

REINING IN THE WRIT: LIMITING THE SEVENTH CIRCUIT'S DISCRETION UNDER 28 U.S.C. § 2255 IN FEDERAL DEATH PENALTY CASES

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I. INTRODUCTION

Imagine a man involved in a criminal enterprise that sells and distributes drugs across multiple states. In the course of this operation, when the man believes one of his dealers has stolen from him, he kidnaps the dealer's sixteen-year-old sister in retaliation. While driving the young woman across state lines to avoid detection, he and several of his associates take turns raping her over several days. When they are finished with her, they determine she knows too much, and they beat her with a shovel until she is unconscious, but still clinging to life. The man takes the barely-breathing young woman to a shallow grave, where she is buried alive until she suffocates to death.

The man is no criminal mastermind; he is apprehended shortly after, tried, and convicted of the young girl's murder due to the overwhelming weight of evidence. At his sentencing, the man argues he should not be put to death because he is a person with intellectual disabilities. The trial court hears the evidence of his mental capabilities and rejects this contention, thereby sentencing the man to death. The same contention is presented on direct appeal, and the appellate court reaches the same conclusion. The evidence is even presented to a federal court as part of a habeas corpus proceeding, and once again rejected. Twenty years later, the same man wishes to present essentially the same evidence to another federal court in hopes of obtaining relief from his death sentence, solely because he has been transferred to a different federal facility.

Compare the first man with an individual who commits another heinous crime, in the same jurisdiction, in the same year. The man walks seven miles across town, stopping at a gas station along the way to buy fifty-cents-worth of gasoline. He proceeds to a nearby apartment complex where his ex-girlfriend is preparing to leave for work. As she steps outside the door, the individual forces her back inside and throws the cup of gasoline on her and a man who is nearby. He pulls a lighter from his pocket, sets both individuals on fire, laughing: "I told ya I was gonna get you." The innocent man miraculously survives; the perpetrator's ex-

girlfriend, however, lives to suffer nineteen days in agony, with burns all over her body, before dying in the hospital.

Like the first man, he is convicted of the crime and sentenced to death. This man goes through essentially the same appeals process as the first man, arguing that he is categorically ineligible for the death penalty because he is a person with an intellectual disability. Every court that reviews his case finds the evidence of his limited mental functioning insufficient to establish his intellectual disability. The issue of his diminished capacity is presented to a federal appeals court as part of a habeas corpus proceeding, just like the first man, and summarily rejected. One would assume the man's next step would be to file another petition to another federal appeals court, like the first man, in hopes of obtaining relief from his death sentence.

However, there is a problem: the first man was tried in federal court, while the second man was convicted in state court. Because the first man was sentenced to death under the federal system, he will be transferred to Terre Haute, Indiana, the site of the only federal death chamber, and out of the original federal circuit which affirmed his sentence.¹ Therefore, if he files a second habeas petition under § 2255(e), contesting the legality of the original judgment,² this second petition will be heard by a court of appeals that is potentially much more hostile to the death penalty than the court of original jurisdiction. This effectively increases the chances that the second petition is granted, and the issue of his mental capacity relitigated. The second man, however, is left to file his second habeas petition in the same federal circuit that upheld his original judgment. Because every state that permits the death penalty has its own death chamber, thereby negating any transfer to another jurisdiction, the chances of his petition being granted are substantially lower.

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1. Michael Brick, *Execution, if it Occurs, is Years Away for Killer*, N.Y. TIMES (Feb. 1, 2007), http://www.nytimes.com/2007/02/01/nyregion/01next.html?_r=1 (“All federal condemned prisoners are assigned to the United States Penitentiary in Terre Haute, said Felicia Ponce, a spokeswoman for the Bureau of Prisons.”). The prison was modified in 1995 to include a death chamber, and then again in 1999 to become the federal death center. *Id.*

2. 28 U.S.C. § 2255(e) (2012).

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Id.

These are not just worst case scenarios intended to frighten individuals as to the inconsistencies of the justice system. The first man is Bruce Webster, convicted in 1996 in Fort Worth, Texas, for the rape and murder of sixteen-year-old Lisa Rene.³ After his direct appeals and first habeas corpus petition was denied, he was transferred to Terre Haute, Indiana, to await death.⁴ While there, he petitioned the Seventh Circuit to relitigate the issue of his intellectual disability, arguing that the original judgment of the Fifth Circuit was inadequate to test the legality of his detention under § 2255(e).⁵ The Seventh Circuit agreed with Mr. Webster, overruling the numerous decisions out of the Fifth Circuit, and remanded the case to the Southern District of Indiana so that Mr. Webster can potentially present new evidence as to his intellectual disabilities.⁶

The second man is Carl Henry Blue, who murdered Carmen Richards-Sanders in Bryan, Texas, in 1994.⁷ Like Mr. Webster, Mr. Blue claimed he was ineligible for the death penalty because he was a person with intellectual disabilities at the time he committed the act.⁸ The Fifth Circuit rejected his direct appeals and first habeas petition, and he was transferred to await death in Brazos County, Texas, still within the Fifth Circuit's jurisdiction.⁹ Mr. Blue was ineligible to contest his first post-conviction appeal because § 2255 only applies to prisoners held in federal custody.¹⁰ As a result, a successive petition was never filed, and Mr. Blue was executed by lethal injection on February 21, 2013.¹¹

Some will argue that it is fundamentally unfair to deny Mr. Blue habeas relief, while another individual who committed a heinous crime under similar circumstances is afforded a new hearing. This Comment, however, argues the exact opposite. The Seventh Circuit erred by interpreting 28 U.S.C. § 2255(e) to permit an individual to relitigate his disabilities without due deference to the lower court's findings of fact. This Comment offers solutions to compel the federal circuits to comply with Congress' purpose in passing § 2255¹² and to prevent the Seventh Circuit from essentially becoming the *de facto* judge of all federal death penalty cases. Section II begins with a cursory look at the history of habeas corpus

3. Webster v. Daniels, 784 F.3d 1123, 1126–27 (7th Cir. 2015).

4. See *id.* at 1135.

5. *Id.*

6. *Id.* at 1146.

7. Crimesider Staff, *Carl Henry Blue Execution: Texas Man Executed for Lighting Ex-girlfriend on Fire*, CBS NEWS (Feb. 22, 2013, 8:51 AM), <http://www.cbsnews.com/news/carl-henry-blue-execution-texas-man-executed-for-lighting-ex-girlfriend-on-fire/>.

8. Blue v. Thaler, 665 F.3d 647, 654 (5th Cir. 2011).

9. See *id.*; Crimesider Staff, *supra* note 7.

10. 28 U.S.C. § 2255 (2012).

11. Crimesider Staff, *supra* note 7.

12. 28 U.S.C. § 2255(e) (2012).

petitions, with a focus on §§ 2254 and 2255. It then reconciles §§ 2254 and 2255 with the Supreme Court's holding in *Atkins v. Virginia* and discusses the resulting interaction between the two. Section III proposes an operational framework to ensure proper deference is afforded a trial court's determination of fact, and provides a workable standard by which inconsistent rulings are minimized.

II. BACKGROUND

The complexities of the issue are best understood when it is broken down into its constituent parts. Section II begins by exploring the evolution of habeas corpus petitions, with emphasis on §§ 2254 and 2255, and how the petitions have evolved. It then proceeds to analyze the Supreme Court's decision in *Atkins v. Virginia* and how it has interplayed with the proliferation of habeas petitions.

A. History of the Habeas Petition and the Antiterrorism and Effective Death Penalty Act of 1996

A writ of habeas corpus alleges that an individual's detainment by a government actor is unlawful.¹³ The original purpose of the writ was "not to determine a prisoner's guilt or innocence, but rather to determine whether the prisoner has been denied his liberty in violation of federal law."¹⁴ An individual's right to contest his detainment has been guaranteed as far back as English common law and codified within the United States since the Judiciary Act of 1789.¹⁵ At its inception, a writ of habeas corpus was only intended to challenge the process by which detainment occurred.¹⁶ Essentially, a writ was only issued if the state actor lacked jurisdiction to detain the individual.¹⁷

The scope of habeas corpus writs began to expand in 1867, when the rights of state prisoners were included within its breadth.¹⁸ Congress was concerned with enforcing the flux of legislation that resulted from Reconstruction and enforcing the federal government's mandates upon the States.¹⁹ Since 1867, however, the plain language of §§ 2241 to 2255 has remained relatively unchanged, except for the passage of the Antiterrorism

13. Charles A. Wright, et al., *Federal Practice & Procedure Jurisdiction and Related Matters*, 17B FED. PRAC. & PROC. JURIS. § 4261 (3d ed.).

14. Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH U. J. URB. & CONTEMP. L. 399, 400 (1997).

15. Wright et al., *supra* note 13.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

and Effective Death Penalty Act in 1996, a piece of legislation that included new important limitations on the availability of habeas relief in post-conviction cases.²⁰ The legislation sought to rein in the proliferation of habeas petitions plaguing the federal courts due to Supreme Court jurisprudence expanding the writ beyond its initial procedural requirements, which began, in earnest, as early as 1923.²¹

In 1923, in *Moore v. Dempsey*, the Supreme Court held that even if all procedural requirements were met, if a court was influenced by mob action, a federal or state prisoner could contest his imprisonment under a writ of habeas corpus.²² Twelve years later, the Court went further, holding that if a conviction was obtained through the use of perjured testimony, the same challenge could be made.²³ It was not until 1942, however, that the Supreme Court formally abandoned the use of writs as purely procedural when it stated:

the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.²⁴

Modern interpretations of the writs have abandoned the term “exceptional cases” and have allowed challenges where the proceeding would offend the Fourteenth Amendment.²⁵

20. *Id.*

21. *Id.*

22. *Moore v. Dempsey*, 261 U.S. 86 (1923).

The appellants are five negroes who were convicted of murder in the first degree and sentenced to death by the Court of the State of Arkansas. The ground of the petition for the writ is that the proceedings in the State Court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.

Id. at 87.

23. *See Mooney v. Holohan*, 294 U.S. 103 (1935).

24. *Waley v. Johnston*, 316 U.S. 101, 104–05 (1942)

25. *Wright et al.*, *supra* note 13; *see also Hensley v. Municipal Court* 411 U.S. 345, 349–50 (1973).

While the “rhetoric celebrating habeas corpus has changed little over the centuries,” it is nevertheless true that the functions of the writ have undergone dramatic change. Our recent decisions have reasoned from the premise that habeas corpus is not “a static, narrow, formalistic remedy,” but one which must retain the “ability to cut through barriers of form and procedural mazes.”

Id.; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (“It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their [liberty].”).

In 1996, in response to the bombing of the Edward Murrow building in Oklahoma City, Oklahoma, President Bill Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).²⁶ While primarily concerned with reducing domestic terrorism, it also had the effect of placing the first serious limitations on writs of habeas corpus since their expansion.²⁷ Going forward, any petition for a writ would be subject to “stringent filing deadlines, limits upon evidentiary hearings held by federal habeas courts, and state law remedy exhaustion requirements.”²⁸ The AEDPA established new procedural requirements for capital cases, but a state was not bound by the mandates unless it decided to adopt the federal requirements.²⁹ “[I]f a state chooses to adopt the new framework, the Act provides stay of execution guidelines, additional specific time limits for filings, and a judicial timetable intended to ensure that courts hear these claims without undue delay.”³⁰

B. 28 U.S.C. § 2254

One of the most profound effects of the AEDPA was the changes it made to 28 U.S.C. § 2254. The AEDPA’s amendments restrained the ability of federal courts to grant habeas relief to prisoners held under state

26. *Comegys v. Stouffer*, 2002 WL 32639143 (D. Md. May 3, 2002).

27. *Kochan*, *supra* note 14, at 409.

28. *Id.*

29. *See* 28 U.S.C. § 2262 (2012).

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

Id.

30. *Kochan*, *supra* note 14, at 409.

charges pursuant to § 2254.³¹ Now, a federal court is powerless to grant habeas relief, unless the petitioner demonstrates that he has exhausted his state remedies, the state lacks a process necessary to vindicate his claim, or exceptional circumstances exist that render any state remedy ineffective.³² Nothing, however, constrains the federal court from simply dismissing the petition on its merits even if the prisoner has not exhausted his remedies in state court.³³ If the federal court can point to even one state procedure by which the petitioner can assert his claim, the federal court is justified in dismissing the petition and denying relief.³⁴

At first glance, the amendments also seem to diminish the standard of review for findings of fact. Under the old rules, a federal court was required to grant extreme deference to the state court's factual determinations, even if it disagreed with the state court's interpretation.³⁵ Now, a federal court is entitled to grant relief if the original decision was based on an "unreasonable determination of the facts" when viewed in relation to the evidence as a whole.³⁶ However, this apparent lesser standard is contradicted by the next section, which mandates that federal courts presume any factual findings by the state court are correct.³⁷ Furthermore, the petitioner must rebut any challenge to the state court's factual findings by clear and convincing evidence.³⁸ If the factual contention was never litigated at the state court level, the petitioner is only entitled to relief if the evidence could not have been obtained through his due diligence, and the new evidence is sufficient to demonstrate no reasonable fact finder could have found him guilty of the underlying offense.³⁹

A key question regarding these seemingly inconsistent standards of review is whether they should be read together, or whether the reasonableness standard applies to the facts as a whole, while the

31. Allen Idles, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 678–79 (2003).

32. 28 U.S.C. § 2254(b)(1) (2012).

33. *Id.* § 2254(b)(2).

34. *Id.* § 2254(c).

35. Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1869 (1997).

36. 28 U.S.C. § 2254(d)(2) (2012).

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.

37. 28 U.S.C. § 2254(e)(1) (2012).

38. *Id.*

39. *Id.* § 2254(e)(2).

presumption of correctness applies to individual findings of fact.⁴⁰ Section 2254 could be interpreted as requiring the federal court to use the reasonableness standard when the petitioner presents no new evidence in his habeas petition, while requiring the clear and convincing evidence standard to be used when new evidence is presented upon appeal.⁴¹ The Supreme Court was less than clear in *Miller-El v. Cockrell* when it held that acceptance of a petitioner's habeas petition under § 2254 may be based on either standard.⁴² A reviewing court is entitled to find the state court's judgment objectively unreasonable or that the factual basis for the judgment was not proven by clear and convincing evidence when granting the petition for relief.⁴³

However, more recently, the Court has moved back to the deferential standard that existed prior to the amendments.⁴⁴ At the same time, the Court has expressly passed on the opportunity to elaborate on the interplay that exists between the two different standards embodied in § 2254.⁴⁵ The Court's only guidance has been in its statements that both standards will be interpreted as exceedingly difficult to meet,⁴⁶ and that there is a "highly deferential standard for evaluating state-court rulings . . . which demands that state-court decisions be given the benefit of the doubt."⁴⁷ The purpose of § 2254 is only to correct the state court's most egregious errors, and a writ should only be issued when no "fair-minded jurist" could agree with the state court's determination.⁴⁸

The lower courts have thus defined the appellate standard of review as one that operates under the assumption that any factual findings at the trial court level are presumed to be correct.⁴⁹ The petitioner still bears the

40. Note, *supra* note 35, at 1874.

41. *Id.* at 1875.

42. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).

Id.

43. *Id.*

44. See *Wood v. Allen*, 558 U.S. 290 (2010).

45. *Id.* at 299.

Although we granted certiorari to resolve the question of how §§ 2254(d)(2) and (e)(1) fit together, we find once more that we need not reach this question, because our view of the reasonableness of the state court's factual determination in this case does not turn on any interpretive difference regarding the relationship between these provisions.

Id.

46. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

47. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

48. *Harrington*, 562 U.S. at 102–03.

49. *Wellons v. Warden, Ga. Diagnostic & Classification Prison*, 695 F.3d 1202, 1206 (11th Cir. 2012).

burden of proof and must rebut the factual findings of the state court by clear and convincing evidence.⁵⁰ An unreasonable interpretation of the facts only exists when the state court identifies the appropriate legal standard, but it unreasonably applies the facts of the case to that standard.⁵¹ Essentially, the petitioner must show a blatant mischaracterization of the facts as applied, which deprives him of a right guaranteed under federal law or the Constitution.⁵² Federal courts are still not free to set aside the factual determinations of state courts simply because they disagree with the interpretation; this solidifies the highly deferential standard that exists in appellate review.⁵³

C. 28 U.S.C. § 2255

At the same time changes were being made to § 2254, the AEDPA altered § 2255 and its allowance of collateral review.⁵⁴ Section 2255 provides a procedure whereby a prisoner in custody under sentence of a federal court may move the court to “vacate, set aside or correct [a] sentence.”⁵⁵ Initially, § 2255 was enacted to combat the excessive use of habeas petitions by federal prisoners due to the Supreme Court’s expansion of the scope of review.⁵⁶ In the years preceding the passage of § 2255, the number of habeas petitions filed in the federal courts had almost tripled.⁵⁷ The 1867 version of § 2255 prohibited collateral review unless it was filed in the jurisdiction where the federal prisoner was currently being detained.⁵⁸ However, the initial version did little to curb these problems, and instead, it created entirely new ones. As the Supreme Court explained,

serious administrative problems developed in the consideration of applications which appear meritorious on their face. Often, such applications [were] found to be wholly lacking in merit when compared with the records of the sentencing court. But, since a habeas corpus action

50. *Id.*

51. *Id.*

52. *See Rice v. White*, 660 F.3d 242, 257 (6th Cir. 2011).

53. *See Carter v. Frazier*, 2012 WL 6761514, at *3 (M.D. Ga., Dec. 4, 2012).

54. 28 U.S.C. § 2255 (2012).

55. *Id.* at § 2255(a).

56. Nicholas Matteson, *Feeling Inadequate? The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*, 54 B.C. L. REV. 353, 358 (2013).

57. *United States v. Hayman*, 342 U.S. 205, 212 (1952).

During 1936 and 1937, an annual average of 310 applications for habeas corpus were filed in the District Courts and an annual average of 22 prisoners were released. By 1943, 1944 and 1945, however, the annual average of filings reached 845, although an average of only 26 prisoners were released per year.

Id. at n. 13.

58. Matteson, *supra* note 56, at 358.

must be brought in the district of confinement, those records [were] not readily available to the habeas corpus court.⁵⁹

In response to these new problems, the 1942 Judicial Conference of the United States proposed amending § 2255 to require any petition be brought in the court which originally sentenced the prisoner.⁶⁰ Congress enacted the majority of its recommendations in 1948, causing the Supreme Court to deem the revised version of § 2255 as a proposed solution to the existing jurisdictional problems.⁶¹ The scope of review changed slightly, but it did so simply by realigning the section with the rest of the habeas corpus statutes.⁶² The amendments also foreclosed federal prisoners from initiating successive habeas petitions, instead requiring them to use § 2255, with one key exception.⁶³ The so-called “savings clause” was added,⁶⁴ which allowed a prisoner to file a successive petition if any remedy pursuant to § 2255 was “inadequate or ineffective to test the legality of his detention.”⁶⁵

The original formulation of the savings clause, which Congress presented, was much narrower, and it allowed a federal prisoner to test his confinement only when he was unable to attend the previous hearing, or for other practical reasons.⁶⁶ Congress’ interpretation was rejected by the Judicial Conference, and the broader language granting a successive petition when the first remedy was “inadequate or ineffective” was substituted in its place.⁶⁷ As a result of the changes, various courts have determined that Congress rejected § 2255’s original purpose, and review should be allowed beyond practical considerations.⁶⁸ The Supreme Court has stated the changes indicate a disapproval of infringing upon a prisoner’s right to bring collateral review, only to guarantee the review occurs in a more convenient forum.⁶⁹

59. *Hayman*, 342 U.S. at 212–13.

60. *Id.* at 214–15.

61. Matteson, *supra* note 56, at 359.

62. *Kaufman v. United States*, 394 U.S. 217, 221 (1969).

63. Matteson, *supra* note 56, at 359.

64. *Id.*

65. 28 U.S.C. § 2255(e) (2012).

66. *Hayman*, 342 U.S. at 215 n.23.

No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons.

Id. (quoting H.R. 4232, 79th Cong. (1945)).

67. See *Wofford v. Scott*, 177 F.3d 1236, 1239 (11th Cir. 1999); 28 U.S.C. § 2255(e).

68. Matteson, *supra* note 56, at 360.

69. *Hayman*, 342 U.S. at 219.

With the passage of the AEDPA, Congress sought to rein in abuses of § 2255 by prisoners who were filing too many frivolous petitions.⁷⁰ The most dramatic change came from the new requirement that any collateral review be certified by a federal court of appeals, stating in the petition “(1) newly discovered evidence . . . sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty . . . or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”⁷¹ If a federal prisoner was unable to satisfy either prong, his only option for a successive petition was to resort to the savings clause and argue the remedy is inadequate or ineffective.⁷² However, the individual attempting to utilize the savings clause would not file his habeas petition under § 2255; instead, he would file under § 2241—the general habeas statute.⁷³ Thus, the savings clause was essentially remade into a broad statute that permitted collateral review when the prisoner would otherwise be barred from bringing his claim.⁷⁴

The changes to § 2255 also greatly restricted the scope of review available to courts.⁷⁵ Previously, inmates were allowed to bring collateral review based on both issues that had been adjudicated at the lower levels, as well as those that had never been raised at all.⁷⁶ The only requirement was that the petition could not abuse the writ process, but even this limitation could be overcome by a showing that in the interests of justice another hearing should be permitted.⁷⁷ Now, in most instances the writ is dismissed at its earliest stages, furthering Congress’ purpose in enacting the AEDPA and eliminating abuses of the writ.⁷⁸

Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners’ rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.

Id.

70. 141 CONG. REC. 11,407 (1995) (statement of Sen. Robert Dole) (“[Violent criminals] can appeal and appeal and appeal in the event they are apprehended, tried and convicted—continued appeals for 7, 8, 10, 15 years in some cases.”).

71. 28 U.S.C. § 2255(h) (2012).

72. *Id.* § 2255(e).

73. Matteson, *supra* note 56, at 362.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. 28 U.S.C. § 2255(h) (2012) (requiring dismissal of a second or subsequent § 2255 motion if it does not meet either the “newly discovered evidence” or the “new rule of constitutional law” prongs).

D. The Supreme Court's Decision in *Atkins v. Virginia*

While the AEDPA greatly restricted the use of § 2255 for successive petitions, the Supreme Court could expand review every time it issued a new rule of constitutional law that applied retroactively.⁷⁹ Every time such a law was passed, the first prong under the AEDPA would always be met, and successive writs would be proper.⁸⁰ The Supreme Court's decision in *Atkins v. Virginia* allowed for an expansion of the purviews of §2255,⁸¹ and Mr. Webster had previously tried to invoke its purviews before the Fifth Circuit.⁸² Because his attempts failed, he was forced to resort to the savings clause and argue "that the remedy by motion is inadequate or ineffective to test the legality of his detention" pursuant to *Atkins*.⁸³

Daryl Atkins, along with an accomplice, abducted Eric Nesbitt at gunpoint and robbed him.⁸⁴ After forcing Mr. Nesbitt to withdraw additional money from an ATM, Mr. Atkins drove him into the middle-of-nowhere and shot him eight times.⁸⁵ During Mr. Atkins' trial, the two men differed as to who shot Mr. Nesbitt, but both confirmed most of the details and were convicted.⁸⁶ The State sought the death penalty against Mr. Atkins because of the severity of the killing and the likelihood that he would commit a similar crime in the future.⁸⁷ Evidence was presented that Mr. Atkins had committed several other assault and robberies, and crime scene photos were shown to the jury to demonstrate the severity and brutality of the act.⁸⁸

The defense presented only one witness during the penalty phase—a forensic psychologist who examined Mr. Atkins and found him to be suffering from "mental retardation."⁸⁹ Mr. Atkins only scored a fifty-nine on an IQ test and was placed in special education classes throughout his schooling.⁹⁰ Nonetheless, the jury sentenced Mr. Atkins to death.⁹¹ The Virginia Supreme Court overturned his sentence and remanded the case back to the trial court for a new sentencing hearing because the jury had been presented with an improper verdict form.⁹²

79. *Id.*

80. *Id.*

81. *Atkins v. Virginia*, 536 U.S. 304, 304 (2002).

82. *Webster v. Daniels*, 784 F.3d 1123, 1135 (7th Cir. 2015).

83. *Id.*

84. *Atkins*, 536 U.S. at 307.

85. *Id.*

86. *Id.*

87. *Id.* at 308.

88. *Id.*

89. *Id.*

90. *Id.* at 309.

91. *Id.*

92. *Id.*

At Mr. Atkins' second sentencing hearing, the State presented its own psychologist who disagreed that the defendant was "mentally retarded."⁹³ The State's expert testified that Mr. Atkins is of at least "average intelligence" and his only disability was that he suffered from an "antisocial personality disorder."⁹⁴ Mr. Atkins was once again sentenced to death, and the Virginia Supreme Court affirmed the decision.⁹⁵ The defendant's only argument on appeal was that his proven intellectual disability rendered him categorically ineligible for the death penalty under the Eighth Amendment.⁹⁶ However, the Virginia Supreme Court stated it was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score."⁹⁷ The Supreme Court granted certiorari to review the constitutionality of imposing death sentences on those who are "mentally retarded."⁹⁸

1. *The Majority Opinion*

The Court began by noting that the Eighth Amendment categorically prohibits the imposition of cruel and unusual punishments,⁹⁹ and 18 U.S.C. § 3596(c) prohibits the execution of individuals "lack[ing] the mental capacity to understand the death penalty and why it was imposed on [] [them]."¹⁰⁰ The crux of "the Eighth Amendment is nothing less than the dignity of man. . . . The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁰¹ In determining what constitutes the evolving standards of decency, the majority used an objective analysis, primarily relying on the most recent laws passed by legislatures across the country.¹⁰² A majority of states had recently enacted legislation barring the execution of individuals deemed to suffer from "mental retardation."¹⁰³ The majority noted it was not just the sheer number of states that had enacted the ban, but also the consistency with which they had done so.¹⁰⁴ The Court held that overwhelming evidence established that "society views mentally retarded offenders as categorically less culpable than the average criminal."¹⁰⁵

93. *Id.*

94. *Id.*

95. *Id.* at 309–10.

96. *Id.* at 310.

97. *Id.*

98. *Id.*

99. *Id.* at 311.

100. 18 U.S.C. §3596(c) (2012).

101. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

102. *Atkins*, 536 U.S. at 312.

103. *Id.* at 313–14.

104. *Id.* at 315.

105. *Id.* at 316.

However, the Court specifically refused to define what constitutes “mental retardation,” leaving that determination to the various states.¹⁰⁶

The majority gave two reasons for a categorical ban on the execution of those who are “mentally retarded.”¹⁰⁷ First, it is debatable whether the execution of these individuals would effectively deter future behavior or provide retribution to the victim.¹⁰⁸ As a result, their execution would serve no purpose other than to impose pain and suffering upon them, and thus violates the Eighth Amendment.¹⁰⁹ Second, the limited cognitive abilities of the “mentally retarded” enhances the chances of imposing the sentence on individuals who give a false confession, and reduces their chances of proving mitigating factors.¹¹⁰ Thus, the Court found no reason to disagree with the prevailing trend among the legislatures and held that “death is not a suitable punishment for mentally retarded criminals.”¹¹¹

2. *The Dissents*

Justices Rehnquist, Scalia, and Thomas dissented, stating that a national consensus does not defeat the fact the defendant was competent to stand trial, fully apprised of the crime and the appropriate punishment, and his intellectual disability was not sufficient to lessen his culpability for the crime.¹¹² The dissent reasoned that the majority’s reliance on a majority of the states was simply subterfuge for advancing the majority’s own personal beliefs.¹¹³ Justice Scalia wrote that the majority’s interpretation was not warranted by the plain language of the Eighth Amendment, nor the history of its interpretation.¹¹⁴

The dissent argued that Mr. Atkins’ mental abilities were a pivotal issue at his sentencing, and two separate juries had rejected it as a mitigating factor.¹¹⁵ The Eighth Amendment could provide a basis for setting aside the jury’s verdict only if the method of execution would have been deemed cruel and unusual at the time of the signing of the Bill of Rights, or it was contrary to modern standards of decency.¹¹⁶ The majority did not contest the first standard, but instead blindly stated that there is a consensus among the lower courts that the execution of persons with

106. *Id.* at 317.

107. *Id.* at 318.

108. *Id.* at 319.

109. *Id.*

110. *Id.* at 320–21.

111. *Id.* at 321.

112. *Id.* at 321–22 (Rehnquist, J., dissenting).

113. *Id.* at 322.

114. *Id.* at 337 (Scalia, J., dissenting).

115. *Id.* at 339.

116. *Id.* at 339–40.

intellectual disabilities is against modern standards of decency.¹¹⁷ However, the majority conceded that over half of the states that still permit the execution of defendants allow for the execution of those with intellectual disabilities.¹¹⁸ The dissent continued that the majority's analysis relies on relatively new legislation, and the legislation's reasoning and policies have not yet proven "sensible."¹¹⁹ Thus, the infant laws do not provide a sufficient basis for constitutional adjudication.¹²⁰

Finally, the dissent took issue with the majority's justifications for a categorical ban. Justice Scalia argued there is no evidence those who are "mentally retarded" are not competent to understand the consequences of their actions.¹²¹ Thus, they may very well be deterred by the actions of others, or refrain from committing murder based on their own knowledge of the consequences.¹²² Furthermore, if courts categorically ban the execution of the "mentally retarded" because of their difficulties in proving mitigating factors or assisting counsel, do we also do so to those individuals who are simply "stupid" or "inarticulate"?¹²³ This assertion might give rise to a due process claim under the Fourteenth Amendment, but it does not rise to cruel or unusual punishment protected by the Eighth Amendment.¹²⁴

III. ANALYSIS

The Seventh Circuit's decision to allow Mr. Webster another opportunity to relitigate his intellectual disabilities is troubling for several reasons. Because of changes in federal inmate housing procedures, the Seventh Circuit is now the *de facto* court of appeals for all federal death penalty cases.¹²⁵ A simple textual reading of 28 U.S.C. § 2255 does not support the Seventh Circuit's interpretation, and it takes the savings clause away from its originally intended purpose. This interpretation allows the Seventh Circuit to essentially enforce its own view on the death penalty, drive up the cost of litigation, and distort what constitutes new evidence without affording the appropriate level of deference to the trial court's determinations of fact. However, by simply amending § 2255 to match § 2254's language, Congress can effectively limit the discretion of the Seventh Circuit.

117. *Id.* at 341.

118. *Id.* at 342.

119. *Id.* at 344.

120. *Id.*

121. *Id.* at 351.

122. *Id.* at 351–52.

123. *Id.* at 352.

124. *Id.*

125. Brick, *supra* note 1.

A. The Text of 28 U.S.C. § 2255 does not Support the Seventh Circuit's Interpretation

The Seventh Circuit essentially argues that even though the plain language of 28 U.S.C. § 2255(h) forbids affording Mr. Webster another hearing as to his intellectual disabilities, other textual evidence suggests that this is not what Congress intended, and he may proceed under the savings clause.¹²⁶ Section 2255(h) states that a successive petition is only allowed if “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.”¹²⁷ Mr. Webster, however, does not seek to show that he is not guilty of the offense, only that his sentence is in violation of the Supreme Court's decision in *Atkins*.¹²⁸ The Seventh Circuit nonetheless argues that a prisoner is allowed to attack his sentence with a second post-conviction petition because in two other clauses of § 2255, Congress refers to the sentence or the illegality of the detention.¹²⁹ The majority asserts this argument even after acknowledging that “[t]he language of section 2255(h) already makes it clear that Congress was aware of the difference between claims of innocence of the underlying offense and claims relating to a sentence.”¹³⁰

So, how do we reconcile § 2255(h) with § 2255(e)? The answer becomes clearer upon examination of the savings clause's history. The savings clause was only intended to ensure that petitions subject to § 2255 did not violate the Constitution,¹³¹ most notably the Suspension Clause of Article I.¹³² The amendments to the writs of habeas corpus in 1948, limiting a prisoner's right to successive appeal, fostered concerns that the new limitations would violate the Constitution.¹³³ The Supreme Court thus interpreted the savings clause as an attempt to ensure the constitutionality

126. *Webster v. Daniels*, 784 F.3d 1123, 1138 (7th Cir. 2015).

127. 28 U.S.C. § 2255(h)(1) (2012).

128. *See generally Atkins*, 536 U.S. at 312.

129. *See* 28 U.S.C. § 2255(a); *id.* § 2255(e).

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Id. § 2255(a).

130. *Webster*, 784 F.3d at 1138.

131. *See Swain v. Pressley*, 430 U.S. 372 (1977).

132. U.S. CONST. art. 1, § 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.”).

133. *Webster*, 784 F.3d at 1152 (Easterbrook, J., dissenting).

of § 2255, allowing review pursuant to § 2241.¹³⁴ This interpretation is furthered by the fact that the Supreme Court has never sustained a ruling under § 2255, throughout the sixty years of the statute's existence, as "inadequate or ineffective," because the writs of habeas corpus have never been suspended, and thus constitutionality issues have never been present.¹³⁵

The easiest way to picture the overall structure of § 2255 is to imagine it as a three-step process. At the outset, a federal prisoner may file a motion challenging his sentence pursuant to § 2255(a).¹³⁶ If he can establish his sentence violates the Constitution, the original court lacked jurisdiction, or it exceeds the maximum sentence permitted by law, the reviewing court must vacate and set aside the judgment.¹³⁷ If his petition is denied, he may then resort to the savings clause only if he can establish his sentence violated the Suspension Clause.¹³⁸ Essentially the savings clause would only be used in those rare instances, in time of war or rebellion, where the writ has been suspended. If neither of the first two steps are applicable, a prisoner may then only file a successive petition pursuant to § 2255(h), by demonstrating newly discovered evidence exists or there is a new rule of constitutional law.¹³⁹ This interpretation is consistent with the purpose of the AEDPA: to eliminate successive petitions and abuses of the writ.

Limiting the discretion of courts to use the savings clause as a mechanism for affording successive petitions is especially important in the context of federal death penalty cases. All federal death row inmates are assigned to the federal facility at Terre Haute, Indiana, within the Seventh Circuit's jurisdiction.¹⁴⁰ With the amendments to § 2255, Congress could not have anticipated the unprecedented power the Seventh Circuit would have in ruling on death sentences because the assimilation of death row inmates within its jurisdiction did not take effect until 1999.¹⁴¹ The Seventh Circuit has essentially become the *de facto* judge of all federal death sentences, with the ability to overrule all other circuits. The only check on the Seventh Circuit's almost absolute power is the Supreme Court, which is reluctant to delve into factual determinations of the lower courts. When a prisoner's intellectual ability is at issue, like in *Webster*, the analysis will inherently be fact-specific, and the Seventh Circuit can overrule other circuits virtually free of the risk of being overturned.

134. *United States v. Hayman*, 342 U.S. 205, 223 (1952).

135. *Webster*, 784 F.3d at 1152 (Easterbrook, J., dissenting).

136. 28 U.S.C. § 2255(a) (2012).

137. *Id.*

138. *Webster*, 784 F.3d at 1153 (Easterbrook, J., dissenting).

139. 28 U.S.C. § 2255(h)(1)-(2).

140. *Brick*, *supra* note 1.

141. *Id.*

Allowing the savings clause to be used to initiate a second successive petition also undermines one of the chief purposes behind the initial enactment of § 2255. With its enactment in 1948, § 2255 was intended to centralize all appeals within the jurisdiction of the courts who laid out the initial sentence.¹⁴² By restricting appeals to the district court of original jurisdiction, it ensured the issue would be decided based on knowledge of the full record and inconsistent results would be limited.¹⁴³ The author of § 2255 specifically stated a goal of the provisions was to prevent “the unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction.”¹⁴⁴ But the Seventh Circuit’s interpretation does the opposite—it increases the chance that any appeal of a federal death penalty case will be heard in an opposite jurisdiction, with the sole exception of sentences it originally imposed. Decisions will be made in courts which potentially do not have access to the full record or a personal stake in the litigation. The Seventh Circuit’s interpretation returns the court to the standards before the enactment of § 2255, and it reestablishes the very dangers it was intended to correct.¹⁴⁵

B. Congress Should Amend 28 U.S.C. § 2255(h) to Define What Constitutes Newly Discovered Evidence

Simply interpreting 28 U.S.C. § 2255(e) to limit post-conviction appeals to violations of the Suspension Clause may not be sufficient to effectively limit the Seventh Circuit’s discretion. In fact, in *Webster* the Seventh Circuit also sustained the ability to seek a second post-conviction appeal under 28 U.S.C. § 2255(h).¹⁴⁶ The court found that evidence that existed at the time of his sentencing, indicating Webster was a person with intellectual disabilities, constituted newly discovered evidence because it was never presented.¹⁴⁷ The opinion reads as an attempt by the court to justify its conclusion regardless of any interpretation of the savings clause provisions. However, it is the subject of some debate whether the evidence cited by the Seventh Circuit truly is new evidence or not.

The evidence concerned an application for social security benefits that Webster applied for a year before the crime was committed, and indicated the assessor’s opinion that he may suffer from intellectual disabilities.¹⁴⁸ Mr. Webster was aware of the social security report, his mother testified to

142. *United States v. Hayman*, 342 U.S. 205, 214–19 (1952).

143. *See id.*

144. Hon. John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 71 (1949).

145. *Webster v. Daniels*, 784 F.3d 1123, 1149–50 (7th Cir. 2015).

146. *Id.* at 1140.

147. *Id.*

148. *Id.* at 1148 (Easterbrook, J., dissenting).

it, and his attorney requested the report at the time of his trial.¹⁴⁹ His lawyer's only recollection as to the report is that he requested its production but never received it.¹⁵⁰ The Seventh Circuit holding means "newly discovered evidence" encompasses evidence that the court was fully aware of when rendering the sentence. It makes no difference that the court considered the evidence when mitigating the defendant's sentence, or that the evidence is almost identical to other evidence presented at trial.

It is not difficult to imagine the problems with the Seventh Circuit's interpretation. The rule could encourage attorneys to effectively sit on certain evidence in the hopes of using it later in the event of a conviction. The problem is exacerbated if an attorney believes the evidence is substantially similar to other evidence to be presented, and possibly could run afoul of Federal Rule of Evidence 403.¹⁵¹ Any procedural safeguards, which are present in corresponding habeas statutes, that prevent attorneys from sitting on relevant evidence, are absent in § 2255. However, the fix is quite easy, by simply adopting the language of § 2254 which applies to prisoners in state custody.¹⁵²

28 U.S.C. § 2254(e)(2) contains a specific provision concerning post-conviction petitions based on factual evidence not presented at the lower stages.¹⁵³ The new evidence may only be introduced if the evidence could not have been obtained through the opposing party's due diligence.¹⁵⁴ Imposing these standards to challenge federal sentences will limit the Seventh Circuit's discretion to entertain new evidence and allow § 2255 to run parallel to state standards. The language could easily be inserted into 28 U.S.C. § 2255(h)(1).¹⁵⁵ The new provision would read:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—newly discovered evidence that, could not have been previously discovered through a party's due diligence, and if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and

149. *Id.* at 1151.

150. *Id.*

151. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

152. 28 U.S.C. § 2254(e)(2)(A)(ii) (2012).

153. *Id.* § 2254(e)(2).

154. *Id.* § 2254 (e)(2)(A)(ii).

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—the claim relies on— a factual predicate that could not have been previously discovered through the exercise of due diligence

Id.

155. *Id.* § 2255(h)(1).

convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.

The amendment would do nothing to change the substance of the statute; it would only decrease the ability of reviewing courts to admit new evidence.

At the same time, the amendment will require attorneys to present all available evidence and diligently search for all evidence. An attorney's failure to do so will bar the evidence from being presented for post-conviction purposes. This approach serves the best interests of defendants by presenting all evidence to mitigate his sentence at the earliest stages and determining his punishment based on that evidence. The amendment aligns the evidence that may be presented regardless of whether the defendant is tried in state or federal court. The majority of death penalty cases in the federal system are based on murder charges. Because the federal government can try any murder case in federal court involving a federal nexus, it is especially important that the statutes align. The decision on what evidence will be presented in a post-conviction appeal should not be based on whether a federal nexus is present.

C. Failure to Limit the Seventh Circuit's Discretion Runs Contrary to the Normal Deference Afforded to a Trial Court's Determinations of Fact

Amending § 2255 to match § 2254 would make it harder for petitioners to introduce new evidence in a successive post-conviction appeal and also align the habeas statutes with the normal deference afforded a trial court's determination of a question of fact. Black's Law Dictionary defines a question of fact as:

An issue that has not been predetermined and authoritatively answered by the law, a disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial, or an issue capable of being answered by way of demonstration, as opposed to a question of unverifiable opinion.¹⁵⁶

In cases involving defendants with intellectual disabilities, an individual's mental capacity fits within all three definitions, as the Supreme Court has passed on defining "mental retardation."¹⁵⁷ Additionally, any

156. *Question of fact*, BLACK'S LAW DICTIONARY (10th ed. 2014).

157. *Atkins*, 536 U.S. at 317.

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."

determination as to limited capacity is made by the trial judge, and expert witnesses are used to demonstrate a defendant's intellectual disabilities. Typically, such questions of fact are reviewed under the highly deferential "clear error" standard of review, where the trial court's determination is presumed to be true.¹⁵⁸

The clear error standard provides that a trial court's factual determination will not be set aside absent "a definite and firm belief that a mistake has been made."¹⁵⁹ A clear error only occurs when the trial court fails to consider substantial evidence that exists to contradict its findings.¹⁶⁰ An appellate court is not free to set aside the determination of the trial court simply because it disagrees with the trial court's determination.¹⁶¹ The Supreme Court in *Anderson v. City of Bessemer City* gave the most cited definition of the deference afforded under this standard:

Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.¹⁶²

This deferential standard of review makes sense because the trial court's finder of fact is in the best position to determine the credibility and

Id.

158. *Ornelas v. United States*, 517 U.S. 690, 695 n.3 (1996) ("'Clear error' is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact.").

159. Robert E. Larsen, *Navigating the Federal Trial*, § 15.17 (2016).

160. *Id.*

161. *Id.*

162. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

weight to be afforded all available witnesses. Witnesses' demeanor, such as their voice tone, facial expressions, or body language, is considered reliable in ascertaining whether or not a witness is telling the truth.¹⁶³ The "importance of credibility of witnesses in the trial of cases cannot be overstated and this is especially true with respect to expert witnesses."¹⁶⁴ A trial court's determination as to whether an expert witness is biased, or may be impeached on claims of prejudice, is preserved by applying the deferential standard to evaluations of expert testimony.¹⁶⁵ A trial court's determination of witnesses' credibility is only heightened in cases where the defendant's mental abilities are at issue, because the only way to prove the defendant's capacity or incapacity is through expert testimony. Thus, it is even more important the trial court's determination be afforded proper deference in cases such as *Webster*.

The Seventh Circuit's failure to exercise this standard by permitting the introduction of the "new" evidence as it pertained to Mr. Webster's intellectual disabilities opens the door to an expansion of appellate authority. May an appellate court now review a jury's decision that a defendant willfully committed the act of first degree murder without affording the jury proper deference? May an appellate court now weigh the credibility of an eyewitness based solely on the paper record presented for appeal? If so, each of these decisions allows a reviewing court to replace the fact finder and render its own judgment regardless of the amount of evidence supporting a contrary conclusion, as long as it can point to any amount of evidence that was not presented at trial. This possible situation will have a chilling effect on the number of summary judgment motions being upheld at a time when courts are being encouraged to use the summary judgment process to avoid undue expense and burdensome litigation.¹⁶⁶

Additionally, failure to afford the proper deference to the trial court's factual determinations in federal death penalty cases essentially allows the appellate court to substitute its own moral judgment. It is no stretch to envision an appellate court who is categorically opposed to the death penalty using any new evidence as a means of avoiding the sentence. The case can be remanded for new proceedings, with the trial court understanding the appellate court's opposition to its original sentence. If the trial court chooses to reinstate the original penalty, the exact same court

163. Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJS*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 2-3 (2000).

164. *Burger v. Allstate Ins. Co.*, 2009 WL 1587396, at *2 (E.D. Mich. June 8, 2009) (quoting *Behler v. Hanlon*, 199 F.R.D. 553, 556 (D. Md. 2001)).

165. *Id.* at *2.

166. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

will again review its decision. This may force lower courts into handing down lower sentences as a means of avoiding a continual cycle of remand, even though the sentence may be contrary to the weight of the evidence, or the public's desire. The late Justice Scalia prophesized the evils that come with allowing a panel of unelected officials to dictate moral or philosophical judgments upon the public.¹⁶⁷

IV. CONCLUSION

In conclusion, the Seventh Circuit's interpretation of 28 U.S.C. § 2255 as it pertained to Mr. Webster's intellectual disabilities was in error. The amendments to § 2255 were intended to limit post-conviction appeals and rein in frivolous complaints that clog the judicial system. The effect of the Seventh Circuit's interpretation is to return the habeas statutes to their pre-amendment status and encourage the proliferation and abuse of the writ. It also leads to inconsistent results between defendants tried in federal courts and those sentenced to death in the various state courts.

Furthermore, the Seventh Circuit's interpretation is in direct contrast to a textual reading of § 2255. The statute's language and purpose indicate its proper use and foreclose the meaning advocated in *Webster*. Congress should act to amend § 2255 to define "newly discovered evidence" and align § 2255 with § 2254 and state standards. The amendment will effectively afford proper deference to the lower courts and ensure consistent results throughout the circuits. Given the Seventh Circuit's place as the *de facto* court of appeals for all federal death penalty cases, Congress must act swiftly to address the problems apparent in § 2255.

167. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Id.

