19-50914

In The

United States Court Of Appeals

For The Fifth Circuit

MOHAMAD YOUSSEF HAMMOUD,

Petitioner – Appellant,

v.

WARDEN SERKOU MA'AT,
FEDERAL CORRECTIONAL INSTITUTE BASTROP,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
USDC NO. 1:18-CV-751

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

Christopher J. Blake
D. Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
(919) 329-3800

Jon Greenbaum
Arthur Ago
Rochelle F. Swartz
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
(202) 662-8600

Counsel for Amicus Curiae The Lawyers' Committee for Civil Rights Under Law

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to the Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case.

Amicus

Lawyers Committee for Civil Rights Under Law

Counsel for Amicus

Christopher J. Blake

D. Martin Warf

Jon Greenbaum

Arthur Ago

Rochelle F. Swartz

Respectfully Submitted,

s/ Christopher J. Blake
Christopher J. Blake
Attorney for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonpartisan, non-profit civil rights organization formed in 1963 at the request of President Kennedy. The Lawyers' Committee enlists the private legal bar's leadership and resources to protect and defend the civil rights of Black Americans and other people of color in the areas of criminal justice, voting rights, economic justice, education, fair housing, digital justice, and fighting hate. The Lawyers' Committee's Criminal Justice Project works to combat race discrimination and protect equal justice under the law by confronting the ways in which racism infects every stage of the criminal justice system, by challenging laws and policies that criminalize poverty, by promoting access to justice and representation, and by advancing accountability and structural reform of police departments. The Lawyers' Committee brings its national experience to bear on the issues before this Court.

Pursuant to the requirements of Rule 29(a)(2) of the Federal Rules of Appellate Procedure, the Lawyers' Committee states that counsel for all parties have consented to the filing of this brief as *amicus curiae*.

Pursuant to the requirements of Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the Lawyers' Committee states: (a) no

"AEDPA"). Passed in the aftermath of the 1993 bombing of the World Trade Center and the 1995 Oklahoma City bombing, 18 U.S.C. § 2339B was eventually also used to prosecute supposed terrorist activity following September 11, 2001. During the three years following September 11, however, courts around the country began to more closely scrutinize the statute. Specifically, courts expressed concern that the *mens rea* requirement of the 1996 version of the statute might be constitutionally infirm. In order to preserve the statute, courts began to read into it an additional *mens rea* requirement. For example, the Ninth Circuit reasoned "that when Congress included the term 'knowingly' in § 2339B, it meant that proof that a defendant knew of the organization's designation as a terrorist organization or proof that a defendant knew of the unlawful activities that caused it to be so designated was required to convict a defendant under the statute." *Humanitarian Law Project v. U.S. Dep't of Just.*, 352 F.3d 382, 400 (9th Cir. 2003), opinion vacated on reh'g *en banc*, 393 F.3d 902 (9th Cir. 2004) (in part to Congress passing clarifying language). The Ninth Circuit relied on Supreme Court precedent allowing for a *mens rea* requirement to be read into a challenged statute, because *not* to do so "would criminalize otherwise

party's counsel has authored the Lawyers' Committee's Amicus Brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the Lawyers' Committee's Amicus Brief; and (c) no person other than the Lawyers' Committee or its counsel contributed money intended to fund the preparation and submission of the Lawyers' Committee's Amicus Brief.

SUMMARY OF ARGUMENT

Before the Court is the scope of the savings clause under 28 U.S.C. § 2255 and its application to cases that involve actual innocence based on a retroactive clarification of the law. In construing the savings clause, the Lawyers' Committee submits that the Court's focus should not stray from the starting point of whether an incarcerated person presents a meritorious claim of actual innocence.[1] Persons of color, whose interests

[1] "Actual innocence" in the context of habeas review includes cases where new factual evidence establishes a person's innocence. *See, e.g., McQuiggin v. Perkins*, 569 U.S. 383 (2013) (ruling that newly discovered witness statements, if credited, would establish actual innocence). It also includes cases, such as this one, where a change in law establishes that a person was convicted for acts that are no longer sufficient to establish a crime. *See, e.g., Merryman v. Davis*, 781 Fed. App'x. 325 (5th Cir. 2019) (observing that "other appellate courts and even recent Supreme Court jurisprudence suggest that a post-conviction change in the state law on which the conviction was based could be a sufficient basis for a gateway actual innocence claim.") (citing *Bousley v. United States*, 523 U.S. 614 (1998)); *Vosgien v. Persson*, 742 F.3d 1131 (9th Cir. 2014); *United States v. Tyler*, 732 F.3d 241, 252 (3d Cir. 2013) (holding that change in law that added additional element to a criminal statute that was not proved at trial supported claim of actual innocence); and *Phillips v. United States*, 734 F.3d 573 (6th Cir. 2013).

the Lawyers' Committee seeks to advance, are disproportionately represented in the total incarcerated population and are thus more likely to possess claims of actual innocence that will be presented through a habeas petition. In a racially fair and equitable system of justice – and one in which the savings clause actually saves something – those that possess meritorious claims of actual innocence would be provided full and meaningful access to the courts. The Section 2255 savings clause should not be construed in a way that precludes such meaningful access and commits those who may be actually innocent to languish further in the confines of a prison because of procedural bars that need not exist.

In order to approach racial equity in the habeas context, this Court should modify its *Reyes-Requena* test. In *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001), as refined in *Garland v. Roy*, 615 F. 3d 391 (5th Cir. 2010), this Court held that three factors that must be satisfied for a petitioner to file a petition in connection with Section 2255's savings clause: "(1) the petition raises a claim that is based on a retroactively applicable Supreme Court decision; (2) the claim was previously foreclosed by circuit law at the time when [it] should have been raised in petitioner's trial, appeal or first § 2255 motion; and (3) that retroactively

applicable decision establishes that the petitioner may have been convicted of a nonexistent offense." *Garland*, 615 F.3d at 394 (5th Cir. 2010) (citing *Reyes–Requena*, 243 F.3d at 904 and *Christopher v. Miles*, 342 F.3d 378 (5th Cir. 2003) (internal quotations omitted). The central problem for Appellant in this case is the first prong of the test, which forecloses review of his actual innocence claim because it is based on a Congressional change in the law, as opposed to the Supreme Court alteration in law articulated in the test. This procedural bar should not exist, and this Court has the power to eliminate it.

The Lawyers' Committee supports expanding the first prong of the *Reyes-Requena* test to allow for a habeas petition to proceed within the savings clause where subsequent acts of Congress — and not just retroactive Supreme Court decisions — establish that someone has been imprisoned for conduct that is now not actually prohibited. The Lawyers' Committee also supports this Court further modifying the *Reyes-Requena* savings clause analysis to allow for habeas review when an initial Section 2255 motion filed by an incarcerated person *pro se* inadequately raised the claim supporting actual innocence. In short, with just slight modifications to this Circuit's savings clause jurisprudence, this Court

can still maintain a "stringent savings clause test," *Reyes-Requena*, 243 F.3d at 906, that also provides greater access to justice for incarcerated people who have meritorious claims of actual innocence.

Furthermore, because people of color are the ones most likely to need to avail themselves of habeas relief in connection with claims of actual innocence when relief under Section 2255 is not available, the Lawyers' Committee supports the modification of the *Reyes-Requena* test being advanced by Appellant. The Lawyers' Committee urges the Court not to overrule *Reyes-Requena* and in the process adopt a more restrictive interpretation of the savings clause, as any such ruling would fall disproportionately on people of color and deny meaningful access to justice for those that possess meritorious claims that they are actually innocent of the crimes for which they have been incarcerated.

ARGUMENT

I. THE SAVINGS CLAUSE SHOULD NOT BE CONSTRUED TO FORECLOSE HABEAS RELIEF.

A. The Modification Being Advanced By Appellant Is A Reasonable Extension Of The *Reyes-Requena* Test.

This Court's analysis should begin with the principle that habeas review must be permitted in cases, like this one, where there is a meritorious claim of actual innocence. Habeas corpus jurisprudence

frequently loses itself in the procedural trees and sometimes loses sight of the forest, which is that people who are incarcerated in contravention of the law — and especially when they are actually innocent — should be released. *See, e.g., Holland v. Florida*, 560 U.S. 631, 649 (2010) (holding that federal habeas corpus one-year statute of limitations is subject to equitable tolling because, if not, it would "close courthouse doors that a strong equitable claim would ordinarily keep open."). Whether a claim of actual innocence arises from a change in the interpretation of law brought about by a subsequent Supreme Court decision or, as in this case, by a Congressional amendment that clarifies the substantive elements of the crime for which a person was convicted, habeas relief should be available under the savings clause. This Court should make explicit that the savings clause applies to a change in statutory law because such a change does not meet the successive Section 2255 review requirements as currently articulated. The rationale for taking this slight step in expanding the operative savings clause analysis has already been outlined by this Court.

As noted in *Reyes-Requena*, the overarching feature of nearly all the circuit courts' savings clause analysis is "actual innocence and

retroactivity." 243 F.3d at 903. "Courts have framed the actual innocence factor differently, but the core idea is that the petitioner may have been imprisoned for conduct that was not prohibited ***by law***." *Id*. (emphasis added). There is no particular reason why "by law" would be limited to Supreme Court interpretation of a statute as opposed to Congressional clarification. In fact, this Court noted that Supreme Court interpretation of a statute was a "likely" situation for applying the savings clause; it did not say it was the "only" situation. *Id*. This Court applied the savings clause broadly enough then to permit habeas review of a retroactive interpretation of a statute by the Supreme Court, not because it was a high court decision but because "the idea that the incarceration of one whose conduct is not criminal inherently results in a complete miscarriage of justice." *Id*. at 904. That idea is bedrock.

The history of this case is illustrative of that bedrock principle. When it was enacted in 1996, the statute that Appellant was convicted under, 18 U.S.C. § 2339B, punished "[w]hoever … knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so …." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat 1214 (1996) (herein

innocent conduct." *Id.* (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)).

The Ninth Circuit was not the only court that scrutinized 18 U.S.C. § 2339B. The Middle District of Florida also concluded that "to convict a defendant under Section 2339B(a)(1) the government must prove beyond a reasonable doubt that the defendant knew that: (a) the organization was a [foreign terrorist organization] or had committed unlawful activities that caused it to be so designated; and (b) what he was furnishing was 'material support.'" *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1338–39 (M.D. Fla. 2004). Like the Ninth Circuit, the Middle District of Florida was concerned with criminalizing innocent conduct without specific proof of *mens rea*. *See id.* at 1339 ("To avoid Fifth Amendment personal guilt problems … the government must show more than a defendant knew something was within a category of 'material support' … [it] must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a [foreign terrorist organization]."). *See also Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1008 (7th Cir. 2002) (holding that someone could be civilly liable for violating 18 U.S.C. § 2339B so long

as there was proof that they "knew about [an] organization's illegal [terrorist] activity, desired to help that activity succeed and engaged in some act of helping.").

By 2004, on the heels of the opinions of these courts, Congress amended 18 U.S.C. § 2339B, specifying that

> [t]o violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat 3638, (December 17, 2004) (codified at 18 U.S.C. § 2339B). With this amendment, Congress made clear that to secure a conviction under 18 U.S.C. § 2339B, the government needed to prove not only that someone knowingly provided material support to a terrorist organization, but also that the person knew that that organization was so designated or knew about its terrorist activities. Without this 2004 *mens rea* amendment, there was a danger that 18 U.S.C. § 2339B "would criminalize otherwise innocent conduct." *Humanitarian Law*, 352 F.3d at 400. Appellant, in his brief to this Court, explains precisely how he is

actually innocent in light of the 2004 Congressional change in law. (*See* Appellant Supp. Brief at 6-9). In the wake of this statutory history, Appellant's request for judicial consideration of his actual innocence claim should be granted.

The notion that those who possess claims of actual innocence should be given meaningful access to the courts perseveres even in Section 2255 because Section 2255 "was not intended to limit the rights of federal prisoners to collaterally attack their convictions and sentences." *Reyes-Requena,* 243 F.3d at 901, n.18. This Court recognized that without an effective and adequate safety valve built into Section 2255, the law would face severe constitutional scrutiny as suspending habeas relief. *See id.* at 901, n.19. It is a straightforward interpretation of the savings clause — and one that guards against miscarriages of justice — that opportunity should be given for district court review following a Congressional modification in the law that suggests the incarcerated person is actually innocent.

In *Davis v. U.S.*, 417 U.S. 333, 342-43 (1974), the Supreme Court rejected the argument that Section 2255(a) relief could only apply to claims "of a constitutional dimension" and not a change in interpretation

of the law. In so doing, the Court noted that the text of the statute applies to "laws of the United States." *Id.*

> No microscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief 'on the ground that (the prisoner) is in custody in violation of the . . . laws . . . of the United States' or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect.

Id. at 344. Based on that analysis, the Court held that relief under Section 2255 was absolutely available because, in part, it would be equally available under habeas petitions. And to deny relief under either statute would be a travesty of justice.

> If the petitioner's contention [regarding a change in the interpretation of the statute he was convicted under] is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under § 2255.

Id. at 346–47.

It is unlikely that the Supreme Court, which looked to the text of the habeas statute and Section 2255, would hold that an incarcerated person should be released because the interpretation of laws of the United States was clarified by the Supreme Court, but deny the same habeas relief when those same laws are clarified by the institution that

enacted them. Statutory interpretation is, at its core, an attempt to discern the intent of Congress. *United States v. Barlow*, 41 F.3d 935, 942 (5th Cir. 1994) ("[I]t is our task to give effect to the intent of the Congress that enacted that statute."). A claim for actual innocence should be no less reviewable under a habeas petition when Congress itself clarifies its intent in drafting the laws of the United States than when the Supreme Court discerns the same. A Congressional clarification makes clear Congress's intent, and this Court should give it the requisite effect. If either the legislative or judicial branch's clarification of the law supports a claim for actual innocence, it is evident that neither's retroactive clarification of the statute could be the subject of review under a successive Section 2255 motion.[2] Accordingly, that is why both should fall within the savings clause and allow for a habeas petition to proceed.

This Court has already determined slight modifications in the savings clause test to be appropriate — namely, those that increase availability. This one is no different. For instance, in *Santillana v. Upton*, 846 F.3d 779, 783 (5th Cir. 2017), the Court updated *Reyes-Requena* and

[2] Second or successive motions under Section 2255 must be certified by the appellate court to contain either newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2255(h).

recognized that "the retroactivity element of [its] savings-clause analysis is not tethered to a similar statutory limitation [as 28 U.S.C. § 2244(b)(2)(A)]." The *Santillana* Court continued:

> Our precedent requires only that a § 2241 petition be based on a "retroactively applicable Supreme Court decision," without specifying that the Supreme Court must have made the determination of retroactivity. *Garland v. Roy*, 615 F.3d 391, 394 (2010). Indeed, *Garland* states that Supreme Court decisions that substantively interpret federal statutes "automatically apply retroactively." *Id.* at 396 (emphasis added).

Id. In so holding, this Court rejected a possible (but ill-advised) narrow reading of the savings clause for statutory clarifications by the Supreme Court that could have mirrored "new rules of constitutional law" in Section 2255(h). There, Section 2255(h)(2) states that successive motions under Section 2255(a) are available just where a "new rule of constitutional law [is] made retroactive to cases on collateral review by the Supreme Court." That same language appears in 28 U.S.C. § 2244(b)(2)(A), wherein "made" and "by the Supreme Court" has been interpreted to mean that the retroactive application must be stated by the Supreme Court in *its* opinion. *See Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("Quite significantly, under this provision, the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive."). Thus, this

Court's savings clause test will protect incarcerated people so long as their innocence can be shown to be rooted in a substantive clarification of a statute.

And the rationale for retroactive application of substantive interpretations in the federal criminal law is telling, as this Court and the Supreme Court have noted: "[s]uch rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004); *see also Santillana*, 846 F.3d at 782. When a substantive clarification of the law means that a person was convicted for an act that is not criminal, this Court should not erect barriers or unnecessary procedural hurdles to habeas review in order to keep such an innocent person in prison. That would be a miscarriage of justice.

B. The AEDPA[3] Was Not Intended To Foreclose Habeas Relief In Appropriate Circumstances, And Persons Of Color Are Far More Likely To Need To Avail Themselves Of Habeas Relief Under The Savings Clause.

Modifications broadening slightly the circumstances of this Court's savings clause test for actual innocence, including when a clarifying statutory amendment shows that Appellant was convicted for conduct that does not make up an offense, will better facilitate relief for incarcerated people of color. There is overwhelming evidence that racial inequities pervade the criminal justice system, including the fact that Black and Latinx people are disproportionately represented in the American prison population[4] and that they serve longer prison sentences

[3] The AEDPA not only included codifying the criminal act Mr. Hammoud was convicted of, but also made changes to 28 U.S.C. §§ 2241 and 2255.

[4] Although Black people and Latinos comprise only 29% of the U.S. population, they make up 57% of the U.S. prison population, and imprisonment rates for Black and Latinx adults are 5.9 and 3.1 times the rate for white adults, respectively. *See* Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance (March 2018), available at https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (citing U.S. Bureau of Justice Statistics, Prisoners in 2016, (Jan. 2018); Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons, The Sentencing Project (2016), available at: https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.). *See also* Peter A. Joy, *Unequal Assistance of Counsel*, 24 KANSAS JOURNAL OF LAW & PUBLIC POLICY (Aug. 2015) ("More than 2.2 million people are in U.S. prisons and jails, and a disproportionate number of them, comprising 60% of people in prison, are persons of color. African American men are 6.5 times more likely to be incarcerated than white men ….)"

as compared to whites.[5] The dramatically higher numbers of people of color in prison means that even apparent race-neutral restrictions on habeas relief have a disparate impact on them. "By curbing access to habeas, the poor and people of color are further removed from due process and fairness in representation." Marvin L. Astrada, *Death, Law & Politics: The Effects of Embracing a Liberty-Restrictive vs. a Liberty-Enhancing Interpretation of Habeas Corpus*, 48 UNIVERSITY OF BALTIMORE LAW REVIEW 147, 188 (2019). As one author concluded after examining the AEDPA's effect on habeas relief from state courts, focusing on habeas review as a liberty-enhancing procedure is more essential now than ever before.

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[5] "At the federal level, over two-thirds (68.2%) of the estimates of the direct effect of race on sentencing indicated harsher sentences for blacks, and almost half (47.6%) of the estimates of the direct effect of ethnicity on sentencing registered harsher sentences for Latinos." Tushar Kansal, Racial Disparity in Sentencing: A Review of the Literature (January 2005), a report from the Sentencing Project. Pages 4-5. *See also* Starr, Sonja B. "Racial Disparity in Federal Criminal Sentences." M. M. Rehavi, co-author. J. Pol. Econ. 122, no. 6 (2014): 1320-54.1349,1350 ("[R]obust evidence that black male federal arrestees ultimately face longer prison terms than whites arrested for the same offenses with the same prior records …. Observed case and defendant characteristics are capable of completely explaining the large raw disparities in incarceration, but not in the length of incarceration. The conditional black-white sentence disparity is approximately 9 percent at each decile in our main sample …. There are currently 95,400 black men incarcerated in federal facilities. Eliminating a 9 percent black premium would ultimately reduce the steady-state number of black males in federal incarceration by nearly 8,000, and most of this reduction could potentially be achieved by simply eliminating the disparity in mandatory minimum charges.").

> The AEDPA regime reflects, in part, a larger structural problem wherein race and class have an adverse and disproportionate effect on petitioners seeking review of their convictions in a federal forum. Race especially factors into a negative-impact calculus vis-à-vis substantive due process and fair representation of petitioner's liberty interest because of the disproportionate amount of people of color that are charged with and convicted of capital crimes. Habeas, as a liberty-enhancing mechanism, is important because it provides a modicum of due process and fairness.

Id. at 200-201.

For Black people in particular, broadening the opportunity for habeas review under the savings clause offers an opportunity to address more cases involving claims of actual innocence and, in the process, begins to create racial equity. Broadening this opportunity will also result in speedier justice for Black people with meritorious actual innocence claims:

> Exonerations of innocent murder defendants take longer if the defendant is black, 14.2 years on average, than if he is white, 11.2 years. For death row exonerations in the Registry the average delays and the difference by race are larger, 16 years for black defendants and 12 years for whites. In other words, black murder exonerees average about three more years in prison than white murder exonerees—which means that, at any given time, a larger proportion of black murder defendants who will eventually be exonerated are still in prison .... Among murder exonerations with official misconduct, the average time to exoneration is 15 years for black exonerees and 12.5 years for white exonerees; among

> murder exonerations without misconduct, it's 11.4 years for black exonerees and 9.2 for whites.

Samuel R. Gross et al., *Race and Wrongful Convictions in the United States, National Registry of Exonerations*, 7 (Mar. 7, 2017).[6]

Broader access to habeas relief in cases like this one will also dispel any biases — either implicit or systemic — that might have infected the case. In this case — initiated virtually contemporaneously with September 11, 2001, and tried to a jury soon thereafter — the federal government prosecuted Appellant, an Arab man from Lebanon, for allegedly supporting terrorism by sending a few thousand dollars to Lebanon, a crime for which he received a prison sentence, at first, of 155 years. Although eventually reduced to 30 years, the initial sentence was at odds with similarly situated non-Arab people. Compare, for example, the case of John Walker Lindh, a white American citizen who trained first with the Harakat ul-Mujahideen, a group designated by the United States as a foreign terrorist organization, and who later fought with the Taliban in Afghanistan. *See United States v. Lindh*, 227 F.Supp.2d 565, 567-69 (E.D. Va. 2002). Lindh received a 20-year sentence for supplying

[6] Available at: http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

services to the Taliban, *see id*. at 566, a sentence dramatically shorter than the original sentence in Appellant's case and even substantially shorter than Appellant's revised sentence of 30 years.[7] "Sentencing studies that take the prosecutor's case descriptions and the formal charges as objective and unbiased reflections of the seriousness of a crime are based therefore on a questionable foundation that can lead to the underestimation of race effects on sentencing whenever race has affected earlier processing decisions."[8] That underestimation is very concerning, because sentencing studies demonstrate that people of color within the federal system are sentenced more harshly than similarly situated white people. Allowing people with meritorious actual innocence claims will allow more actually innocent people of color to petition for release and therefore serve to narrow the gap in these racially disparate sentences.

[7] Lindh, although prosecuted at essentially the same time as Appellant, is now free. *See* Carol Rosenberg, "John Walker Lindh, Known as the 'American Taliban,' Is Set to Leave Federal Prison This Week," NY Times (May 21, 2019), available at: https://www.nytimes.com/2019/05/21/us/politics/american-taliban-john-walker-lindh.html. Appellant is still incarcerated.

[8] Michael L Radelet and Glenn L. Pierce, *Race and Prosecutorial Discretion*, 19 LAW & SOCIETY REVIEW, 616 (1985).

II. MODIFYING SAVINGS CLAUSE PRECEDENT WILL PROMOTE RACIAL EQUITY FOR *PRO SE* LITIGANTS OF COLOR.

Incarcerated people who file their first Section 2255 motion *pro se*, like Appellant, are at a particular disadvantage if this Court maintains its restrictions on their ability to seek relief through the savings clause. The Lawyers' Committee supports Appellant's request that a court should presumptively consider a *pro se* litigant's Section 2255 motion — whether it is the first or a subsequent motion — on the merits. (*See* Appellant Supp. Brief at 49). To do otherwise would limit the ability, in particular, of *pro se* litigants of color untrained in the law, like Appellant, to secure relief when they have meritorious claims of actual innocence.

There is ample evidence that people of color are disproportionately forced to proceed *pro se*. "Proceeding *pro se* … is extraordinarily common and deeply unfortunate … [and p]eople of color are much more likely to engage the legal system without the aid of a lawyer than whites are …." Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24.1 LEWIS AND CLARK LAW REVIEW 1, 11-12 (2019).[9] Indeed, of the parties pursuing appellate relief in this Circuit, "[*p*]*ro se* litigants filed 44.5% of

[9] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389279

the notices of appeal, and 52.1% of the cases were proceeding *pro se* at the time the case terminated." Practitioners' Guide to the United States Court of Appeals for the Fifth Circuit, Clerk's Office, United States Court of Appeals for the Fifth Circuit, 6 (December 2020). To this end, modifying the *Reyes-Requena* test in the way that Appellant advances will help to lift the burden disproportionately borne not only by people of color, but more specifically people of color proceeding *pro se*.

In the context of this case, and specifically against the backdrop of complicated habeas jurisprudence, *pro se* litigants like Appellant would struggle to fully and effectively assert their initial claims of actual innocence. Although the Supreme Court admonished that a "document filed *pro se* is to be liberally construed," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), that does not mean that a *pro se* litigant like Appellant will capture all of the necessary actual innocence arguments to be persuasive in their first pleading. Because Section 2255 makes filing more than one actual innocence motion exceedingly difficult, *see* 28 U.S.C. § 2255(e) and (h), *pro se* litigants, of whom people of color are disproportionately represented, are at a decided disadvantage.

Here, Appellant, as a *pro se* movant, would be required to: (a) identify that there was a clarification in the law of his offense; (b) know that Congress retroactively changed the *mens rea* requirement (or that courts would apply that to his case on collateral review); and (c) articulate that in such a way as to highlight the correct decision for the reviewing court. Together, the intricacies of these concepts are such that many criminal defense attorneys might struggle to understand and articulate them, let alone someone situated like Appellant. Furthermore, although Appellant did attempt to raise the retroactive change to the statute in his *pro se* motion, his arguments were not persuasive enough for the previous reviewing courts to consider. Thus, it can hardly be argued that he was afforded an ***effective*** and ***adequate*** means of presenting his arguments, particularly when the courts in which he filed his motion never explained why he was wrong. Such a denial of meaningful access to the courts, falling disproportionately on *pro se* litigants of color, would undoubtedly constitute a miscarriage of justice. *See Davis*, 417 U.S. at 346 (A petitioner's "conviction and punishment are for an act that the law does not make criminal … inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral

relief under § 2255.") (relying on *Hill v. United States*, 368 U.S. 424, 428 (1962) (Habeas review appropriate when there is "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure. It does not present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.")).

Finally, although Section 2255 itself makes the filing of multiple actual innocence claims procedurally difficult, the real restriction has been imposed by this Court, and this Court now has the power to lift it. The rationale for requiring that incarcerated people accessing habeas review not have missed the chance to raise their claim for actual innocence in their first Section 2255 motion comes from a single sentence. *See Reyes-Requena*, 243 F.3d at 904 ("We therefore hold that the savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and *(ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion*.") (emphasis added). Yet that requirement is not part of the text of Section 2255.

While successive Section 2255 motions are restrained in the statutory text, the restriction at issue is based on what one can argue in a successive motion, not what was said or not said in the first. Thus, in determining that a successive Section 2255 motion is an inadequate or ineffective remedy, the courts should remove additional hurdles beyond what is already present in the text of the statute.[10]

In this way, the Court should not foreclose habeas review to federal prisoners based on what they could have raised in their first Section 2255 motion, or how well they briefed their first motion without assistance of counsel. Instead, the Court must focus on ensuring that the law affords, at the very least, a meaningful opportunity to raise actual innocence theories that arise from a clarification of statutory law. Otherwise, as the Supreme Court in *Davis* warned, Fifth Circuit procedure would result in a "complete miscarriage of justice." 417 U.S. at 346. This is particularly true for *pro se* litigants of color like Appellant.

[10] 28 U.S.C. § 2244(a) restricts entertaining a petition for habeas corpus as the legality of such detention when the legality of that detention was the subject of a prior habeas, but the same is not true of Section 2255 motions. Adding that requirement to Section 2255 motions to foreclose a first habeas petition is overly restrictive for no discernible reason and departs from bedrock principles of statutory interpretation.

CONCLUSION

The Lawyers' Committee is not advocating a modification that will open a floodgate of habeas petitions for the Fifth Circuit. Allowing federal inmates habeas review of claims of actual innocence due to a substantive change in law — be it from the Supreme Court or Congress — will still be a remarkably rare occurrence. But even if permitting claims of actual innocence to reach a habeas review following an initial Section 2255 denial were to increase the workload on the district courts, this Court should nevertheless permit these reviews. Foreclosing review for any person on procedural grounds is never an appropriate response to a legitimate concern of an innocent person serving any further time in prison:

> The desire to render capital habeas efficient, to make habeas cost-effective, and to procure finality, while simultaneously respecting the states' police power, has resulted in a liberty-restrictive interpretation of habeas. This interpretation is diametrically opposed to a liberty-enhancing interpretation of habeas. In *Spencer v. United States*, [773 F.3d 1132 (11th Cir. 2014)] for instance, a dissent noted that "finality is not 'the central concern of the writ of habeas corpus' — 'fundamental fairness is.'"

Astrada, *supra*, pp. 158-59.

When facing claims of actual innocence from prisoners who are more likely to be the subject of racial inequity, there is little fairness in endorsing policies such as finality or cost-efficiency that block habeas review with rigorous elemental tests as a proxy. When Congress says that an incarcerated person should proceed through the process of a Section 2255 petition, and not habeas relief, "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention," 28 U.S.C. § 2255(e), it is up to the Court to determine when Section 2255 would be inadequate or ineffective. This Court should err on the side of promoting habeas review whenever a legitimate claim of retroactive clarifications of criminal law could show actual innocence.

Moreover, habeas review itself carries limitations. *See, e.g.,* 28 U.S.C. § 2244(a) (limiting successive habeas petition reviews of the same judgment outside of Section 2255). This Court's determination that actual innocence is the *sine qua non* of the savings clause will in and of itself limit the number of petitions and promote judicial efficacy. That another court denied Appellant's Section 2255 petition without explanation, or that the retroactive substantive change to the law Appellant is now presenting was available to be raised previously and

was not, are not reasons to forego habeas review now with the assistance of counsel. Instead, such restrictions are efficiencies in the judicial system that perpetuate more ***inadequate*** and ***ineffective*** justice for people of color, who are more likely to be going through the system with stiffer sentences and without the aid of counsel.

Congress gave this Court an outlet for making a difference. The Lawyers' Committee requests that this Court affirm the opportunity for Appellant and people of color like him to establish their actual innocence.

This 2nd day of August, 2021.

s/ *Christopher J. Blake*
Christopher J. Blake
chris.blake@nelsonmullins.com
D. Martin Warf
martin.warf@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH, LLP
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
Phone: (919) 329-3800
Fax: (919) 329-3799

Jon Greenbaum
Arthur Ago
Rochelle F. Swartz
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
Phone: (202) 662-8800

Counsel for Amicus Curiae The Lawyers' Committee For Civil Rights Under Law

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this petition has been duly served on the attorneys listed below by e-mail service through ECF on this date:

Joseph H. Gay, Jr., Assistant U.S. Attorney
Elizabeth Berenguer, Assistant U.S. Attorney
U.S. Attorney's Office for the Western District of Texas
601 NW Loop 410, Suite 600
San Antonio, Texas 78216

James P. McLoughlin, Jr.
Christopher D. Tomlinson
Fielding E. Huseth
Moore & Van Allen PLLC
100 North Tryon Street, Suite 4700
Charlotte, NC 28202

Jonathan D. Gilmartin
Raquel Macgregor Pearkes
Alexis T. Narducci
Moore & Van Allen PLLC
100 North Tryon Street, Suite 4700
Charlotte, NC 28202

Dated: August 2, 2021

s/ *Christopher J. Blake*
Christopher J. Blake

Counsel for Amicus Curiae The Lawyers' Committee For Civil Rights Under Law

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,110 words which is less than half the 13,000 words Appellant's Supplemental *En Banc* Brief was permitted to contain, as determined by the word-count function of Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

s/ *Christopher J. Blake*
Christopher J. Blake

Counsel for Amicus Curiae The Lawyers' Committee For Civil Rights Under Law