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INTRODUCTION

"It's not easy for me to raise my hand and send off a boy to die without talking about it first."[1]

The death penalty has been used as a form of criminal punishment since the beginning of civilization,[2] and has existed in the United States since the founding of the original colonies.[3] In its early days, the death penalty was used for a variety of crimes, including murder,

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[1] 12 ANGRY MEN (Reginald Rose, et. al. 1957).

[2] The first established death penalty laws were codified in the Code of King Hammaurabi of Babylon in the eighteenth century B.C. *History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/part-i-history-death-penalty#america (last visited Sept. 13, 2015).

[3] *Origins of Capital Punishment*, CRIME MUSEUM, http://www.crimemuseum.org/crime-library/origins-of-capital-punishment (last visited Sept. 13, 2015).

burglary, treason, counterfeiting, and arson.[4] This use was limited, however, by the ratification of the Bill of Rights in 1791.[5] Indeed, the Eighth Amendment of the Bill of Rights prohibits the infliction of "cruel and unusual punishment."[6] Thus, the punishment must be proportional to the crime committed.[7] Accordingly, today, the death penalty is imposed predominantly for the crime of murder,[8] with the view being that the punishment of death "fits the crime" of murder—an "eye for an eye" if you will.

Over 3000 inmates currently sit on death row in the United States.[9] Sixty-two (62) of these inmates await execution on federal death row[10] in Terre Haute, Indiana.[11] Among these inmates is a man by the name of Bruce Webster.[12] Webster has been housed in Terre Haute since 1996, following his conviction in the Northern District of Texas for the federal crimes of kidnapping resulting in death,

[4] *Id*.

[5] *America's Tug of War over Sanctioned Death: The U.S. History of Capital Punishment*, Random History (Sept. 19, 2009), http://www.randomhistory.com/2009/09/19_capital-punishment.html.

[6] *Id.*; *see also* U.S. CONST. amend. VIII.

[7] *See* Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)) ("The Eighth Amendment's protection against excessive or cruel and unusual punishment flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense.").

[8] *Death Penalty for Offenses Other than Murder*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last visited Sept. 13, 2015). Although capital offenses exist in several states for various other types of crimes, no one is currently on death row for these crimes. *Id*.

[9] *Death Row Inmates by State*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (last visited Sept. 13, 2015).

[10] *Federal Death Row Prisoners*, DEATH PENALTY INFORMATION CENTER (June 26, 2015), http://www.deathpenaltyinfo.org/federal-death-row-prisoners.

[11] The federal correctional facility in Terre Haute is currently "the only federal facility which can carry out executions." Jon Swaner, *Why Tsarnaev Was Not Sent to Terre Haute*, WTHI, June 26, 2015, http://wthitv.com/2015/06/26/why-tsarnaev-was-not-sent-to-terre-haute/.

[12] *Federal Death Row Prisoners*, *supra* note 10.

conspiring to commit kidnapping, and using and carrying a firearm during a crime of violence.[13] He was sentenced to death on the first count (kidnapping resulting in death) after the district court dismissed the argument that he was ineligible for the death penalty because he suffers from an intellectual disability.[14] On direct appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed Webster's death sentence.[15] Several years later, the Fifth Circuit rejected Webster's motion to vacate his sentence pursuant to 28 U.S.C. § 2255[16] as well as his request for a second collateral review under this same statute.[17] Webster then filed a writ of habeas corpus in the Seventh Circuit pursuant to the Savings Clause of Section 2255.[18]

The Savings Clause has been and continues to be a constant "source of litigation" in federal courts,[19] and was at the heart of Webster's plea before the U.S. Court of Appeals for the Seventh Circuit. Section 2255 allows for a federal prisoner to vacate his sentence if it "was imposed in violation of the Constitution or laws of the United States."[20] As a general rule, the remedy afforded by Section 2255 functions as a substitute for the writ of habeas corpus.[21]

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[13] Webster v. Daniels, 784 F.3d 1123, 1124 (7th Cir. 2015).

[14] *Id*. at 1124–25. The governing statute at the time was 18 U.S.C. § 3596(c), which makes it unlawful to impose a sentence of death upon a person who is mentally retarded (now termed "intellectually disability" by the Supreme Court). *See* Hall v. Florida., 134 S. Ct. 1986, 1990 (2014).

[15] United States v. Webster, 162 F.3d 308, 351 (5th Cir. 1998).

[16] United States v. Webster, 421 F.3d 308 (5th Cir. 2005).

[17] *In re* Webster, 605 F.3d 256 (5th Cir. 2010).

[18] *Webster*, 784 F.3d at 1135.

[19] Nicolas Matterson, *Feeling Inadequate?: The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*, 54 B.C. L. REV. 353, 355 (2013).

[20] 28 U.S.C. § 2255(a).

[21] *Webster*, 784 F.3d at 1124. "A writ of habeas corpus is a court order that commands an individual or government official, usually a prison warden, who has restrained another to produce the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner's release." *Habeas Corpus*, THE FREE DICTIONARY, http://legaldictionary.thefreedictionary.com/writ+of+habeas+corpus (last visited Sept. 13, 2015).

However, Congress has recognized that there might be cases in which the remedy provided by Section 2255 "is inadequate or ineffective to test the legality of the [prisoner's] detention,"[22] and has, accordingly, authorized the filing of a traditional writ of habeas corpus under 28 U.S.C. § 2241 in these rare circumstances.[23] In *Webster v. Daniels*, the Seventh Circuit recognized that Bruce Webster had presented such a rare case, due largely to the fact that he seeks to offer "newly discovered" evidence that may demonstrate that he was diagnosed as intellectually disabled before his arrest and subsequent sentencing.[24] As a result of this decision, Webster could have the opportunity to challenge his death sentence yet again.[25]

This article will analyze the soundness of the Seventh Circuit's decision to allow Bruce Webster to file a writ of habeas corpus attacking his death sentence pursuant to 28 U.S.C. § 2241. Part I of this article discusses the federal statutes at issue in *Webster v. Daniels*: 28 U.S.C. § 2255 and 28 U.S.C. § 2241. Part II analyzes the factual and procedural background of *Webster v. Daniels*. Part III then examines the Seventh Circuit's opinion in *Webster v. Daniels* as well as prior Seventh Circuit cases that address the application of the Savings Clause. Finally, Part IV considers the Seventh Circuit's decision in *Webster v. Daniels*, and argues that this decision, though commendable in principle, was not supported by prior case law or sufficient legal justification and is contrary to public policy.

STATUTORY BACKGROUND

To fully understand *Webster v. Daniels*, a brief overview of federal habeas corpus law is required, specifically Section 2255, since the conclusion reached in this case turns on the Seventh Circuit's interpretation of this provision. Accordingly, this first Part provides a brief history of the writ of habeas corpus, leading to the enactment of

[22] *Webster*, 784 F.3d at 1124; *see also* 28 U.S.C. § 2255(e).

[23] 28 U.S.C. § 2255(e).

[24] *See Webster*, 784 F.3d at 1142–44.

[25] *See id*. at 1146.

28 U.S.C. § 2255. It will also discuss the provisions of 28 U.S.C. § 2255, with a focus on the Savings Clause.

A. History of Federal Habeas Corpus Review

Habeas corpus is a Latin phrase meaning "to produce the body."[26] Thus, the function of a writ of habeas corpus, often referred to as the "Great Writ,"[27] is to bring a prisoner before the court to determine the legality of the incarceration or detention.[28] It is most often invoked after conviction and after the exhaustion of direct appeal; it is often a last resort for prisoners seeking relief.[29] The writ of habeas corpus was developed in England during the thirteenth century, and was later brought to the colonies, and incorporated into the U.S. Constitution.[30] The Suspension Clause, contained in Article I of the Constitution, provides that "the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety shall require it."[31]

This common law right to habeas corpus was codified for the first time in the Habeas Corpus Act of 1867,[32] and is currently codified at 28 U.S.C. § 2241.[33] Section 2241 authorizes federal courts to grant writs of habeas corpus "when any person is restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the

[26] Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 446 (2007).

[27] *See* Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[28] Kovarsky, *supra* note 26, at 446.

[29] CHARLES DOYLE, CONG. RESEARCH SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 1 (2006).

[30] Jennifer L. Case, Note, *Text Me: A Text-Based Interpretation of 28 U.S.C. § 2255(e)*, 103 KY. L.J. 169, 171–72. (2014).

[31] U.S. CONST. art. 1, § 9, cl. 2.

[32] Case, *supra* note 30, at 173.

[33] Jennifer L. Case, *Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause*, 45 U. MEM. L. REV. 1, 9 (2014).

United States."[34] This statute provided prisoners with federal habeas corpus relief for well over a century.[35] However, the filing requirements of the Act eventually became problematic.[36]

The Habeas Corpus Act required a prisoner to file his or her writ of habeas corpus in the district of the prisoner's incarceration.[37] This requirement created two main problems.[38] First, those federal districts with large concentrations of federal prisons were required to handle an inordinate number of habeas corpus petitions.[39] Second, because habeas courts were "often far from the sentencing court, prisoners had limited access to relevant records, witnesses, and evidence."[40] To remedy these problems, Congress proposed new legislation that required federal prisoners to challenge their convictions in the court that sentenced them, rather than the court with jurisdiction over their confinement.[41] This legislation, codified at 28 U.S.C. § 2255, was enacted in 1948.[42]

B. 28 U.S.C. § 2255 and the Savings Clause

Section 2255 allows a federal prisoner to move "to vacate, set aside, or correct" a federal sentence if "the sentence was imposed in violation of the Constitution or laws of the United States."[43] A federal prisoner can also use a Section 2255 motion to argue that: (1) the sentencing court was without jurisdiction to impose the sentence; (2)

[34] Case, *supra* note 30, at 173 (citing Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86).

[35] *Id*. at 174 (quoting Wayne R. LaFave et. al., Criminal Procedure §28.2(b) (3d. ed. 2013)).

[36] *Id*. at 175.

[37] United States v. Hayman, 342 U.S. 205, 213 (1952).

[38] Case, *supra* note 30, at 175.

[39] *Id*.

[40] *Id*. at 175–76.

[41] Matteson, *supra* note 19, at 358–59 (2013) (citing *Hayman*, 342 U.S. at 213–14).

[42] *Id*. at 359.

[43] 28 U.S.C. § 2255(a).

the sentence was in excess of the maximum authorized by law; or, (3) the sentence is otherwise subject to collateral attack.[44]

Section 2255 effectively replaced the traditional writ of habeas corpus provided by 28 U.S.C. § 2241 as the means for a federal prisoner to challenge a federal criminal sentence.[45] In fact, Section 2255 goes so far as to prohibit federal courts from hearing Section 2241 petitions filed by federal prisoners.[46] Indeed, the relevant language of the statute provides that "an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him."[47]

Section 2255 enables federal prisoners to bring an initial motion as a matter of right.[48] However, Congress has limited the opportunity for successive relief under Section 2255 as a result of the societal interest in the finality of judicial decisions.[49] Therefore, prisoners seeking to bring a second or successive motion pursuant to Section 2255 must satisfy stringent standards before the motion may be heard.[50] Section 2255(h) first requires the prisoner to petition the appropriate court of appeals[51] for an order authorizing the district court to consider the successive motion.[52] A three-judge panel of the court of appeals then hears this petition.[53] The court of appeals may authorize the filing of a second or successive motion if it contains:

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[44] Case, supra note 30, at 177 (citing 28 U.S.C. § 2255).

[45] Lauren Staley, Note, *Inadequate and Ineffective? Factual Innocence and the Savings Clause of § 2255*, 81 U. CIN. L. REV. 1149, 1151 (2013) (quoting Wayne R. LaFave et. al., Criminal Procedure §28.9(a) (3d. ed. 2013)).

[46] Case, *supra* note 33, at 12–13.

[47] 28 U.S.C. § 2255(e).

[48] *See* Case, *supra* note 33, at 14.

[49] *See* Hawkins v. United States, 706 F.3d 820, 824 (7th Cir. 2013).

[50] *See* 28 U.S.C. § 2255(h).

[51] In other words, the court of appeals with jurisdiction over the sentencing court.

[52] 28 U.S.C. § 2244(3)(A).

[53] *Id.* § 2244(3)(B).

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[54]

Simply put, if a successive Section 2255 motion fails to introduce either new evidence demonstrating innocence of the underlying crime or a new rule of constitutional law previously unavailable to the prisoner, a court of appeals will not certify the petition.[55] As a result, successive collateral review will be barred, unless the Savings Clause applies.[56]

The Savings Clause, codified at 28 U.S.C. § 2255(e), allows federal prisoners to file a traditional habeas corpus petition in the district of incarceration pursuant to Section 2241.[57] However, the Savings Clause only applies when the remedy provided by Section 2255(a) is "inadequate or ineffective to test the legality of the detention."[58] This provision is often relied upon in cases where the prisoner filed an unsuccessful motion under Secion 2255(a), and then was denied the opportunity to file a successive motion pursuant to Section 2255(h), leaving the Savings Clause as the only means available to obtain review of a sentence that may be unconstitutional or illegal.[59] The application of the Savings Clause in such

[54] *Id*. § 2255(h).

[55] Staley, *supra* note 45, at 1152. The grant or denial of an authorization to file a successive Section 2255 motion is not appealable. 28 U.S.C. § 2244(3)(E).

[56] Staley, *supra* note 45, at 1152.

[57] Case, *supra* note 33, at 14.

[58] 28 U.S.C. § 2255(e).

[59] Matteson, *supra* note 19, at 362.

circumstances is frequently litigated,[60] and it is the source of the dispute among the Seventh Circuit judges in *Webster v. Daniels*.

CASE BACKGROUND

It is necessary to understand the facts and procedural history of *Webster v. Daniels* in order to understand the Seventh Circuit's holding in this case. Accordingly, this Part will set forth the facts, detailing the crimes committed by Webster that ultimately led to his conviction in the Northern District of Texas. It will also briefly discuss the case's disposition in the Texas district court and the U.S. Court of Appeals for the Fifth Circuit prior to the collateral attack in the Seventh Circuit.

A. Factual Background

Webster, along with his accomplices Orlando Hall and Marvin Holloway, ran a drug ring in Pine Bluff, Arkansas in the early 1990s.[61] The group purchased marijuana in the Dallas/Fort Worth area with the help of a local contact, Steven Beckley, and transported it back to Arkansas to sell.[62]

On September 21, 1994, Hall flew to Dallas to participate in a drug transaction.[63] In Dallas, Hall and his local contact, Beckley, met two local drug dealers, Stanford Vitalis and Neil Rene, at a car wash and gave them $4,700 as an advance payment for marijuana.[64] Vitalis and Rene stated that they would return to the car wash later that day with the marijuana, but they never appeared.[65] Vitalis and Rene claimed that the money and the car they had been driving were stolen.[66] Hall was suspicious of this story, so he, along with his

[60] *Id*. at 355.
[61] Webster v. Daniels, 784 F.3d 1123, 1125 (7th Cir. 2015).
[62] United States v. Webster, 162 F.3d 308, 317 (5th Cir. 1998).
[63] *Id*.
[64] *Webster*, 784 F.3d at 1125.
[65] *Id*.
[66] *Id*.

brother, Demetrious, and Beckley, began to survey Vitalis and Rene's apartment.[67] When they later saw Vitalis and Rene in the supposedly stolen vehicle, they deduced that the story about the stolen money was also false.[68]

On September 24, 1994, Hall arranged for Webster to fly to Dallas.[69] That night, Hall, Demetrious, Beckley, and Webster went to Vitalis and Rene's apartment in a vehicle owned by Hall's sister.[70] The group approached the apartment and knocked on the door.[71] The occupant, Lisa Rene (the sixteen-year old sister of Neil Rene), refused to let them in.[72] Webster then forcibly entered the apartment, grabbed Lisa, and dragged her to the car.[73] Webster forced Lisa onto the floorboard of the car, and the group drove to Hall's sister's apartment nearby.[74] Once there, they forced Lisa into Beckley's car and drove around looking for a secluded spot.[75] During the drive, Hall raped Lisa and forced her to perform fellatio on him.[76]

Beckley, Demetrious, and Webster eventually decided to drive Lisa back to Pine Bluff, Arkansas.[77] Webster and Demetrious took turns raping Lisa on the way there.[78] Once they arrived in Pine Bluff, the men rented a motel room, where they tied Lisa to a chair and continued to sexually assault her.[79]

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] United States v. Webster, 162 F.3d 308, 318 (5th Cir. 1998).
[72] Webster v. Daniels, 784 F.3d 1123, 1126 (7th Cir. 2015).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] United States v. Webster, 162 F.3d 308, 318 (5th Cir. 1998).
[77] *Webster*, 784 F.3d at 1126.
[78] *Id.*
[79] *Id.*

The next day, Hall and Holloway arrived at the motel.[80] They decided that Lisa "knew too much."[81] Later that afternoon, Hall and Webster went to a nearby park, and dug a grave.[82] Webster, Hall, and Beckley took Lisa to the park the next morning.[83] They covered her eyes with a mask, and led her to the grave site.[84] At the grave site, Hall turned Lisa's back to the grave, placed a sheet over her head, and then hit her in the head with a shovel.[85] Lisa screamed and tried to run away, but Beckley grabbed her and hit her in the head twice with the shovel.[86] Webster and Hall then took turns hitting her with the shovel.[87] Webster then gagged her, dragged her to the grave, stripped her, poured gasoline on her, and shoveled dirt over her.[88] Shortly thereafter, Hall, Demetrious, Beckley and Webster were arrested for this horrific crime.[89]

B. Procedural History

Webster was convicted in the Northern District of Texas on charges of kidnapping in which death occurred, conspiracy to commit kidnapping, and using and carrying a firearm during a crime of violence.[90] He was sentenced to death on the first count.[91]

[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] United States v. Webster, 162 F.3d 308, 319 (5th Cir. 1998).
[87] *Webster*, 784 F.3d at 1126.
[88] *Id*.
[89] *Id*.
[90] *Id*. at 1126–27.
[91] *Id*. at 1127.

Webster challenged this sentence, arguing that he was ineligible for the death penalty under 18 U.S.C. § 3596(c)[92] because he suffers from an intellectual disability.[93] Webster relied on the testimony of three expert psychologists to support this argument.[94] These three experts maintained that a finding of mental retardation is appropriate if the person's I.Q. is roughly 70 or below and if the person has a deficit in at least one of the three areas of adaptive functioning (communication, socialization, and daily living skills).[95] All three testified that Webster suffered from a low I.Q. (with scores on I.Q. tests[96] ranging from 59 to 65)[97] and had the adaptive functioning of a six to seven-year old.[98]

To rebut this testimony, the government offered two of its own experts, who testified that Webster achieved a score of 72 on a truncated version of the I.Q. test performed by the government[99] and that Webster had satisfactory adaptive functioning.[100] The government also suggested that Webster may have lied or otherwise manipulated the tests performed by his experts in order to establish that he was ineligible for the death penalty.[101]

This conflicting evidence clearly created a question of fact, and the district court, weighing this evidence, concluded that Webster was not intellectually disabled, and, therefore, he was not exempt from the

[92] 18 U.S.C. § 3956(c) provides that "a sentence of death shall not be carried out upon a person who is mentally retarded, or a person who lacks the mental capacity to understand the death penalty due to mental disability."

[93] *Webster*, 784 F.3d at 1132.

[94] *Id*. at 1127.

[95] *Id*.

[96] These experts administered the Wechsler Adult Intelligence Scale (WAIS) Test. *Id.* at 1128. This test is widely used to test I.Q and assesses both verbal and performance skills. *Id*.

[97] *Id*. at 1128.

[98] *Id*. at 1129.

[99] *Id*. at 1130.

[100] *Id*. at 1131.

[101] *Id*. at 1128.

implementation of the death penalty under 28 U.S.C. § 3596(c).[102] Webster immediately filed an appeal, but his death sentence was affirmed by the U.S. Court of Appeals for the Fifth Circuit.[103]

In 2005, six years after Webster was sentenced, the U.S. Supreme Court, in *Atkins v. Virginia*, held that the Eighth Amendment of the United States Constitution—not just federal statutory law—prohibits the execution of the intellectually disabled.[104] Even though the trial court had previously determined that Webster was not intellectual disabled, Webster nevertheless filed a motion to vacate his death sentence in light of *Atkins*.[105] In this motion, brought pursuant to 28 U.S.C. § 2255, Webster argued that his sentence was imposed in violation of the Eighth Amendment.[106] This argument was rejected by the Fifth Circuit, which held that Webster failed to establish that he suffered from an intellectual disability at trial and that, accordingly, the imposition of the death penalty by the trial court was proper, regardless of the Supreme Court's decision in *Atkins*.[107]

Following this decision, "nothing of legal significance happened in Webster's case for four years."[108] In 2009, though, Webster returned to the Fifth Circuit and, with the aid of new counsel, again attempted to get his sentence vacated pursuant to 28 U.S.C. § 2255.[109] With this second Section 2255 motion, Webster sought to introduce newly discovered evidence purportedly revealing that he had been diagnosed as intellectually disabled a year before the commission of the crimes for which he was convicted.[110] His motion for certification was denied

[102] *Id*. at 1131.

[103] *Id*.

[104] Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded criminals constitutes cruel and unusual punishment within the meaning of the Eighth Amendment).

[105] United States v. Webster, 421 F.3d 308, 310–11 (5th Cir. 2005).

[106] *Id*.

[107] *Id*. at 313.

[108] *Webster*, 784 F.3d at 1132.

[109] *Id*.

[110] *Id*. at 1133.

by the Fifth Circuit, which held that Webster's proposed new evidence "did not meet the stringent standards imposed by Section 2255(h)" for successive motions.[111] The Fifth Circuit first concluded that Section 2255(h)(1) was not applicable because it requires the prisoner to present evidence that he could not be found guilty of the underlying offense.[112] However, Webster did not seek to offer evidence of his innocence; rather, he sought to challenge his sentence.[113] The Fifth Circuit also concluded that Section 2255(h)(2) was inapplicable because it requires a new rule of constitutional law that was previously unavailable, and *Atkins* had already been decided at the time of Webster's initial Section 2255 motion.[114]

When certification of his successive Section 2255 petition was denied, Webster filed a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the District Court for the Southern District of Indiana, where Webster then currently resided on death row in Terre Haute.[115] Webster argued that he was permitted to bring a traditional habeas corpus petition under Section 2255(e).[116] Section 2255(e)—or the "Savings Clause"—allows federal prisoners to file a petition for writ of habeas corpus when the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of his detention."[117] The district court found that Webster did not qualify for relief under the Savings Clause on the basis that the Clause applies only to changes in the law, not to new or additional facts.[118] Webster appealed the district court's denial of his habeas corpus petition to the Seventh Circuit.[119] A panel of the

[111] *Id*. at 1134.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id*. at 1135. "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

[116] *Webster*, 784 F.3d at 1135.

[117] 28 U.S.C. § 2255(e); *see also* Matteson, *supra* note 19, at 359.

[118] *Webster*, 784 F.3d at 1135.

[119] *Id*.

U.S. Court of Appeals for the Seventh Circuit reviewed the denial of Webster's Section 2241 petition *de novo*.[120] The panel affirmed the district court decision, concluding that new evidence can never satisfy Section 2255(e).[121] However, the full court vacated that decision and reheard the case *en banc*.[122] This decision led to the controversial opinion that is the subject of this article.

DISCUSSION OF THE SEVENTH CIRCUIT'S OPINION IN *WEBSTER V. DANIELS*

This Part will discuss Seventh Circuit case law interpreting the Savings Clause of 28 U.S.C. § 2255. This Part will then examine the majority opinion, with a focus on how the majority interpreted and applied the Savings Clause in *Webster v. Daniels*. Finally, this Part will consider the dissenting opinion in *Webster v. Daniels*.

A. Prior Seventh Circuit Interpretations of the Savings Clause

The Savings Clause allows a federal prisoner to file a habeas corpus petition under Section 2241 when the remedy provided by Section 2255 "is inadequate or ineffective to test the legality of his detention."[123] Interestingly, the Supreme Court has never interpreted this Clause, despite ambiguity as to the meaning of the terms "inadequate" or "ineffective."[124] As a result, the circuit courts have developed different methodologies for determining whether the Savings Clause allows a prisoner to seek collateral review under Section 2241.[125]

[120] *See* Brown v. Caraway, 719 F.3d 583, 586 (7th Cir. 2013) (quoting Hill v. Werlinger, 695 F.3d 644, 648 (7th Cir. 2012)).

[121] *Webster*, 784 F.3d at 1125.

[122] *Id*.

[123] 28 U.S.C. § 2255(e).

[124] Taylor v. Gilkey, 314 F.3d 832, 834 (7th Cir. 2002).

[125] Case, *supra* note 33, at 15.

The Seventh Circuit's interpretation is best understood by reviewing its noteworthy decisions. The first of these decisions as well as the one providing the most comprehensive discussion of the Savings Clause is *In Re Davenport*.[126] In *Davenport*, a federal prisoner was convicted of the use of a firearm in the commission of a drug offense under 18 U.S.C. § 924(c) because he was in possession of a firearm during the offense.[127] After his conviction, Davenport sought relief under Section 2255.[128] His request was denied.[129] Shortly thereafter, the Supreme Court held that the "use" of a firearm within the meaning of 18 U.S.C. § 924(c) did not include mere possession, as had been the law when Davenport was convicted.[130] However, Davenport was barred from filing a successive motion under Section 2255(h) because he was unable to present newly discovered evidence of innocence of the offense, or a new Supreme Court *constitutional* ruling.[131] As a result, Davenport was prevented from challenging the legality of his sentence under Section 2255, even though the retroactive Supreme Court decision, if applied, could have proven that Davenport had not committed the crime for which he was convicted.[132] Accordingly, the Seventh Circuit concluded that Section 2255 provided an inadequate remedy and thereby allowed Davenport to bring a habeas corpus petition under Section 2241.[133] This ruling provided Davenport with the opportunity to argue that his sentence was now improper in light of the Supreme Court's new interpretation of 18 U.S.C. § 924(c).[134]

[126] *Webster*, 784 F.3d at 1135–36.
[127] *In Re* Davenport, 147 F.3d 605, 607 (7th Cir. 1998).
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*. at 610.
[132] *Id*.
[133] *Id*. at 610–12.
[134] *Id*.

In reaching this conclusion, the Seventh Circuit established that three conditions must be present for the Savings Clause to apply.[135] First, the prisoner must show that he relies on a change in law that has recently been made retroactive by the Supreme Court, such that he could not have invoked this law as the basis for his initial Section 2255 motion.[136] Second, the change in law must be a change that "eludes the permission in Section 2255(h) for successive motions."[137] In other words, the prisoner must show that he relies on a new or differing interpretation of a *statute* rather than a new interpretation of the Constitution.[138] After all, if a new rule of constitutional law is made retroactive by the Supreme Court, then the prisoner would be able to initiate a successive Section 2255 motion under Section 2255(h), and, thus, the remedy under Section 2255 would be adequate.[139] Third, the prisoner must show "a fundamental defect in his conviction or sentence."[140] As a final point, the Seventh Circuit noted that the "change in law" cannot be the result of a difference in law between the circuit where the prisoner was sentenced and the circuit in which he is imprisoned.[141]

The Seventh Circuit has applied these conditions in later cases to guide their Savings Clause analysis, with varied results.[142] Cases that were decided in the wake of *Davenport* employed a narrow interpretation of the Savings Clause, limiting its application to those prisoners asserting claims of actual innocence.[143] Indeed, the Seventh Circuit repeatedly stated that "§ 2255 is inadequate or ineffective only

[135] Brown v. Caraway, 719 F.3d 583, 586 (7th Cir. 2013).

[136] *Davenport*, 719 F.3d at 611.

[137] *Id*.

[138] *Brown*, 719 F.3d at 586.

[139] *See* 28 U.S.C. § 2255(h).

[140] *Davenport*, 147 F.3d at 611.

[141] *Id*. at 612.

[142] *See* Webster v. Daniels, 784 F.3d 1123, 1136 (7th Cir. 2015)

[143] *See* Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002); Unthank v. Jett, 549 F.3d 534, 536 (7th Cir. 2008).

when a prisoner is unable to present a claim of actual innocence."[144] By way of illustration, in *Taylor v. Gilkey*, the Seventh Circuit declined to apply the Savings Clause when a federal prisoner invoked it in an attempt to reduce his prison sentence.[145] The prisoner in *Taylor* did not plead innocent of the underlying crime.[146] Instead, he argued that his sentence was erroneously elevated as a result of ineffective assistance of counsel at trial.[147] Similarly, in *Unthank v. Jett*, the Seventh Circuit dismissed a prisoner's habeas petition under Section 2241 because the prisoner did not claim to be innocent of the actual crime; he merely claimed that the sentence imposed was too high.[148]

However, in *Brown v. Caraway*, the Seventh Circuit shifted towards a broader interpretation of the Savings Clause.[149] The federal prisoner in *Brown* was convicted of possession with intent to distribute cocaine and possession of a firearm by a felon.[150] He was thereafter sentenced as a career offender in accordance with the sentencing guidelines.[151] The prisoner initially challenged his sentence pursuant to Section 2255(a) on the basis of ineffective assistance of counsel.[152] After this motion was denied, the prisoner invoked the Savings Clause and filed a habeas corpus petition under 28 U.S.C. § 2241.[153] The prisoner argued that he was entitled to a reduction in his sentence in light of a new Supreme Court decision, *Begay v. United States*, that called into question his classification as a career offender.[154]

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[144] *See, e.g.*, *Taylor*, 314 F.3d at 835; *Unthank*, 549 F.3d at 536.

[145] 314 F.3d at 834.

[146] *Id*. at 836.

[147] *Id*.

[148] 549 F.3d at 536.

[149] *See* Webster v. Daniels, 784 F.3d 1123, 1136 (7th Cir. 2015) (describing *Brown v. Caraway* as a case where the Court applied a "broader understanding" of the Savings Clause).

[150] Brown v. Caraway, 719 F.3d 583, 584 (7th. Cir. 2013).

[151] *Id*.

[152] *Id*.

[153] *Id*.

[154] *Id*.

In determining the applicability of the Savings Clause in *Brown*, the Seventh Circuit noted that "the text of the Clause focuses on the legality of the prisoner's detention."[155] "It does not limit its scope to testing the legality of the underlying criminal conviction."[156] In other words, Savings Clause relief is not solely limited to prisoners asserting claims of actual innocence.[157] Accordingly, a federal prisoner may "utilize the Savings Clause" to challenge the legality of his sentence, provided that he or she satisfies the conditions set forth by *Davenport*.[158]

The Seventh Circuit ultimately found that these conditions were fulfilled, and, therefore, the court permitted the federal prisoner, Brown, to pursue traditional habeas relief under Section 2241.[159] The first condition was satisfied because Brown relied on a statutory interpretation case to challenge the legality of his sentence, not a constitutional case.[160] After all, Brown argued that he was entitled to a reduced sentence in light of *Begay v. United States*, a case that called into question the validity of his classification as a career offender under federal law—the very classification that led to his increased prison sentence in the first place.[161] Brown also successfully demonstrated that he could not have relied on *Begay* in his initial Section 2255 motion because it had not been decided at the time his motion was heard, thereby satisfying *Davenport*'s second prerequisite.[162] Lastly, the misapplication of the sentencing guidelines based on Brown's unwarranted classification as a career offender

[155] *Id*. at 588.
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] *Id*. at 596.
[160] *Id*. at 586.
[161] *Id*.
[162] *Id.*

yielded a "fundamental defect" in his sentence.[163] In other words, his sentence was unjustly increased.[164]

B. The Majority Opinion in Webster v. Daniels

The Seventh Circuit further expanded this complex body of case law with its recent decision in *Webster v. Daniels.* In *Webster*, a divided *en banc* court held that the Savings Clause permitted Webster to file a habeas corpus petition pursuant to 28 U.S.C. § 2241.[165] The court, in an opinion authored by Chief Judge Wood, offered two reasons for its conclusion.

The Seventh Circuit first relied on the language of 28 U.S.C. § 2255 to support its holding.[166] Section 2255 motions are available to federal prisoners "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."[167] Thus, this statute allows federal prisoners to challenge the legality of a sentence on the basis of a flaw in the underlying conviction.[168] It also allows federal prisoners to challenge a sentence that is unlawful "because of a constitutional or statutory rule pertaining to sentences."[169] The majority therefore contended that the Savings Clause, in the same vein, allows a federal prisoner to challenge the legality of his sentence (and not just his conviction) under Section 2241,[170] a familiar holding initially set forth by the Seventh Circuit in *Brown v. Caraway*.[171] According to the majority, the

[163] *Id.*
[164] *Id.* at 587–88.
[165] Webster v. Daniels, 784 F.3d 1123, 1138 (7th Cir. 2015).
[166] *Id*.
[167] 28 U.S.C. § 2255(a).
[168] *Webster*, 784 F.3d at 1138.
[169] *Id*.
[170] *Id.*
[171] *See* Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013).

language of the statute alone "leads directly to the result that the Savings Clause should apply here."[172]

Second, the majority reasoned that relief under the Savings Clause is appropriate in light of the Supreme Court's decision in *Atkins v. Virginia*.[173] Recall that in *Atkins*, the Supreme Court held that the Constitution prohibits the execution of mentally disabled persons.[174] Thus, according to the majority, an unconstitutional punishment will result if the Savings Clause does not apply.[175] Indeed, Webster, an allegedly mentally challenged person, would be executed since his appeals have been exhausted. This is sufficient reason, in the majority's opinion, to allow Webster the opportunity to file a Section 2241 petition for habeas corpus relief.[176]

Thus, with this decision, the majority established a new rule: that a federal prisoner may present newly discovered evidence pursuant to Section 2241 where the new evidence may reveal that the Constitution prohibits the penalty imposed upon the prisoner.[177] However, the majority was quick to limit this rule, fearing that the implementation of a broad rule would eliminate any degree of finality in capital cases involving intellectually disabled persons.[178] Accordingly, newly discovered evidence may be presented via Section 2241 only if: (1) the evidence existed before the time of the original trial; (2) the evidence was not available during the original trial despite diligent efforts by counsel; and (3) the evidence would purportedly show that the prisoner is constitutionally ineligible for the sentence he received.[179] The prisoner must make a prima facie showing of these three elements

[172] *Webster*, 784 F.3d at 1139.

[173] *Id*. at 1138.

[174] Atkins v. Virginia, 536 U.S. 304 (2002)

[175] *Webster*, 784 F.3d at 1139.

[176] *See id*. at 1139.

[177] *Id*. at 1140.

[178] *Id*.

[179] *Id*. at 1140–41; *see also A New Route for Post-Conviction Sentencing Challenges*, MILLER, SHAKMAN & BEEM (June 2015), http://millershakman.com/a-new-route-for-post-conviction-sentencing-challenges/.

in order to proceed with a Section 2241 petition on the merits.[180] If the prisoner successfully makes this showing, he may introduce the new evidence at a merits hearing.[181] The government, in turn, will have the opportunity to refute this evidence and present its own.[182] The prisoner, as the petitioner, bears the burden of proof; that burden being a preponderance of the evidence.[183] It is then up to the district court to decide, as a matter of fact, whether the prisoner is constitutionally ineligible for the sentence in light of all the evidence.[184]

The Seventh Circuit applied this new standard in Webster's case.[185] First, the court concluded that the evidence that Webster now seeks to offer would be used to prove that Webster is constitutionally ineligible for the death penalty on the basis of an intellectual disability.[186] Second, this new evidence reveals that Webster was evaluated by the Social Security Administration and deemed "mentally retarded" by an Administration psychologist a year before the crime in question occurred.[187] The evidence therefore existed before the time of trial. Finally, the court noted that, although the facts are disputed, there is evidence suggesting that these records were not available to Webster during the initial trial as a result of missteps by the Social Security Administration, not Webster's counsel.[188] Accordingly, the Seventh Circuit concluded that Webster was eligible under its new standard to seek relief under Section 2241 as a matter of law.[189]

Whether or not Webster should be granted this relief as a matter of fact, however, is debatable. After all, the parties contest whether the evidence Webster now seeks to present was indeed unavailable to

[180] *Webster*, 784 F.3d at 1141.
[181] *Id*.
[182] *Id*.
[183] *Id*. at 1146.
[184] *Id*. at 1141.
[185] *Id*. at 1140.
[186] *Id*. at 1141.
[187] *Id*. at 1133.
[188] *Id*. at 1140.
[189] *Id*. at 1145.

Webster and his counsel at the initial trial.[190] Webster's counsel argued that its pre-trial request for these records went unanswered.[191] The government, on the other argued that any failure to receive the records was attributable to Webster's counsel.[192] In any event, it is currently unknown to the court whether Webster's counsel ever followed up with the Social Security Administration on his records request or if the Administration deliberately or accidentally failed to provide these records.[193] In light of this uncertainty, the Seventh Circuit decided to remand the case to the district court to resolve these issues of fact.[194] If the district court determined that the records were unavailable and all reasonable diligence was exercised by counsel to obtain them, then Webster's habeas corpus petition will be decided on the strength of his evidence.[195]

C. The Dissenting Opinion in Webster v. Daniels

The dissent's opinion of the majority's holding in *Webster v. Daniels* can effectively be summed up by one short sentence: "The majority concluded that Section 2255 provides inadequate or ineffective relief to Webster simply because it prevents Webster from presenting the particular argument he now wants to make."[196] Indeed, the dissent, in an opinion authored by Judge Easterbrook, vehemently argued that the majority does not provide sufficient legal justification for its invocation of the Savings Clause.[197]

The dissent first attacked the textual analysis offered by the majority.[198] Recall that the majority argued that the language of the

[190] *Id*. at 1146.
[191] *Id.* at 1142.
[192] *Id*. at 1141.
[193] *Id.* at 1142.
[194] *Id*. at 1146.
[195] *Id*.
[196] *Id.* at 1148 (Easterbrook, J., dissenting).
[197] *See id*. at 1147–52.
[198] *See id.* at 1150.

statute supports the application of the Savings Clause to challenge an unlawful sentence.[199] The dissent recognized that the language of Section 2255 as a whole covers convictions as well as sentences, but questions how this language "justifies using [the Savings Clause] to escape from § 2255 altogether?"[200] Certainly, Webster was able to, and did, in fact, use Section 2255 to make an argument that he is constitutionally ineligible for capital punishment.[201] The fact that this argument was rejected on the merits does not, by itself, render Section 2255 "inadequate or ineffective."[202]

The dissent then calls into question the majority's reliance on *Atkins v. Virginia*.[203] The dissent contended that *Atkins* did not alter the substantive standard set forth by 18 U.S.C. § 3596(c), in effect at the time Webster was sentenced to death.[204] Indeed, the statute made it unlawful to impose the death penalty upon a person suffering from a mental disability.[205] The Supreme Court, in *Atkins*, later held that the Constitution establishes this same rule.[206] Thus, according to the dissent, there is no basis for another round of collateral review when the substantive rule is unchanged.[207]

ANALYSIS

This Part will argue that the Seventh Circuit incorrectly decided *Webster v. Daniels*. In support of this conclusion, I will first argue that the Seventh Circuit's decision to allow Webster to file a successive habeas corpus petition is not supported by relevant Seventh Circuit precedent. I will then argue that the justifications offered by the

199 *Id.* at 1138 (majority opinion).
200 *Id*. at 1150 (Easterbrook, J., dissenting).
201 *Id*.
202 *Id*.
203 *Id*.
204 *Id*.
205 *See* 18 U.S.C. § 3596(c).
206 *Webster*, 784 F.3d at 1147 (Easterbrook, J., dissenting).
207 *Id*. at 1151.

Seventh Circuit are inadequate to invoke the Savings Clause in Webster's case. Finally, I will argue that the Seventh Circuit's opinion raises significant policy concerns; indeed, the decision is contrary to the objective of 28 U.S.C. § 2255.

A. The Seventh Circuit's Opinion in Webster v. Daniels *is not supported by relevant Savings Clause jurisprudence.*

The Seventh Circuit has developed a body of case law discussing circumstances that justify the application of the Savings Clause. This body of case law indicates that the Seventh Circuit has only invoked the Savings Clause when the remedy provided by Section 2255 is inadequate or ineffective as a result of a structural problem created by the statute itself.[208]

The Seventh Circuit identified this type of structural problem in *Davenport*, where the prisoner sought to rely on a new statutory interpretation made retroactive by the Supreme Court.[209] This new interpretation would have allowed the prisoner to establish innocence of the underlying crime for which he was convicted.[210] However, the prisoner was barred from challenging the legality of his sentence under Section 2255.[211] He had already utilized his initial Section 2255 motion and was unable to satisfy either of the requirements necessary to obtain certification of a successive motion under Section 2255(h), as the statute only allows new rules of *constitutional* law (not statutory law) to be presented for certification.[212] Consequently, the prisoner was without the ability to obtain a remedy under Section 2255, even though a Supreme Court decision binding on federal courts would have granted him relief.[213] In other words, the prisoner was unable to obtain the habeas corpus relief to which he was entitled because of a

[208] *See id*. at 1136 (majority opinion).
[209] *In re* Davenport, 147 F.3d 605, 610 (7th Cir. 1998).
[210] *Id*.
[211] *Id*. at 607.
[212] *Id*. at 610.
[213] *See id*.

defect in the structure of Section 2255. To cure this deficiency, the Seventh Circuit permitted the prisoner to bring a habeas corpus petition under Section 2241.[214]

The Seventh Circuit recognized the existence of a similar structural problem in *Brown v. Caraway*. In this case, the prisoner was convicted of drug and weapons charges, and classified as a "career offender" under mandatory sentencing guidelines.[215] A higher sentence was imposed as a result of this classification.[216] The prisoner unsuccessfully challenged his sentence under Section 2255.[217] After this motion was denied, the Supreme Court decided *Begay v. U.S.*;[218] this case offered a new interpretation of the sentencing guidelines.[219] The prisoner then filed a petition for habeas corpus in the Seventh Circuit pursuant to Section 2241, arguing that under *Begay*, he could not be classified as a career offender, and accordingly, his sentence should be reduced.[220]

The Seventh Circuit authorized the prisoner to pursue a habeas petition under Section 2241.[221] The court acknowledged that without resorting to Section 2241, the prisoner would be unable to obtain relief.[222] The prisoner would not be afforded relief under Section 2255 because he had already exhausted his initial Section 2255 motion.[223] Additionally, any request for a successive motion under Section 2255(h) would have been denied because the prisoner did not seek to present newly discovered evidence of his innocence, or rely on a new constitutional ruling.[224] Yet again, the structural confines of

[214] *Id*. at 610–12.
[215] Brown v. Caraway, 719 F.3d 583, 585 (7th Cir. 2013).
[216] *Id.*
[217] *Id.*
[218] 533 U.S. 137 (2008).
[219] *Brown*, 719 F.3d at 586.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *See id.* at 585.
[224] *See id*. at 586.

Section 2255 prevented the prisoner from obtaining habeas relief. The Seventh Circuit recognized this limitation, and accordingly, allowed resort to Section 2241.

Both of these decisions indicate that "there must be some kind of structural problem with Section 2255 before Section 2241 becomes available."[225] That is, "something more than a lack of success with a section 2255 must exist before the savings clause is satisfied."[226] While the Seventh Circuit acknowledged this binding precedent in *Webster v. Daniels*, the court failed to abide by it in reaching its decision. Indeed, the Seventh Circuit did not and cannot justify invocation of the Savings Clause in Webster's case on the basis of a structural problem inherent in Section 2255. Webster did not assert a claim of innocence of the underlying crime based on a change in the law, like the defendant in *Davenport*.[227] Nor did Webster contend that a change in the law entitles him to a reduced sentence.[228] Rather, Webster sought to present "newly" discovered evidence of his mental competency that would allegedly demonstrate ineligibility for the death penalty.[229] Webster contended that this evidence, though in existence at the time of trial, was not made available to him, despite a request by his attorney.[230] Webster thus argued that a Section 2241 petition was necessary in order to remedy this problem.[231]

However, any problem with obtaining this evidence prior to trial, by the Seventh Circuit's own admission, is attributable to either the custodian of the records or Webster's attorneys, not the structure of Section 2255.[232] Wherever the fault lies, Section 2255 provides an adequate remedy. Indeed, if Webster's former counsel is to blame, relief under Section 2255 is available on the grounds of ineffective

[225] Webster v. Daniels, 784 F.3d 1123, 1136 (7th Cir. 2015).
[226] *Id*.
[227] *See In re* Davenport, 147 F.3d 605, 610 (7th Cir. 1998).
[228] *See* Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013).
[229] *Webster*, 784 F.3d at 1132.
[230] *Id*. at 1133.
[231] *See id*.
[232] *See id*. at 1142.

assistance of counsel.[233] In fact, the most common issue raised in a Section 2255 motion is ineffective assistance of counsel.[234] Section 2255 also provides prisoners with an effective means of claiming that material evidence has been withheld in violation of *Brady v. Maryland*.[235] Circuit courts hear and resolve these types of claims under Section 2255 frequently.[236] Webster could have raised either of these arguments on his initial Section 2255 motion.[237] Certainly, Webster's attorneys would have known in 2005, when the initial Section 2255 petition was made, that records requested in 1998 were never received.[238] The fact that Webster failed to present these arguments on an earlier motion, though unfortunate, does not justify giving him the opportunity to do so now. After all, pursuant to the Savings Clause, "an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief pursuant to this section shall not be entertained if it appears that the applicant *has failed to apply for relief, by motion,* to the court which sentenced him."[239]

Accordingly, the Savings Clause cannot be applied to allow a prisoner to make up for his own (or in all likelihood, his counsel's) lack of diligence. There must be a structural problem that would foreclose collateral review under Section 2255.[240] The Seventh Circuit, however, did not follow its own precedent when it decided *Webster v. Daniels*. The court decided to apply a far broader interpretation of the Savings Clause than that contained in *Davenport* and its progeny without any real justification for doing so.

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[233] *See id*. at 1151 (Easterbrook, J., dissenting); *see also* INEFFECTIVE ASSISTANCE OF COUNSEL: APPEAL, 16A FED. PROC., L. ED. § 41.445 (2015).

[234] Ellen Henak, *When the Interests of Self, Clients and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 AM. J. TRIAL ADVOC. 347, 347 (2009).

[235] *Webster*, 784 F.3d at 1151 (Easterbrook, J. dissenting).

[236] *Id*.

[237] *Id*.

[238] *Id*.

[239] 28 U.S.C. § 2255(e) (emphasis added).

[240] Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2013).

B. The Seventh Circuit does not offer sufficient legal justification for applying the Savings Clause in Webster v. Daniels.

The Seventh Circuit set forth two justifications in support of its holding that the Savings Clause permits Webster to file a habeas corpus petition pursuant to Section 2241. I will explore the validity of these justifications in the following section, ultimately concluding that these justifications fail to support the application of the Savings Clause in *Webster v. Daniels.*

1. The language of the 28 U.S.C. § 2255 does not justify application of the Savings Clause in *Webster v. Daniels*.

The first justification is that the language of the statute itself allows Webster to bring a traditional habeas corpus petition.[241] The Seventh Circuit contended that Section 2255 is the vehicle whereby federal prisoners may challenge both their sentences and underlying convictions.[242] The Savings Clause, specifically, focuses on the legality of the prisoner's detention[243] and, therefore, applies when the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention."[244] That is, the Savings Clause may be invoked to allow a federal prisoner to file a writ of habeas corpus under Section 2241 even if the prisoner only wishes to challenge his sentence.

However, it is hardly a novel concept that challenges to a prison sentence (rather than just the underlying conviction) can be brought under Section 2241. Indeed, the Seventh Circuit has previously applied the Savings Clause to allow a federal prisoner to attack his *sentence* under Section 2241.[245] In fact, the Seventh Circuit has

[241] *Webster*, 784 F.3d at 1138 (majority opinion).
[242] *Id*.
[243] *Id.*
[244] 28 U.S.C. § 2255(e).
[245] *See* Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013).

explicitly stated that the Savings Clause may be used to attack the legality of a prison sentence.[246] So, while in *Webster* the Seventh Circuit correctly states that the Savings Clause allows federal prisoners to challenge the legality of their sentences, all the court has done is reiterate a familiar holding. The Seventh Circuit did not offer a compelling reason why the Savings Clause should be applied to allow Mr. Webster, or prisoners like him, to resort to a petition under Section 2241. The court only stated that the Savings Clause allows for collateral review of a federal sentence under Section 2241. This statement alone cannot justify application of the Savings Clause.

2. The Savings Clause cannot be invoked to present a constitutional argument that was previously heard and decided on them merits.

The Seventh Circuit secondarily relies on the fact that *Atkins v. Virginia* was decided after Webster was convicted and sentenced to death to support its application of the Savings Clause in *Webster v. Daniels*.[247] Recall that in *Atkins,* the Supreme Court established that the Constitution forbids the execution of mentally disabled persons.[248] It is the Seventh Circuit's contention that because Webster did not have the benefit of arguing that he was constitutionally ineligible for the death penalty under *Atkins* at his sentencing and on direct appeal, he should be able to do so now.[249] This argument would certainly be persuasive if Webster never had the opportunity to argue categorical ineligibility pursuant to *Atkins,* but he did.

After all, Webster made the exact same argument in his initial Section 2255 motion, and it was rejected by the Fifth Circuit on the grounds that there was little difference between the governing standards in 18 U.S.C. § 3596(c) and the Constitution.[250] Indeed, the

[246] *Id*.

[247] *Webster*, 784 F.3d at 1138–39.

[248] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[249] *See Webster*, 784 F.3d at 1139.

[250] *Id.* at 1132.

Fifth Circuit stated that "[t]he only substantive change ushered in by *Atkins* with respect to federal capital [prisoners] is the recognition of a new source of federal law (i.e. constitutional) that bars their execution."[251] Thus, the trial court's decision that Webster was an eligible candidate for the death penalty under 18 U.S.C. § 3596 applied with equal force under *Atkins*; that is, a different result was not warranted due to the decision in *Atkins*.[252]

However, the Seventh Circuit seemed to forget this relevant procedural history. Instead, the court invoked *Atkins* to give Webster another bite at the apple, without any explanation as to why *Atkins* justified the filing of a successive collateral attack. This decision begs the question: why should Webster get another chance to present the same argument he presented to the Fifth Circuit, an argument in which he received a decision on the merits by the Fifth Circuit?[253]

Interestingly, the Seventh Circuit did concede that the Savings Clause would not apply if *Atkins* had never been decided.[254] According to the majority, the argument that Webster now has new evidence that would demonstrate that a federal statute (i.e., Section 3596(c)) would be violated by his execution would not be enough to trigger the Savings Clause.[255] Yet, the Seventh Circuit nevertheless asserted that *Atkins*, which sets forth the same legal standard codified in 18 U.S.C. § 3596(c), justifies subsequent collateral review in Webster's case. These statements yield a conflicting conclusion.

The Seventh Circuit attempted to alleviate this confusion in a footnote, in which it is explained that "collateral review is primarily used for constitutional violations, not violations of federal law that . . . should be raised on direct appeal."[256] With this statement, the Seventh Circuit seems to have suggested that collateral review of a prison sentence is justified when the sentence is imposed in violation of the

[251] United States v. Webster, 421 F.3d 308, 311 (5th Cir. 2005).
[252] *Id*.
[253] *See Webster*, 784 F.3d at 1151 (Easterbrook, J., dissenting).
[254] *Id*. at 1139 (majority opinion).
[255] *Id*.
[256] *Id*. at 1139 n.6.

Constitution, but not when the sentence is imposed in violation of a federal law. However, this explanation only serves to cause further confusion because the language of the statute—the bedrock of the Seventh Circuit's primary justification for application of the Savings Clause in Webster's case—provides that a federal prisoner may challenge his sentence under Section 2255 if it was imposed in violation of the Constitution or *laws of the United States*.[257] So, it would seem that the statute itself does not recognize a difference between those collateral attacks made pursuant to the Constitution and those made pursuant to federal statute, which begs the question: why should the Seventh Circuit make such a distinction?

C. The precedent set by Webster v. Daniels *will lead to results that are contrary to the intent of 28 U.S.C. § 2255.*

Finally, the Seventh Circuit's opinion in *Webster v. Daniels* should be rejected on policy grounds. Indeed, the decision to allow Webster to file a successive collateral review in the Seventh Circuit directly conflicts with the intended purpose of Section 2255. Recall that Congress enacted 28 U.S.C. § 2255 to solve venue problems created by the Habeas Corpus Act of 1867, which required a federal prisoner to file his writ of habeas corpus in the federal district court with jurisdiction over his place of confinement.[258] This venue requirement flooded those federal courts whose jurisdiction included federal prisons with numerous habeas corpus petitions.[259] It also created a "physical-proximity problem" since federal courts with habeas jurisdiction were often a substantial distance from the relevant witnesses and evidence.[260] Section 2255 was intended "to disperse the caseload associated with collateral attacks and to ensure that post-conviction proceedings were conducted closer to the relevant records and witnesses" by requiring federal prisoners to challenge their

[257] *See* 28 U.S.C. § 2255(a) (emphasis added).
[258] Case, s*upra* note 30, at 175.
[259] *Id*.
[260] *Id*. at 176.

sentences in the court which imposed that sentence.[261] In addition to "matching the litigation with the court possessing the record," Section 2255 also "ensures that only one court of appeals will be involved."[262]

However, the Seventh Circuit seems to undermine these objectives by allowing Webster to seek habeas corpus relief in the jurisdiction of his incarceration. So, not only does Webster potentially have another opportunity to challenge his death sentence, he also has the added benefit of challenging it in a new jurisdiction, one that has already proven favorable to him. This is particularly problematic for several reasons. First, as indicated by the dissent, the Seventh Circuit is home to the only federal correctional facility housing death row inmates.[263] As a result, all habeas corpus petitions brought pursuant to Section 2241 (by virtue of Savings Clause application) will be heard by the Seventh Circuit.[264] This effectively gives the Seventh Circuit "final say about the propriety of every federal death sentence."[265] Is it wise to create a system in which one circuit is deciding the fate of all death row inmates?

Relatedly, the decision in *Webster* may also facilitate conflict among federal circuits.[266] After all, due to application of the Savings Clause in *Webster*, a district court in the Seventh Circuit will now be reviewing a case that was previously considered by the Fifth Circuit. This opens the door for circuit courts to contradict each other in the same case.[267] One must ask whether it is prudent to adopt a policy whereby circuit courts have the ability to undermine the decisions of their sister circuits. Such a policy may lead to invocation of the Savings Clause in order to procure a more "favorable" circuit. It may also create bad blood among the circuits, especially if the Seventh

[261] *Id*.; *see also* 28 U.S.C. § 2255(a).

[262] Webster v. Daniels, 784 F.3d 1123, 1147 (7th Cir. 2015) (Easterbrook, J., dissenting).

[263] *Id*. at 1149.

[264] *Id*.

[265] *Id*.

[266] *Id*. at 1147.

[267] *See id*.

Circuit has final review over all habeas petitions, even those that originated in other circuits.

CONCLUSION

An interest in the finality of judgment in the criminal process has led to limited post-conviction relief. Indeed, prisoners seeking to challenge the legality of their sentences or convictions only have one opportunity to do so as a matter of right under 28 U.S.C. § 2255. The Savings Clause is oftentimes the only recourse for a federal prisoner who seeks to obtain subsequent collateral review of his sentence or conviction. The Seventh Circuit has historically interpreted this Clause to allow successive collateral review for federal prisoners only when a structural problem inherent in the statute forecloses effective review. However, the Seventh Circuit significantly and unjustifiably broadened this interpretation with its decision in *Webster v. Daniels*. In *Webster*, the Seventh Circuit applied the Savings Clause to allow a federal prisoner to pursue a successive collateral attack on his death sentence on the basis that "newly discovered" evidence would render the sentence unconstitutional. This conclusion is inconsistent with relevant Seventh Circuit Savings Clause jurisprudence; is not supported by sufficient legal justification; and is contrary to the purpose and objective of the Savings Clause.