

FEDERAL STATUTES

28 U.S.C. § 2255 — Collateral Review — Habeas Corpus — Jones v. Hendrix

Given the complexity of habeas corpus law,¹ one can understand why “fairminded jurists”² have disagreed over the circumstances under which a person in government custody may challenge his³ sentence or conviction. But amid these debates, Americans have taken a bedrock principle of the criminal legal system for granted: that it is unconscionable for innocent people to be incarcerated for crimes they have not committed.⁴ Six Supreme Court Justices have just made it more difficult to effectuate this truism. Last Term, in *Jones v. Hendrix*,⁵ the Court curtailed incarcerated people’s ability to seek habeas corpus review of their convictions. *Jones* held that a federal prisoner who filed a motion to have his sentence vacated, set aside, or corrected, and who could not file a subsequent motion because his new claim did not fall within one of the two exceptions to the statutory bar on second or successive motions, does not qualify for federal habeas review⁶ even if he is not guilty of the crime for which he is imprisoned. And the last thirty years demonstrate that neither Congress nor the judiciary is willing to vindicate the rights of wrongfully incarcerated innocent people.

This case began twenty-eight years ago. In 1995, Marcus De’Angelo Jones was convicted of several felony offenses, at least one of which he agreed to plead to.⁷ As a collateral consequence of his convictions, he was barred from possessing a gun upon his release from prison.⁸ However, Mr. Jones mistakenly believed his felony convictions would be expunged from his record five years after signing his plea agreement,

¹ See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (characterizing the majority’s “petty procedural barriers” to federal habeas as “a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights”).

² *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (noting that the standard for federal habeas review of state conviction determinations is whether “‘fairminded jurists could disagree’ on the correctness of the state court’s decision” (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))).

³ Because 92.8% of people incarcerated in state and federal prisons are men, this comment uses male pronouns in generic references to those in custody. LAURA M. MARUSCHAK & EMILY D. BUEHLER, U.S. DEP’T OF JUST., CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2019 — STATISTICAL TABLES 9 tbl.3 (2021), <https://bjs.ojp.gov/content/pub/pdf/csfac19st.pdf> [<https://perma.cc/8EC4-K2ZA>].

⁴ See, e.g., Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in 43 THE PAPERS OF BENJAMIN FRANKLIN: AUGUST 16, 1784, THROUGH MARCH 15, 1785, at 491, 493 (Ellen R. Cohn et al. eds., 2018) (“That it is better 100 guilty Persons should escape, than that one innocent Person should suffer, is a Maxim that has been long & generally approv’d.”).

⁵ 143 S. Ct. 1857 (2023).

⁶ *Id.* at 1868.

⁷ Brief for Plaintiff-Appellee at 12, *United States v. Jones*, 266 F.3d 804 (8th Cir. 2001) (No. 00-3706).

⁸ See 18 U.S.C. § 922(g) (prohibiting those “who ha[ve] been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . [from] possess[ing] . . . any firearm”).

rendering him reeligible to legally own a gun.⁹ So, after serving his sentence, waiting the supposedly sufficient five years, and clearing background checks run by both a licensed gun seller and the local police,¹⁰ he bought a gun in 1999.¹¹ Thinking the purchase was legal,¹² Mr. Jones openly admitted to possessing the gun¹³ until his arrest later that year for an unrelated matter.¹⁴ Mr. Jones was subsequently charged with two counts¹⁵ of being a felon in possession of a gun¹⁶ and one count of making a false statement to acquire a gun.¹⁷ At trial, he was found guilty on all counts and sentenced to twenty-seven years in federal prison.¹⁸

After his conviction became final,¹⁹ Mr. Jones sought relief through 28 U.S.C. § 2255, the statute governing federal prisoners' motions to "vacate, set aside or correct" an erroneously imposed sentence.²⁰ Though the district court denied his § 2255 motion, the Eighth Circuit reversed and remanded, holding that one of Mr. Jones's felon-in-possession

⁹ See Brief for Petitioner at 5, *Jones*, 143 S. Ct. 1857 (No. 21-857) [hereinafter Brief for Mr. Jones (S. Ct.)] (describing Mr. Jones's trial testimony: he "thought [expungement] would be automatically done" after finishing probation and, upon signing his plea agreement, the state purportedly told him "that in like five years from that day . . . it could be possible that [his] record would be wiped clean").

¹⁰ See Brief for Appellant Marcus De'Angelo Jones at 12, 21, *Jones*, 266 F.3d 804 (No. 00-3706) [hereinafter Brief for Mr. Jones (8th Cir. 2001)] ("[Mr. Jones] had his criminal history run by the Sheriff's Office in Callaway County, Missouri and by the gun dealer. . . . [He] was told he had no prior felonies. His actions indicated he [believed] . . . his prior convictions had been expunged." *Id.* at 21.).

¹¹ See *Jones*, 266 F.3d at 808.

¹² See Brief for Mr. Jones (8th Cir. 2001), *supra* note 10, at 19 (explaining that Mr. Jones was told before being approved for his permit that "if there were convictions on his record, the background check would pick it up").

¹³ During a traffic stop on the day he purchased the firearm, Mr. Jones volunteered that he had a weapon. See Brief for Plaintiff-Appellee, *supra* note 7, at 5. The police ran Mr. Jones's paperwork and returned the gun to him. *Id.* at 6.

¹⁴ Mr. Jones was arrested in an undercover drug operation. *Jones*, 266 F.3d at 808 n.3.

¹⁵ Because Mr. Jones was confirmed to be in possession of a gun on two occasions (during his earlier traffic stop as well as his later arrest), he was charged with two counts of possession. See *United States v. Jones*, 403 F.3d 604, 606 (8th Cir. 2005).

¹⁶ This was a violation of 18 U.S.C. § 922(g).

¹⁷ *Jones*, 266 F.3d at 808. This was a violation of 18 U.S.C. § 922(a)(6). The Government alleged that Mr. Jones lied on ATF Form 4473 to purchase the gun. Brief for Plaintiff-Appellee, *supra* note 7, at 12. Form 4473 requires a would-be gun purchaser to report whether he has been convicted of a felony, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FORM 4473, no.21(e) (2022), and it is a federal offense for a purchaser to lie on the form, 18 U.S.C. §§ 922(a)(6), 924(a)(1)(A).

¹⁸ *Jones*, 403 F.3d at 605 ("The district court sentenced Mr. Jones to 327 months on each of the felon-in-possession charges and 60 months on the charge of making false statements . . ."). Mr. Jones's conviction was affirmed on appeal. *Id.*

¹⁹ A federal prisoner's conviction becomes final for habeas purposes when his certiorari petition to the Supreme Court is denied or when he becomes time-barred from filing such a petition. See *Clay v. United States*, 537 U.S. 522, 527 (2003).

²⁰ 28 U.S.C. § 2255(a) ("A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."); *Jones*, 143 S. Ct. at 1864.

convictions should be vacated.²¹ The trial court acquiesced without changing the length of Mr. Jones's sentence.²²

Nearly two decades into Mr. Jones's sentence, a Supreme Court decision reinterpreting the felon-in-possession statute cast doubt on the legality of his conviction. In *Rehaif v. United States*,²³ the Court announced that felon-in-possession prosecutions require "the Government [to] prove both that the defendant knew he possessed a firearm *and that he knew he belonged to the relevant category of persons barred from possessing a firearm*."²⁴ Because he consistently asserted that he believed his record was expunged,²⁵ and because this belief was thoroughly memorialized,²⁶ Mr. Jones thought he could raise a colorable claim of legal innocence under *Rehaif*. In 2019, he filed a habeas corpus petition.²⁷

The district court dismissed the petition for lack of jurisdiction.²⁸ It explained that a federal inmate may file a habeas petition only when a motion under § 2255 would be "inadequate or ineffective to test the legality of his detention."²⁹ Mr. Jones argued that this exception, often called the "saving clause,"³⁰ applied in his case because § 2255 was, in fact, inadequate to test his detention: he was barred from filing another § 2255 motion because he had already filed one,³¹ and the underlying reason for his subsequent petition, a new rule of statutory interpretation announced by the Supreme Court, was not one of the two exceptions allowing for second or successive motions outlined in the statute.³² But

²¹ *Jones*, 403 F.3d at 607. The court held that Mr. Jones's possession convictions were "multiplicitous" because both were for his uninterrupted possession of a single firearm. *Id.* at 606. Put simply, he was convicted twice for a single crime, a result disallowed by the Fifth Amendment's Double Jeopardy Clause. *Id.*

²² *United States v. Jones*, No. 05-3435, 2006 WL 1766713, at *1 (8th Cir. June 29, 2006). The trial court simply removed the multiplicitous conviction. The Eighth Circuit affirmed. *Id.*

²³ 139 S. Ct. 2191 (2019).

²⁴ *Id.* at 2200 (emphasis added).

²⁵ See Brief for Mr. Jones (8th Cir. 2001), *supra* note 10, at 19, 21; Brief for Mr. Jones (S. Ct.), *supra* note 9, at 5; *supra* notes 9–10 and accompanying text.

²⁶ The crime of falsifying statements to acquire a firearm requires the defendant to have *knowingly* lied to get the gun. 18 U.S.C. § 922(a)(6). That mens rea requirement made Mr. Jones's state of mind when completing his gun-purchasing paperwork relevant to his conviction, explaining why his beliefs about expungement feature prominently throughout his trial and appellate records.

²⁷ *Jones v. Hendrix*, No. 19-CV-00096, 2020 WL 10669427, at *2 (E.D. Ark. Jan. 24, 2020).

²⁸ *Id.* at *6.

²⁹ *Id.* at *2; see also *id.* at *3 (citing 28 U.S.C. § 2255(e)).

³⁰ *Id.* at *3 n.5.

³¹ Brief for Mr. Jones (S. Ct.), *supra* note 9, at 1.

³² *Jones*, 2020 WL 10669427, at *3; see 28 U.S.C. § 2255(h)(1)–(2) (allowing second or successive motions to vacate, set aside, or correct federal sentences only when there is either "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," 28 U.S.C. § 2255(h)(1), or when the Supreme Court announces "a new rule of constitutional law [that was] made retroactive to cases on collateral review . . . [and] was previously unavailable," *id.* § 2255(h)(2)). Congress added this language to § 2255 when it passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 21 and 28 U.S.C. and at FED. R. APP. P. 22).

the district court disagreed, determining that “[n]othing in th[e] statute authorizes a federal prisoner to bring a successive § 2255 motion based on a ‘new rule of statutory construction,’ even one that gives rise to a claim of actual innocence.”³³

The Eighth Circuit affirmed.³⁴ Writing for the panel, Judge Gruender³⁵ explained that Mr. Jones’s argument was foreclosed by circuit precedent; a procedural bar to filing a second or successive § 2255 motion was not, on its own, enough to render the statute inadequate.³⁶ Acknowledging that the change in law post-*Rehaif*, combined with the procedural barrier, was cause for reconsideration, and recognizing that “[m]ost circuits would [have] allow[ed] a petitioner to invoke the saving clause in a case like Jones’s,”³⁷ Judge Gruender nonetheless sided with the *minority* of circuits and forbade Mr. Jones from accessing habeas on the grounds that § 2255 was an effective vehicle for him to raise his innocence claim the first time he sought relief.³⁸ Mr. Jones appealed.

The Supreme Court affirmed.³⁹ Writing for the majority, Justice Thomas⁴⁰ began by recounting the origins of § 2255. Historically, any person incarcerated in federal prison could file a habeas corpus petition once his conviction became final.⁴¹ Habeas petitions can be filed either in one’s convicting court or the district where the incarcerated person is detained,⁴² and many incarcerated people chose the latter.⁴³ Since federal prisoners are concentrated in a few locations, the district courts in those areas were inundated with habeas petitions.⁴⁴ Congress enacted § 2255 to alleviate the burden on those courts; the statute requires prisoners to seek review of their sentences in their sentencing courts⁴⁵ and, per the majority, allows them to file habeas petitions only in the

³³ *Jones*, 2020 WL 10669427, at *6.

³⁴ *Jones v. Hendrix*, 8 F.4th 683, 690 (8th Cir. 2021).

³⁵ Judge Gruender was joined by Judges Benton and Shepherd. *Id.* at 685.

³⁶ *See id.* at 686.

³⁷ *Id.*

³⁸ *See id.* at 688. Judge Gruender cited cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and D.C. Circuits suggesting that Mr. Jones *could* petition for habeas review based on the rule announced in *Rehaif*. *Id.* at 686–87. Only the Tenth and Eleventh Circuits would have barred Mr. Jones’s petition. *See id.* at 687. Judge Gruender sided with the latter because “Jones could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion.” *Id.* Of course, Mr. Jones would likely have lost on a *Rehaif*-type claim had he raised it before the statute of limitations for making a § 2255 motion ran out in 2008, over a decade before *Rehaif* was decided. *See id.* at 686 (“When Jones filed his first § 2255 motion, [the Eighth Circuit] had already rejected a *Rehaif*-type argument.”).

³⁹ *See Jones*, 143 S. Ct. at 1877.

⁴⁰ Justice Thomas was joined by Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett. *Id.* at 1862.

⁴¹ *See id.* at 1865.

⁴² *See* 28 U.S.C. § 2241(d).

⁴³ *See Jones*, 143 S. Ct. at 1866.

⁴⁴ *Id.* (describing district courts as being forced to “process ‘an inordinate number of habeas corpus actions’” (quoting *United States v. Hayman*, 342 U.S. 205, 213–14 (1952))).

⁴⁵ *See id.* at 1865–66; 28 U.S.C. § 2255(a).

“unusual circumstances in which it [would be] impossible or impracticable for a prisoner to seek relief from the sentencing court.”⁴⁶

Nearly fifty years after passing § 2255,⁴⁷ Congress again restricted detainees’ ability to pursue collateral review. The Antiterrorism and Effective Death Penalty Act of 1996⁴⁸ (AEDPA) amended § 2255 by imposing a one-year limitation period for filing motions under the statute⁴⁹ and barring detainees from filing a second or successive motion except in two circumstances: when newly discovered evidence would exonerate them⁵⁰ or when the Supreme Court announces a new rule of constitutional law and makes that rule retroactive.⁵¹ Notably, however, AEDPA did not amend § 2255’s saving clause. Therefore, over the last twenty-eight years, some circuit courts interpreted the saving clause to permit detainees to file habeas petitions when they were barred from filing § 2255 motions by the statute’s near-total ban on second or successive motions.⁵² Mr. Jones argued that the Court should adopt this interpretation: since he had already used his one shot at a § 2255 motion, and since his new claim was not saving clause–eligible, the statute was ineffective to test the lawfulness of his detention. But the Court disagreed.⁵³

Meanwhile, the Government argued⁵⁴ that § 2255 would be inadequate for considering a federal prisoner’s successive motion when he could raise a showing of factual innocence that did not fall within the statute’s two exceptions.⁵⁵ It reasoned that Congress (via AEDPA) had not spoken clearly enough⁵⁶ to “close[] the door on pure[ly] statutory claims not brought in a federal prisoner’s initial § 2255 motion.”⁵⁷ The Court rejected this argument too, stating that the only exceptions to the

⁴⁶ *Jones*, 143 S. Ct. at 1866. Justice Thomas noted that the statute was enacted before highways became ubiquitous, suggesting that some of the difficulties prompting Congress to include the saving clause, like transporting prisoners, may be irrelevant today. *Id.* n.2. He also pointed to several courts’ dissolutions as a situation where the clause was permissibly invoked. *Id.* at 1866.

⁴⁷ *See id.* at 1865 (discussing creation of § 2255 in 1948).

⁴⁸ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

⁴⁹ 28 U.S.C. § 2255(f).

⁵⁰ *Id.* § 2255(h)(1) (requiring “clear and convincing evidence that no reasonable factfinder” would find the petitioner guilty of the offense for which he was convicted).

⁵¹ *Id.* § 2255(h)(2). For § 2255(h)(2) to apply, the Court must explicitly make the rule retroactive to cases on collateral review. *Id.*

⁵² *See supra* note 38 (listing circuits that would likely allow Mr. Jones to file his habeas petition).

⁵³ Justice Thomas explained that “the saving clause is concerned with the adequacy or effectiveness of the remedial *vehicle* . . . not any court’s asserted errors of law.” *Jones*, 143 S. Ct. at 1870.

⁵⁴ The Court considered three arguments on § 2255’s inadequacy in Mr. Jones’s case: Mr. Jones’s, the federal government’s, and the Eighth Circuit’s as argued by a court-appointed amicus curiae. The Court appointed the amicus after learning that the Solicitor General agreed with the Eighth Circuit’s outcome but not its reasoning and thus would not be defending the decision below. *Id.* at 1864.

⁵⁵ *Id.* at 1874.

⁵⁶ The Government invoked the rule that Congress must speak clearly to limit habeas relief to argue that Congress did not intend to block innocent prisoners’ habeas claims. *See* Brief for Respondent at 8, *Jones*, 143 S. Ct. 1857 (No. 21-857).

⁵⁷ *Jones*, 143 S. Ct. at 1876.

bar on successive motions a court should consider are the two outlined in § 2255(h): new evidence or a new rule of constitutional law.⁵⁸

As a result, Mr. Jones was stuck. He used his one chance to file a § 2255 motion before *Rehaif* announced the change that could have exonerated him.⁵⁹ So even though he was likely legally innocent of being a felon in possession,⁶⁰ he had no recourse. Why? Because the Court believed that letting Mr. Jones raise his claim would flout Congress's desire for finality and comity in criminal cases.⁶¹

Justices Sotomayor and Kagan jointly dissented.⁶² Agreeing with the Government, they asserted that habeas should be available to incarcerated people who cannot raise claims under § 2255 when “they can make a colorable showing that they are innocent under an intervening decision of statutory construction.”⁶³ Per their interpretation, AEDPA did not disturb the longstanding principle that habeas should always be available to the innocent, and the case should have been remanded.⁶⁴

Justice Jackson also dissented.⁶⁵ She recounted the history of § 2255 differently from the majority, explaining that it was meant to maintain, not narrow, detainees' ability to seek postconviction review and that the saving clause was written expressly for that purpose.⁶⁶ Acknowledging that AEDPA restricted habeas, she nonetheless argued that Congress, by not altering the saving clause when adding said restraints, intended to preserve detainees' ability to file habeas petitions when their claim was grounded in innocence, as had historically been possible.⁶⁷ And contra the majority, which claimed Congress spoke clearly by articulating only two exceptions to the bar on successive motions, Justice Jackson argued that Congress's silence about how the statute would apply in situations where a detainee's claim is based on legal innocence did not support the Court's “negative inference” and instead could be explained by AEDPA's inartful drafting.⁶⁸

Justice Jackson's dissent ended with several critiques and observations. She criticized the majority for not using the clear statement rule, which would have yielded a more accurate result by demonstrating that

⁵⁸ *See id.*

⁵⁹ *Id.* at 1864.

⁶⁰ *See id.* at 1878 (Jackson, J., dissenting).

⁶¹ *See id.* at 1867–69 (majority opinion).

⁶² *Id.* at 1877 (Sotomayor & Kagan, JJ., dissenting).

⁶³ *Id.*

⁶⁴ *See id.* at 1877–78.

⁶⁵ *Id.* at 1878 (Jackson, J., dissenting).

⁶⁶ *See id.* at 1880 (“[T]he ‘sole purpose’ of § 2255 ‘was to minimize the difficulties encountered in habeas corpus hearings’ while still ‘affording the same rights in another and more convenient forum.’” (alteration in original) (quoting *United States v. Hayman*, 342 U.S. 205, 219 (1952))).

⁶⁷ *See id.* at 1880–82.

⁶⁸ *See id.* at 1889 n.10, 1890–91, 1899 (“The rushed and emotionally charged manner in which AEDPA came into fruition makes Congress's lack of attention to this detail a very realistic possibility. . . . AEDPA is ‘shoddily crafted and poorly cohered.’” *Id.* at 1889 n.10 (quoting Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 342 (2010))).

AEDPA was not intended to prohibit legal innocence claims from being raised in federal habeas if filed after the petitioner had already raised a claim under § 2255.⁶⁹ She chastised the Court for “downplay[ing] the stakes in th[e] case” by characterizing Mr. Jones’s claim as merely statutory rather than as one of innocence, which helped the majority demarcate the claim as outside the scope of pre-AEDPA federal habeas.⁷⁰ She pondered whether there was an Eighth Amendment “cruel and unusual punishment” issue in continuing to detain someone who may be innocent.⁷¹ Finally, she lamented that the Court had further turned “postconviction judicial review into an aimless and chaotic exercise in futility,”⁷² calling on Congress to “step in and fix th[e] problem” the Court has created in its AEDPA jurisprudence.⁷³

Both the majority and Justice Jackson recognized that, for people in Mr. Jones’s position to qualify for habeas relief, Congress must amend the statutes governing collateral review. But Congress is well aware of the problems it has created — and that the Court has exacerbated — for those seeking collateral review and has not enacted meaningful reforms on behalf of innocent incarcerated people.

Jones is part of the Court’s general habeas jurisprudence, which considers postconviction remedies for anyone held in government custody. Generally, incarcerated people seeking review of their convictions assert that an error or constitutional violation has tainted the proceedings or outcome of their criminal case.⁷⁴ Collateral review is a critical tool for vindicating these people’s constitutional rights, even if they never claim they are innocent. But the American public is more interested in, and sympathetic to, the plight of the wrongfully convicted.⁷⁵ Though they comprise a small percentage of those seeking collateral review,⁷⁶ possibly innocent prisoners are the face of criminal legal reform.⁷⁷ And though

⁶⁹ *Id.* at 1897 (“Is there an unambiguous sign in the text of § 2255 that Congress meant for § 2255(h) to strip an incarcerated individual of any opportunity to raise a new claim of legal innocence in a motion brought in federal court? No such sign exists.”).

⁷⁰ *See id.* at 1894.

⁷¹ *See id.* at 1897.

⁷² *Id.* at 1898.

⁷³ *Id.* at 1899.

⁷⁴ *See, e.g.*, CONG. RSCH. SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 4–8 (2010).

⁷⁵ For an explanation of this phenomenon in the capital context, see Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 597 (2005).

⁷⁶ *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, NAT’L CTR. FOR STATE CTS., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 31 (2007), <https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/54L2-SKGG>].

⁷⁷ For an example in the capital context, see Liliana Segura & Jordan Smith, “*There Are Innocent People on Death Row*” — *Citing Wrongful Convictions, California Governor Halts Executions*, THE INTERCEPT (Mar. 13, 2019, 4:03 PM), <https://theintercept.com/2019/03/13/california-death-penalty-moratorium> [<https://perma.cc/CDT2-MT2Z>].

this focus on innocence is controversial,⁷⁸ the *Jones* decision is especially important because it is an example of the Court shunning someone in the most favored class of criminal appellants: an innocent man in prison.

There are two ironies in Mr. Jones's case. First, his situation is arguably the exact reason why habeas exists. Postconviction review is controversial. Critics describe it as antithetical to federalism,⁷⁹ subject to manipulation,⁸⁰ and a drain on judicial resources.⁸¹ Indeed, AEDPA is the crowning achievement in a decades-long movement to shrink collateral review.⁸² But most advocates for a conservative collateral review regime have been careful to avoid suggesting limiting postconviction remedies for the innocent. For example, Judge Friendly, in an article explicitly calling for collateral review to be sharply curtailed, stated that he would "allow an exception . . . where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man."⁸³ Later, AEDPA's proponents, furious over prisoners "mak[ing] a mockery of the criminal justice system by using every trick in the book to delay imposition of their sentences,"⁸⁴ still attempted to write the Act such that innocent people would not be trapped behind bars.⁸⁵

But, perversely, the Supreme Court has made it harder for innocent people to get postconviction relief. Consider *Herrera v. Collins*.⁸⁶ There, the Court assessed a state prisoner's assertion of his innocence in a second habeas petition based on new evidence: affidavits asserting that someone else committed the murders for which Mr. Herrera was imprisoned.⁸⁷ The Court rejected Mr. Herrera's innocence claim not because it was without merit but instead because it did not, by itself, entitle him to federal habeas relief.⁸⁸ Innocence, the Court reaffirmed,⁸⁹ could be

⁷⁸ For a discussion of the pitfalls of focusing on innocence, see Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 324 (2009).

⁷⁹ See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 510–19 (1963).

⁸⁰ See, e.g., *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring in result) (complaining that habeas vagueness "invite[s] farfetched or borderline petitions").

⁸¹ See, e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970) ("[T]he most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community . . .").

⁸² Conservatives have called for habeas to be narrowed for decades. See generally, e.g., Bator, *supra* note 79.

⁸³ Friendly, *supra* note 81, at 160 (footnote omitted).

⁸⁴ 141 CONG. REC. 4086 (1995) (statement of Rep. Bill McCollum).

⁸⁵ See, e.g., 28 U.S.C. § 2255(h)(1).

⁸⁶ 506 U.S. 390 (1993).

⁸⁷ *Id.* at 396–97.

⁸⁸ *Id.* at 400, 404.

⁸⁹ In *Sawyer v. Whitley*, 505 U.S. 333 (1992), decided a year prior to *Herrera*, the Court announced that a claim of actual innocence could overcome a procedural bar on a successive habeas petition if tied to a federal constitutional claim. *Id.* at 335–36.

used as a gateway⁹⁰ for litigating constitutional issues, but could not be the sole claim in one's habeas petition.⁹¹ To the Court, Mr. Herrera was not innocent, irrespective of his affidavits; because he was found guilty at trial, and because the trial's procedures did not violate his constitutional rights, the new evidence could not be considered.⁹²

There is a big problem with innocence qualifying only as a gateway for incarcerated people to seek habeas rather than being an adequate cause in itself: AEDPA, and the Court's AEDPA jurisprudence, have made it nearly impossible for the incarcerated to successfully raise constitutional claims. Procedural barriers,⁹³ prohibitions on considering new evidence,⁹⁴ and a lack of right to counsel on appeal⁹⁵ all seriously undermine the United States's system of postconviction review. *Jones* is the embodiment of this issue, where the Court's fidelity to procedure and finality takes precedence over the substance of one's claim.

Given this state of affairs, one might think Congress would intervene to fix habeas. But it has not. Congress knows the importance of habeas corpus.⁹⁶ And at least some legislators understand that AEDPA is unconscionably restrictive: Representatives Dennis Moore and Donald Payne, Jr., introduced the Justice for the Wrongfully Accused Act⁹⁷ in 2009, which proposed to remove the procedural and evidentiary bars for second or successive habeas petitions based on actual innocence claims.⁹⁸ Representatives Joe Kennedy III and Hakeem Jeffries's bill, the Citizen Justice Restoration Act of 2020,⁹⁹ would have expanded habeas by allowing federal courts to reverse state court "adjudication[s] . . . in error,"¹⁰⁰ making all new constitutional rules automatically retroactive,¹⁰¹ and creating another exception to the bar on successive petitions based on the announcement of a new rule of constitutional law even if

⁹⁰ For an explanation of innocence as a gateway, see Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 423 & n.10 (2018).

⁹¹ *Herrera*, 506 U.S. at 404.

⁹² *Id.* at 398–400. Later, as the provisions of AEDPA were being debated, Representative Mel Watt proposed an amendment to make innocence a standalone basis for habeas review. 141 CONG. REC. 4096 (1995) (statement of Rep. Mel Watt). That amendment was rejected. *Id.* at 4095.

⁹³ For example, AEDPA's one-year statute of limitations for filing § 2255 motions. 28 U.S.C. § 2255(f).

⁹⁴ See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1727–28 (2022) (prohibiting federal habeas courts from considering evidence beyond the state court record even when that evidence was not developed because of ineffective assistance of counsel).

⁹⁵ See *Garza v. Idaho*, 139 S. Ct. 738, 749 (2019).

⁹⁶ For example, there are numerous instances of legislators discussing habeas as a right for those detained at Guantanamo Bay. See, e.g., 154 CONG. REC. 12424 (2008) (statement of Sen. Dianne Feinstein) ("[T]he Supreme Court has recognized that detainees at Guantanamo cannot be denied the fundamental legal right to habeas corpus, enshrined in the Constitution.").

⁹⁷ H.R. 3320, 111th Cong. (2009).

⁹⁸ *Id.*

⁹⁹ H.R. 9045, 116th Cong. § 3(a) (2020).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 3(b)(1).

the same claim was raised in the first petition.¹⁰² And Representative Henry C. Johnson's Effective Death Penalty Appeals Act,¹⁰³ introduced both in 2009 and 2020 and cosponsored by numerous representatives each time, proposed allowing successive petitions in federal habeas review of both state and federal convictions when the basis for the claim is the petitioner's innocence.¹⁰⁴ None of these Acts were ultimately enacted.¹⁰⁵

One can understand why legislators are hesitant to create a workable system of collateral review. Public acknowledgement of mass incarceration¹⁰⁶ notwithstanding, politicians may be wary of being perceived as sympathetic to criminals.¹⁰⁷ And since people with criminal convictions are often disenfranchised,¹⁰⁸ politicians have no incentive to pass laws on their behalf. Congress's choice is, effectively, between enacting unpopular reforms in the name of justice or doing nothing.

Finally, the second irony: were Mr. Jones a state prisoner seeking state habeas review, he may have had his claim heard. Even Texas, infamously draconian on criminal matters,¹⁰⁹ allows the type of innocence claim Mr. Jones sought to raise.¹¹⁰ This incongruence highlights the absurdity of our nation's collateral review system. Absent meaningful reforms, the United States will continue to be blemished by our capricious criminal legal system, where innocent people, like Mr. Jones, remain trapped behind bars.

¹⁰² *Id.* § 3(b)(3).

¹⁰³ H.R. 3986, 111th Cong. (2009).

¹⁰⁴ *Id.* § 3(b)(3); *see also* Effective Death Penalty Appeals Act, H.R. 7532, 116th Cong. § 3(b)(3) (2020).

¹⁰⁵ Congress did pass the Innocence Protection Act of 2004, Pub. L. No. 108-405, tit. IV, 118 Stat. 2260, 2278–93 (codified as amended in scattered sections of 18, 28, and 34 U.S.C.), but that Act did nothing to expand the statutory avenues for incarcerated people seeking collateral review and instead only created procedures for capital defendants to seek exoneration through DNA testing. *See id.*

¹⁰⁶ *See, e.g.*, The New Yorker Radio Hour, *Mass Incarceration, Then and Now*, NEW YORKER (Jan. 17, 2020), <https://www.newyorker.com/podcast/the-new-yorker-radio-hour/mass-incarceration-then-and-now> [<https://perma.cc/JH3A-EQJR>].

¹⁰⁷ *See, e.g.*, Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html> [<https://perma.cc/P58V-WBHR>].

¹⁰⁸ *See, e.g.*, German Lopez, *The State of Ex-Felons' Voting Rights, Explained*, VOX (Sept. 18, 2020, 10:40 AM), <https://www.vox.com/voting-rights/21440014/prisoner-felon-voting-rights-2020-election> [<https://perma.cc/SX2T-A87Q>].

¹⁰⁹ *See, e.g.*, Jolie McCullough, *Texas Executes Wesley Ruiz Despite Ongoing Fight Over State's Use of Old Lethal Injection Drugs*, TEX. TRIB. (Feb. 1, 2023, 7:00 PM), <https://www.texastribune.org/2023/02/01/texas-execution-drugs-wesley-ruiz> [<https://perma.cc/XCD9-48X4>].

¹¹⁰ *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 4(a) (West 2023).