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## The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. 2255(1)

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**THE FAILURE OF WORDS: HABEAS CORPUS REFORM, THE  
ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT,  
AND WHEN A JUDGMENT OF CONVICTION BECOMES  
FINAL FOR THE PURPOSES OF 28 U.S.C. § 2255(1)**

**INTRODUCTION**

Originally enacted in 1948, 28 U.S.C. § 2255 created a remedy for federal prisoners seeking “to vacate, set aside or correct [a] sentence ....”<sup>1</sup> Section 2255 is “the principal postconviction remedy for federal convicts.”<sup>2</sup> Congress “intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.”<sup>3</sup> Until 1996, motions filed under § 2255 were subject to no statute of limitations<sup>4</sup> and could be filed at any time.<sup>5</sup> The lack of a statute of limitations in § 2255 reflected the history of federal habeas corpus.<sup>6</sup>

On April 24, 1996, the 104th Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>7</sup> The purpose of the AEDPA is “[t]o deter terrorism, provide justice for victims, [and] provide for an effective death penalty ....”<sup>8</sup> Title I of the AEDPA, “Habeas Corpus Reform,” provides for a one year statute of

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1. DONALD E. WILKES, JR., *FEDERAL POSTCONVICTION REMEDIES AND RELIEF* § 4-1, at 163 (1996 ed.).

2. *Id.*

3. *Davis v. United States*, 417 U.S. 333, 343 (1974).

4. 28 U.S.C. § 2255 (2000); *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring) (stating that there is no statute of limitations for § 2255 motions).

5. RULES GOVERNING SECTION 2255 PROCEEDINGS 9 advisory committee's note. The section governing delayed motions, however, provides that a motion filed under § 2255 “may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing ....” RULES GOVERNING SECTION 2255 PROCEEDINGS 9(a). *But see McKinney v. United States*, 208 F.2d 844, 846-47 (D.C. Cir. 1953) (reversing the district court's dismissal of a § 2255 motion for being late after 15 years because “tardiness is irrelevant where a constitutional issue is raised and where the prisoner is still confined”).

6. WILKES, *supra* note 1, § 4-15, at 253.

7. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

8. *Id.* § 105.

limitations in § 105.<sup>9</sup> This section thus amends 28 U.S.C. § 2255. Section 105 provides in pertinent part: “A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final ....”<sup>10</sup>

Soon after the passage of the AEDPA, several circuit courts of appeals had to decide when a judgment of conviction becomes “final” for purposes of the new limitation in the case of the prisoner who does not file a petition for certiorari with the United States Supreme Court.<sup>11</sup> Specifically, the courts were asked to decide whether the statute of limitations for § 2255 motions begins to run when the court of appeals affirms the district court’s conviction and sentence, or when the time for filing a petition for certiorari with the United States Supreme Court expires. A minority of courts have held the former,<sup>12</sup> a majority the latter.<sup>13</sup>

In arriving at their different outcomes, both sides of the argument relied heavily upon different constructions<sup>14</sup> of the

9. Section 105 is titled “Federal custody; remedies on motion attacking sentence.”

10. *Id.* Section 105 continues:

- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

*Id.*

11. See *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000); *United States v. Gamble*, 208 F.3d 536 (5th Cir. 2000); *United States v. Garcia*, 210 F.3d 1058 (9th Cir. 2000); *United States v. Torres*, 211 F.3d 836 (4th Cir. 2000); *Kapral v. United States*, 166 F.3d 565 (3d Cir. 1999); *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998) (*per curiam*), *cert. denied*, 526 U.S. 1113 (1999).

12. See *Torres*, 211 F.3d at 842; *Gendron*, 154 F.3d at 674.

13. See *Burch*, 202 F.3d at 1279; *Gamble*, 208 F.3d at 537; *Garcia*, 210 F.3d at 1061; *Kapral*, 166 F.3d at 577.

14. In this Note, construction and interpretation are used interchangeably. Historically, “interpretation determines the meaning of words and construction determines the application of words to the facts.” 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45:04, at 24 (6th ed. 2000). This is a distinction, however, without any practical difference. *Id.* An illustration of this point comes from *Kapral*, “We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.” 166 F.3d at 569 (emphasis added) (quoting *Consumer*

relevant statutory language.<sup>15</sup> Among the factors the courts measured were the intent of the legislature when enacting the AEDPA,<sup>16</sup> the purpose of the AEDPA,<sup>17</sup> the dictionary definitions of "final" and "judgment of conviction,"<sup>18</sup> and, to a much lesser extent, practical<sup>19</sup> and policy considerations.<sup>20</sup> As this Note will illustrate, however, careful analysis of the arguments on each side reveal that the textual, intrinsic arguments fail, leaving only extrinsic factors, policy considerations, and the historical purpose of the writ of habeas corpus to accurately guide courts to the correct conclusion. The conclusion of this Note is that both sides' methods of analysis were faulty and internally inconsistent, and that extrinsic, policy, and historical considerations prove that the conclusion of the *Kapral* court and the other courts in the majority is, in fact, the correct one. For the purposes of 28 U.S.C. § 2255(1), a judgment of conviction becomes final when the time for filing a petition of certiorari expires, not when the court of appeals affirms the conviction and sentence of the defendant.

Part I of this Note briefly sketches the history of habeas corpus, the purposes and historical context of the passage of § 2255 in 1948, and the purposes and context of the 1996 AEDPA amendments to § 2255. Part II analyzes the arguments behind the conclusions of both the majority and minority of courts, pointing out flaws and weaknesses on each side, focusing principally on the presumptions that each side makes. Part III discusses one of the most relevant and recent Supreme Court decisions, *Duncan v. Walker*.<sup>21</sup> The analysis of *Duncan* reveals that although a majority of the Court

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Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

15. The Seventh Circuit was the first court of appeals to address this particular issue in *Gendron*. The court relied almost exclusively on the *Russello* presumption of statutory interpretation in arriving at its conclusion that the one-year limitation begins to run on the date the circuit court affirms the conviction and sentence. *Gendron*, 154 F.3d at 674. In *Kapral*, the most analytically exhaustive case on the majority side, the Third Circuit relied heavily on the context of the words and a comparison of § 2255(1) with other provisions of the AEDPA. 166 F.3d at 569.

16. See, e.g., *Kapral*, 166 F.3d at 569 ("We must determine which concept of 'finality' Congress intended in § 2255."); *Gendron*, 154 F.3d at 673.

17. See *Kapral*, 166 F.3d at 571, 573.

18. See, e.g., *Burch*, 202 F.3d at 1276; *Kapral*, 166 F.3d at 570.

19. See *Torres*, 211 F.3d at 842.

20. See *Kapral*, 166 F.3d at 571.

21. 533 U.S. 167 (2001).

may be considered textualists, their own reasoning will lead them to conclude that a textualist approach is inappropriate in this case. The Note concludes that it is impossible to interpret the language of the § 2255 amendments in the AEDPA without resorting to extrinsic policy considerations, and explains how these outside considerations firmly support the holdings of the majority of circuit courts that have considered the issue.

## I. HISTORY & CONTEXT

### A. *Habeas Corpus*<sup>22</sup>

#### 1. *England*

The first seeds that would eventually evolve into the writ of habeas corpus are said to have been sown in the Magna Carta in 1215.<sup>23</sup> As first used, habeas corpus was much more narrow in scope than it is today.<sup>24</sup> The scope of habeas corpus expanded because of jurisdictional disagreements between English superior courts and English local courts.<sup>25</sup> The form of habeas corpus the courts used, habeas corpus *cum causa*,<sup>26</sup> compelled the sheriff to produce the

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22. Habeas corpus literally means "produce the body." BADSHAH K. MIAN, *AMERICAN HABEAS CORPUS: LAW, HISTORY, AND POLITICS* 6 (1984). Habeas corpus is: "A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal (*habeas corpus ad subjiciendum*)." BLACK'S LAW DICTIONARY 715 (7th ed. 1999); see also *infra* note 26.

23. See 9 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 104 (3d ed. 1944). But see DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA* 5 (1966) (stating "that habeas corpus and Magna Carta part ways; they do not flow from a single source," and that it is a "myth that habeas corpus stemmed from Magna Carta"). Regardless of the truth of this assertion, by the seventeenth century the English Parliament was arguing that habeas corpus derived directly from the Magna Carta. WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 45 (1980).

24. JOSEPHINE R. POTUTO, *PRISONER COLLATERAL ATTACKS* § 1:3, at 6 (1991) (noting that habeas corpus was limited to challenging an indefinite confinement by the king, but only when the reason for the confinement was within the jurisdiction of the courts).

25. DUKER, *supra* note 23, at 27.

26. At common law, there were several forms of habeas corpus: habeas corpus *ad faciendum*, habeas corpus *ad recipiendum*, habeas corpus *ad respondendum*, habeas corpus *ad satisfaciendum*, habeas corpus *ad subjiciendum*, habeas corpus *ad testificandum*, habeas corpus *capias ita*, and habeas corpus *quod distringat*. See DUKER, *supra* note 23, at 17-19, 138-40, 287. "[T]he phrase 'habeas corpus' used alone refers to the common-law writ of

prisoner who was the subject of the courts' jurisdictional dispute.<sup>27</sup> Through a series of important cases, beginning with the *Case of the Five Knights*<sup>28</sup> and culminating with the *Chamber's Case*,<sup>29</sup> "[t]he questioning of the validity of commitments, previously an incidental effect of the writ, now became the major object."<sup>30</sup>

Courts generally limited the use of the writ to challenge "commitment in criminal cases *before* conviction."<sup>31</sup> Habeas corpus relief was not available to prisoners "held by a valid warrant or pursuant to the execution or judgment of a proper court."<sup>32</sup> Essentially, "a convicted person was not entitled to the privilege of the writ because appeal was the remedy for a conviction contrary to law."<sup>33</sup>

## 2. America

Although they did not do so immediately,<sup>34</sup> the British colonies in America had adopted habeas corpus by the late 1600s.<sup>35</sup> By the time of the 1787 Constitutional Convention, three of the twelve state constitutions of the original thirteen colonies had a habeas corpus provision.<sup>36</sup> At the time of the drafting of the Constitution, the Framers viewed habeas corpus as so fundamental that they did not expressly provide for the writ, but instead, because they assumed

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habeas corpus *ad subjiciendum* ...." *Stone v. Powell*, 428 U.S. 465, 475 n.6 (1976) (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807)).

27. DUKER, *supra* note 23, at 27; see also 9 HOLDSWORTH, *supra* note 23, at 109-13.

28. 3 State Trials 1-59 (K.B. 1627).

29. 79 Eng. Rep. 717 (K.B. 1629).

30. DUKER, *supra* note 23, at 46.

31. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1097 (1995) (referring to the English Habeas Corpus Act of 1679). Forsythe describes the 1679 Act as "the most significant part of the English law of habeas corpus for its impact on American law at the Founding." *Id.* at 1095; see also *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

32. Forsythe, *supra* note 31, at 1097 (quoting Dallin Oates, *Habeas Corpus in the States - 1776-1865*, 32 U. CHI. L. REV. 243, 245 (1965)).

33. *Id.* at 1100 (footnote omitted).

34. See MIAN, *supra* note 22, at 41.

35. *Id.* at 51, 55.

36. *Id.* at 73. Rhode Island did not have a state constitution.

that people enjoyed the privilege,<sup>37</sup> simply prohibited its abolishment except in certain extraordinary circumstances.<sup>38</sup>

The Judiciary Act of 1789 gave federal courts the power to grant the writ.<sup>39</sup> The writ, however, only applied to federal prisoners<sup>40</sup> and could only be used to challenge the jurisdiction of the sentencing body.<sup>41</sup> It was not until 1867 that the writ's application was expanded to include state prisoners, and still the inquiry remained limited to the jurisdiction of the sentencing body.<sup>42</sup> This was the state of affairs until the mid-twentieth century.<sup>43</sup>

In 1942, the United States Supreme Court expanded habeas corpus to include attacks based on other constitutional grounds.<sup>44</sup> Since 1942, habeas corpus provides relief if:

- (1) the conviction is void for lack of personal or subject matter jurisdiction;
- (2) the statute defining the offense is unconstitutional, or the conviction was obtained in violation of a federal constitutional right;
- (3) the statute authorizing the sentence is unconstitutional, or the sentence was obtained in violation of a federal constitutional right;
- (4) the sentence is contrary to the applicable statute, in excess of the statutory maximum, or otherwise unauthorized by law; or
- (5) the conviction or the sentence is otherwise deemed subject to collateral attack.<sup>45</sup>

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37. See *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 12 (1993) [hereinafter *Habeas Corpus Hearings*] (statement of H. Lee Sarokin, U.S. District Court Judge (N.J.)) ("So fundamental, by the way, that it is not provided for in the Constitution. The Constitution merely says it can't be abolished. That is because everyone assumed how important the writ was."). Judge Sarokin granted the habeas petition in the famous case of Rubin "Hurricane" Carter, subject of the movie, *THE HURRICANE* (MCA/Universal Pictures 1999), starring Denzel Washington.

38. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

39. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

40. See POTUTO, *supra* note 24, at 9.

41. See *Powell v. Stone*, 428 U.S. 465, 475 (1976).

42. *Id.* (citing Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385).

43. See WILKES, *supra* note 1, § 3-1, at 116-17 (stating that habeas corpus was expanded in the late-nineteenth century to include violations of double jeopardy, sentences "contrary to the applicable statute," and punishment in "excess of the statutory maximum, or otherwise unauthorized by law...").

44. See *id.* § 3-1, at 117 (citing *Waley v. Johnston*, 316 U.S. 101 (1942)).

45. *Id.* (footnotes omitted).

*B. 28 U.S.C. § 2255**1. Original Purpose*

Section 2255 derived from a bill by the Judicial Conference Committee on Habeas Corpus Procedure.<sup>46</sup> The Committee intended to address “serious administrative problems associated with habeas corpus.”<sup>47</sup> The idea was to provide “federal prisoners with a post conviction remedy equivalent in scope to habeas corpus,”<sup>48</sup> but eliminate many of the “administrative problems associated with habeas corpus.”<sup>49</sup> First, the number of habeas petitions had increased significantly.<sup>50</sup> Second, habeas corpus was subject to abuse by federal prisoners.<sup>51</sup> Many of the petitions prisoners filed were repetitious and “patently frivolous.”<sup>52</sup> This was all the more difficult for the courts because habeas applications were filed in the district where the prisoner was confined and not the court where the prisoner was sentenced.<sup>53</sup> The courts in districts where federal prisons were located therefore had to “handle an inordinate number of habeas corpus actions,”<sup>54</sup> and did not have easy access to

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46. Brendan W. Randall, *United States v. Cooper: The Writ of Error Coram Nobis and the Morgan Footnote Paradox*, 74 MINN. L. REV. 1063, 1073-74, 1075 n.71 (1990).

47. *Id.*

48. WILKES, *supra* note 1, § 3-1, at 117 (footnote omitted); *see also* *United States v. Hayman*, 342 U.S. 205, 219 (1952) (“[T]he sole purpose [of passing 28 U.S.C. § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.”).

49. Randall, *supra* note 46, at 1073-74.

50. *See id.* at 1074 n.63 (citing *Hayman*, 342 U.S. at 212).

51. The Honorable John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 171 (1949). Judge Parker was the chairman of the Judicial Conference’s Committee on Habeas Corpus Procedure.

The federal district court for the District of Columbia provides an example of the abuses that were occurring. One prisoner filed fifty applications between July 1939 and April 1944, another twenty-seven, a third twenty-four, a fourth twenty-two, and a fifth twenty. *Dorsey v. Gill*, 148 F.2d 857, 862 (1945). One hundred and nineteen persons averaged five applications each during this period. *Id.*

52. *Hayman*, 342 U.S. at 212.

53. *Id.* at 213.

54. *Id.* at 213-14. The burden, in terms of sheer number of petitions, upon the courts at the time is insignificant when compared to today’s numbers. In 1936 and 1937, the yearly average of habeas corpus petitions filed in the United States was 310. By 1943, 1944, and 1945, that number had increased to 845 (excluding the District of Columbia). *Id.* at 212 n.13. Five of the eighty-four federal district courts during this latter time frame were,



witnesses or the records of the case,<sup>55</sup> which caused further delays and backlog.

After approving the Committee's recommendations, the Judicial Conference submitted them to Congress.<sup>56</sup> Congress did not pass the two bills, but did incorporate them into its revision of the entire Judicial Code.<sup>57</sup>

The purpose of § 2255 "was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum"<sup>58</sup> without suppressing "prisoners' rights of collateral attack upon their convictions."<sup>59</sup>

## 2. Nature of § 2255 Proceedings

Historically, the nature of § 2255 has been the subject of much disagreement. Congress intended the § 2255 remedy to be similar to the writ of error *coram nobis*,<sup>60</sup> but much broader—"as broad as habeas corpus."<sup>61</sup> Subsequent judicial interpretation, however, has underscored the point that it is more a substitute for habeas corpus than similar in nature to *coram nobis*.<sup>62</sup> Additionally, later legal commentators have concluded that the principles of habeas corpus,

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nevertheless, handling sixty-three percent of all habeas corpus petitions. *Id.* at 214 n.18. Of those filed between 1943 and 1945, 1556 were filed by federal prisoners. *See Parker, supra* note 51, at 172 (citing statistics compiled by the Administrative Office of the United States Courts).

By comparison, "more than one-third of [845 petitions] will have been filed by only federal prisoners in [the Southern District of Florida] in the 1996 calendar year." The Honorable Lurana S. Snow, *Prisoners in the Federal Courts*, 9 ST. THOMAS L. REV. 295, 297 n.17 (1997). Judge Snow cites the average number of habeas petitions as 865. *See id.* This number is incorrect. *Hayman*, which Snow cites, actually says the average number was 845. *Hayman*, 342 U.S. at 212 n.13. However, 865 may have been closer to the truth considering the District of Columbia was excluded from the *Hayman* court.

55. *Hayman*, 342 U.S. at 213.

56. *Id.* at 215.

57. *Id.* at 218.

58. *Id.* at 219.

59. *Id.*

60. The writ of error *coram nobis* is "[a] writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact." BLACK'S LAW DICTIONARY 338 (7th ed. 1999).

61. *Hayman*, 342 U.S. at 217 (quoting Statement of the Judicial Committee on Habeas Corpus Procedure (1944)).

62. *See Randall, supra* note 46, at 1078.

and not *coram nobis*, control § 2255 remedies.<sup>63</sup> In *Hill v. United States*,<sup>64</sup> the Supreme Court announced:

[I]t conclusively appears from the historic context in which § 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined.<sup>65</sup>

The language of the section itself, however, indicates that it is separate and distinct from habeas corpus.<sup>66</sup> In fact, “[t]he federal habeas corpus remedy continues to be widely utilized when relief is sought on grounds unrelated to the validity of the conviction or the sentence.”<sup>67</sup> It therefore appears that habeas corpus and § 2255 motions are not “exactly commensurate.”

Further disagreement concerned whether a § 2255 proceeding was a further step in the criminal chain or a separate civil action.<sup>68</sup> In *Hayman*, Justice Vinson indicated that § 2255 proceedings were governed by the Civil Rules of Appellate Procedure just like habeas corpus proceedings.<sup>69</sup> In 1976, however, Congress approved the Rules Governing Section 2255 Proceedings in the United States District Courts (§ 2255 Rules). The Advisory Committee’s Note to Rule One states that “a motion under § 2255 is a further step in the movant’s criminal case and not a separate civil action ....”<sup>70</sup> Regardless, the § 2255 Rules as a whole “appl[y] a mixture of civil and criminal rules to section 2255 proceedings ....”<sup>71</sup> Furthermore, the ABA Standards for Criminal Justice state that

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63. See CHARLES ALAN WRIGHT, 3 FEDERAL PRACTICE AND PROCEDURE: CRIMINAL PROCEDURE § 589 n.5 (2001).

64. 368 U.S. 424 (1962).

65. *Id.* at 427; see also *Davis v. United States*, 417 U.S. 333, 343 (1974) (stating that § 2255 “afford[s] federal prisoners a remedy identical in scope to federal habeas corpus”).

66. 28 U.S.C. § 2255 (2000) (“An application for a writ of habeas corpus ... shall not be entertained ... unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”).

67. WILKES, *supra* note 1, § 3-1, at 118.

68. See *Randall*, *supra* note 46, at 1080.

69. *Hayman*, 342 U.S. at 209 n.4.

70. RULES GOVERNING SECTION 2255, at 1 advisory committee note.

71. *Randall*, *supra* note 46, at 1080-81.

labeling postconviction remedies as either "civil" or "criminal" is meaningless.<sup>72</sup>

### 3. *Scope of § 2255 Proceedings*

The scope of relief a § 2255 motion affords is effectively equivalent to the relief afforded by the writ of habeas corpus.<sup>73</sup> Section 2255 provides that relief may be granted on four grounds:

(1) 'the sentence was imposed in violation of the Constitution or laws of the United States;' (2) 'the court was without jurisdiction to impose such sentence;' (3) 'the sentence was in excess of the maximum authorized by law;' and (4) the sentence 'is otherwise subject to collateral attack.'<sup>74</sup>

Although each of the grounds for relief refers to attacking the "sentence" and the caption of the statute is "Federal Custody; Remedies on Motion Attacking Sentence,"<sup>75</sup> there is doubt as to whether this is entirely accurate. At least one commentator has stated that § 2255 motions are generally used to attack the underlying conviction.<sup>76</sup> Some overlap does exist,<sup>77</sup> but for the prisoner challenging his sentence and not his conviction, a motion under Rule 35 of the Federal Rules of Criminal Procedure is normally appropriate.<sup>78</sup> Others regard the use of the word "sentence" as an all-inclusive term that encompasses "all of the proceedings leading up to the sentence."<sup>79</sup>

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72. ABA STANDARDS FOR CRIMINAL JUSTICE § 22-1.2, at 22.10 (2d ed. 1980) (stating that rules governing postconviction proceedings should be formed based on the proceeding's specific characteristics, not its classification as civil or criminal because these labels are imprecise).

73. See WRIGHT, *supra* note 63, § 593.

74. Hill v. United States, 368 U.S. 424, 426-27 (1962) (quoting 28 U.S.C. § 2255); *cf. supra* text accompanying note 45.

75. 28 U.S.C. § 2255 (2000).

76. See POTUTO, *supra* note 24, at 12.

77. This overlap is not relevant to prisoner's collateral attacks. *Id.* at 13.

78. *Id.*

79. WRIGHT, *supra* note 63, § 593.

The scope of § 2255 is limited by Supreme Court decisions interpreting the statute.<sup>80</sup> These decisions make it clear that there is a difference between motions claiming constitutional or jurisdictional errors and those claiming errors of law or fact.<sup>81</sup> Relief will be granted for errors of law or fact only if the error is so fundamental that the due process right to a fair trial has been violated.<sup>82</sup>

### *C. The Antiterrorism and Effective Death Penalty Act of 1996*

#### *1. Events Leading to the Passage of the AEDPA*

The revisions to habeas corpus within the AEDPA may have had most to do with two dramatic events, one political and one tragic,<sup>83</sup> that occurred just prior to its passage. First, in the mid-term elections of 1994, Republicans swept to victory in the House of Representatives, gaining a majority for the first time since 1952, gaining a majority in the Senate, and picking up eleven governorships.<sup>84</sup> The House Republicans, led by Minority Whip Newt Gingrich, put forth a broad statement of proposed legislative reforms called "The Contract with America."<sup>85</sup> The Contract with America included the proposed "Taking Back Our Streets Act," which included provisions for habeas corpus reform and specifically provided for the one-year limitation to be added to 28 U.S.C. § 2255.<sup>86</sup> After fifty years of fighting for restrictions on prisoners'

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80. *Id.*; see also *United States v. Addonizio*, 442 U.S. 178, 179 (1979) (holding that "a postsentencing change in the policies of the United States Parole Commission [that] prolonged [petitioners'] actual imprisonment beyond the period intended by the sentencing judge" does not "support a collateral attack on the original sentence under 28 U.S.C. § 2255"); *Hill*, 368 U.S. at 428 (holding that prior decisions have limited habeas corpus to "exceptional circumstances").

81. WRIGHT, *supra* note 63, § 593.

82. *Id.*

83. Although depending on your personal political views, both may have been tragic.

84. Dan Balz, *A Historic Republican Triumph: GOP Captures Congress; Party Controls Both Houses For First Time Since 50's*, WASH. POST, Nov. 9, 1994, at A1. Representative Newt Gingrich announced at the time that it was "the most significant election in a generation." *Id.* at A22.

85. More than three-hundred Republican candidates and incumbents signed "The Contract with America" on September 27, 1994, on the steps of the Capitol. Robert Suro, *Clinton Suggests Tax Cut "As Long as I Can Pay for It,"* WASH. POST, Dec. 12, 1994, at A1.

86. Taking Back Our Streets Act of 1994, 104th Cong., 1st Sess., tit. I, subtit. A, § 105.

rights to habeas corpus,<sup>87</sup> Republicans were finally in a position to make good.

The second major event affecting the passage of the AEDPA was the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, on April 19, 1995, less than a year after the mid-term elections of 1994.<sup>88</sup> The tragedy took the lives of "at least 146 people, including fifteen children."<sup>89</sup> During the congressional debates concerning the AEDPA, the victims and their families were put forth as examples of why habeas corpus reform was essential.<sup>90</sup> Supporters of the bill used letters from victims' relatives and friends as evidence that the American public was behind the reform.<sup>91</sup> Of course, those on the other side of the issue were just as quick to show that the survivors really did not want this reform passed in the memories of their loved ones.<sup>92</sup> Nevertheless, it is apparent from a survey of the debates surrounding the AEDPA that the Oklahoma City bombing was in the forefront of many representatives' minds, and that emotions played a large part in the Act's passage.

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87. See generally Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422-42 (1996) (discussing the debate over habeas corpus reform between Democrats and Republicans).

88. See generally Abner J. Mikva, *Habeas Corpus and the Oklahoma City Bombing*, 48 FED. LAW. 30 (2001).

89. Linnet Myers, *Report Warned Before Bombing That Militias Might Turn Deadly*, CHI. TRIB., May 4, 1995, at 28.

90. 142 CONG. REC. 4806 (1996) (statement of Rep. Henry Hyde (R-Ill.)). Representative Hyde noted the words of President Bill Clinton: "We need to cut the time delay on the appeals dramatically. And it ought to be done in the context of this terrorism legislation, so that it would apply to any prosecutions brought against anyone indicted in Oklahoma ...." *Id.* At least one commentator has described the Oklahoma City bombing as "political cover" for the habeas corpus reform included in the AEDPA. See Joseph L. Hoffman, *Justices Weave Intricate Web of Habeas Corpus Decisions*, 37 J. TRIAL LAW. AM. 62, 62 (2001).

91. See 141 CONG. REC. 14,526 (1995) (statement of Sen. Hatch (R-Utah)) (introducing letters to be printed in the Record including a letter from Alice Maroney-Denison, May 24, 1995, whose father died in the Oklahoma City blast, stating: "I need your support in passing Habeas reform. The murderers who committed this crime should be executed as soon as possible, not in 15-20 years. My father will not get to live another 15-20 years so why should the convicted?").

92. 142 CONG. REC. 4794 (1996) (statement of Rep. Helen Chenoweth (R-Idaho)) (quoting a letter from Bud Welch whose daughter Julie was killed in the Oklahoma City bombing: "We have actually learned what is contained in this massive bill, we know that the last thing our family wants ... is for this legislation ... so crippling of Americans' constitutional liberties to be passed in our daughter's name and memory.").

The AEDPA passed against this backdrop of political revolution and overwhelming tragedy. The election of the first Republican House since 1952,<sup>93</sup> the aftermath of Oklahoma City, along with the 1993 World Trade Center bombing and the siege at Waco created the political landscape necessary for such sweeping reform.

## *2. Reasons Cited for the AEDPA's Habeas Corpus Reform*

Proponents of habeas corpus reform cited several reasons why it was necessary. The legislative history of the AEDPA, particularly the debates, is replete with examples of how habeas corpus was broken, and why it needed to be fixed. First, habeas needed reform in order to restore the public's confidence in the judicial system.<sup>94</sup> Specifically, reformers linked habeas abuse to past delays in the carrying out of death sentences,<sup>95</sup> and they did not want such delay for those convicted of the Oklahoma city bombing.<sup>96</sup>

Second, as in 1948, reformers perceived an undue burden on the federal courts by frivolous, unnecessary petitions.<sup>97</sup> Members of Congress not only saw this as a problem with habeas corpus generally, but also with § 2255 motions particularly, and members of the federal judiciary agreed.<sup>98</sup>

Some members of the federal judiciary, however, disagreed with this assessment of the burden on the courts.<sup>99</sup> According to

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93. David Rogers, *Running the Show: New GOP Majority Moves to Wield Power Over Congress, Clinton*, WALL ST. J., Nov. 10, 1994, at A1.

94. See *Habeas Corpus Hearings*, *supra* note 37, at 2 (statement of Rep. Canady (R-Fla.)) (linking habeas reform with an effective death penalty when stating "nothing has done more to undermine public confidence in our system of justice in this country than the interminable delays in carrying out sentences of death"); 141 CONG. REC. 14,533 (1995) (statement of Sen. Strom Thurmond (R-S.C.)) ("[The] habeas reform proposal is badly needed to restore public confidence [in] America's criminal justice system.").

95. See *supra* notes 90-91 and accompanying text.

96. See, e.g., 142 CONG. REC. 4567 (1996) (statement of Rep. Lucas (R-Okla.)) ("The habeas corpus reform that is included in this bill will ensure that those who committed this crime will not be able to delay punishment through endless appeals.").

97. See, e.g., 142 CONG. REC. 4811 (1996) (statement of Rep. Gingrich (R-Ga.)) (describing the current appeals process as "interminable" and "frivolous").

98. See Snow, *supra* note 54, at 302 ("In my view, the instances in which § 2255 relief is warranted are so rare that the vast expenditure of our federal judicial resources required to process these motions simply cannot be justified.").

99. See *Habeas Corpus Hearings*, *supra* note 37, at 3 (statement of H. Lee Sarokin, U.S. District Court Judge for the District for New Jersey) ("[W]e at the district court level are not

testimony of one judge in 1993, habeas corpus applications only constituted approximately four percent of the federal district court caseload.<sup>100</sup>

If it was hard to make the case for federal court overload when looking at the numbers of habeas corpus motions generally, it was immeasurably harder to make when taking into account only motions to vacate sentence. Of the 269,132 civil cases commenced in federal district courts in the twelve-month period ending September 30, 1996, motions to vacate sentence (9,729) constituted only 3.6% of the total.<sup>101</sup>

Third, reformers were concerned about the finality of convictions in the judicial process. Some thought that a reasonable filing deadline would help to increase the sense of finality.<sup>102</sup> Others, however, did not think that finality was an issue in cases other than death penalty cases. Petitioning prisoners who are not facing the death penalty are, by definition, already in custody and

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overburdened by habeas petitions.... [M]ost of the petitions are without merit or frivolous ... [and] take very little time of sitting judges and therefore are susceptible to easy and speedy resolution.”).

100. *Id.* It is not clear that the AEDPA has ameliorated this burden, undue or not, although the AEDPA seems to have had a significant effect on the number of § 2255 motions filed by prisoners. Indeed, between 1996, when the AEDPA was passed, and 2000, motions to vacate sentence in federal district courts declined by 34.8% (9,729 in 1996 compared to 6,341 in 2000), whereas of habeas corpus cases generally have increased by 54% (16,194 in 1996 compared to 24,945 in 2000). 2000 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Judicial Business of the U.S. Courts, tbl. C-2A, available at <http://www.uscourts.gov/judbus2000/contents.html> [hereinafter 2000 ANNUAL REPORT].

In the courts of appeals, there was a 30.98% decrease in the number of motions to vacate sentence between 1997 and 2000 (3,870 in 1997 compared to 2,671 in 2000), whereas of habeas corpus cases generally increased 184.5% (491 in 1997 compared to 1,397 in 2000). *Id.*, tbl. B-1A; see also Peter Ausili, *Analyzing Federal Court Statistics for 2000*, 226 N.Y. L.J. 1, col. 1 (July 16, 2001) (noting that between 1996 and 1999 there was a “35 percent drop in federal prisoner motions to vacate sentence [resulting] ... from [AEDPA] ...” and that “state prisoner habeas corpus petitions have risen during this period and, during fiscal year 2000, federal prisoner motions to vacate sentence and federal habeas corpus petitions rose 10 percent and 8 percent respectively”).

101. 2000 ANNUAL REPORT, *supra* note 100, tbl. C-2A. As is the case for federal habeas petitions generally, the effect of the AEDPA on motions to vacate sentence as a percentage of the total number of civil cases commenced is insignificant: In 2000, motions to vacate sentence constituted 2.4% of all civil cases. *Id.*

102. See 137 CONG. REC. 15,723 (1991) (statement of Sen. Grassley (R-Iowa)) (“A reasonable limitation is also called for on Federal habeas corpus petitions in order to promote some sense of finality in the criminal proceedings.”).

therefore in the process *already* of serving their “final” sentence. Petitioning prisoners sentenced to death, on the other hand, have not served their final sentence and these few people do have motivation to cause delay in order to postpone execution.<sup>103</sup> The vast majority of the incarcerated are motivated instead to expedite their petitioning process in order to gain their freedom. Allowing them to file their applications for a long time would not cause delay in determining their final sentence. This is certainly true for motions to vacate sentence because § 2255 expressly requires that the petitioner be in custody.<sup>104</sup>

### 3. *The AEDPA and § 2255*

Congress also cited the “Powell Report” findings as support for the AEDPA. The “Powell Committee” was the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases that Chief Justice Rehnquist formed in 1988 in his capacity as head of the Judicial Conference of the United States.<sup>105</sup> The committee acquired its moniker because retired Justice Lewis F. Powell, Jr. chaired it.<sup>106</sup> The purpose of the committee was to “inquire into ‘the necessity and desirability of legislation directed toward avoiding delay and the lack of finality’ in capital cases in which the prisoner had or had been offered counsel.”<sup>107</sup>

Three problems with the existing habeas corpus process were identified by the Powell Committee.<sup>108</sup> The only one which relates

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103. See *Habeas Corpus Hearings*, *supra* note 37, at 4 (statement of Judge Sarokin) (“[C]onfinement is a prerequisite to habeas relief, so ... [the] public’s need for finality ... is not impaired in any way .... Only in death penalty cases is the lack of finality a real ... problem.”).

104. See 28 U.S.C. § 2255 (stating “[a] prisoner in custody under sentence”). The custody requirement of § 2255 is exactly the same as that which exists under habeas corpus, although it is read so expansively that it is rarely a problem. See WRIGHT, *supra* note 63, § 596.

105. See Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467, 479 (2000).

106. *Id.* at 479-80.

107. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) [hereinafter Powell Report] (quoting Chief Justice William Rehnquist, Address to the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (June 1988)).

108. Kappler, *supra* note 105, at 481 (citations omitted).



to the imposition of a one-year limitations period on the time for review was that "the system led to 'unnecessary delay and repetition.'"<sup>109</sup> Unnecessary delay, however, was predominately a problem in capital cases.<sup>110</sup> On the other hand, repetition was due to a lack of communication between state and federal authorities which resulted in state prisoners litigating and relitigating to exhaust state remedies in order to properly bring claims in federal court.<sup>111</sup> This concern regarding repetition would not attach in the context of federal prisoners pursuing their claims in federal courts since there would be no state-level requirement of exhaustion. Similarly, since there would be no need for state and federal officials to communicate in reference to federal prisoners, the "lack of communication" problem also would be nonexistent.

The effect of the AEDPA's one year limitation period on § 2255 does not seem to have played a big part in the debates concerning habeas corpus reform. Perhaps this is because habeas corpus occupies such a large place in Anglo-Saxon legal tradition and is therefore susceptible to sweeping generalities as opposed to detailed discussion. Democratic Representative Robert W. Kastenmeier from Wisconsin gave the single longest monologue on the specific subject of § 2255's one-year limitation:

There is no evidence that section 2255 motions are delayed in the current system. This new procedural cutoff is simply not needed.

The amendment also incorporates wholesale all the restrictions contained in the original Powell Committee report, but applies those restrictions in an entirely different context. The Powell Committee focused exclusively on habeas corpus proceedings involving State prisoners and did not recommend that its plan should be adopted for section 2255 cases involving prisoners convicted in Federal court. The same concerns for the

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109. *Id.* (quoting Powell Report, *supra* note 107, at 3239). The two other problems identified by the Committee were (1) the need for counsel for prisoners facing the death penalty, and (2) petitions filed just before execution, which put a great deal of stress on the judicial system. *Id.*

110. *See Hoffman, supra* note 90, at 65. Logically, a prisoner facing an extended stay in mandatory, government-provided housing (i.e., prison) would want to get out in the shortest amount of time possible, while a prisoner facing a death sentence would want to delay receiving his ultimate punishment for as long as possible.

111. *See Kappler, supra* note 105, at 481.

interests of the States are simply not present in this different context.<sup>112</sup>

When viewed in the context of the Powell Committee findings, Representative Kastenmeier's remarks seem to have hit upon something that other legislators either did not see or were not willing, for political or other reasons, to address.

The reforms of the AEDPA may have been applicable to those prisoners facing a death sentence. Congress overlegislated, however, when it passed the new limitations imposed by the AEDPA in the noncapital habeas corpus area, especially in relation to *federal* noncapital habeas corpus prisoners. The result is a limit on a prisoner's ability to receive justice with no significant improvements to the overall efficiency of the system.<sup>113</sup>

#### *D. History of Pertinent Cases*

##### *1. Gendron v. United States*

The Seventh Circuit Court of Appeals addressed the issue of when a judgment of conviction becomes final for purposes of 28 U.S.C. § 2255 in *Gendron v. United States*.<sup>114</sup> Randall Gendron was convicted in federal district court of "conspiracy to distribute and to possess with intent to distribute cocaine."<sup>115</sup> On October 8, 1996, the Seventh Circuit affirmed his sentence and conviction, and on October 25, 1996, the court denied his petition for rehearing and issued the mandate on November 4, 1996. Gendron never filed a petition of certiorari with the United States Supreme Court and filed his § 2255 motion to vacate on November 18, 1997.<sup>116</sup> The district court found that the judgment of conviction had become

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112. 136 CONG. REC. 27,522 (1990) (statement of Rep. Kastenmeier) (D-Wis.) (referring to the Gekas Amendment to the Comprehensive Crime Control Act of 1990 which proposed a 90-day limitation period for § 2255 motions).

113. See Larry Yackle, *Federal Habeas Corpus in a Nutshell*, 28 HUM. RTS. 7, 7 (2001) ("[T]he Supreme Court's restrictive doctrines and the additional limits established by the AEDPA undermine the ability of federal courts to vindicate federal rights in habeas corpus proceedings.").

114. 154 F.3d 672 (7th Cir. 1998).

115. *Id.* at 673.

116. *Id.*

final the day the circuit court had issued its mandate, November 4, 1996. Because Gendron filed his § 2255 motion more than one year from that date, the district court held that the period of limitation had expired and denied his petition.<sup>117</sup>

In his appeal to the Seventh Circuit, Gendron argued that the one-year period should not have begun to run until after the ninety-day period<sup>118</sup> for filing a petition for certiorari had expired.<sup>119</sup> If correct, Gendron would have had until January 25, 1998, to file his motion to vacate, and his § 2255 motion would have been timely filed in the district court.

In affirming the district court's decision, the Seventh Circuit rejected Gendron's analogy to the Supreme Court's definition of when a conviction becomes final in the retroactivity context.<sup>120</sup> That definition, handed down in *Griffith v. Kentucky*,<sup>121</sup> stated: "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."<sup>122</sup> Despite recognizing that "the Court's definition can be used for guidance," the Seventh Circuit found that "Congress has the authority to independently determine the standards to be applied under §§ 2244 and 2255."<sup>123</sup>

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117. *Id.*

118. According to Supreme Court Rule 13:

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals ... is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

....

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate ....

SUP. CT. R. 13.

119. *Gendron*, 154 F.3d at 673.

120. *Id.* at 674.

121. 479 U.S. 314 (1987).

122. *Id.* at 321 n.6. *Griffith* dealt with the retroactive application of the Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).

123. *Gendron*, 154 F.3d at 674. 28 U.S.C. § 2244 governs determinations of finality for writs of habeas corpus filed under 28 U.S.C. § 2254, the method by which prisoners in custody pursuant to a state court judgment file federal habeas corpus petitions. 28 U.S.C. § 2244 (2000).

The Seventh Circuit went on to compare the one-year periods of limitation included in §§ 2244(d)(1)<sup>124</sup> and 2255(1) in order to understand the latter. Employing the *Russello* presumption, which takes its name from *Russello v. United States*,<sup>125</sup> the court found that because Congress had included language in § 2244(d)(1)(A) that made it clear when a judgment of conviction became final, but did not include the same language in § 2255,<sup>126</sup> Congress must have “intended to treat the period of limitation differently under the two sections.”<sup>127</sup> The court concluded that in order to avoid rendering the specific language in § 2244 pointless, the only reading possible was that for “federal prisoners who decide not to seek certiorari with the Supreme Court ... the period of limitation begin[s] to run on the date this court issues the mandate in their direct criminal appeal.”<sup>128</sup>

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124. Section 2244(d)(1) reads:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1) (2000).

125. 464 U.S. 16 (1983). The *Russello* presumption of statutory interpretation is that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Id.* at 23 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

126. The specific language of § 2244 states that the one-year period of limitation begins to run from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244 (2000). On the other hand, § 2255 simply states that the one-year period of limitation runs from “the date on which the judgment of conviction becomes final.” 28 U.S.C. § 2255 (2000).

127. *Gendron*, 154 F.3d at 674.

128. *Id.*

## 2. *Kapral v. United States*

The Third Circuit was the second United States Court of Appeals to take up the issue, in *Kapral v. United States*.<sup>129</sup> On January 17, 1995, Michael Kapral pled guilty in federal district court to conspiracy to distribute and to possess with intent to distribute methamphetamine and evasion of federal income taxes.<sup>130</sup> On May 25, 1995, Kapral appealed his conviction to the Third Circuit Court of Appeals, which affirmed on February 13, 1996.<sup>131</sup> On April 29, 1997, Kapral filed his § 2255 motion to vacate sentence.<sup>132</sup> The district court dismissed Kapral's motion with prejudice because it found that the motion was filed after the one-year period of limitations included in § 2255 had expired.<sup>133</sup>

In reversing the district court's decision, the Third Circuit rejected each argument the lower court had accepted<sup>134</sup> as well as the rationale of the Seventh Circuit's decision in *Gendron*.<sup>135</sup> Instead, the court relied upon the Supreme Court's definition of "final" in *Griffith*,<sup>136</sup> congressional intent,<sup>137</sup> and a comparison of the language in § 2255(1) with that in § 2263(a).<sup>138</sup> The court held that, within § 2255, a judgment of conviction becomes final on "the date on which the defendant's time for filing a timely petition for certiorari review expires."<sup>139</sup>

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129. 166 F.3d 565 (3d Cir. 1999).

130. *Id.* at 567.

131. *Id.*

132. *Id.*

133. *Kapral v. United States*, 973 F. Supp. 495, 496 (D.N.J. 1997).

134. *Kapral*, 166 F.3d at 568-71.

135. *Id.* at 573-77.

136. *Id.* at 571-72.

137. *Id.* at 572-73.

138. *Id.* at 576-77. Section 2263(a) reads:

(a) Any application under this chapter [28 USCS §§ 2261 et seq.] for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

28 U.S.C. § 2263(a) (2001).

139. *Kapral*, 166 F.3d at 577.

Between February and May of 2000, the Tenth,<sup>140</sup> Fifth,<sup>141</sup> and Ninth<sup>142</sup> Circuits each issued opinions which almost exclusively relied on or employed the rationale of *Kapral*.

### 3. *United States v. Torres*

At about the same time these three circuits were following the Third Circuit's reasoning, the Fourth Circuit was also addressing the issue in *United States v. Torres*.<sup>143</sup> D'Andre Torres was convicted of one charge of conspiring to possess with intent to distribute cocaine on August 1, 1995. On May 19, 1997, the Fourth Circuit Court of Appeals affirmed his conviction and issued its mandate on June 10, 1997.<sup>144</sup> Torres did not file a petition for certiorari with the Supreme Court, but did file his § 2255 motion to vacate sentence on August 24, 1998.<sup>145</sup> The district court found that because his motion to vacate sentence had been filed more than one year after the date the Fourth Circuit had issued its mandate on Torres' direct appeal, the AEDPA statute of limitations barred the motion.<sup>146</sup>

In affirming the district court's decision, the Fourth Circuit rejected the reasoning of *Kapral*, and, by extension, the other decisions following *Kapral*. In doing so, the court accepted the limited analysis of *Gendron* while also embarking on some of its own analysis. The court noted that the extra language in § 2244(d)(1), expressly stating that a judgment of conviction becomes final only after the time for seeking Supreme Court review has expired, was missing in § 2255(1). The court found, therefore, that Congress had intended to leave the extra language out of §2255.<sup>147</sup> Again, following the rationale of *Gendron*, *Griffith's* interpretation of when a decision becomes final was rejected by the Fourth Circuit.<sup>148</sup> The court also noted that in § 2263(a), which

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140. *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000).

141. *United States v. Gamble*, 208 F.3d 536 (5th Cir. 2000).

142. *United States v. Garcia*, 210 F.3d 1058 (9th Cir. 2000).

143. 211 F.3d 836 (4th Cir. 2000).

144. *Id.* at 837.

145. *Id.*

146. *Id.*

147. *Id.* at 839.

148. *Id.* at 841.

concerns time limitations for *state* prisoners serving sentences for capital crimes, Congress included language like that in § 2244(d)(1).<sup>149</sup> The court presumed that Congress did not consider the possibility of a federal defendant not filing a petition for certiorari,<sup>150</sup> and noted that since nothing else happens after issuance of a circuit court's mandate if the prisoner does not file a petition for certiorari, the judgment must be "final" at that point.<sup>151</sup>

### *E. Areas of Agreement*

It is helpful to note not only where the courts disagree, but also where they agree. All of the courts of appeals that have addressed the issue have agreed that when a prisoner files a petition for certiorari with the Supreme Court after his conviction and sentence have been affirmed by the court of appeals, direct review concludes when the Supreme Court either denies his petition or decides his case on the merits.<sup>152</sup> In *Torres*, Judge Karen Williams wrote:

In our system of federal courts, it is generally accepted that, for a defendant who files a petition for certiorari with the Supreme Court, the conclusion of direct review occurs when the Supreme Court either denies his petition or decides his case on the merits.<sup>153</sup>

So, to be clear, the disagreement in the circuits concerns only the situation in which the prisoner, for whatever reason, does not file a petition for certiorari to the Supreme Court.

There also seems to exist some agreement that the wording of the AEDPA leaves room for reasonable disagreement about exactly when a decision becomes final for purposes of § 2255(1). In his concurrence in *Kapral*, Judge Samuel Alito wrote that § 2255(1) "is

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149. *Id.* at 840 (citing 28 U.S.C. § 2263(a) (2000)).

150. *Id.* at 839.

151. *Id.*

152. See *United States v. Green*, 260 F.3d 78 (2d Cir. 2001); *Washington v. United States*, 243 F.3d 1299 (11th Cir. 2001); *Johnson v. United States*, 246 F.3d 655 (6th Cir. 2001); *United States v. Torres*, 211 F.3d 836 (4th Cir. 2000); *United States v. Marcello*, 212 F.3d 1005 (7th Cir. 2000); *United States v. Willis*, 202 F.3d 1279 (10th Cir. 2000); *Kapral v. United States*, 166 F.3d 565 (3d Cir. 1999).

153. *Torres*, 211 F.3d at 839.

susceptible to two entirely reasonable interpretations.... Indeed if I were compelled to choose one interpretation based solely on the text of that provision, I would find the choice exceedingly hard. Moreover, I think that a reasonable legislator could easily choose either interpretation."<sup>154</sup> Other courts of appeals addressing this issue have agreed with this statement.<sup>155</sup>

## II. ANALYSIS OF *GENDRON*, *KAPRAL*, AND *TORRES*

### A. *Inconsistency with Teague v. Lane*<sup>156</sup>

#### 1. *Gendron*

As the Seventh Circuit noted in *Gendron*, the Supreme Court has already defined when a judgment of conviction becomes "final" in the context of retroactive application of Supreme Court decisions to cases receiving collateral review.<sup>157</sup> In *Allen v. Hardy*,<sup>158</sup> the Court stated: "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed ...."<sup>159</sup> *Allen* came to the Court as an appeal from a federal district court's rejection of petitioner's petition for federal habeas corpus and a court of appeal's affirmance of that rejection.<sup>160</sup> Then, in *Griffith v. Kentucky*,<sup>161</sup> the Court took

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154. *Kapral*, 166 F.3d at 577-78 (Alito, J., concurring).

155. See *Burch*, 202 F.3d at 1276 ("Like the court in *Kapral*, we recognize that there are several possible meanings of the word 'final' in this context."); *Garcia*, 210 F.3d at 1059 ("The phrase 'becomes final' is capable of at least two meanings."); *Torres*, 211 F.3d at 844 (Hamilton, J., dissenting) ("[T]he phrase 'the date on which the judgment of conviction becomes final' contained in § 2255(1) is ambiguous, as it is susceptible of two reasonable interpretations.").

156. 489 U.S. 288 (1989).

157. See *Gendron*, 154 F.3d at 673-74.

158. 478 U.S. 255 (1986). Earl Allen, was convicted of murdering his girlfriend and her brother by a jury during the selection of which the prosecutor had used nine of seventeen peremptory challenges to remove seven blacks and two Hispanic potential jury members. Allen petitioned the Court arguing that its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), which was pending when the court of appeals rejected his claims, should be applied to his case. The Court rejected this argument and held that its decision in *Batson* would not be applied on collateral review of cases that were final. *Id.* at 257-58.

159. *Id.* at 258 n.1 (quoting *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)).

160. *Id.* at 256-57.

161. 479 U.S. 314 (1987).



up the issue of the retroactive application of its decisions to cases pending on state or federal direct review and affirmed its previous definition of "final."<sup>162</sup> Finally, in *Teague v. Lane*,<sup>163</sup> the Court held, as *Allen* had previously held, that its decisions are not retroactively applicable on collateral review to convictions that have become final.<sup>164</sup> The Court thus affirmed its definition of when a judgment of conviction becomes final from both *Allen* and *Griffith*.<sup>165</sup> The Seventh Circuit rejected this definition from *Allen*, *Griffith*, and *Teague*, concluding that, though the Supreme Court's definition provided guidance, Congress was completely free to disregard the Court's definition and adopt its own because "[w]e start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."<sup>166</sup>

In fact, one can conclude that Congress "articulated" the § 2255 definition of when a judgment of conviction becomes final only by using a very strained definition of the word "articulate." *Webster's* defines the verb "articulate," as employed by the Seventh Circuit, as (1) "to utter distinctly" or (2) "to give clear and effective utterance to: to put into words."<sup>167</sup> The Seventh Circuit suggested that Congress "articulated" the "appropriate" definition of "final" for § 2255 by including more specific language in § 2244 and excluding that same language from § 2255. The Seventh Circuit's suggestion

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162. *Id.* at 321 n.6 (citing *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982)) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.").

163. 489 U.S. 288 (1989). In *Teague*, the Court held that (1) retroactivity is an initial, threshold question because fairness requires that a new rule be applied to all those similarly situated to the defendant when the rule was handed down, and (2) a new constitutional rule of criminal procedure should not be applied retroactively unless (a) "it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[.]'" or (b) "it requires the observance of 'those procedures ... implicit in the concept of ordered liberty.'" *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

164. *Id.* at 296. The Third Circuit correctly summarized this holding in *Kapral*: "For purposes of a *Teague* analysis, a defendant's judgment of conviction becomes final (1) on the date the Supreme Court denies certiorari ... or (2) on the date the time for filing a timely petition for a writ of certiorari expires." *Kapral*, 166 F.3d at 572 (citations omitted).

165. *Teague*, 489 U.S. at 295.

166. *Gendron*, 154 F.3d at 674 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)).

167. WEBSTER'S COLLEGIATE DICTIONARY 65 (10th ed. 1993).

that Congress can "put into words" a concept by not putting it into words defies the definition of "articulate" and common sense.

Moreover, *Milwaukee v. Illinois*,<sup>168</sup> the case the Seventh Circuit cited for its "articulation principle," illustrates that the principle is not applicable to the § 2255 controversy. In *Milwaukee*, the Court addressed whether the federal common law of nuisance, which it had previously stated governed the dispute between several municipal corporations of the state of Wisconsin and the state of Illinois concerning sewage discharge into Lake Michigan, had been preempted by Congress's passage of the 1972 Amendments to the Federal Water Pollution Control Act.<sup>169</sup> The question was not the definition of a term used by Congress, or methods of statutory interpretation, but whether Congress had legislated on the question at all.<sup>170</sup> Statutory interpretation is a courts' attempt to determine what Congress meant by the language it used in a certain statute. Federal common law is federal judge-made law in the absence of a federal statute. In *Milwaukee*, the issue was one of preemption, not one of interpretation and the case thus is not appropriate for analogy to the § 2255 question.

Finally, as the Third Circuit pointed out in *Kapral*, the Seventh Circuit's logic would mean that a petitioner's limitation period for filing a § 2255 motion would begin to run ninety days before the petitioner's case became final for purposes of *Teague*.<sup>171</sup> The Supreme Court could announce a new rule under this that would provide the petitioner with the basis of a claim on collateral review at the end of a prisoner's window in which he may petition for certiorari. Under the *Gendron* logic the petitioner would only have nine months to file his § 2255 motion. This defies, as the Third Circuit pointed out, "the orderly administration of direct and collateral proceedings."<sup>172</sup> There is no reason to work such an

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168. 451 U.S. 304 (1981).

169. *Id.* at 312-14.

170. *Id.*

171. *Kapral*, 166 F.3d at 572. Also, using the Seventh Circuit's logic, no court would be able to say whether the § 2255 limitation period had begun running when the court of appeals confirmed the petitioner's judgment of conviction until the ninety-day period for petitioning for a writ of certiorari with the Supreme Court had expired. This is because the running of the statute would depend on the future action or inaction of the petitioner, i.e. whether or not he or she timely filed for a writ of certiorari.

172. *Kapral*, 166 F.3d at 572.

injustice on a § 2255 petitioner, particularly when state petitioners subject to § 2244 are not under such time constraints.<sup>173</sup>

The Seventh Circuit did not address the effects of the inconsistency of its definition with the definition of “final” as employed by a *Teague* retroactivity analysis. The Seventh Circuit can point to no affirmative evidence that this inefficient scheme is what Congress intended, only conclusions based upon presumption.<sup>174</sup>

## 2. *Torres*

In *Torres*, the Fourth Circuit, unlike the Seventh Circuit, *did* address the question of whether there ought to be consistency with *Teague* in § 2255. It concluded that “there is no necessary reason to conclude that Congress intended to import the judicially created concept of finality for purposes of a *Teague* retroactivity analysis into the context of the limitation periods of either § 2244 or § 2255.”<sup>175</sup> The court went on to say that even if Congress did include language consistent with *Teague*, it was contained in § 2244(d)(1) and absent in § 2255(1).<sup>176</sup> The court concluded that Congress, therefore, must have intentionally made § 2255(1) different.<sup>177</sup>

Various portions of the Fourth Circuit’s argument illustrate the convenient characterizations that the Fourth Circuit employed to

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173. This would mean that, in the situation where the Supreme Court issued a new rule after the court of appeals affirmed the judgment of conviction, a petitioner convicted under a federal drug statute would receive less time to file his § 2255 motion than a state petitioner convicted of a state drug felony.

174. *Gendron*, 154 F.3d at 674 (discussing the *Russello* presumption).

175. *Torres*, 211 F.3d at 841.

176. *Id.*

177. In an unpublished opinion, *United States v. Walker*, No. 97-7854, 1998 U.S. App. LEXIS 35975, decided a little over a year before the *Torres* decision, the Fourth Circuit vacated and remanded District Court Judge Rebecca Beach Smith’s order dismissing the petitioner’s § 2255 motion as untimely because it was filed after the one-year period of limitation had expired. The district court found that the petitioner’s judgment of conviction became final on the date the appeals court affirmed his conviction and sentence. The Fourth Circuit, in overturning the decision, specifically referred to *Teague* in holding that direct review does not end until the time for filing a writ of certiorari with the Supreme Court expires. In *Torres*, the Fourth Circuit completely reversed itself, illustrating the disagreement and confusion that surrounds this issue. *Torres*, however, has become the law of the Fourth Circuit. See *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001), *cert. denied*, 70 U.S.L.W. 3339 (U.S. Nov. 13, 2001) (No. 01-6715).

reach its result, and the pitfalls of relying exclusively upon presumptions. Alternating between informed and uninformed legislators, the Fourth Circuit stated that "Congress was presumably aware that a federal defendant's judgment of conviction becomes final for purposes of collateral attack at the conclusion of direct review[,]"<sup>178</sup> but that "Congress almost certainly did not consider the situation in which a federal defendant, upon the affirmance of his conviction by a court of appeals, exercises his prerogative *not* to file a petition for certiorari."<sup>179</sup> The court concluded that Congress possessed knowledge about one thing, but not about another. The reason the court presumed that Congress knew when a judgment of conviction becomes final was because that knowledge "is generally accepted,"<sup>180</sup> i.e., it is common, public knowledge within the federal court system. No reason is given as to why Congress would not consider the prisoner who fails to exercise his right to petition for certiorari to the Supreme Court after affirmance by the court of appeals. The most probable conclusion to be drawn from this lack of reasoning is that the Fourth Circuit is really saying that because it would not have considered that situation, Congress must not have considered it either.<sup>181</sup>

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178. *Id.* at 839.

179. *Id.*

180. *Id.*

181. At least one lower court has already expanded the holding of *Torres*. In *United States v. Sherrod*, 123 F. Supp. 2d 338 (E.D. Va. 2000), Judge Rebecca Beach Smith denied the defendant's motion to extend time to file a § 2255 motion. Judge Smith concluded that the logic of *Torres* also applies when a defendant fails to appeal the district court's conviction to the appellate court. Because Sherrod did not appeal his district court conviction to the Fourth Circuit Court of Appeals, his conviction became final and the one-year period of limitation began on the day the district court entered its decision. Therefore, Sherrod was not entitled to the ten-day period, beginning when the district court enters its judgment or order, within which Federal Rule of Appellate Procedure 4(b)(1) provides that criminal defendants can file their appeal. *Id.* at 339.

In Sherrod's case, starting the one-year period of limitation from the date of the district court's judgment as opposed to ten days later made all the difference. The district court entered judgment against Sherrod on October 28, 1999. *Id.* The district court received his motion for a time extension on November 8, 2000, although the prison stamped the letter for processing on November 6, 2000. *Id.* at 338-39 & n.1. Without the ten days, Sherrod was required to file his § 2255 motion by October 28, 2000. With the ten days, Sherrod would have been required to file his motion by November 7, 2000. Under the "prison mailbox rule," a *pro se* petitioner, which Sherrod evidently was, is deemed to have filed with the clerk of court on the day prisoner officials receive the prisoner's letter to mail. *Houston v. Lack*, 487 U.S. 266, 273-74 (1988). *Houston* is cited with approval in *Thompson v. E.I. DuPont de*

### 3. Summary

Regarding the question of why Congress would choose to ignore the previously existing *Teague* definition of when a judgment of conviction becomes final, the arguments advanced by both the Seventh and Fourth Circuits are filled with holes. The Seventh Circuit failed to address the inconsistency and inefficiency created by the interplay of the definition of final already used in a *Teague* retroactivity analysis and its own interpretation. Furthermore, while it may be Congress's responsibility to articulate the proper federal standards to be applied, it is only by using a very strained definition of "articulate" that one can conclude that Congress did so in this instance. Furthermore, the case the Seventh Circuit cites for this proposition is taken completely out of context. The Fourth Circuit, on the other hand, maintained its position by alternating between presumptions that Congress was informed and presumptions that it was uninformed. Both circuits' arguments suffer from flaws that make their conclusions regarding the definition of when a judgment of conviction becomes final untenable.

#### B. Comparison of §§ 2244(d)(1) and 2255(1)

##### 1. The Russello Presumption and the "Negative Inference"

Both the Seventh and Fourth Circuits relied heavily on the difference in language between §§ 2244(d)(1) and 2255(1). The Seventh Circuit invoked the *Russello* presumption to explain this

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*Nemours & Co.*, 76 F.3d 530 (4th Cir. 1996) and numerous other unpublished Fourth Circuit opinions. If Sherrod had been given the ten-day filing period under Rule 4(b)(1), the November 6, 2000 stamp for processing would have meant that he filed his motion for an extension of time one day before the November 7, 2000 deadline.

Other courts have specifically held that a § 2255 motion is considered filed the instant prison officials receive it for mailing. See *Morales-Rivera v. United States*, 184 F.3d 109 (1st Cir. 1999); *United States v. Gray*, 182 F.3d 762 (10th Cir. 1999); *Adams v. United States*, 173 F.3d 1339 (11th Cir. 1999); *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998); *United States v. Hatala*, 29 F. Supp. 2d 728 (N.D. W. Va. 1998); see also *Grady v. United States*, 269 F.3d 913 (8th Cir. 2001) (assuming that the prisoner mailbox rule applies to § 2255 motions and remanding case to the district court to make factual determinations regarding when the prisoner put his § 2255 motion in the prison mail system); *Simmons v. Ghent*, 970 F.2d 392 (7th Cir. 1992) (assuming that the prisoner mailbox rule applies to all prisoner district court filings).

difference.<sup>182</sup> The Fourth Circuit, perhaps because it had seen the response from other circuits to the invocation of the *Russello* presumption, did not explicitly refer to that presumption. Instead, the Fourth Circuit simply stated that the exclusion of the specifying language in § 2244(d)(1) from § 2255(1) “provides a powerful negative inference” that Congress did not intend the period of limitation to run from the expiration of a prisoner’s time to file for certiorari.<sup>183</sup> Although this does not state the principle as absolutely as the Seventh Circuit did, the difference is without distinction. Both courts meant that because Congress included language in one section and left it out of a second, the second section cannot have the same meaning as the first. Both lead to the conclusion “that Congress intended to treat the period of limitation differently under the two sections.”<sup>184</sup>

Conversely, other courts have found that § 2244, which provides the limitation period provision of § 2254, and § 2255 are virtually identical and that the difference in language should have no significant effect on the interpretation of either section.<sup>185</sup> Additionally, in *Reed v. Farley*,<sup>186</sup> the Supreme Court stated that at least where mere statutory violations are at issue, “§ 2255 was intended to mirror § 2254 in operative effect.”<sup>187</sup> Therefore, in the absence of a clear indication from Congress, the limitation period governing each should be given the same operative effect.

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182. *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998).

183. *United States v. Torres*, 211 F.3d 836, 840 (4th Cir. 2000).

184. *Gendron*, 154 F.3d at 674.

185. *United States v. Kapral*, 166 F.3d 565, 574 (3d Cir. 1999) (“[F]ederal inmates who wish to file motions ... under 28 U.S.C. § 2255 must adhere to a one-year period of limitation *virtually identical to that of § 2244(d)(1).*”) (quoting *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998)); *Then v. United States*, 126 F. Supp. 2d 727, 730 (S.D.N.Y. 2001) (“The difference in language is not meaningful, as section 2255 simply omits the definition of ‘final’ without providing any alternative definition.”).

186. 513 U.S. 339 (1994).

187. *Id.* (quoting *Davis v. United States*, 417 U.S. 333, 344 (1974)) (“[N]o microscopic reading of § 2255 can escape ... the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect,” in determining whether the petitioner’s claim was cognizable under § 2255).

*a. Poor Draftsmanship of the AEDPA*

There is a more basic problem with the use of the *Russello* presumption.<sup>188</sup> The *Russello* presumption is predicated upon the premise that statutes are carefully drafted,<sup>189</sup> and the AEDPA was not carefully drafted. "A well-drafted statute should reduce the frequency of disputes about interpretation,"<sup>190</sup> which the AEDPA has not done. In *Lindh v. Murphy*,<sup>191</sup> the Supreme Court stated that "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting."<sup>192</sup> Legal commentators have reached the same conclusion.<sup>193</sup> Even proponents of the legislation admit that the AEDPA is poorly drafted.<sup>194</sup>

Indeed, the history of the *Russello* presumption supports the fact that it is based on a presumption of careful draftsmanship. In *FTC v. Simplicity Pattern Co., Inc.*,<sup>195</sup> the first case to employ the doctrine, the Supreme Court, interpreting § 2 of the Clayton Act, stated that it could not "supply what Congress has studiously omitted."<sup>196</sup> Simply put, the presumption should not be applied to a statute that was poorly drafted.

*b. Vagaries of the Legislative Process*

The Supreme Court has employed the "negative inference" reasoning used by the Fourth Circuit in *Torres*. Specifically, in *Lindh v. Murphy*,<sup>197</sup> the Court addressed the retroactive effect of Chapters 153 and 154 of the AEDPA. The Court found that because

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188. This Note characterizes the "negative inference" language used by the Fourth Circuit as essentially the same as the *Russello* presumption. Therefore, an analysis of one is an analysis of the other.

189. *Kapral*, 166 F.3d at 579 (Alito, J., concurring).

190. SINGER, *supra* note 14, § 45:02, at 15.

191. 521 U.S. 320 (1997).

192. *Id.* at 336.

193. See Yackle, *supra* note 87, at 381 ("[The AEDPA] is not well drafted.").

194. Marcia Coyle, *Law: Innocent Dead Men Walking?*, NAT'L L. J., May 20, 1996, at A1 (quoting Kent Scheidegger, of the conservative Criminal Justice Legal Foundation, a proponent of the AEDPA as saying, "I don't think [the AEDPA] was well drafted ....").

195. 360 U.S. 55 (1959).

196. *Id.* at 67 (emphasis added).

197. 521 U.S. 320, 327-30 (1997).

§ 107(c)<sup>198</sup> provided that “Chapter 154 ... shall apply to cases pending on or after the date of enactment of this Act,”<sup>199</sup> there was an implicit inference “that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act.”<sup>200</sup> The Court reasoned that because “it was only after [chapters 153 and 154] had been joined together and introduced as a single bill in the Senate ... that ... § 107(c) was added[,] [b]oth chapters ... had to have been in mind when § 107(c) was added.”<sup>201</sup> Therefore, “[n]othing ... but a different intent explains [with regard to chapters] the different treatment [of the chapters].”<sup>202</sup> Justice Souter, author of the majority opinion, stated, however, that this may not always be true:

This might not be so if, for example, the two chapters had evolved separately in the congressional process, only to be passed together at the last minute, after chapter 154 had already acquired the mandate to apply it to pending cases. Under those circumstances, there might have been a real possibility that Congress would have intended the same rule of application for each chapter, but in the rough-and-tumble no one had thought of being careful about chapter 153, whereas someone else happened to think of inserting a provision in chapter 154.<sup>203</sup>

The origin of the language in §§ 2244(d)(1) and 2255(1) is analogous to the situation Souter imagined. First, the language in §§ 2244(d)(1) and 2255(1) originated in separate Senate bills introduced several months apart.<sup>204</sup> Second, the bills were

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198. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 107(c), 110 Stat. 1226 (1996).

199. *Lindh*, 521 U.S. at 327.

200. *Id.*

201. *Id.* at 330.

202. *Id.* at 329.

203. *Id.* at 329-30.

204. See *Kapral*, 166 F.3d at 580 (Alito, J., concurring) (discussing the history of the Comprehensive Terrorism Protection Act of 1995). At the start of the 104th Congress, Senator Dole introduced Senate Resolution 3, The Violent Crime Control and Law Enforcement Improvement Act of 1995, which would have amended § 2255 to include the “date on which the judgment of conviction becomes final” language which is the same as the current § 2255(1). *Id.* (quoting S. Res. 3, 104th Cong. (1995)). The bill would also have



introduced by different Senators.<sup>205</sup> Third, there is little or no legislative history concerning these provisions.<sup>206</sup> And finally, the bill that Congress eventually enacted as the AEDPA, Senate Resolution 735, was introduced slightly more than a week after the Oklahoma City bombing, when emotions were running high.<sup>207</sup> Along with the survivor letters that were introduced during the debate,<sup>208</sup> this timing supports a conclusion that there was significant “rough-and-tumble” present during the discussion of the bill.<sup>209</sup> The legislative history does not indicate that “a thoughtful Member of the Congress was most likely to have intended just what the later reader sees by inference.”<sup>210</sup> Rather, it fits the *Lindh* Court’s exception to the “negative inference” presumption.<sup>211</sup>

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amended § 2244, with different language (“the date on which State remedies are exhausted”) from that which is currently in § 2244(d)(1). *Id.* Later that year, Senators Specter and Hatch sponsored Senate Resolution 623, the Habeas Corpus Reform Act of 1995, which differed from Senate Resolution 3 in that it amended § 2244 with the language “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” *Id.* (quoting S. Res. 623, 104th Cong. (1995)). Then, eight days after the Oklahoma City bombing, Senator Dole introduced Senate Resolution 735, the Comprehensive Terrorism Protection Act of 1995. It included the same language as Senate Resolution 623 for both state and federal prisoners and was passed without any significant changes. *Id.* at 581 (discussing S. Res. 735, 104th Cong. (1995) (enacted) and citing the remarks of several Senators).

205. *See id.*

206. *See id.* at 581 n.3 (“No house or Senate Report was submitted, and the Conference Report contained only one brief reference to this provision.”).

207. *See id.* at 581.

208. *See supra* notes 91-92 and accompanying text.

209. The Supreme Court has previously acknowledged, in the context of the AEDPA, that “rough-and-tumble,” and not Congressional intent, may explain some word choice in statutes. *Lindh*, 521 U.S. at 320, 329.

210. *Id.* at 330.

211. Other scholars seem to conclude, as does this Note, that Souter’s discussion in *Lindh* is particularly appropriate for § 2255:

[The AEDPA] bears the influence of various bills that were fiercely debated for nearly forty years. Along the way, proponents of habeas legislation adjusted their initiatives in light of contemporaneous events and circumstances: the Powell Committee Report in 1989, for example, as well as shifting levels of political support for particular measures and new Supreme Court decisions on point. Proponents often kept abreast of the times by adding new elements to their bills without, at the same time, reexamining old formulations in order to maintain an intellectually coherent whole. The result, I am afraid, is extraordinary arcane verbiage that will require considerable time and resources to sort out.

Yackle, *supra* note 87, at 381.

The *Russello* presumption, although perhaps a useful statutory interpretation tool in certain circumstances, is not appropriately used in an analysis of when a judgment of conviction becomes final for purposes of § 2255. First, the presumption itself is based upon a presumption of good draftsmanship, which, as the Supreme Court, commentators, and supporters have concluded, is inappropriate in regard to the AEDPA. Second, the situation described in *Lindh*, in which a negative inference drawn from a comparison of two separate sections of the same act would be inappropriate according to the Supreme Court, is exactly what took place with the language of §§ 2244(d)(1) and 2255(1).

## 2. *The Difference Between State and Federal Petitioners*

The Third Circuit concluded correctly that the statute of limitations on § 2255 motions does not begin to run until the time to file a petition for certiorari has passed, but its analysis too was flawed. The Third Circuit's comparison of §§ 2244(d)(1) and 2255 in *Kapral* proceeds from the presumption that there is "no principled reason to treat state and federal habeas petitioners differently."<sup>212</sup> An analysis of either § 2244 or § 2255, therefore, should produce the same results. Specifically, the court found the term "direct review," included in § 2244(d)(1), particularly helpful. In *Barefoot v. Estelle*,<sup>213</sup> the Supreme Court wrote that for a state prisoner, "the process of direct review ..., if a federal question is involved, includes the right to petition this Court for a writ of certiorari."<sup>214</sup> The Third Circuit concluded that if this is true for state prisoners and Congress did not intend to treat them any differently than federal prisoners, then the same must be true for federal prisoners.<sup>215</sup> The court did acknowledge the absence in § 2255 of § 2244's "clarifying language," but concluded that the absence was not significant

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212. *Kapral*, 166 F.3d at 575. *But see* Josephine R. Poluto, *The Federal Prisoner Collateral Attack: Requiescat in Pace*, 1988 BYU L. REV. 37, 40 n.15 (explaining why disparate treatment of state and federal prisoners' collateral attacks has not been "foreclosed" and why the appropriate comparison is not between federal § 2255 motions and state prisoner habeas corpus motions, but between § 2255 motions and federal prisoner habeas corpus motions).

213. 463 U.S. 880 (1983).

214. *Id.* at 887.

215. *Kapral*, 166 F.3d at 575.

enough to overcome the presumption that Congress intended to treat state and federal prisoners the same.<sup>216</sup>

There is, however, at least one reason to treat state and federal prisoners differently with respect to the one-year period of limitation. As Representative Kastenmeier pointed out, the Powell Committee report, one of the most recent catalysts for habeas corpus reform,<sup>217</sup> did not address federal prisoners, but focused exclusively on state prisoners.<sup>218</sup> The Report's conclusion that dealt with time limits specifically referred to the problem of "unnecessary delay and repetition"<sup>219</sup> that existed within the *state* system and did not mention federal prisoners. If, in fact, the problem only existed at the state level, then there would indeed be a "principled reason" to treat state and federal prisoners differently; namely, that the problem of delay that Congress meant to address by including a period of limitation in § 2255 did not exist for federal prisoners. In essence, Congress included a fix, § 2255's period of limitation, for a procedure that was not broken.

Although the Third Circuit may have been correct that Congress did not intend to treat state and federal habeas petitioners differently, it was incorrect to conclude that there is no reason to treat state and federal petitioners differently. The reason that they should be treated differently, specifically in the context of periods of limitation, is that the concerns which prompted the call for a period of limitation, the delay and repetition caused by the exhaustion requirement, did not exist for federal petitioners, but only for state petitioners.<sup>220</sup> This justification for different treatment, however, *supports* the Third Circuit's ultimate conclusion that, for federal petitioners, a judgment of conviction becomes final when the time for filing for a writ of certiorari with the Supreme Court expires. If the problem promoting the adoption of a period of limitation did not exist for federal petitioners, then certainly the period of limitation provision should not be construed

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216. *Id.*

217. See *supra* notes 105-13 and accompanying text. The Oklahoma City bombing was the other major catalyst. See *supra* notes 88-92 and accompanying text.

218. See *supra* note 112 and accompanying text.

219. See *supra* note 109.

220. See *supra* note 111 and accompanying text.

even more strictly against them than the provision governing state petitioners.

*C. Comparison of §§ 2244(d)(1) and 2255(1) with § 2263(a)*

*1. The Third Circuit's Approach*

Congress enacted § 2263(a) under Chapter 154 of Title 28 of the AEDPA, which governs capital sentence-serving state prisoners' habeas petitions filed in states that comply with the requirements set out in 28 U.S.C. § 2261. The Third Circuit also argued that a comparison of the language in § 2263 with the language of §§ 2244(d)(1) and 2255(1) supported its view that the one-year period of limitation in § 2255 begins to run only after the time for filing a petition for certiorari with the Supreme Court has expired.<sup>221</sup> Specifically, the court pointed to the "use of 'State court' [in § 2263] to modify the well-settled meaning of direct review (which includes the right to seek review in the Supreme Court) ...."<sup>222</sup> Because neither §§ 2244(d)(1) nor 2255(1) modify the meaning of direct review at all, the Third Circuit concluded that Congress's intent was to exclude the time a defendant has to seek certiorari to the Supreme Court from the final year-long limit on his right to file for a writ of habeas corpus.<sup>223</sup>

Furthermore, § 2263 begins the period of limitation before a petition for certiorari is filed, but also provides that the period will be tolled if a petition is filed.<sup>224</sup> Sections 2244 and 2255 do not contain analogous tolling provisions.<sup>225</sup> The Third Circuit concluded "that Congress did not mention tolling in § 2244 or § 2255 because Congress assumed tolling was unnecessary since it did not intend

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221. *Kapral*, 166 F.3d at 577. 28 U.S.C. § 2263(a) reads: "Any application under this chapter ... for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2263(a) (2001).

222. *Kapral*, 166 F.3d at 576.

223. *Id.*

224. *See* 28 U.S.C. § 2263(b)(1) (2001).

225. *See* 28 U.S.C. §§ 2244, 2255 (2001).

the limitations period to begin until after the time for certiorari review expired.<sup>226</sup>

The flaws in these arguments can be found in the Third Circuit's own reasoning. When addressing the Seventh Circuit's argument, the court stated: "[T]he difference between the wording of § 2244(d)(1) and § 2255 could simply be the result of imprecise draftsmanship, and not at all an expression of congressional intent."<sup>227</sup> Certainly, the same poor draftsmanship could explain the difference between the language of §§ 2244 and 2255 and that of § 2263. Essentially, the Third Circuit seems to assume poor draftsmanship when addressing the arguments based upon the language of the statute posed by the Seventh Circuit, but assumes careful drafting when putting forth its own language-based argument.

Not only does the tolling provision argument suffer from the same shaky assumption of a clear purpose and intent based upon language of an act that is admittedly poorly written, but the argument also proceeds from the assumption that there is no principled reason to treat state and federal prisoners differently concerning their time periods for review.<sup>228</sup> As previously stated, there *is* a principled reason to treat state and federal prisoners differently; namely, the lack of "unnecessary delay and repetition"<sup>229</sup> at the federal level that existed at the state level.<sup>230</sup>

## 2. *The Fourth Circuit's Approach*

Oddly enough, in *Torres* the Fourth Circuit was able to use the same comparison of § 2255 with § 2263 to support a conclusion opposite from that of the Third Circuit. First, the court noted another difference in language between the sections.<sup>231</sup> In § 2263(a), Congress expanded the time period before the limitation period would begin, including "the expiration of the *time for seeking*

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226. *Kapral*, 166 F.3d at 577.

227. *Id.* at 575 n.7.

228. See *supra* note 112 and accompanying text. Section 2263 governs state prisoners' petitions while § 2255 governs federal prisoners' petitions.

229. See *supra* note 111 and accompanying text.

230. See *supra* notes 109-11 and accompanying text.

231. *Torres*, 211 F.3d at 840.

[direct] review.”<sup>232</sup> Section 2255 does not include this language allowing a prisoner to file for relief during the “time for seeking such review” even if he does not choose to seek such review.<sup>233</sup> Second, the court noted that § 2263(b)(1) provides for tolling only if the prisoner files a petition for certiorari, but the dispute about § 2255 pertains only to those prisoners who do *not* file a petition for certiorari.<sup>234</sup> The court concluded that these distinctions mean that § 2263 therefore provides “no reliable guidance”<sup>235</sup> for interpreting § 2255.

The Fourth Circuit’s very different interpretation rests, like the Third Circuit’s interpretation, squarely on drawing a negative inference from inclusion of language in one part of the AEDPA and its absence in another.<sup>236</sup> The legislative history of the AEDPA, or rather the lack of any legislative history pertaining to the specifics of the language included in §§ 2244, 2255, or 2263,<sup>237</sup> the evolution of the statute in Congress,<sup>238</sup> and the virtually universal conclusion that the Act was poorly drafted<sup>239</sup> are strong evidence that the inclusion or exclusion of particular language from any part of the AEDPA may not stem from any specific intent on Congress’s part. Courts should avoid the mistake that both the Third and Fourth Circuits made and not rely solely on the text of § 2255 to guide them in applying the statute of limitations on filing for § 2255 relief.

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232. 28 U.S.C. § 2263(a) (2000) (emphasis added).

233. *Torres*, 211 F.3d at 840 n.9.

234. *Id.* at 840.

235. *Id.*

236. *See id.* at 840 n.9; *see also* note 181 and accompanying text.

237. The Conference Committee Report, H.R. CONF. REP. NO. 104-518 (1996), did not modify §§ 101-108 of the AEDPA, which included the sections adding the limitation period to §§ 2244 and 2255, because the Senate and House bills were identical. Besides Representative Kastenmeier’s statement, *supra* note 112, which was made five years before final passage of the AEDPA, no discussion, debate, or report even tangentially touched the specific language of the limitation period additions.

238. *See supra* notes 204-11 and accompanying text.

239. *See supra* notes 192-94.

III. THE U.S. SUPREME COURT—*DUNCAN V. WALKER*<sup>240</sup>

With the recognition that there is a genuine disagreement at the federal appeals court level, the next question is what the Supreme Court will do if and when they decide to hear the issue.<sup>241</sup> Perhaps the Court's most telling decision thus far is *Duncan v. Walker*,<sup>242</sup> in which the Court addressed the issue of whether a federal habeas corpus petition was an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2).<sup>243</sup> Section 2244(d)(2) provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."<sup>244</sup> The State of New York argued that "State" in § 2244 modifies the whole phrase "post-conviction or other collateral review."<sup>245</sup> Conversely, Walker argued that "State" applied only to "post-conviction" and, therefore, "other collateral review" encompassed federal as well as state review.<sup>246</sup>

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240. 533 U.S. 167 (2001).

241. The Court has recently reviewed a similar question in *Carey v. Saffold*, 122 S. Ct. 2134 (2002). Section 2244(d)(2) of Title 28 states that the time during which an application for state collateral review is pending is not included in the one-year federal habeas corpus period of limitation. 28 U.S.C. § 2244(d)(2) (2000). California urged that "pending" did not include the time during which a lower court issues its decision and a notice of appeal is timely filed with a state appellate court. *Carey*, 122 S. Ct. at 2138. The Court held that (1) California's interpretation would require federal courts to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense required by law (because they would otherwise be barred by the one-year statute of limitations). *Id.* at 2138.

242. 533 U.S. 107 (2001). Sherman Walker was convicted of several robberies; his last conviction was affirmed on June 12, 1995, and became final in April of 1996, but before the AEDPA's April 24, 1996 effective date. On April 10, 1996, Walker filed a petition for federal habeas corpus, which the district court dismissed without prejudice in July of 1996. On May 20, 1997, Walker filed a second federal habeas petition. The district court ruled that the petition was not timely because it had been filed more than one year after the AEDPA's effective date. The Second Circuit reversed, stating that the first habeas petition that was pending "had tolled because it was an application for 'other collateral review' within the meaning of § 2244(d)(2)[,]" the limitation period and, therefore, Walker's second petition was timely. *Id.* at 171 (discussing the Second Circuit's analysis).

243. *Id.* at 169.

244. 28 U.S.C. § 2244(d)(2) (2000).

245. *Duncan*, 533 U.S. at 172.

246. *Id.*

In ruling for New York that "State" modified both "post-conviction" and "other collateral review," Justice O'Connor began with the language of § 2244(d)(2).<sup>247</sup> She noted that although Congress did include the modifier "State," it had not specified any type of federal review that would fall within "other collateral review."<sup>248</sup> This was important to the majority because in several other sections of the AEDPA Congress had expressly denoted some review "'State' and other review 'Federal.'"<sup>249</sup> Justice O'Connor then invoked the *Russello* presumption to conclude that when Congress left out a word, in this case "Federal," the Court would not infer that Congress meant to include it.<sup>250</sup> She wrote that any other construction "would render the word 'State' insignificant, if not wholly superfluous."<sup>251</sup>

This use of the *Russello* presumption in construing the language of the AEDPA might suggest that the Court would side with the Fourth and Seventh Circuits and hold that, if the federal prisoner does not file for a writ of certiorari, the one year period of limitation begins when the federal appeals court issues its mandate. There are, however, two important aspects of Justice O'Connor's opinion that suggest the opposite. First, the majority named many examples of Congress's ability to use both "State" and "Federal" in other provisions of the AEDPA when they wanted the absence of "Federal" in § 2244(d)(2) to be telling.<sup>252</sup> These many examples support the conclusion that Congress intentionally left out the word "Federal," and did not simply poorly draft § 2244.<sup>253</sup> The conclusion of congressional intent as opposed to drafting error finds further support in "the fact that the words 'State' and 'Federal' are likely to be of no small import when Congress drafts a statute that governs

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247. *Id.*

248. *Id.* at 172-73.

249. *Id.* Justice O'Connor cited 28 U.S.C. § 2254(i) as an example: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." *Id.* at 172. Other examples she gave were 28 U.S.C. §§ 2261(e) and 2264(a)(3). *Id.* at 173.

250. *Id.* (citing *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

251. *Id.* at 174.

252. The majority wrote: "We find no likely explanation for Congress' omission of the word 'Federal' in § 2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period." *Id.* at 173.

253. See *supra* notes 188-96 and accompanying text.



federal collateral review of state court judgments."<sup>254</sup> The phrase at issue in the § 2255 cases is not necessarily susceptible to this conclusion of careful drafting.

In contrast to the relevant § 2244 language, there are few examples of Congress's decision to include or exclude the § 2255(1) modifying phrase "by the conclusion of direct review or the expiration of the time for seeking such review" in the code. Only the amendments to § 2244(d)(1)(A), one of the provisions at issue, and § 2263(a) use this language.<sup>255</sup> This provides very weak support for concluding that the difference in language between §§ 2244(d)(1) and 2255(1) is attributable to congressional intent rather than congressional mistake.

Furthermore, the language at issue does not have the importance of that at issue in *Duncan*. The reasoning in *Duncan* emphasized the fact that the words "State" and "Federal" were important to the statute as a whole.<sup>256</sup> By contrast, the pertinent language in §§ 2244(d)(1) and 2255(1) is not important throughout the AEDPA as a whole. A majority of the AEDPA addresses areas other than habeas corpus reform.<sup>257</sup> Even specifically regarding habeas corpus reform, the legislative history reveals that Congress did not give § 2255 much consideration.<sup>258</sup>

Additionally, at least two members of the Court disagreed with the majority's use of the *Russello* presumption in ascertaining the meaning of § 2244(d)(2), and they could have their way in a § 2255 case. In dissent, Justice Breyer argued that looking to other parts of the statute where Congress expressly used "State" and "Federal" did not automatically lead to the conclusion that the difference

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254. *Duncan*, 533 U.S. at 173-74. The majority also wrote that it was unwilling to treat "State" as "surplusage," particularly "when the term occupies so pivotal a place in the statutory scheme as does the word 'State' in the federal habeas statute." *Id.* at 174.

255. *See, e.g.*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. 1, 110 Stat. 1214 (1996).

256. *See supra* notes 249-52.

257. Other areas addressed by the AEDPA include victim restitution, prohibitions on international terrorism, terrorist and criminal alien removal and exclusion, nuclear, chemical, and biological weapons restrictions, and assistance to law enforcement. *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. 1, 110 Stat. 1214 (1996).

258. *See supra* text accompanying note 209.

must be attributed to congressional intent.<sup>259</sup> Instead, “the ‘argument from neighbors’ shows only that Congress might have spoken more clearly than it did. It cannot prove the statutory point.”<sup>260</sup> Instead of relying on canons of statutory construction, the dissent would have relied on the purpose of the ambiguous provision.<sup>261</sup>

In sum, although use of the *Russello* presumption by the majority in *Duncan* might lead one to believe that the Supreme Court would side with the Fourth and Seventh Circuits in deciding the § 2255 dispute, a closer look at the Court’s reasoning finds that those arguments which the Court used to support its reasoning in *Duncan* are absent in the dispute about when a judgment of conviction becomes final for purposes of § 2255(1). Moreover, there are at least two Justices who see the approach of relying almost exclusively on canons of statutory construction as misplaced and dangerous. They would rely, instead, on the purpose behind the statute.

The disagreement between the majority and dissent illustrates the radically different approaches that Supreme Court Justices use to interpret statutory language.<sup>262</sup> The majority opinion represents the formalist or textualist method, looking only at the text of the statute to discern its meaning.<sup>263</sup> The dissent represents the functionalist method, looking behind the language to the purpose and intent of Congress.<sup>264</sup> The Court’s current composition and

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259. Justice Breyer was joined by Justice Ginsburg. At least two Justices, therefore, believed “that neither the statute’s language, nor the application of canons of construction, is sufficient to resolve the problem.” *Duncan*, 533 U.S. at 189.

260. *Id.* at 188. In addressing the use of “linguistic canons to dispel the uncertainties caused by ambiguity,” Justice Breyer wrote that “[w]here statutory language is ambiguous, I believe these priorities are misplaced. Language, dictionaries, and canons, unilluminated by purpose, can lead courts into blind alleys, producing rigid interpretations that can harm those whom the statute affects.” *Id.* at 193. This is exactly what has happened in the Seventh and Fourth Circuits.

261. *Id.*

262. See Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 541 (2001) (describing the formalist and non-formalist approaches as “fundamentally different methods of interpretation”).

263. See *id.*

264. See *id.* The five Justices who most frequently use the textualist, formalist method (O’Connor, Rehnquist, Scalia, Kennedy, and Thomas) made up the majority in *Duncan*. The concurrences and dissent were composed of the four Justices who most frequently use the non-formalist or functionalist, approach (Stevens, Souter, Breyer, and Ginsburg). It would

previous decisions indicate that a strictly textual, formalist approach may prevail. An honest look at and recognition of the problems in the drafting of the AEDPA, its history and context, and the key differences between the words at issue in § 2255 and those addressed by prior decisions like *Duncan*, however, should persuade a majority that a rigid textual approach is inappropriate.

### CONCLUSION

Simply invoking a statutory canon and following it blindly to its conclusion is not the proper way to deal with a problematic question of statutory interpretation,<sup>265</sup> especially when it involves a right as precious as petitioning for habeas corpus, to which a § 2255 motion provides the equivalent.<sup>266</sup> Courts on both sides of the issue have been able to employ competing canons and arrive at diametrically opposed conclusions. This fact alone lends support to the conclusion that, in this context, statutory canons do not yield a definitive answer.

The courts of appeals' decisions on this subject provide a clear example of the problems that presumptions can create. The Seventh Circuit concluded in *Gendron*<sup>267</sup> that Congress ignored the Supreme Court's *Griffith* definition of finality and created its own. The Third Circuit, in *Kapral*, disagreed, finding from the text that Congress had not intended to be inconsistent with the Supreme Court's definition of finality.

The Fourth Circuit's *Torres* case provides another clear example of conflicting presumptions and the problems they create. The court concluded that Congress "almost certainly" did not take into consideration a federal defendant who decides not to file a

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not be surprising to see a 5-4 split when, and if, the Court takes up the definition of "final" in § 2255.

265. See SINGER, *supra* note 14, § 45:02, at 12-13 ("Difficult questions of statutory interpretation ought not be decided by the bland invocation of abstract jurisprudential maxims.").

266. See *supra* note 48 and accompanying text.

267. In *Clay v. United States*, No. 00-3671, 2002 U.S. App. LEXIS 1217 (7th Cir. 2002), an unpublished opinion, the Seventh Circuit reaffirmed its decision in *Gendron*. Recognizing that the holding in *Gendron* was the minority view, the court stated that "[b]owing to *stare decisis*, we are reluctant to overrule a recently-reaffirmed precedent without guidance from the Supreme Court." *Id.* at \*7.

petition for certiorari with the Supreme Court, but that Congress “presumably” possessed knowledge of when a judgment of conviction becomes final. The use of the phrase “almost certainly” and the word “presumably” indicate that the court possessed no substantial evidence to support these claims. Instead, the court’s reasoning rests upon unsubstantiated presumptions about what Congress did or did not know.

The Fourth and Seventh Circuits’ use of the *Russello* presumption<sup>268</sup> suffer from the same type of problem. The presumption does not recognize drafting mistakes. The presumption underlying the *Russello* presumption is, therefore, mistake-free draftsmanship of the statute in question. In most situations, this is a good tool to use. It would not be practical or beneficial to force courts to decide whether a given statute was well-drafted before they could approach a question of statutory interpretation. When there is good evidence or a general consensus that a particular statute or act is poorly drafted, however, the *Russello* presumption must give way. This is the case with the AEDPA.

Yet another faulty presumption plagued the Third Circuit’s majority opinion in *Kapral*. The court presumed that there was no legitimate reason for treating state and federal prisoners differently in the context of time limitations for filing federal habeas corpus petitions. A closer look, however, reveals that the catalyst for habeas corpus reform, the Powell Committee report, focused exclusively on the problems that existed for state prisoners in the habeas system. Indeed, the pertinent problem, as it relates to the limitation period of § 2255, of “unnecessary delay and repetition” does not attach to habeas corpus petitions filed by federal prisoners. Because exhaustion is not required of federal prisoners filing for habeas,<sup>269</sup> shortening the time for federal prisoners to file was unnecessary. In fact, § 2255 motions constitute such a small portion of the federal court system caseload that even if delay and repetition did exist, the burden it would place on federal courts would be insignificant. The Fourth Circuit’s presumption that there is no principled reason to treat state and federal prisoners

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268. The fact that it is called the *Russello* “presumption” says a lot about this tool’s logical underpinnings.

269. See Kappler, *supra* note 105, at 481.

differently for purposes of a time limit for filing habeas corpus petitions is incorrect. The delay and repetition concerns that prompted the call for reform in 1996 do not exist in the federal prisoner habeas corpus context.

The correct reading of § 2255(1) interprets its limitation period to begin running *after* the expiration of the ninety-day period a prisoner has to file a petition for certiorari with the United States Supreme Court. Although the Third Circuit got it wrong in assuming that there was no principled reason for treating state and federal prisoners differently in this context, the Third Circuit's holding was correct.

For federal prisoners, a § 2255 motion to vacate sentence is the equivalent of a petition for habeas corpus relief. The writ of habeas corpus, the Great Writ, is the last resort of those who have been wrongly imprisoned. It therefore necessarily occupies an important and special place in American jurisprudence. In considering questions involving § 2255 motions, courts should always keep the rich history of the writ of habeas corpus in the forefront of their analyses.

In the federal prisoner context, judicial efficiency is not an adequate justification for beginning the one-year limitation period when the court of appeals issues its mandate. First, motions to vacate sentence compose such a small percentage of the federal judiciary's caseload that limiting them, even in a substantial way, would have a negligible impact on that caseload. Second, to the individual prisoner, the effect of limiting the ability to receive a review of conviction and sentence is great. In most cases, the prisoner's motion to vacate sentence will be denied and the end result will be the same as that achieved without the review. The ability of our justice system to provide adequate review is, however, still important. The fact that most § 2255 motions fail does not mean that the review should not be given.<sup>270</sup> The negligible benefits that might accrue in terms of alleviating the judicial workload are outweighed by the cost to the individual prisoner and to the faith in the judicial system as a whole.

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270. Just because the majority of prison inmates receive a fair trial does not mean the judicial process should stop with the trial court's decision.

Congress certainly can, and has, severely restricted the once broad writ of habeas corpus. In the absence of clear expression from the legislature, however, courts should not further limit a federal prisoner's last chance of vindication. As the *Kapral* majority pointed out, the intent of Congress to limit delays (ignoring the fact that delays may not have been a problem in the federal prisoner context) is fulfilled even if a prisoner is given the extra ninety days.<sup>271</sup> "Recognizing that one is allowed 90 days to file a petition for certiorari does not mitigate the congressional objective of imposing time limits where none previously existed."<sup>272</sup>

Habeas corpus was "[c]onsidered by the Founders as the highest safeguard of liberty ...."<sup>273</sup> It "has been for centuries esteemed the best and only sufficient defence of personal freedom."<sup>274</sup> "[T]here is no higher duty than to maintain it unimpaired."<sup>275</sup> As the writ has evolved, Congress and the courts have developed a complex set of rules and procedures to govern it. These rules have necessarily narrowed the once broad scope and applicability of the writ.<sup>276</sup> The courts should not take it upon themselves to further narrow the writ unnecessarily, however, in the form of its effectively identical substitute for federal prisoners, § 2255, based upon presumptions and canons of statutory construction rendered useless by the poor draftsmanship of Congress.

*Benjamin R. Orye III*

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271. See *Kapral*, 166 F.3d at 571 n.4 ("I introduced this legislation ... to impose a statute of limitations on the filing of habeas corpus petitions.") (quoting Rep. Henry Hyde).

272. *Id.* at 571.

273. *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

274. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869).

275. *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

276. See *Lonchar v. Thomas*, 517 U.S. 314, 322-23 (1996).