shown. *Id.* at 335, 338. *Sawyer* provided that actual innocence for this purpose meant that the petitioner is ineligible for the death penalty. *Id.* at 347-48 & n.15 (agreeing with actual innocence test in *Johnson v. Singletary*, 938 F.2d 1166 (11th Cir. 1991) (en banc), that but for constitutional error, no reasonable juror would find the petitioner eligible for the death penalty). The Eleventh Circuit found that *Sawyer’s* actual innocence of sentence exception was of no help to Gilbert for four reasons. App. A at 1320-23. However, some of the reasons offered by the Eleventh Circuit conflict with

make explicit-is that a claim of error in addressing the sort of *constitutional theory* that has long been appropriate for collateral review does not render § 2255 ‘inadequate or ineffective.’”) (citation omitted; emphasis added).

¹³ This Court defined successive claims as those that had been previously heard and decided on the merits, abusive claims as those that had not previously been raised, and defaulted claims as those that were not raised in accordance with the state court’s procedural rules. *Id.* at 339.

decisions of other circuits, and only this Court can ultimately resolve whether *Sawyer* applies in cases such as Gilbert's.

1. Gilbert's Case Presents the Issue of Whether *Sawyer* is Limited to Capital Cases, an Issue that Divides the Circuits and That Was Left Unresolved in *Dretke v. Haley*, 541 U.S. 386 (2004)

The first reason asserted in the en banc decision for why *Sawyer* is no help to Gilbert is that neither this Court nor the Eleventh Circuit has applied the actual innocence of sentence exception to noncapital cases and, according to the Eleventh Circuit, the "better view" is that it does not apply in such cases. App. A at 1321. This Court, however, has not held that the actual innocence of sentence exception is limited to capital cases; instead, it has declined to decide this issue. *See Dretke v. Haley*, 541 U.S. 386, 392-94 (2004) (recognizing circuit split on this issue, but holding that a court "must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default").

The Eleventh Circuit's view is in conflict with the decisions of other circuits that have applied the actual innocence exception in noncapital cases. *See Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 170-71 (2d Cir. 2000) ("[T]he [Supreme] Court has made clear that the availability of actual innocence exception depends not on the 'nature of the penalty' the state imposes, but on whether the constitutional error 'undermined the accuracy of the guilt or sentencing determination.'") (quoting *Smith v. Murray*, 477 U.S. 527, 538-39 (1986)); *United States v. Maybeck*, 23 F.3d 888, 893 (4th Cir. 1994) (applying actual innocence to career offender claim); *United States v. Mikalajunas*, 186 F.3d 490, 494-95 (4th Cir. 1999) (limiting actual innocence in noncapital cases to career or habitual offender enhancements); *United States v. Pettiford*, 612 F.3d 270, 282-84 (4th Cir.) (limiting what it means to be factually innocent of the career offender enhancement, but not retreating from actual innocence application to noncapital, habitual offender

sentences), *cert. denied*, 131 S. Ct. 620 (2010); *but see Embrey v. Hershberger*, 131 F.3d 739, 740-41 (8th Cir. 1997) (en banc); *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993).

This Court’s guidance is therefore needed to address the circuit conflict not resolved in *Dretke*. This Court has previously rejected the suggestion that the procedural default principles “apply differently depending on the nature of the penalty a State imposes.” *Smith*, 477 U.S. at 538. Capital and career offender sentencings are sufficiently similar for purposes of the actual innocence analysis. Like capital sentencing, a career offender determination is based on aggravating factors and results in an enhanced sentence. *See* U.S.S.G. § 4B1.1. The result of the sentencing, whether death or longer incarceration, does not affect the pertinent inquiry: whether a person is actually innocent of (or ineligible for) the enhanced penalty. This is a sufficiently objective standard, *see Sawyer*, 505 U.S. at 341, and in Gilbert’s case there is no dispute that he is not eligible for the career offender enhancement. Gilbert therefore seeks this Court’s review to resolve whether the actual innocence of sentence exception applies in this noncapital context.

2. Gilbert’s Case Presents the Issue of Whether *Sawyer* is Limited to Constitutional Claims, an Issue that Also Divides the Circuits

The Eleventh Circuit also concluded that *Sawyer*’s actual innocence of sentence exception applies only to constitutional claims and Gilbert’s claim is not constitutional in nature. App. A at 1321-22. As an initial matter, the en banc Court did not engage in any analysis of this Court’s or its own previous decisions concerning due process claims, and Gilbert maintains that he has raised such a constitutional claim. *See, e.g., Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *Shukwit v. United States*, 973 F.2d 903, 904 (11th Cir. 1992). The Eleventh Circuit’s conclusion that Gilbert’s claim is not constitutional in nature also conflicts with a more recent decision of the Seventh Circuit. *Narvaez v. United States*, 641 F.3d 877, 882 (7th Cir. 2011) (“[T]he decisions [in *Begay* and *Chambers v. United States*, 555 U.S. 122 (2009)] make clear that, at the time of his sentencing, Mr.

Narvaez did not qualify as a career offender under the guidelines. An additional five years of incarceration was imposed upon him without any legal justification. Such gratuitous infliction of punishment is a fundamental defect in the court's judgment that clearly constitutes a complete miscarriage of justice and a violation of due process.”); *but see Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (concluding in post-conviction challenge to career offender sentence that “constitutional error[.]” was not “at issue here”).

Moreover, even assuming *arguendo* that Gilbert's claim is nonconstitutional in nature, the Eleventh Circuit's conclusion that actual innocence is limited to constitutional claims conflicts with the contrary conclusion by the Fourth Circuit. *Mikalajunas*, 186 F.3d at 495 n.4 (“[T]he Government contends that the Supreme Court has recognized the availability of the actual innocence exception only in cases in which an alleged constitutional violation was at issue. The Court, however, has not refused to apply the actual innocence exception in a nonconstitutional context; that issue simply has never been before the Court. And, the Government's argument cannot be squared with *Maybeck*, in which this court excused a procedural default based upon the actual innocence exception involving the misapplication of the career offender provision, not a constitutional error.”). This Court's decisions cited in *Gilbert*, 640 F.3d at 1321, involved state prisoners who raised constitutional claims. *Sawyer*, 505 U.S. at 347-48; *Schlup v. Delo*, 513 U.S. 298, 314 (1995); *Murray v. Carrier*, 477 U.S. 478, 483 (1986). That does not mean, however, that actual innocence must necessarily be limited to constitutional claims. If a claim of a nonconstitutional error is otherwise cognizable (because of a fundamental defect resulting in a complete miscarriage of justice), and that nonconstitutional error has resulted in the imprisonment of one who is actually innocent, then that petitioner should also meet the “miscarriage of justice” exception, permitting his claim to be heard. *See Sawyer*, 505 U.S. at 339 (equating “miscarriage of justice” and “actual

innocence”). This Court’s guidance is needed to address the scope of the *Sawyer* actual innocence exception, an issue that currently divides the circuits.

3. Gilbert’s Case Presents the Issue of Whether a Petitioner May be Actually Innocent of a Career Offender Sentence

Thirdly, the Eleventh Circuit found that actual innocence would not apply in Gilbert’s case because he would still be “statutorily eligible for the sentence he received.” App. A at 1322. However, the actual innocence test, as noted above, is whether the petitioner is ineligible for the **enhanced penalty**. *See Sawyer*, 505 U.S. at 347-48 & n.15. That test “focus[es] on those **elements** that render a defendant eligible for the death penalty.” *Id.* at 347 (emphasis added). Thus, actual innocence concerns whether the petitioner is innocent of the enhancement, or of the elements of that enhancement. *See also Smith*, 477 U.S. at 539 (expressing actual innocence concern in terms of “accuracy of the . . . sentencing determination”).

In Gilbert’s case, he is not, and never was, eligible for the career offender enhancement. The career offender enhancement requires two qualifying prior convictions, but Gilbert has only one. Moreover, Gilbert was sentenced pursuant to the then-mandatory sentencing guidelines, which at that time had the force and effect of law. *See Booker*, 543 U.S. at 234-35. The Eleventh Circuit’s conclusion that the actual innocence exception would not apply to Gilbert cannot therefore be sustained.

4. Whether *Sawyer* Did Not Survive AEDPA’s Second or Successive Bar is an Issue that Must Ultimately Be Resolved by this Court

The fourth and final reason cited by the Eleventh Circuit is that the *Sawyer* actual innocence of sentence exception – a “judge-made” doctrine – did not survive the enactment of § 2255(h), the second/successive bar that contains its own actual innocence exception. App. A at 1318, 1322 (quoting *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997)). Whether *Sawyer*’s actual

innocence of sentence exception has been supplanted by § 2255(h) can only be resolved by this Court, further warranting certiorari in this case.

In sum, the Eleventh Circuit has narrowed the scope of the actual innocence of sentence exception and concluded that it was trumped by § 2255(h). This Court's review is needed to address whether the actual innocence of sentence exception has survived AEDPA and, if so, the scope of that exception.

C. The Great Writ Cannot Be Dead – Policy and Equity Weigh in Favor of Providing Gilbert, and Those Similarly Situated, With Relief.

The result in Gilbert's case prompted Judge Hill and Judge Barkett to state that the "Great Writ is dead in this country." App. A at 1336 (Hill, Barkett, JJ., dissenting). As the three dissenting judges together determined:

This [en banc] decision removes any possibility of habeas relief for [] Gilbert by equating the requirements for relief under § 2255(e) with those under § 2255(h) and, in the process, renders the savings clause a dead letter. So now it is true that there is no relief in Alabama, Florida or Georgia for any person who is, for some reason, barred from relief under § 2255 but wrongfully incarcerated on account of a sentencing error.

Id. at 1332 (Martin, Barkett, Hill, JJ., dissenting). Gilbert's case raises important questions concerning the viability and scope of the Great Writ, warranting this Court's review.

In addition, the equitable and policy considerations of Gilbert's case support review, and relief, in his case. As a litigant, Gilbert has done everything that was required of him, challenging his career offender enhancement at each stage of the proceedings. The Eleventh Circuit rejected his argument on direct appeal. Although this Court's decision in *Begay*, which abrogated the Eleventh Circuit's decision in Gilbert's direct appeal, was issued after his first § 2255 was denied, the majority held that Gilbert cannot bring his claim in a § 2241 petition under the savings clause. It found that this limitation on the savings clause is supported by the "finality interests" Congress

sought to achieve through AEDPA's second or successive bar. *Id.* at 1309-12. But, as Judge Hill and Judge Barkett stated, "without justice, finality is nothing more than a bureaucratic achievement." *Id.* at 1337 (Hill, Barkett, JJ., dissenting). As they expressed, "[f]inality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliable judicial determination of his claim, but "Gilbert has never had this opportunity." *Id.* As they further explained:

A judicial system that values finality over justice is morally bankrupt. That is why Congress provided in § 2255 an avenue to relief in circumstances just such as these. For this court to hold that it is without the power to provide relief to a citizen that the Sovereign seeks to confine illegally for eight and one-half years is to adopt a posture of judicial impotency that is shocking in a country that has enshrined the Great Writ in its Constitution. Surely, the Great Writ cannot be so moribund, so shackled by the procedural requirements of rigid gatekeeping, that it does not afford review of Gilbert's claim.

Id.

Gilbert's case not only raises these important issues, but his case will affect other federal prisoners who, like him, have been or will be denied post-conviction relief despite decisions of this Court, such as *Begay*, that show that their sentence violates the law of the United States. Based on the importance of the issues, and the number of other prisoners who may be affected by this case, Gilbert respectfully requests this Court's review.

II. A federal prisoner may seek to reopen his first 28 U.S.C. § 2255 proceeding pursuant to Federal Rule of Civil Procedure 60(b) and amend his § 2255 motion to include a challenge to his sentence that is related to the challenge presented in his first § 2255 motion

Alternatively, Fed. R. Civ. P. 60(b)(5) and (b)(6) are viable and justifiable vehicles to grant relief based on the unique and compelling circumstances of Gilbert's case. Using Rule 60(b) to reopen and correct the undisputable error that occurred at Gilbert's sentencing will not run afoul of *Gonzalez v. Crosby*, 545 U.S. 524 (2005). As a result, Gilbert's motion should not be deemed a second or successive § 2255 petition.

Fed. R. Civ. P. 60(b)(5) and (6) authorize the district courts to relieve a party to a civil action from the force of a final judgment on the following grounds: “(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b). Motions based on grounds (1)-(3), which are not issue in this proceeding, must be filed within one year after the subject judgment was entered. Motions based upon grounds (5) and (6), as relied upon by Gilbert, must only be filed within a reasonable time. *See* Fed. R. Civ. P. 60. Gilbert submits that an intervening change in law, coupled with extraordinary circumstances, permits a district court to grant a motion for relief from a judgment or order under subsections (5) or (6) of Rule 60(b).

Significantly, this Court in *Gonzalez* declared at footnote 3:

In this case we consider only the extent to which Rule 60(b) applies to habeas proceedings under 28 U.S.C. § 2254, which governs federal habeas relief for prisoners convicted in state court. Federal prisoners generally seek postconviction relief under § 2255, which contains its own provision governing second or successive applications. Although that portion of § 2255 is similar to, and refers to, the statutory subsection applicable to second or successive § 2254 petitions, it is not identical. *Accordingly, we limit our consideration to § 2254 cases.*

Gonzalez, 545 U.S. at 529 n.3 (emphasis added).

Gilbert’s motion, “like some other Rule 60(b) motions in § 2254 cases, confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding.” *Id.* at 534. In other words, it is a “true” 60(b) motion.

Justice Stevens explained in his dissenting opinion, “As the Court recognizes, whether a Rule 60(b) motion may proceed in the habeas context depends on the nature of the relief the motion seeks.” *Id.* at 539 (Stevens, J., dissenting). Indeed, Justice Stevens opened his dissenting opinion

by saying, “The most significant aspect of today’s decision is the Court’s unanimous rejection of the view that all postjudgment motions under Federal Rule of Civil Procedure 60(b) except those alleging fraud under Rule 60(b)(3) should be treated as second or successive habeas corpus petitions. I believe that we should have more promptly made clear that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Rule 60(b) can coexist in harmony.” *Id.*; *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995) (Rule 60(b) “reflects and confirms the courts’ own inherent and discretionary power, ‘firmly established in English practice long before the foundation of our Republic,’ to set aside a judgment whose enforcement would work inequity”).

Accordingly, a Rule 60(b) motion in this case may properly come before the Court. The question then presented is what relief the motion seeks; or, what is the nature of the motion? Gilbert humbly assumes the position that, as discussed in his Motion to Reopen, his Motion may properly be viewed as a procedural amendment with, hopefully, substantive success – Gilbert is asking the Court to simply allow him the opportunity to amend his original § 2255 motion so as to better frame and present the question and challenge at issue, *i.e.*, whether he should have been sentenced as a career offender. Recognizing that his original § 2255 motion was inartfully filed as a *pro se* litigant, the Court should allow the amendment under Rule 15 of the Rules of Civil Procedure.

Here, we now know that Gilbert should not have been sentenced as a career offender in light of *Begay* and *Archer*. Gilbert has already served a non-career offender sentence. To require him to continue to serve time in prison based on what is an erroneous judgment would propagate the error into the future.

Rule 60(b)(5), *in pari materia* with Rule 60(b)(6), allows this Court to grant the requested relief, *i.e.*, to reopen Gilbert’s original § 2255 motion and amend his claim, because the Court “may relieve a party . . . from a final judgment, order, or proceeding . . . [if] applying it prospectively is

no longer equitable [and for] any other reason that justifies relief.” It may do so without running afoul of *Gonzalez* (because *Gonzalez* by its own express terms does not apply to § 2255 proceedings). Instead, the requested relief would be in alignment with the policy considerations behind the AEDPA’s concern for successive habeas petitions and Rule 60(b). *Cf. e.g., Custis v. United States*, 511 U.S. 485 (1994).

In sum, under all the facts and surrounding circumstances of Gilbert’s case, Rules 60(b)(5) and 60(b)(6) grant the necessary authority, discretion, and most importantly, jurisdiction, to reopen the prior § 2255 proceedings, allow Gilbert to amend his original petition as discussed in his motion, and grant the ultimate relief requested without violating this Court’s *Gonzalez* opinion.

CONCLUSION

For the reasons set forth above, Petitioner Ezell Gilbert respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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